



CONSTITUTIONAL COURT OF SOUTH AFRICA

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another

CCT 103/12

Date of Hearing: 5 November 2012

Date of Judgment: 10 July 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 dismissing an appeal from the Supreme Court of Appeal in a matter regarding the powers of a Head of a Provincial Department of Education (HOD) to instruct a principal of a public school to act in contravention of a learner pregnancy policy adopted by the governing body of that school.

In 2008 and 2009 the governing bodies of Welkom High School and Harmony High School respectively adopted pregnancy policies that provide for the exclusion of pregnant learners from school for certain time-periods. The HOD issued instructions to the principals of the schools to readmit two learners who had been excluded from school in terms of the pregnancy policies.

In the Free State High Court, Bloemfontein (High Court) the respondent schools sought to interdict the HOD from interfering with the implementation of their policies. The High Court granted the interdict, which was confirmed by the Supreme Court of Appeal. The High Court and the Supreme Court of Appeal reasoned that the HOD did not have authority to instruct the principals to contravene adopted policies.

Khampepe J, with whom Moseneke DCJ and Van der Westhuizen J concurred, dismissed the appeal. She held that, as a matter of legality, supervisory authority must be exercised lawfully in accordance with the Schools Act. She concluded that, because the HOD had

purported to override school policies without following the relevant procedures set out in the Schools Act, he acted unlawfully. The interdict was therefore correctly granted. Khampepe J acknowledged that the respondent schools' pregnancy policies at face-value infringe upon the constitutional rights of pregnant learners, including the rights to human dignity, to freedom from unfair discrimination and to receive a basic education. In order to address these concerns, she ordered the schools to review the policies in the light of the requirements of the Constitution, the Schools Act and the considerations set out in the judgment. She further ordered that the schools meaningfully engage with the HOD in the process of reviewing their policies, according to the principles of cooperative governance enshrined in the Schools Act.

In a separate concurring judgment by Froneman J and Skweyiya J, in which Moseneke DCJ and Van der Westhuizen J concurred, they support and endorse the approach and outcome of Khampepe J. They note that, although this is a matter between school governing bodies and the HOD, their respective functions are to serve the needs of children. An approach which places the learners' best interests as the starting point must contextualise the present dispute within the parties' duties to engage and cooperate. Froneman J and Skweyiya J hold that where a crisis requiring immediate redress arises, the duty to engage, cooperate and communicate in good faith remains. However, any short-term remedial action taken to secure learners' rights must be lawfully taken.

Zondo J wrote a dissenting judgment, in which Mogoeng CJ, Jafta J and Nkabinde J concurred, and would have upheld the appeal. He held that the governing bodies' learner pregnancy policies were unconstitutional in that the exclusion of a pregnant learner from school as envisaged in the policies unjustifiably infringes the right to a basic education and equality. Zondo J also held that the exclusions were unlawful because they constitute a suspension or expulsion of the learner from school by the governing body. This is in breach of the Schools Act. The HOD was therefore not only entitled but obliged to take steps to prevent the principals, who are his employees and representatives in the school, from enforcing the policies.