CONSTITUTIONAL COURT OF SOUTH AFRICA

Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo & Others

Case CCT 40/09
[2009] ZACC 32

Date of Judgment: 14 October 2009

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday 14 October 2009, the Constitutional Court delivered judgment in a case concerning the constitutional right to be taught in an official language of one's choice and the power of the Head of Department of Education (HoD) to withdraw the function of a school governing body to determine the school's language policy.

The HoD and the national Minister for Education sought leave to appeal against a decision of the Supreme Court of Appeal. That Court held that the Schools Act did not empower the HoD to withdraw the function from the governing body and that the withdrawal was unlawful. It further held that the decisions of the HoD to appoint an interim committee, and of the committee to amend the school's language policy from Afrikaans medium only to include English, were unlawful and set them aside. The Supreme Court of Appeal ordered that the learners who had been enrolled at the school since 25 January 2007 in terms of the parallel medium policy should continue to be taught and write examinations in English at the school until completing their school careers.

In January 2007 there was a shortage of space in English medium schools in the Ermelo area to accommodate the grade 8 intake. There were approximately 113 English learners who could not be accommodated because schools were full to capacity. Hoërskool Ermelo (the school) is an Afrikaans medium school and, in the light of its language policy, the school could accommodate the additional learners only if they were prepared to receive tuition in Afrikaans. In terms of the Schools Act, a school's language policy is determined by that school's governing body.

The school was originally built to accommodate 2000 learners. However over the years its enrollment had dropped and by 2007 it had only 587 high school learners. The HoD and his

Department took the view that the class to learner ratio at the school was well below the national norm and that it had excess capacity to admit more learners.

In January 2006, the Department approached the school with a request that it accommodate English medium learners. The school refused, but agreed to an arrangement that the learners be admitted to a nearby school and that they may use a disused laundry on the school premises. During August 2006 the Department enquired from school principals in the area how it could best accommodates new grade 8 English medium learners. The school suggested that the two vacant buildings in Ermelo be adapted to accommodate them. The Department did not go along with this suggestion.

On 26 October 2006, the Department wrote to the school governing body requesting that the children accommodated in the laundry be accommodated in actual classrooms. On 8 November 2006 the school governing body declined the request. On 9 January 2007, the Department convened a meeting with the chairperson of the governing body. At the meeting, the chairperson was given a letter requiring that the school should admit grade 8 English medium learners at the school. On 10 January 2007, the first day of the school year, a group of about 71 English medium learners, accompanied by their parents arrived at the school for enrolment in grade 8. The school declined to admit them as they did not want to be taught in Afrikaans.

On 25 January 2007, the HoD summarily withdrew the function of the governing body to determine the school's language policy and appointed an interim committee to perform the function. On the same day, the interim committee met and decided to change the school's language policy to parallel medium. This meant that the school would provide tuition in English and Afrikaans, thus allowing the additional learners to be accommodated.

The school challenged the decisions of the HoD in the North Gauteng High Court, Pretoria. A full bench of the High Court upheld the decisions of the HoD on the grounds that, in terms of the Schools Act, he had the authority to withdraw the power of the school governing body to determine language policy and to appoint an interim committee to perform the function and that he was confronted by an urgent need to find schooling places for grade 8 learners who wanted to be taught in English.

The Supreme Court of Appeal reversed this decision.

In this Court, the HoD argued that the decisions taken in January 2007 were lawful; that all negotiations with the school to find a solution to the problem had been unsuccessful and that he acted reasonably in withdrawing the function to determine language policy in order to alleviate an urgent situation and to give effect to the constitutional right to basic education.

On the other hand, the school submitted that this case is about procedural fairness and legality and not about its language policy. It argued that the Supreme Court of Appeal had correctly set aside the HoD's decisions because he did not have the power to withdraw the language function from the school's governing body and that in any event his decisions did not comply with the constitutional requirements of just administrative action. The school argued further that the HoD was aware of the problem in 2006 and that the urgent need to admit grade 8 learners in 2007 was created by his failure to address the problem of school overcrowding when it arose.

Moseneke DCJ, writing for a unanimous court, held that the Schools Act does give the HoD the power to withdraw on reasonable grounds the function of the governing body to determine the school's language policy. This power derives from section 29(2) of the Constitution read together with section 22 of the Schools Act. Once the HoD has properly withdrawn the function, it vests in him or her and the function may be exercised for a specified remedial purpose. However, the Court found it unnecessary to determine whether the HoD in this case acted reasonably or not, because the exercise of his power to withdraw the function to determine language was tainted by his simultaneous decision to appoint in terms 25 of the Schools Act an interim committee to determine the schools language policy. The Court held that the HoD failed to distinguish the power given to him under section 22 from the power given to him under section 25. Hence his exercise of the power was contaminated by his incorrect reliance on section 25. In short, in appointing the committee to determine the school language policy, the HoD acted without the necessary legal power to do so. Consequently, the withdrawal of the function, the appointment of the committee and the subsequent alteration of the schools language policy were unlawful and were set aside.

Moseneke DCJ noted that there is a great need to ensure that the constitutional rights to education and to be taught in an official language of one's choice are properly protected. He emphasised that education is the engine for a better life for all and that the most stubborn and disempowering legacy of our apartheid past is the inequality which was spawned by unequal resources afforded to white and black public schools. He also expressed dismay at the failure of the provincial Department of Education, Mpumalanga to ensure that there are enough public schools in the Ermelo area to ensure that every grade 8 learner attends school as required by the Schools Act.

The Court emphasised that procuring enough school places implies pro-active and timely steps by the Department. The steps should be taken well ahead of the beginning of an academic year. On all accounts, it is highly probable that there will be an increased demand for grade 8 school places at the beginning of the year 2010. And in any event, there is an unacceptably high level of crowding in high schools in Ermelo other than at Hoërskool Ermelo. Additional places at Hoërskool Ermelo will afford only partial alleviation

The Court concluded that it was just and equitable to make an order requiring the HoD to file within a fixed period of time a report to this Court setting out the likely demand for grade 8 English places at the beginning of 2010 and setting out the steps that the Department has taken to satisfy this likely demand for an English or parallel medium high school in the circuit of Ermelo.

In relation to the school's exclusively Afrikaans language policy, Moseneke DCJ observed that there are at least two reasons why the governing body of the school should revisit its language policy. First, the school argued that it is entitled to determine a language policy having regard only to the interests of its learners and of the school without considering the interests of the community in which the school is located and the needs of other learners. That approach, the Court held, is not consistent with provisions of the Constitution and the Schools Act. A school is obliged to exercise its power to select a language policy in a manner that takes on board the provisions of section 29(2) of the Constitution, and of section 6(2) of the Schools Act and of the norms and standards prescribed by the Minister.

Second, whilst the adoption of the language policy by the interim committee was unlawful, the underlying challenge relating to the scarcity of classroom places for learners who want to be taught in English in Ermelo remains and is likely to resurface in January 2010. At the very least, in reassessing its language policy, the school governing body must have regard to its dwindling enrolment numbers. It must act, recognising that there is a great demand for the admission of grade 8 learners who prefer the English medium of instruction.

A further relevant consideration is that the Department bears a constitutional and statutory duty to provide basic education in an official language of choice to everyone, where it is reasonably practical and just. It is accordingly duty bound to take lawful steps to achieve this constitutional obligation.

For these reasons, the Court has made an order that requires the school governing body and the school to report to this Court within a specified period of time on the reasonable steps it has taken in reviewing its language policy and on the outcome of the review process. The Court's order directs the school by not later than Monday 16 November 2009 to lodge with this Court an affidavit setting out the process that was followed to review its language policy and a copy of the language policy.

The Court also ordered the HoD to report back to the Court on the steps that are being taken to ensure that there are enough places for grade 8 English learners at the start of 2010.

Accordingly, on behalf of the Court, Moseneke DCJ granted the application for leave to appeal and dismissed the appeal, and reaffirmed the decision of the Supreme Court of Appeal but for different reasons.