THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
CASE NO: 140/05

In the matter between:

THE WESTERN CAPE MINISTER OF EDUCATION	First Appellant
THE HEAD: EDUCATION, WESTERN CAPE EDUCATION DEPARTMENT	Second Appellant
PARENTS OF CERTAIN LEARNERS CURRENTLY RECEIVING INSTRUCTION AT MIKRO PRIMARY SCHOOL	Third Appellants

and

THE GOVERNING BODY OF MIKRO PRIMARY SCHOOL	First Respondent
MIKRO PRIMARY SCHOOL	Second Respondent

Before: **STREICHER, CAMERON, BRAND, LEWIS & MLAMBO JJA**
Heard: **23 MAY 2005**
Delivered: **27 JUNE 2005**

Summary: Section 29(2) of the Constitution – the right to receive education in an official language at a public educational institution if practicable – not a right to receive such education at each and every public educational institution – s 6(2) of South African Schools Act 1996 – determination of language policy of established ordinary public school the function of governing body – department of education has no power to determine such language policy – s 16(3) of the Act – head of provincial education department must exercise authority in regard to the professional management of a public school through the principal - s 41 of the Constitution – governing body of a public school does not operate within a sphere of government when determining the language policy of a public school.

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] Mikro Primary School ('the second respondent') is an Afrikaans medium public school in Kuilsriver whose governing body ('the first respondent') refused to accede to a request by the Western Cape Education Department ('the department') to change the language policy of the school so as to convert it into a parallel medium school. A subsequent directive by the Head: Education, Western Cape Education Department ('the second appellant') to the principal of the second respondent to admit certain learners, and to have them taught in English; the dismissal of an appeal against the directive to the Western Cape Minister of Education ('the first appellant'); and the resultant admission of 21 learners for instruction in English gave rise to an urgent application by the respondents to the Cape High Court ('the court *a quo*') for an order setting aside the directive and the decision on appeal, as well as for ancillary relief. The application succeeded and the court *a quo*:

a) Set aside the directive of the second appellant;

b) Set aside the decision by the first appellant upholding the directive by the second appellant;

c) Interdicted the first and second appellants from compelling the second respondent or its principal to admit learners otherwise than in compliance with the second respondent's language policy;

d) Interdicted the first and second appellants from instructing or permitting officials of the department to unlawfully interfere with the government or the professional management of the second respondent;

e) Ordered that the 21 learners who had been admitted to the second respondent be placed by the appellants at another suitable school or schools.

The judgment is reported as *Governing Body of Mikro Primary School v Western Cape Minister of Education* [2005] 2 All SA 37 (C). With the leave of the court *a quo* the first and second appellants now appeal to this court against the whole of the judgment.

[2] The parents of the 21 learners referred to were joined as third respondents in the court *a quo*. Although they had not appealed against the court *a quo*'s judgment, they made common cause with the appellants rather than with the respondents in this court. However, since the other parties had no objection to their counsel addressing us and attacking the court *a quo*'s order, we allowed her to do so. The parents so represented will therefore be referred to as the third appellants.

[3] Section 29(2) of the Constitution provides as follows:

'Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.'

[4] The South African Schools Act 84 of 1996 ('the Act') was passed shortly after the adoption of the Constitution. According to the long title it was passed in order '[t]o provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith'. In the preamble to the Act it is stated, *inter alia*, that the Act is passed because 'this country requires a new national system for schools which will redress past injustices in educational provision, . . . , advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, . . . , protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State'.

[5] In terms of s 12 of the Act the Member of the Executive Council of the province which is responsible for education in that province must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. Every public school so provided is a juristic person, with legal capacity to perform its functions in terms of the Act (s 15). The governance of every such public school is vested, subject to the Act, in its governing body which may perform only such functions and obligations and exercise only such rights as are prescribed by the Act (s 16(1)). The professional

management of such a public school, on the other hand, must be undertaken, subject to the provisions of the Act, by the principal of the school under the authority of the head of the education department concerned. It is therefore clear that, subject to the limitations contained in the Act, the governance of a public school, as opposed to the professional management of such a school, is the responsibility of the governing body of the school.

[6] The statutorily prescribed composition of the governing body of ordinary public schools reflects the aim of the Act, namely to advance the democratic transformation of society. It includes, subject to the provisions of the Act, elected members, the principal in his or her official capacity and co-opted members. Elected members comprise a member or members of each of the following categories: parents of learners at the school, educators at the school, members of staff at the school who are not educators and learners in the eighth grade or higher at the school (s 23(1)). The number of parent members must comprise one more than the combined total of other members of the governing body who have voting rights. Certain co-opted members do not have voting rights (s 23(8) and (12)).

[7] Section 20(1) of the Act provides that the governing body must perform a number of functions. It must, *inter alia*, adopt a constitution (subsec (b)), develop the mission statement of the school (subsec (c)), adopt a code of conduct for learners at the school (subsec (d)) and 'discharge all other functions imposed upon the governing body by or under the Act' (subsec l). One of the

other functions imposed on the governing body is to be found in s 5(5) which provides:

'Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.'

Another one of the functions imposed on the governing body is to be found in s 6(2) which provides:

'The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law.'

[8] In terms of s 6(1) of the Act the Minister of Education may, subject to the Constitution and the Act, by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine norms and standards for language policy in public schools. Such norms and standards were determined and published by the Minister of Education ('the Norms and Standards').[1] Sections V.D and E thereof read as follows:

'D. THE RIGHTS AND DUTIES OF THE PROVINCIAL EDUCATION DEPARTMENTS

1. The provincial education department must keep a register of requests by learners for teaching in a language medium which cannot be accommodated by schools.

2. In the case of a new school, the governing body of the school in consultation with the relevant provincial authority determines the language policy of the new school in accordance with the regulations promulgated in terms of section 6(1) of the South African Schools Act, 1996.

[1] See Government Notice 1701 in Government Gazette 18546 of 19 December 1997.

3. It is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in grades 7 to 12 learners in a particular grade request it in a particular school.

4. The provincial department must explore ways and means of sharing scarce human resources. It must also explore ways and means of providing alternative language maintenance programmes in schools and or school districts which cannot be provided with and or offer additional languages of teaching in the home language(s) of learners.

E. FURTHER STEPS

1 Any interested learner, or governing body that is dissatisfied with any decision by the head of the provincial department of education, may appeal to the MEC within a period of 60 days.

2 Any interested learner, or governing body that is dissatisfied with any decision by the MEC, may approach the Pan South African Language Board to give advice on the constitutionality and/or legality of the decision taken, or may dispute the MEC's decision by referring the matter to the Arbitration Foundation of South Africa.

3 A dispute to the Arbitration Foundation of South Africa must be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an arbitrator or arbitrators appointed by the Foundation.'

[9] As required by s 5(5) and s 6(2) of the Act the first respondent adopted a language and an admission policy. Paragraph 4 of its admission policy, which incorporates its language policy, provides:

'Alle onderrig in hierdie skool (behalwe in die leerareas Engels en Xhosa) geskied deur medium Afrikaans.'

[10] Since at least 2002 the department has been trying to persuade the first respondent to admit English learners for instruction in English, that is to change

its language policy and to convert the second respondent into a parallel medium school. The first respondent steadfastly refused to do so. During the latter part of 2004 parents of approximately 100 English learners applied for admission of their children to De Kuilen Primary School ('De Kuilen'). (De Kuilen is a public school within walking distance of the second respondent. Historically De Kuilen was also an Afrikaans medium school but some seven years ago it started admitting English learners. As a result it is now a parallel medium school in that it offers instruction in Afrikaans as well as English in separate classes.) De Kuilen volunteered to accommodate the learners in grades 2 to 7 but contended that it was full and that it could not accommodate 40 grade 1 learners. As a result the department, on 30 November 2004, held a meeting with the first respondent and the governing body of De Kuilen. The department could once again not persuade the first respondent to admit learners for instruction in English. After the meeting, on 2 December 2004, the second appellant instructed the principal of the second respondent as follows:

'7 You are consequently instructed, under my authority to admit and accommodate the learners listed in the document attached to this letter at Mikro Primary School. I will provide the relevant number of educators to ensure that effective learning and teaching takes place.

8 Furthermore, you are requested to make the necessary arrangements to accommodate the learners and to inform the parents of the admission of these learners via their present schools before schools close on 8 December 2004.

9 I must advise you that failure to implement this directive may constitute grounds for disciplinary action. You are also advised to discuss with the EMDC Director your

additional needs regarding school furniture learner support materials and staff requirements that may arise from the admission of these learners. This will allow the Department to timeously procure and deliver your requirements.'

The list referred to contained 40 names.

[11] The first respondent appealed to the first appellant against the second appellant's directive. The appeal was lodged on 17 December 2004. The second appellant had previously advised the first respondent that once the appeal had been lodged with the first appellant it would automatically suspend his directive. On 18 January 2005 the first appellant met with the first respondent and the governing body of De Kuilen in what he called 'a last-ditch attempt to request the (first respondent) to admit the 40 English learners at Mikro'. Again the first respondent made it clear that it was not prepared to do so. Thereafter, on 19 January 2005, the first school day after the December/January school holidays, the first appellant notified the first respondent of its decision to dismiss the appeal.

[12] The first respondent's attorneys had, in a letter dated 20 December 2004, written to the second appellant:

'We assume that, should the MEC dismiss the appeal, the decision will likewise be suspended pending arbitration and/or our approach to the Pan South African Language Board, in terms of the Norms and Standards document. (We hereby give notice that, in the event the MEC decides the appeal against our client, we will indeed refer the matter to arbitration and/or to the Board).

In view of the automatic suspension of the Head of Department's decision, it naturally follows that the 40 learners, will not, pending the finalization of the appeal and, if necessary,

the referral thereafter of the matter to arbitration and/or to the Board, be accommodated at Mikro Primary School. We trust that you have therefore begun exploring alternative accommodation for the learners concerned for the 2005 school year.'

[13] The second appellant responded on 21 December 2004:

'[O]nce I am in receipt of (the MEC's) decision, I will consider my options and inform you of my intended course of action, accordingly.

Moreover, it is my obligation to ensure that all learners in this Province are accommodated appropriately, and I will manage this process timeously.'

[14] The first respondent's attorneys replied on 23 December 2004:

'We note the contents of your letter but can really see no reason why you should not confirm that your decision would be further suspended pending the arbitration and/or approach to the Pan South African Language Board. Be that however as it may we assume that you will give us adequate notice of your intended course of action so as to enable us to adequately protect our client's rights.'

[15] Early on the morning of 19 January 2005 Mr Caroline, the Director: Education Management and Development Centre (EMDC) Metropole East, Western Cape Education Department, his deputy Mr Saunders, three other officials of the department, 19 of the 40 learners referred to, their parents and two other learners who wished to be instructed in English, together with their parents, arrived at the second respondent. Caroline informed Mr Wolf, the chairman of the first respondent, that he was there to assist the principal with the admission of the English learners and to ensure that they were admitted. Wolf contended that Caroline's instructions were unlawful but Caroline said that he would implement his instructions until instructed to the contrary. A request by

Wolf that the learners and their parents be taken to the staffroom and that the matter be discussed first was declined. Caroline's attitude was that the children had been admitted to the second respondent. He and Saunders informed the principal that they would be taking the learners and parents to assembly so that they could be welcomed at the school. The children as well as their parents were thereupon taken to the hall where the assembly took place.

[16] During the course of the morning on 19 January 2005, the first respondent's attorney advised the legal adviser of the second appellant that in the event of the department persisting with the registration of the new learners the first respondent would as a matter of urgency approach the high court. The second appellant's law adviser, after having taken instructions from the second respondent, indicated that the department would continue with the registration of the learners. The respondents thereupon lodged the urgent application for the relief eventually granted by the court *a quo*. The application was opposed by the first and second appellants and, after having been joined as parties, also by the third appellants. On 18 February 2005 the court *a quo* granted the following order:[2]

'1. The decision of the second respondent, set out in his letter to the principal of the second applicant dated the 2 December, 2004, to direct the latter to admit certain pupils to the second applicant, and to have them taught in the medium of English, is set aside.

2. The decision of the second respondent of the 19 January, 2005 to put the said directive into effect is also set aside.

[2] At 59b-60b.

3. The decision of the first respondent, made on or about the 19 January, 2005, to uphold the aforesaid decision of the second respondent and to dismiss the first applicant's appeal against it, is set aside.
4. The first and second respondents are prohibited and restrained from compelling or attempting to compel the second applicant or its principal to admit pupils for instruction in the medium of English otherwise than in compliance with the second applicant's language policy, and with the applicable provisions of the South African Schools Act, No. 84 of 1996, of the Norms and Standards determined in terms of section 6(1) of that Act, and of any other legislation which may be applicable.
5. It is declared that the conduct of certain officials of the Western Cape Education Department on the 19 January, 2005 at the second applicant's premises constituted unlawful interference by them in the government and professional management of the second applicant, in contravention of sections 16(1) and 16(2) of the said Act.
6. The first and second respondents are prohibited and restrained from instructing or permitting officials of the said department to interfere unlawfully in the government or the professional management of the second applicant.
7. The first and second respondents are ordered to place the 21 minor children presently attending the second applicant, whose parents are the third respondents, at another suitable school or schools on a permanent basis as soon as may be reasonably practicable.
8. Until the said children shall have been so permanently placed at another suitable school or schools, they may continue to attend the second applicant and to receive instruction there in the medium of English; provided that this situation shall not continue after 2005.
9. In the event of the first and second respondents being unable to place the said children permanently at another suitable school or schools by the 18 March, 2005 the second

respondent shall report in writing to the first applicant not later than the 22 March, 2005 as to what steps have been taken to bring about such placing; thereafter, the second respondent shall report in writing to the first applicant on or before the last day of each succeeding month as to what progress has been made in this connection; leave is granted to the applicants and to the third respondents, or any one or more of them, to approach this Court on the same papers, amplified as may be necessary, for further relief in this regard.

10. The first and second respondents are ordered to bear the costs of these proceedings on the scale as between attorney and client, including the costs of the third respondents, such costs to include, in the case of the applicants, the costs occasioned by the employment of two counsel.'

[17] The first and second appellants, relying on s V.E.2 of the Norms and Standards, contended that the proceedings were premature. They argued that the respondents were obliged, in terms of s 41(1)(h)(vi) of the Constitution as well as s 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') to exhaust the options provided in the Norms and Standards before they could approach a court.

[18] Section 41(1)(h)(vi) and (3) of the Constitution provides:

'41(1) All spheres of government and all organs of state within each sphere must –

. . .

(h) co-operate with one another in mutual trust and good faith by –

. . .

(vi) avoiding legal proceedings against one another.

. . .

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.'

An organ of state is defined in s 239 of the Constitution as follows:

'"organ of state" means –

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer.'

[19] The court *a quo* dismissed the appellant's reliance on these provisions of the Constitution.[3] Relying on the authority of *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T) it held that the first respondent was not an organ of state in that the first respondent was intended by the legislature to be independent of state or government control in the performance of its functions.[4] Relying, furthermore, on the judgment in *Independent Electoral Commission v Langeberg*

[3] At 43d-46d.
[4] At 44e-45g.

Municipality 2001(3) SA 925 (CC) the court *a quo* held that the first respondent did not perform its functions within a sphere of government.[5]

[20] In the *Directory Advertising* case Van Dijkhorst J had to interpret the phrase 'organ of state' in the context of the interim constitution which defined 'organ of state' as follows: '"organ of state" includes any statutory body or functionary'[6]. He referred to dictionary meanings of the word 'staatsorgaan', the Afrikaans equivalent of 'organ of state', and came to the conclusion that the test to determine whether a statutory body was an organ of state was whether the body was controlled by the State.[7] The court *a quo* erred in adopting the reasoning of Van Dijkhorst J and ascribing the same meaning to 'organ of state' in the Constitution as in the Interim Constitution. Organ of state is differently and comprehensively defined in the Constitution, and whether a statutory body is an organ of state within the meaning of the Constitution naturally depends on whether that statutory body is a body as defined in the Constitution. In terms of the definition in the Constitution any institution exercising a public power or performing a public function in terms of any legislation is an organ of state. The second respondent, a public school, together with its governing body, the first respondent, is clearly an institution performing a public function in terms of the Act. It follows that it is an organ of state as contemplated in the Constitution.

[21] In the *Independent Electoral Commission* case the Constitutional Court held that the Independent Electoral Commission, although not subject to

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[5] At 45g-46d.
[6] Section 233(1) of the Constitution of the Republic of South Africa Act 200 of 1993.
[7] At 809G-810D.

national executive control, was an organ of state:[8] but that the fact that it was a State structure and that it had to perform its functions in accordance with national legislation did not mean that it fell within the national sphere of government.[9] Because it was not subject to national executive control it stood outside government and was not an organ of state within the national sphere of government.[10] A dispute with the Commission did not qualify as an intergovernmental dispute: an intergovernmental dispute was 'a dispute between parties that [were] part of government in the sense of being either a sphere of government or an organ of State within a sphere of government'.[11]

[22] The first respondent is, in so far as the determination of a language and admission policy is concerned, not subject to executive control at the national, provincial or local level and can therefore, like the Electoral Commission, in so far as the performance of those functions is concerned, not be said to form part of any sphere of government. For the same reason its dispute with the first and second appellants in respect of the language and admission policy determined by it, is not an intergovernmental dispute as contemplated in s 41(3) of the Constitution. The argument based on s 41 of the Constitution was therefore correctly rejected by the court *a quo*.

[23] Subsections 7(2)(a) and (c) of PAJA provide:

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[8] At 936D (para 22).
[9] At 940C (para 30).
[10] At 940D (para 31).
[11] At 936C-D (para 21).

'(a) Subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.'

'(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[24] The court *a quo* held that the matter was unquestionably one of urgency. At stake were the interests of 21 small children whose educational future was in question. It considered it self-evident that the question as to which primary school they would attend should be resolved with as little delay as possible. A reference of the dispute to the Pan South African Language Board ('Pansab') or to arbitration would result in further delay. Furthermore, in the light of the fact that the case had generated considerable public interest, and that questions of language policy in public schools and the rights and powers of their governing bodies were of great moment to many people, it would be regrettable if the matter was to be decided behind closed doors by a statutory board or by an arbitrator. The cumulative effect of these factors was considered by the court *a quo* to constitute exceptional circumstances 'justifying the exemption of the (first and second respondents) from any obligation which they might otherwise have been under to exhaust their internal remedies' in the interests of justice.[12]

[25] The court *a quo* had a discretion to exempt the first and second respondents from the provisions of s 7(2)(a) of PAJA. The power of this court to

[12] At 47a-i.

interfere on appeal with the exercise of such a discretion ‘is limited to cases in which it is found that the trial Court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons’. (See *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1044J-1045A). In my view the court *a quo* did not misdirect itself in any way and there are no grounds upon which this court can interfere with its decision. The statement by the court *a quo* that it would be regrettable if the issues in this case were to be decided behind closed doors by a statutory board or by an arbitrator was probably not intended to mean that the matter would necessarily be decided behind closed doors but merely that that would be a possibility were the matter referred to Pansab or to an arbitrator.

[26] The court *a quo* could have added that the first respondent had indicated that if the second appellant was prepared to agree to a suspension of the directive of 2 December 2004 it intended to approach Pansab or to refer the dispute to arbitration. The second appellant, acting on an instruction by the first appellant, nevertheless implemented the decision without affording the respondents any opportunity to challenge the validity of the dismissal of its appeal to the first appellant. The first and second appellants thereby forced the respondents to launch the urgent application to the court *a quo*. This fact in itself constituted exceptional circumstances justifying the exemption of the first and second respondents as aforesaid.

[27] The finding that this court cannot interfere with the court *a quo*'s dismissal of the contention that the proceedings were premature makes it unnecessary to deal with another matter that was debated before us, namely the question whether a referral of the matter to Pansab or to arbitration constituted 'internal remedies' as contemplated in PAJA.

[28] The court *a quo* held that the second appellant's directive of 2 December 2004 and the implementation thereof on 19 January 2005 were unlawful in that they rode roughshod over the second respondent's language policy by converting the second respondent from a single medium into a parallel medium school while it had no right to do so.[13] If the second appellant needed a remedy, the court *a quo* held, his remedy was to call in aid the provisions of s 22 and to withdraw from the first respondent its function of determining the second respondent's language policy.[14]

[29] The first and second appellants submitted that the court *a quo* erred in this regard. They argued that in terms of s 29(2) of the Constitution everyone had the right to receive education in the official language or languages of their choice in public institutions where that education was reasonably practicable; that it was reasonably practicable to provide education in English to the 40 learners referred to in the directive of 2 December 2004 at the second respondent; that those 40 learners therefore had a constitutional right to receive education in English at the second respondent; that the first respondent's right to determine the language

[13] At 48a-b and 52a-b.
[14] At 52a-b.

policy of the second respondent was, in terms of s 6(2), subject to the Constitution, the Act and any provincial law; and that the second respondent's language policy determined by the first respondent was therefore subordinate to the constitutional right of the learners in question.

[30] In effect, the first and second appellants contended that s 29(2) of the Constitution should be interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable. If this were the correct interpretation of s 29(2), it would mean that a group of Afrikaans learners would be entitled to claim to be taught in Afrikaans at an English medium school immediately adjacent to a an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school. So interpreted, since the right in question extends to 'everyone', this would entail that boys have a constitutional right to be educated at a school for girls if reasonably practicable.

[31] In my view s 29(2) is not susceptible to the interpretation for which the appellants contended. The right of everyone to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable is a right against the State.[15] The Constitution recognizes that there may be various reasonable educational alternatives available to the State to give effect to this right and has left it to the

[15] Section 7(2) of the Constitution provides that the 'State must respect, protect, promote and fulfil the rights in the Bill of Rights'. See Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) para 20.

State to decide how best to do so. In order to ensure the effective access to, and implementation of, this right, the State must in terms of the provision consider all reasonable educational alternatives, including single medium institutions. Section 29(2) therefore empowers the State to ensure the effective implementation of the right by providing single medium educational institutions. This is a clear indication that in terms of s 29(2) everyone has a right to be educated in an official language of his or her choice at a public educational institution to be provided by the State if reasonably practicable, but not the right to be so instructed at each and every public educational institution subject only to it being reasonably practicable to do so. It follows that the 40 learners in question had a constitutional right to receive education in English in a public educational institution provided by the State if reasonably practicable but, even if it was reasonably practicable to provide such education at the second respondent, they did not have a constitutional right to receive education in English at the second respondent.

[32] In so far as schools are concerned, the State obviously considered how to ensure effective implementation of the right provided by s 29(2), and the Act reflects its conclusion. There is no suggestion that any of the provisions of the Act are unconstitutional. On the contrary, counsel for the first and the second appellants made it clear that it was not contended that the Act was unconstitutional. In terms of the Act the first appellant must provide public schools out of funds appropriated for this purpose by the provincial legislature.

Except in the case of new schools,[16] the governance of the school and the admission and language policy of the school are to be determined by the governing body of the school subject to the provisions of the Act and any applicable provincial law. Neither the Act, nor the Norms and Standards, confer any power on the first or the second appellants to determine the language or the admission policy of a public school save in the case of a new public school.[17]

[33] In *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) at 170I-171A and 171J-172A Bertelsmann J held that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. I do not agree. Section 6(1) of the Act authorizes the Minister of Education to determine norms and standards for language policy in public schools. It does not authorize the Minister of Education him- or herself to determine the language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so. As stated above, it is in terms of s 6(2) the function of the governing body of a public school to determine the language policy of the school subject to the Constitution, the Act and any applicable provincial law. The admission and language policy determined by the first respondent is not contrary to any provision of the Constitution, the Act, the Western Cape Provincial School Education Act or the Norms and Standards.

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[16] Section 16(7) of the Act provides that in the case of a new public school provided in terms of s 12 the governance of that school vests in the HOD until a governing body has been constituted..

[17] Section 16(7) of the Act and s V.D2 of the Norms and Standards.

[34] In any event the Norms and Standards do not purport to authorize the alteration of a public school's language policy by anyone. According to the heading of s V.D of the Norms and Standards the section deals with the rights and duties of the provincial education departments. Section V.D3, in which it is stated that it 'is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in grades 1 to 6 or 35 in grades 7 to 12 learners in a particular grade request it in a particular school', would seem to be no more than a guideline formulated by the Minister of Education as to when the State would consider the constitutional right to receive education in a particular official language at a public educational institution to have been established. Neither the Act nor the Norms and Standards purport to provide that in the event of it being practicable to provide education in a particular language at a particular school, children who wish to be educated in that language are automatically eligible for admission to that school for instruction in that language.

[35] Counsel for the first and second appellants submitted that it was unthinkable that the second appellant, who is obliged to provide public schools, could not admit learners to the second respondent if it was reasonably practicable to educate them at the second respondent in the language of their choice. It would indeed be unfortunate if the second appellant has no remedy in the event of an unreasonable refusal by a governing body to change its language

policy. However, that is not the case. The first and second appellants have remedies in such an event.

[36] First, a refusal by the first respondent to change the language policy of the second respondent is an administrative action which is subject to review (s 1 and 6 of PAJA). Should the decision be unreasonable in the sense that no reasonable person would in the circumstances have refused to change the language policy it may be reviewed and set aside (s 6(2)(h) of PAJA).

[37] Second, the HOD may, subject to certain procedural requirements, on reasonable grounds withdraw a function of a governing body (s 22 of the Act[18]). If the HOD determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of the Act, or has failed to perform one or more of such functions, he or she must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months (s 25(1)). The period may be extended for further periods of three months or less but the total period may not exceed

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[18] The section reads as follows:

'22 Withdrawal of functions from governing bodies

(1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body.

(2) The Head of Department may not take action under subsection (1) unless he or she has-

(a) informed the governing body of his or her intention so to act and the reasons therefor;

(b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and

(c) given due consideration to any such representations received.

(3) In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter-

(a) furnishes the governing body with reasons for his or her actions;

(b) gives the governing body a reasonable opportunity to make representations relating to such actions; and

(c) duly considers any such representations received.

(4) The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3).

(5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.'

one year (s 25(2)). If the governing body ceases to perform its functions the HOD must ensure that a governing body is elected in terms of the Act within a year of the appointment of persons to perform functions of the governing body (s 25(3)).

[38] Section 20 provides that the governing bodies of public schools must perform all the functions listed in the section including all other functions imposed upon the governing body by or under the Act. Section 21 makes provision for the allocation by the HOD to a governing body of certain additional functions upon application by such governing body. The first and second appellants submitted that, properly construed, s 22 allowed the HOD to withdraw the additional functions of a governing body allocated to it in terms of s 21 of the Act, but not the functions allocated to it in terms of s 20. However, no basis for construing 'function' as restricted to functions allocated to the governing body in terms of s 21 is to be found in the Act. It is highly unlikely that after having referred to functions of governing bodies in s 20 and in s 21 the legislature would in s 22 have intended the word 'function' to refer only to functions allocated in terms of s 21. It is equally unlikely that s 22 was intended to exclude the withdrawal, in appropriate circumstances, of functions such as those mentioned in s 20(1)(g), namely the administration and control of the school's property, and the buildings and grounds occupied by a school. In my view the word 'function' in s 22(1) refers to any of the functions allocated to a

governing body in terms of the Act. It follows that any such function may in terms of s 22 be withdrawn.

[39] An alternative submission advanced on behalf of the first and second appellants was that the determination of a language and an admission policy constituted the exercising of a power and not the performance of a function. I do not agree. There can of course be no doubt that governing bodies are entrusted with the power to determine a language and admission policy but that does not detract from the fact that it is their function to determine these policies.

[40] The first and second appellants argued that even if s 22 were to be interpreted as aforesaid, it could not be used to change a school's language policy. That was the case, the first and second appellants submitted, because the withdrawal of the function would have no effect as no provision was made in the Act for the first or second appellants to determine a language policy if the function to do so was withdrawn from the governing body. They submitted, furthermore, that s 25 only applied in circumstances where the governing body ceased to perform functions or failed to perform functions and not where a function was withdrawn. It is quite correct that no provision is made in the Act for the first and second appellants to determine the language policy of a school other than a new school. The second leg of the argument is, however, not correct. If a function is withdrawn the governing body ceases to perform that function and s 25 becomes applicable.

[41] Yet a further argument as to why s 22 did not provide a remedy was that the language policy of the second respondent was entrenched in the constitution adopted by the first respondent, which provided that the medium of instruction at the second respondent was Afrikaans, and that an amendment of the constitution had to be approved by at least six members of the first respondent. The simple answer to this submission is that the constitution adopted by the first respondent is its own constitution adopted in terms of s 18 of the Act which provides that a governing body must function in terms of a constitution. The persons appointed in terms of s 25 to perform a function withdrawn from a governing body do not function in terms of that constitution and are not bound by its provisions.

[42] The court *a quo* therefore correctly held that if the second appellant needed a remedy it could call in aid the provisions of s 22 and, if in terms of that section entitled to do so, could withdraw from the first respondent its function of determining the second respondent's language policy.

[43] The first and second appellants did not avail themselves of any of these remedies but simply instructed and assisted the principal of the second respondent to admit learners to the second respondent for instruction in English. They were not entitled to do so. Although the department admits learners to a public school (s 5(7)), the admission policy of the school is determined by the governing body of the school. By admitting learners or instructing the principal to admit learners contrary to the admission policy of the school the department

was substituting its own admission policy for that of the school. In so doing it was acting unlawfully as it did not have the power to determine an admission policy for the school. Even if the language and admission policy determined by the first respondent was invalid, the department or the first and second appellants did not, in terms of the Act, have the power to determine a language or admission policy for the second respondent. It follows that the directive of 2 December 2004 was unlawful.

[44] The court *a quo* proceeded to review and set aside the decision of the first appellant to dismiss the appeal to him as well as the decision of the second respondent to implement the directive of 2 December 2004. It held that the decision of the first appellant had to be set aside in terms of s 6(2)(d) of PAJA on the ground that he committed an error of law in thinking that the second respondent was entitled to issue his directive of 2 December 2004.[19] It was not and could not be contended by the first and second appellants that these decisions could stand if the directive of 2 December 2004 were unlawful.

[45] Apart from setting aside the decision of the second respondent to put the directive of 2 December 2004 into effect the court *a quo* held that the insistence by the department's officials that the learners and their parents attend the school assembly against the wishes of its principal and the first respondent amounted to unlawful interference by them in the government and professional management

[19] At 52i.

of the second respondent. In this regard the court *a quo* relied on sections 16(1) and 16(3) of the Act.[20]

[46] The first and second appellants relying on s 13 of the Western Cape School Education Act contended that the professional management of a public school is vested in the HOD. They acknowledged that in terms of s 13(4) of that Act the HOD had to delegate such powers to the principal of a public school that were required for the effective professional management of such public school but argued that in terms of s 61(3) of the Western Cape School Education Act a delegation of such powers did not prevent the HOD from exercising such powers. However, the Western Cape School Education Act is subordinate to the Act which provides that the professional management of a school must be undertaken by the principal under the authority of the Head of the Department (s 16(3)). It is thus clear that the HOD must exercise his or her authority through the principal of the school. He or she cannot do so through officials of the department. The reason for this provision is rather obvious. The professional management of a school requires a professional educator. The court *a quo* therefore correctly granted the declaratory order and interdict contained in paragraphs 5 and 6 of its order.

[47] Counsel for the third appellants submitted that it would not be in the best interests of the 21 English learners to be transferred to another school during their primary schooling. Relying on the provisions of s 28(2) of the Constitution,

[20] At 54f-55d.

which provides that a child's best interests are of paramount importance in every matter concerning the child, she submitted that the court *a quo*'s order should be replaced by an order that the learners be placed at the second respondent on a permanent basis. In the alternative she submitted that we should admit further evidence so as to enable this court to determine whether the learners could be accommodated at De Kuilen and that, in the event of our finding that they could, we should order that they be placed at De Kuilen.

[48] The submission that it is in the best interests of the 21 learners concerned that they stay at the second respondent is based on the say so of some of the parents of the learners, which in turn is based on the fact that the learners have settled in well at the second respondent and that they are happy there. However, in my view, no case has been made out that it would be in the best interests of the learners to stay at the second respondent and for the following reasons there is no reason to believe that their interests would be better served by an order that they should remain at the second respondent:

a) The fact that they are at present happy does not guarantee that they will in future years be happy as a very small minority in a school that is otherwise an Afrikaans medium school.

b) There is no reason to believe that they would be less happy at another school. In this regard it should be borne in mind that the second respondent was not their parents' first choice.

c) It is unknown whether or not it would be possible to cater adequately for their educational needs at the second respondent if they remain such a small group.

d) The legislature clearly considered it in the best interests of learners that they be educated in schools which are governed and professionally managed in a manner that accords with the provisions of the Act. Given the background to the dispute, to impose the learners in question on the first respondent would be anomalous and would run counter to this goal.

e) The judge *a quo* carefully considered their interests in formulating his order and its terms were designed to ensure that their placement at another school would cause minimal disruption in their lives.[21]

f) The respondents indicated during argument that they have no objection to the addition at the end of paragraph 7 of the order by the court *a quo* of the following sentence: 'The placement of the children at another suitable school is to be done taking into account the best interests of the children.'

[49] In the light of the aforegoing the question as to what the position would have been had it been held to be in the best interests of the 21 learners to stay at the second respondent need not be considered. In the event, should it transpire that it is not in the best interests of the learners in question to be moved, the appellants are free to approach a court for appropriate relief. At that stage it

[21] At 56g-57d.

would be necessary to consider to what relief, if any, having regard to competing rights and interests, the appellants are entitled.

[50] The third appellants' alternative argument that the possible accommodation of the learners at De Kuilen be investigated can be disposed of easily. Neither De Kuilen nor its governing body is a party to these proceedings. No order can therefore be made that the learners be placed at De Kuilen.

[51] Counsel for the first and second appellants submitted that the court *a quo* should not have ordered the second appellant to report to the first respondent what progress had been made with the placing of the children at another school. However, it is necessary that the first respondent should know what progress is being made in order to plan the future utilization of the school buildings and also to avoid its being faced, once again, at the end of the school year with a *fait accompli* as was the case on 19 January 2005. In the circumstances the court *a quo* cannot be faulted for having made the order.

[52] During the third day of the hearing in the court *a quo*, after counsel for the respondents' address and during the first and second appellants' address the first and second appellants applied for leave to file further affidavits. The first and second appellants submitted that the court *a quo* erred by refusing to admit the affidavits. The affidavits dealt with allegations made in the founding affidavits regarding the meeting on 18 January 2005, and with disputes raised in the replying affidavits in respect of allegations made in the answering affidavits relating to the condition and use of prefabricated structures at De Kuilen, the

question whether the English classes at De Kuilen were filled to capacity and the capacity of the second respondent to accommodate more learners. The court *a quo* dismissed the application because of its unexplained lateness ; the urgency of the matter; and the fact that delay was highly undesirable as the interests of a number of children were at stake.

[53] The court *a quo* thought that delay would be caused by the admission of the further affidavits by the first and second appellants, in that the respondents would have had to be given an opportunity to deal with the matters raised in the further affidavits by way of further affidavits in reply. Subsequent events proved the court *a quo* to have been correct. As a result of the first and second appellants contending in their heads of argument that the court *a quo* erred in dismissing their application, the first and second respondents filed a conditional application for the admission of further affidavits. Counsel for the first and second appellants in turn indicated during argument before us that, should the conditional application be successful, they would want to file yet a further set of affidavits.

[54] The court *a quo* had a discretion to allow or disallow the further set of affidavits. It did not misdirect itself in any way in dismissing the application and there is no basis on which this court can interfere with its ruling. In any event, counsel for the first and second appellants conceded that in the light of the

Plascon-Evans rule[22] all these additional affidavits could make no difference to the outcome of the case.

[55] All that remains to be dealt with is the order by the court *a quo* that the costs of the proceedings in the court *a quo* are to be paid by the first and second appellants on the scale as between attorney and client.

[56] In his answering affidavit the first appellant said in regard to pre-fabricated classrooms at De Kuilen, which the first respondent contended could be used to accommodate the 40 English learners, that he had been advised by Caroline that these classrooms had been erected prior to 1971 and that they were in a dilapidated state and posed a serious safety hazard. These allegations were denied in the replying affidavits filed by the first and second respondents, one of which was deposed to by a Mr Liebenberg. He states that he is a qualified mechanical and electrical engineer, that he inspected the four prefabricated structures and a garage located on the grounds of De Kuilen and found that three of them appeared to be in good condition while the fourth one was being renovated. He also found that children were present in three of the four structures under the supervision of adult females.

[57] As is apparent from the further affidavits which the first and second appellants sought to file, they did not dispute that three of the prefabricated structures were in a good condition and that a fourth was being renovated but wanted to explain how the incorrect allegation came to be made. In the

[22] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C.

circumstances the court *a quo* was entitled to accept the correctness of the allegations in the replying affidavit which it did in holding that the first and second respondents should have verified the information.[23] Had they done so, the court *a quo* held, they would have realized that these prefabricated classrooms were available and would reduce De Kuilen's pupil classroom ratio.[24] It held, furthermore, that on the false premise that the learners could not be accommodated at De Kuilen the department threatened that the alternative to leaving them at the second respondent would be to accommodate them temporarily at a school for severely mentally handicapped learners. For being prepared to use this threat after having imposed their will on the unwilling school, and having achieved *a fait accompli* by engineering the children's attendance at the second respondent, the court *a quo* thought that the first and second appellants had to bear a heavy burden of public opprobrium which should be reflected in an appropriate costs order.[25]

[58] Once again the court *a quo* exercised a discretion and once again it did not commit a misdirection. There are no grounds upon which this court can interfere with its decision.

[23] at 58f-g.
[24] At 58h.
[25] At 58i-59b.

[59] For these reasons the appeal is dismissed with costs, including the costs of two counsel save for the addition at the end of paragraph 7 of the court *a quo*'s order of the following: 'The placement of the children at another suitable school is to be done taking into account the best interests of the children.'

P E STREICHER
JUDGE OF APPEAL

CAMERON JA)
BRAND JA)
LEWIS JA) CONCUR
MLAMO JA)