CONSTITUTIONAL COURT OF SOUTH AFRICA

KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and Others

CCT 60/12

Date of Hearing: 22 November 2012
Date of Judgment: 25 April 2013

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.

Today, the Constitutional Court handed down judgment in a matter relating to subsidies granted by the Department of Education, KwaZulu-Natal (Department) to independent schools in that province.

In 2008, the Department issued a notice to independent schools setting out "approximate" funding levels for the 2009 financial year. In May 2009, after the first payment for the year had already fallen due, the Department issued a circular warning schools that they should expect a subsidy cut not exceeding 30% for that financial year. The subsidies eventually paid to independent schools for 2009 were, on average, 30% less than those set out in the 2008 notice.

The applicant – an association of independent schools – brought an application in the KwaZulu-Natal High Court, Pietermaritzburg (High Court). It argued that the 2008 notice gave rise to an enforceable undertaking to pay the entire year's subsidy without

any reduction. The High Court dismissed the application. The Supreme Court of Appeal refused leave to appeal. The applicant approached the Constitutional Court for relief.

In a judgment penned by Cameron J, concurred in by Moseneke DCJ, Froneman J, Khampepe J, Skweyiya J and Yacoob J, the majority of the Court held that even though the 2008 notice did not give rise to a contract between the schools and the Department, it nonetheless constituted a publicly promulgated promise to pay. The majority accepted in general that subsidies promised by government may be reduced. However, Cameron J held that, for reasons based on reliance, accountability and rationality, it is a constitutionally sound principle of our law that a public official who promises to pay specified amounts to named recipients cannot unilaterally reduce the amounts to be paid after the due date for their payment has passed. The Court therefore ordered the Department to pay the applicant schools the approximate amounts specified in the 2008 notice which had fallen due for payment on 1 April 2009.

In a separate concurrence, Froneman J agreed with the reasoning of the main judgment that it is just and equitable to enforce the promise made by the Department. However, he was of the view that this reasoning also applied to the promise made for the whole of the year. He also held that the applicant's whole claim may comfortably be accommodated within the law of contract.

According to Froneman J, the past and present conduct of the Department would have satisfied the requirement of an intention to contract had the promise been made it by it as a private person. There was thus nothing in private contract law or in public administrative law that precluded that construction as a matter of principle.

In a dissenting judgment, Nkabinde J agreed with the main judgment that leave to appeal should have been granted, but held that the appeal should be dismissed. In particular, Nkabinde J disagreed that the 2008 notice constituted a promise to pay the amounts and that the alleged promise constituted an enforceable obligation. According to Nkabinde J, the use of the words "approximate funding levels" in the notice highlighted that it did not

constitute a promise to pay either the full extent of the allocated funds or any percentage thereof. In her view, the form of the applicant's case was important and since the existence of a contract or quasi-contract was neither pleaded nor agreed upon, it fell to be dismissed.

In a separate dissenting judgment, concurred in by Mogoeng CJ and Jafta J, Zondo J took the view that the applicant had no case as the case was based on an alleged contract, whose existence the applicant was unable to prove. Zondo J also held that the approximations of amounts were uncertain and vague and that no legal obligation existed. He held that the order made by the main judgment would not be competent in law because the Department will not know the amounts that it will be required to pay to the affected schools.

In a separate judgment, concurred in by Zondo J, Mogoeng CJ and Jafta J indicated that they do not agree with the judgments of Cameron J and Froneman J. They also indicated that while they do not agree with Nkabinde J that leave to appeal should be granted, they agree with the rest of her judgment.