

FEDERATION OF GOVERNING BODIES FOR SOUTH AFRICAN SCHOOLS V MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG AND ANOTHER

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On 20 May, the Constitutional Court made a unanimous decision concerning the powers of officials in determining admission policies for schools in Gauteng in the *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* matter. The case concerned the validity of amendments to the *Regulations for Admission of Learners to Public Schools in Gauteng* (Regulations) which were promulgated by the Member of the Executive Council for Education, Gauteng (MEC) in 2012.

In July of 2011 the MEC published draft amendments to the Regulations and called for comments from the public. The Federation of Governing Bodies for South African Schools (FEDSAS) submitted that the Regulations should be withdrawn as they were promulgated by the MEC without the required authority. FEDSAS also put forward the principle of legality as a reason for the invalidity of the provisions and argued that a conflict between national and provincial legislation was created by the Regulations. In essence, the regulations gave the MEC power to determine feeder zones for public schools and this was considered an encroachment on the powers of the governing bodies in that they forced admission on schools. The objections were given due consideration and some of the provisions were altered to meet the concerns of not only FEDSAS, but other groups who made submissions. The altered Amendments were promulgated in May of 2012.

FEDSAS approached the High Court, challenging the validity of the amendments. The High Court found that certain provisions in the Regulations were indeed beyond the scope of the MEC's authority. The Court however, saved other provisions by modifying them. The MEC and the Head of Department for Education, Gauteng (HOD) petitioned the Supreme Court of Appeal (SCA), which was asked to decide whether the provisions were invalid and furthermore, whether the regulations conflicted with the *Schools Act* or the applicable provincial law. The SCA upheld the appeal in so far as the provisions ensured the right to education and protects learners from unfair discrimination. The SCA said that FEDSAS did not take into account the disparities in the education system due to apartheid. The amendment to the Regulations is directed at achieving an even distribution of learners across the public school system.

FEDSAS appealed the matter to the Constitutional Court, which granted leave to appeal as it concerned a constitutionally enshrined right - the right to access to education in section 29. In its Constitutional Court appeal FEDSAS submitted that some of the impugned provisions were not reasonable, neither were they justifiable in terms of the *Gauteng Education Act*. Moreover, it argued that there was a conflict between some of the Regulations and national legislation (namely the *South African Schools Act*), which rendered them inoperative by virtue of section 149 of the Constitution. This section provides for legislation becoming

inoperative where it conflicts with legislation which prevails over it. Section 149 provides that where a decision by a court says that legislation prevails over other legislation, the latter is not invalidated but rather, it becomes inoperative as long as the conflict remains.

The MEC and HOD put forward that the decision to alter the feeder zone scheme was driven by the fact that public schools cannot be governed in a way that only catered for the interests of its incumbent parents and learners. Furthermore, the regulations were neither unreasonable nor unjustifiable. The purpose of the regulations, according to the MEC, was equal access to education. Equal Education, a non-governmental organisation focusing on both quality and equality in South Africa, was admitted as *amicus* and highlighted the link between geography and race in South Africa as a result of apartheid policy. It put forward that proximity as the only reason in the determination of feeder zones was inadequate. The current feeder zone scheme has the effect of indirectly discriminating unfairly between entry level learners based on race.

The Court unanimously held that there was no conflict between national and provincial legislation because education is a functional area of concurrent national and provincial legislative competence. The Regulations were found to be in harmony with national legislation. Also, none of the impugned regulations were unreasonable, unjustifiable or irrational. A key provision upheld by the Court is Regulation 3(7) which prohibits a learner's prospective school from requesting confidential information from his/her current school. The regulation's aim is to prevent unfair exclusion of a learner at admission level. Regulations 4(1) and (2) authorise the MEC to determine feeder zones thus attempting to rectify the geographical separation perpetuated by apartheid.

Another key provision is Regulation 11(5) which empowers a District Director to consider the relative capacity of other schools in a district as a criterion for placing a learner in a particular school. The Court held it to be reasonable, rational and justifiable as its guiding purpose is to ensure that every learner is placed in a school regardless of that learner's residential background. The MEC was directed to set feeder zones as required by regulation 4(1) within a reasonable time, not later than one year from the date of the Court order.

This judgment is a victory in the fight against racial discrimination, both directly and otherwise. It is a clear example of how rights are intertwined and indivisible. The right to education is linked to freedom from unfair discrimination in that one cannot be limited to accessing education in a particular geographical area based on one's race. As the rules for the determination of feeder zones stood, a child could be precluded from accessing basic education based on his/her race. Giving more power to MECs to address unique problems in their provinces is commendable. The power is not however, absolute, and the element of reasonableness of the conduct of the MEC has been emphasised by both the SCA and the Constitutional Court. When referring to reasonableness, the courts ask whether the legislation in question is connected to a legitimate government interest thus preventing arbitrary/irrational decisions. In coming to its decision, the SCA examined the reasonableness of the amendments before declaring them sound and rational. As has been



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discussed, the MEC's amendments served a legitimate and constitutional interest and therefore found approval from the SCA.