

CASE NOTE:

STEPPING IN THE RIGHT DIRECTION TOWARDS FULLY REALISING THE CONSTITUTIONAL PROMISE OF SECTION 29(1)(A) OF THE CONSTITUTION

*Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC)**

*by Philile Shandu***



1 Introduction

On 20 May 2016, the Constitutional Court of South Africa ('CC') granted the Federation of Governing Bodies for South African Schools ('FEDSAS') leave to appeal an order from the Supreme Court of Appeal.¹ The applicant, FEDSAS, a national organisation representing school governing bodies, sought an order to invalidate amendments

* This case note constitutes an adapted version of my submission in fulfilment of LLB requirements with the University of South Africa (UNISA).

** Philile Shandu is an LLM candidate at the University of Kwazulu Natal (UKZN).

1 *Member of the Executive Council for Education, Gauteng and Another v Federation of Governing Bodies for South African Schools 2015 4 All SA 591 (SCA).*

made to certain 'regulations relating to the admission of learners to public schools'.² The applicant argued that that the amendments were beyond the scope of namely; section 5(5) of the South African Schools' Act ('Schools Act') and section 11(1) of the Gauteng Schools Education Act, which respectively relate to admission policies in public schools and regulations thereof.³

The CC dismissed the appeal and found the amendments in the regulations to be rational, reasonable and justifiable.⁴ The court further directed the Member of the Executive Council ('MEC') for Education of Gauteng to determine the feeder zones for public schools in Gauteng, no later than twelve (12) months from the date of judgment.

In the unanimous judgment delivered by Moseneke DCJ, the court acknowledged the detrimental effect of the denial of access to education and training.⁵ The court stated that '(a)ll forms of human oppression and exclusion are premised [...] on the obstruction of this basic human right.⁶ Owing to South Africa's history of institutionalised discrimination, its citizens have both the benefit and burden of appreciating the substance of this assertion.⁷ In 1994, poorly qualified teachers and inadequate infrastructure in public schools that was designated to non-white learners further served as a barricade preventing access to quality education.⁸ Many curative steps have been taken since the adoption of the 1996 Constitution.⁹ However, the residual hierarchy of privilege and disadvantage that was created by inequity is the backdrop of FEDSAS's application to the Constitutional Court.¹⁰

2 Regulation 3(7), regulation 4(2) read with 4(1), regulation 5 read with 8, regulation 11(5) and regulation 16 of the Gauteng School Education Act 6 of 1995: Regulations Relating to the Admission of Learners to Public Schools, 2012, GN 1160 *Provincial Gazette* 127, 9 May 2012.

3 Gauteng Schools Education Act 6 of 1995 & South African Schools Act 84 of 1996.

4 *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (4) SA 546 (CC) para 46. Herein after referred to as the 'The FEDSAS case'.

5 The FEDSAS case (n 4) para 3.

6 As above.

7 Based on the policy of apartheid, upon which various laws were formulated to promote segregation.

8 F Maringe & M Prew (eds) *Twenty years of education transformation in Gauteng 1994 to 2014: An independent review* (2014) 84. According to this source, only 54% of black educators were appropriately qualified.

9 The Constitution of the Republic of South Africa, 1996. Hereinafter 'the Constitution of the Republic of South Africa'.

10 *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC).

Central to this case is section 29(1)(a) of the Constitution which endows everyone with the right to basic education. Like any other right in the Bill of Rights, the right to education may be limited in terms of the law of general application.¹¹ However, this constitutional promise exists in the context of poverty, unemployment and inequality - all factors that contribute to unequal access to quality education.¹² These factors have played a more significant role in limiting the right to access to basic education than section 36 (1) of the constitution ever will.

To realise and extend section 29(1)(a) of the Constitution, the South African legislature adopted Schools Act with the aim of providing an education system that facilitates the advancement of the democratic transformation of society.¹³ This Act was enacted to, among other things, 'redress past injustices in educational provision, provide an education of progressively high quality for all learners (and) combat racism and sexism and all other forms of unfair discrimination.'¹⁴ Although the Schools Act intends to provide quality and better education, there have been numerous constitutional challenges under section 5(5) of the Act, which authorises student governing bodies ('SGBs') to determine the admission policies of their respective schools.¹⁵ This provision has created the opportunity for SGBs to implement gate-keeping tactics based on *inter alia*, geography, language, financial status and intellectual ability, as discussed below.¹⁶

This decision comes after a protracted legal tug-of-war between the Gauteng Department of Education and various SGBs relating to school admissions.¹⁷ The importance of this particular case is that

11 *Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others* 2011 (8) BCLR 761 (CC).

12 These factors have been collectively termed as South Africa's 'triple challenge' https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_WG1_CDE_Draft_Report_response_to_committees_comments_24.4.17.pdf accessed on 23 August 2019).

13 Preamble of the South African Schools Act 84 of 1996.

14 As above.

15 For example; *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2013 (9) BCLR 989 (CC) and *MEC For Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

16 The *FEDSAS* case (n 4) para 32: 'The respondents set out uncontested facts on the Department's experience relating to admission patterns. Schools that are told in advance of admission that a learner has learning or remedial difficulties or is troublesome, tend to refuse that learner's admission. Schools would rather have higher achieving learners and better results.'

17 For example; *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2013 (9) BCLR 989 (CC) and *MEC For Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

FEDSAS's application to the CC inadvertently served as an instrument to develop the law as it pertains to the right envisaged in section 29(1)(a) of the Constitution. Notwithstanding all other factors which have the potential to limit this right, the rules developed in seeking to realise the promise of access to quality basic education as entrenched in the Constitution, are reinforced by this judgment – thereby bringing South Africa closer to Constitution's aspiration of 'Improv(ing) the quality of life of all citizens and free(ing) the potential of each person.'¹⁸

This note discusses the critical facts controlling the issues of the FEDSAS case, the court's holding and reasoning thereof, prior litigation regarding admissions to public schools and how the court's decision actualises the right envisaged in section 29(1)(a).

2 Court decisions analysis

2.1 The High Court judgment

Acting on the MEC's invitation to submit comments on draft amendments to Regulations published in July 2011, the FEDSAS made submissions in August 2011 highlighting their concerns regarding 29 provisions.¹⁹ After the MEC had given FEDSAS's input serious consideration, alterations were made, leaving FEDSAS displeased with the outcome. FEDSAS then approached the South Gauteng High Court ('High Court') to challenge the validity of specific regulations on the ground that they were in conflict with the section 5(5) of the Schools Act, the National Education Policy Act, the Admission Policy for Ordinary Public Schools and the Gauteng Education Policy Act.²⁰ FEDSAS further alleged that the regulations were *ultra vires*, considering the powers conferred on the MEC by section 11(1) of the Gauteng School Education Act. It was further argued that they were unreasonable and unjustifiable in terms of section 4 of the Gauteng Schools Education Act.²¹ The court set aside regulation 2(2A),

18 Preamble of the Constitution of the Republic of South Africa (n 9). Most importantly in relation to this paragraph, the Preamble states that, 'this country requires a new national system for schools which will provide an education of progressively high quality for all learners'. The 'rules developed in seeking to realise the promise of access to quality basic education' are found in the South African Schools Act of 1996.

19 General Notice 1929 of 2011, *Provincial Gazette* 154 of 18 July 2011.

20 Gauteng Education Policy Act 12 of 1998. See also National Education Policy Act 27 of 1996 ('NEPA') and sec 3(4)(i) of NEPA in GN 2432, GG 19377 of 19 October 1998, as published by the Minister of Education.

21 The *FEDSAS* case (n 4) para 14.

regulation 3(7), regulation 4, regulation 5 and regulation 16 on grounds proffered by the applicant.²²

2.2 Supreme Court of Appeal

The MEC and Head of Department for Education in Gauteng (HOD) approached the Supreme Court of Appeal (SCA) seeking to appeal the decision of the High Court.²³ The SCA upheld the appeal with costs, finding no substantive or procedural defects with the regulations, save for Regulation 2(2A) which was declared invalid and of no force and effect, thereby setting aside the High Court judgment in part.²⁴

Regulation 2(2A) provided that '[t]he Department may determine the minimum standards for the formulation of the admissions policy for specialist schools, technical schools and education institution.'²⁵ The Supreme Court of Appeal struck down this regulation on the grounds that the inclusion of 'education institutions' in the regulation detracts from its main purpose.²⁶

The court saved the rest of the contested regulations on the basis that they were reasonable, rational, and not *ultra vires* nor were they in conflict with national law.²⁷

3 Issues before the Constitutional Court

FEDSAS brought the matter to the Constitutional Court, seeking a leave to appeal the Supreme Court of Appeal judgment.²⁸ The issue before court was on the same facts and legal question of unconstitutionality of the regulations. The respondents (Gauteng MEC for Education in Gauteng) and HOD for Education in Gauteng, opposed the appeal on the basis that the impugned regulations were rational, reasonable, and designed to prevent unfair discrimination in the process of school admissions.²⁹

22 The High Court held the following: that regulation 16 was *ultra vires*; that a procedural defect invalidated regulation 2(2A); that regulation 3(7) was unjustifiable and unreasonable; that regulation 4 was beyond the power given by section 11(1) and invalid; and that regulation 5, save for regulation 5(5), was *ultra vires* and invalid.

23 The *FEDSAS* case (n 4) para 14.

24 As above.

25 Gauteng School Education Act 6 of 1995: Regulations Relating to the Admission of Learners to Public Schools, 2012, GN 1160 *Provincial Gazette* 127, 9 May 2012.

26 The *FEDSAS* case (n 4) para 17.

27 The *FEDSAS* case (n 4) para 18 - 20.

28 The appeal relates to regulation 3(7), regulation 4(2) read with regulation 4(1), regulation 5 read with regulation 8, regulation 11(5) and regulation 16 of Gauteng School Education Act 6 of 1995: Regulations Relating to the Admission of Learners to Public Schools, 2012, GN 1160 *Provincial Gazette* 127, 9 May 2012.

29 The *FEDSAS* case (n 4) paras 31 & 41.

4 Constitutional Court's decision and rationale

4.1 Leave to appeal

Leave to appeal the specified orders of the Supreme Court of Appeal was granted by the CC.³⁰ The court based this decision on the fact that the application raised '*important constitutional questions of equitable access to education – a promise made by section 29 of the Constitution.*'³¹ The court noted that, while the dispute between SGBs and provincial government was not new to the CC, the significance of the questions before it and the public interest thereof supported the applicant's bid to be heard on the matter.³² Furthermore, the application required the Court to interpret national and provincial legislation in light of the Constitution – a competency of the Constitutional Court.

4.2 Conflict between national and provincial legislation

FEDSAS asserted that regulation 5, read with regulation 8, caused a conflict between national and provincial legislation.³³ The applicant insisted that provincial legislation, which is in conflict with national, should be declared invalid by the court. However, the CC did not assent to their prayer.

According to schedule 4 of the Constitution, education is one of the areas that both the national and provincial have concurrent powers. This means that both these levels of government may enact legislation that deals with educational issues. The Minister of Basic Education exercises executive authority at a national level.³⁴ Whereas, in cases where that the provincial legislature would enact legislation, the executive authority to implement such legislation vests in the Premier and other MECs in a province.³⁵ Based on this, the court accepted the overlap of national and provincial legislation and further cited the conflict resolution scheme of sections 146, 149 and 150 of the Constitution to confirm that '[a]utomatic repugnancy between the two classes of legislation does not arise.'³⁶

30 Order 3 and 4(a) of *Member of the Executive Council for Education, Gauteng and Another v Federation of Governing Bodies for South African Schools* 2015 4 All SA 591 (SCA).

31 The *FEDSAS* case (n 4) paras 23.

32 The *FEDSAS* case (n 4) paras 4 & 23.

33 The *FEDSAS* case (n 4) para 25.

34 P De Vos & W Freedman (eds) *South African Constitution in context* (2014) 196.

35 Sec 125(2)(a) of the Constitution of the Republic of South Africa (n 9).

36 The *FEDSAS* case (n 4) para 27. Also note in terms of the Constitution, sec 146 addresses conflicts between national and provincial legislation. Sec 149 addresses the issue of status of legislation that does not prevail. Sec 150 provides for the interpretation of conflicts.

The court found that regulations 5 and 8 were consistent with sections 5(1) to (5) of the Schools Act and the National Education Policy Act, given the limitations in sections 5(1) to (3) of the Schools Act and the provincial law ordered by section 5(5) of the Schools Act.³⁷

4.3 Impugned regulations

Regulation 3(7) prohibits schools from requesting confidential information of learners from their current school before admission. The court rejected the applicant's suggestion for the regulation to be narrowed by listing specific information on what is permissible or not permissible information to access in order to allow schools to 'discriminate fairly.'³⁸ The court found that the regulation's purpose to prevent unfair discrimination against a learner during the admission phase was a legitimate one.

Regulation 4(1) and (2) provides that MEC, by notice in the *Provincial Gazette*, may determine the feeder zone for any school in the Province, after consultation with the relevant stakeholders have been conducted. In their submissions, the applicant and the *Amicus Curiae* argued that the inclusion of the non-peremptory word 'may' in regulation 4(1) was problematic.³⁹ They stated that it would leave the creation of a permanent default regime of feeder zones, as well as the envisaged consultation, to the MEC's discretion. The court found that the unilateral determination of default feeder zones denied SGBs, as stakeholders, meaningful participation in this process.⁴⁰ The MEC was thus directed to set feeder zones no later than twelve (12) months from the date of the order.

The court then examined regulation 5 which provides that at the end of the admission period, the District Director may place any unplaced learner at any school that has not been declared full. This regulation was read with regulation 8, which stipulated that 'the objective entry level learner enrolment capacity of a school shall be determined by the (HOD)' who may also declare the school full if the school has reached its enrolment capacity. The applicant and *amicus* challenged these provisions for their irrationality and divergence from section 5 of the Schools Act. In response to this, the court emphasised that section 5(5) of the Schools Act which declares that '(s)ubject to

37 The *FEDSAS* case (n 4) para 29.

38 The *FEDSAS* case (n 4) para 30.

39 The court admitted Equal Education, a membership-based democratic movement of learners, teachers, parents and community members as *Amicus Curiae*. Herein after referred to as '*amicus*.'

40 The *FEDSAS* case (n 4) para 37.

this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.⁴¹ This clearly demonstrated that the SGB's admissions autonomy was limited to any provisions of the School Act and any other relevant law – in this case, the regulations. The court further cited the *Rivonia Primary School* case, wherein this textual qualifier was acknowledged and accepted.⁴² Owing to this, the court found regulation 5, read with regulation 8, to be rational, reasonable and justifiable.⁴³

Furthermore, the court probed the merits of regulation 16. This regulation relates to processes available to parents who wish to object to or appeal decisions regarding admission. A primary appeal / objection stratum, wherein parents can petition the HOD before appealing to the MEC, was introduced by this regulation. The court found that this regulation did not amount to 'a delegation of authority by the MEC to the HOD to decide an appeal, 'and therefore found that it was not necessary to further enquire whether this regulation transgressed the bounds of section 105 of the Gauteng School Education Act which regulates delegation of power and assignment of duties.⁴⁴

Lastly, consistent with the *Biowatch* judgment, the court did not impose costs of the application on FEDSAS, as it had 'raised important constitutional questions.'⁴⁵

5 History of litigation regarding public schools' admissions

The CC has adjudicated several disputes involving SGBs and provincial governments in the past and a recurring theme in the case law involving these parties has been the principle of co-operative governance.⁴⁶ The Constitution divides government into national, provincial and local spheres, and directs these three (3)

distinctive, interdependent and interrelated' spheres to 'co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, informing one another of... matters of common interest, co-ordinating their actions and

41 Sec 5(5) of the South African Schools Act 84 of 1996.

42 *MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others 2013 (12) BCLR 1365 (CC)*. Herein after referred to as 'The Rivonia case.'

43 The FEDSAS case (n 4) para 46.

44 The FEDSAS case (n 4) para 49.

45 The FEDSAS case (n 4) para 50. See also *Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC)*.

46 The FEDSAS case (n 4) para 47.

legislation with one another, adhering to agreed procedures and avoiding legal proceedings against one another.⁴⁷

The same can be applied to the 'three-tier partnership' of national and provincial governments and SGBs.⁴⁸

The court hearing the FEDSAS case reiterated the scheme of co-operative governance among these organs of state and noted the incidence of legal proceedings involving these parties.⁴⁹ In his *Rivonia Primary* judgement, Mhlantla AJ emphasised the need for engagement amongst these constant litigants, particularly for the furtherance of the interests of learners.⁵⁰ Regrettably, the best interests of learners are seemingly lost in the various cases where each party has sought to assert their respective statutory mandate above that of the other.

6 Realising the objects of section 29(1)(a)

Addressing the real problem of uneven access to education by statutes has proven to be inadequate. While the right to access to basic education has been entrenched in the Constitution since 1996, it has been made practical over the years by regulation, school policy, administrative action and case law, a judgment at a time.

There are many obstacles standing between the right envisaged by section 29(1)(a) and its practical realisation. Among these obstacles has been unfair discrimination on various grounds, which this case addresses. The court's acceptance of regulation 3(7), particularly, is a giant leap forward towards making schools' admission practices more inclusive. Barring schools from obtaining information which could be used as grounds for unfair discrimination encourages (colour) blind admissions and eliminates the unwarranted differential treatment of learners that does not serve the public interest or purpose.⁵¹

Physical and economic accessibility to education are yet to be dealt with by this court. However, the entrenchment of non-discriminatory admission practices through the court's avowal of regulation 3(7), regulation 5 read with 8, and 11(5) is happily welcomed.

47 Sec 41(1) of the Constitution of the Republic of South Africa (n 9).

48 The *Rivonia* case (n 42) para 36.

49 The *FEDSAS* case (n 4) para 47.

50 The *Rivonia* case (n 42) para 48(d).

51 Art 4 of the Convention Against Discrimination in Education, concluded 14 December 1960 and entered into force 22 May 1962.

7 Developments

Although the MEC failed to meet the twelve (12) month deadline set by the court, an application for an extension was granted and the MEC was given a further eighteen (18) months to expand the province's feeder zones in order to address apartheid spatial planning.⁵² The determination of such involved consultations with stakeholders such as SGB associations, the advocacy group Equal Education, the Premier's office and the Municipal Demarcation board.⁵³

On 15 November 2018, after almost two years after the order was made, the Gauteng education announced that all schools in the province would now have a feeder zone within a 30km radius, as opposed to the previous 5km.⁵⁴ In practicality, this means that a pupil residing in Alexandra township can now be admitted to Parktown High School for Girls, a former 'model C' school which achieved a 100% pass rate and a 98,1% degree entrance in 2018.⁵⁵

Speaking to the *Mail & Guardian* after this announcement, Gauteng Education MEC Panyaza Lesufi confirmed the significance of this judgment and its consequences, saying,

Feeder zone determination plays a significant role in ensuring that access to our schools is fair, transparent and conducted in an equitable manner. Our schools cannot justify any form of discrimination against any learner.⁵⁶

8 Conclusion

This judgment serves to clear the murky waters of ostensibly conflicting national and provincial laws, in order to emphasise reasonableness as an essential element in the exercise of power and to encourage non-discriminatory admission practices in schools.

52 Gemma Ritchie 'Gauteng school feeder zones expanded to 30km' 16 Nov 2018 <https://mg.co.za/article/2018-11-16-00-gauteng-school-feeder-zones-expanded-to-30km> (accessed 10 June 2019).

53 As above.

54 As above.

55 <https://www.parktowngirls.co.za/matric-results-2018> (accessed 12 June 2019). See also schools now referred to as quantile 5 schools. Dass S and Rinquest A 'Chapter 7: school fees' in 'Basic Education Rights Handbook: Education Rights in South Africa' <http://section27.org.za/basic-education-handbook> (accessed 15 June 2017).

56 Ritchie (n 52).

The FEDSAS case makes it clear that fulfilling the constitutional promise contained in section 29(1)(a) will require more than just making educators and school infrastructure available for teaching and learning.⁵⁷ The complete realisation of this right will entail addressing relics of apartheid such as, school admissions policies based on the pre-constitutional era spatial planning and exclusionary language policies.⁵⁸ While these are not the only barriers to education, in the context of South Africa's history of discrimination and inequality, these issues cannot be ignored when developing education policies.⁵⁹

In order to give practical meaning to the right to access to basic education, the South African Schools Act was enacted to 'redress past injustices in educational provision, provide an education of progressively high quality for all learners (and) combat racism and sexism and all other forms of unfair discrimination.'⁶⁰ The CC's rationale in the FEDSAS case echoes this objective and serves as a major legal development in the area of education law in South Africa.

57 Everyone has the right to a basic education, including adult basic education. The author avers that this subsection creates an expectation for access to such basic education, hence making this a promise that should be fulfilled by the Executive branch of government.

58 For example, policy in contention in *Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).

59 According to UNESCO's EFA global monitoring report 2015, the main barriers of access to education are poverty, poor quality of education, physical inaccessibility of schools, gender and unemployment. <https://unesdoc.unesco.org/ark:/48223/pf0000232205?posInSet=1&queryId=36deb540-0411-43d3-b932-a63507ab9ffc> (accessed 7 August 2019).

60 Preamble of the South African Schools Act 84 of 1996.