

Implications of *School Governing Body of Makangwane Secondary School v the MEC of the Executive Council of the Limpopo Department of Education*

1. Background

Makangwane Secondary School (hereinafter “the school”) is a no-fee school, which means it relies solely on government for infrastructure upkeep and maintenance. The condition of the school had deteriorated over time. By the time the school governing body approached the court to compel government to fulfil its responsibilities, Makangwane had fallen into serious disrepair, with much of the infrastructure either completely destroyed or in urgent need of maintenance, electrical wiring exposed, and much of the school and furniture exposed to the elements.

This matter was initially dealt with on an urgent basis, and the school (the applicant) was granted relief. In terms of the initial order, the respondents (the Limpopo Member of the Executive Committee (MEC) for Education, the provincial head of education (HOD), the national Minister of Basic Education and the Director-General of Basic Education) were told to provide the school with five temporary classrooms and the requisite number of desks, chairs and learning paraphernalia. In addition, the respondents were instructed to draft a plan to catch up on the learning time lost by learners due to the poor school infrastructure.

Nevertheless, the court declined to agree that the respondents’ conduct was *prima facie* unconstitutional in terms of section 172 of the Constitution of the Republic of South Africa, 1996.¹ In its appeal, therefore, the applicant insisted that, regardless of the initial order, the respondents were still acting contrary to the Constitution. This, the applicant argued, infringed on learners’ constitutionally guaranteed right to a basic education,² dignity,³ equality⁴ and conduct that is in their best interest.⁵

This eventually saw the issuance of the following order by the Limpopo High Court:

- “An order declaring that the respondents’ failure to provide adequate school buildings, building maintenance and school furniture for the

¹ Constitution of the Republic of South Africa, 1996.

² Constitution of the Republic of South Africa, section 29.

³ *Ibid*, section 10.

⁴ *Ibid*, section 9.

⁵ *Ibid*, section 28(2).

Makangwane Secondary School ('the School') and to develop and/or make known plans to address these failures is unconstitutional and unlawful.

- An order declaring that the respondents' failure to take swift and appropriate action to address the unsafe conditions at the School and to develop and/or make known plans to address these failures is unconstitutional and unlawful."⁶

2. The appeal: Constitutional implications

2.1 The right to dignity infringed

Considering the impact of education on the course and outcome of a person's adolescence, the rights associated with the attainment of a decent education are paramount. Ultimately, education is central to a life of dignity.

In the *Makangwane* matter, the court emphasised the right to dignity through an analysis of the socio-economic conditions of the school community. For instance, the court stressed that, being a no-fee institution, the school was obviously situated in a poor community where housing was generally of a low standard. Having the suboptimal conditions experienced in their homes transposed to a governmental education institution was therefore unfair towards the learners, and unacceptable. So, the court ruled as follows:

"There can be no doubt that the learners at the School will never feel honoured and respected learners from well-equipped schools [sic]. I therefore agree with counsel for the applicant's contention that the structures in which learners learn, the way in which children are taught and their sense of safety and well-being all have a great impact on dignity and self-worth. It is on this basis that I find that their rights to dignity have been violated."⁷

2.2 The right to education infringed

⁶ *School Governing Body of Makangwane Secondary School v the MEC of the Executive Council of the Limpopo Department of Education* (case number 3158/2018) at par. 1 (hereinafter "the judgement").

⁷ *Ibid* at par. 11.

The court proceeded to scrutinise what the right to a basic education meant. Relying on the Constitutional Court's interpretation of section 29 in *Juma Masjid Primary School v Essay NO*,⁸ the court pointed out that the right to a basic education in terms of section 29(1)(a) was not a right to be made progressively available. Instead, it was immediately realisable. In this respect, the difference between sections 29(1)(a) and 29(1)(b) was highlighted: While the latter made further education progressively available and accessible, the right to basic education was immediately realisable.⁹ The only way the application of this right could be limited, the court said, was by virtue of law of general application, if justifiable and reasonable to do so in a society valuing human dignity, equality and freedom.

Reverting to the importance of education and, by implication, a quality educational facility for a child's development, the court cited the Constitutional Court in *Juma Masjid*:

“Basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and world opportunities.”¹⁰

With this in mind, the court analysed the implications of section 29(1)(a) against the backdrop of the evidence the applicant had provided. Judging by the condition of the school's classrooms, the court found, the provincial education department did not regard this right in a sufficiently serious light. For instance, the classrooms had either partial or no roofs; large cracks throughout the building allowed learners to see into adjacent classrooms; electrical wiring was exposed, and learners and staff were left utterly exposed to the elements. These conditions necessitated the removal of the learners from the unsafe structure to be taught under trees, which the teachers rightly objected to.

In addition to the quality of the building and its effect on the learners, the court also examined the condition of school equipment required for basic education.

⁸ *Juma Masjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC). For the full case, see www.fedsas.org.za at “Documents” > “Court judgements”.

⁹ *Ibid* at par. 37.

¹⁰ *Ibid* at par. 43.

Makangwane's desks, chairs and library – all necessary elements to provide a decent basic education – were in an appalling state.¹¹

2.3 The right to equality infringed

Having dealt with the importance of the right to a basic education, the court directed its attention to the right to equality, addressing this fundamental human right from the perspective of South Africa's history of inequality. The court referred to *Head of Department, Mpumalanga Department of Education v Hoërskool [sic] Ermelo*,¹² where the disparity between previously underfunded, black, rural schools and their white counterparts in the previous political dispensation was emphasised.¹³

For Makangwane, this position had not changed. Thus, the respondents' conduct not only perpetuated inequality, but also infringed on the rights of the children concerned, blatantly disregarding their best interests.

3. Arguments in court

The respondents raised two defences. The first was that the responsibility to maintain the school was the governing body's. While the department allocated budget for maintenance, it was up to the school to utilise the funds for the intended purpose; if not, the department could not be blamed. The second defence pertained to the future development of education by the provincial department. The school was to be merged with another, which caused any new maintenance projects, or even the building of a new school, to be viewed as fruitless expenditure.¹⁴ If a new school was to be constructed, it would only be completed by 2026, and "there is a possibility that there will be no children at the school by that time".¹⁵

The applicant, in turn, raised the problem of bureaucracy.¹⁶ To merge two or more schools, the respondents were required to comply with the provisions of section 12A(1)

¹¹ See in this regard *Madzodzo v Minister of Basic Education* 2004 (3) SA 441 (ECM).

¹² *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* (2010) SA 415 (CC)

¹³ *Ibid* at par. 46.

¹⁴ In this regard, the court also indicated that the department had referred to declining learner numbers and that the governing body and teachers refused to be relocated to another school. See par. 17 of the judgement.

¹⁵ *Ibid* at par. 17.

¹⁶ Cora Hoexter defines bureaucracy as "a rather loose and often pejorative term for large-scale administration or officialdom". See C Hoexter, *Administrative Law in South Africa*, 2nd ed, 2012. Claremont: Juta.

of the South African Schools Act.¹⁷ In this regard, the MEC needed to provide the school with a written notice informing them of the intended merger. Moreover, the MEC had to publish a notice to this effect in a local newspaper in order to provide an opportunity for affected parties to make representations; the MEC then had to consider any such representations, and ensure that all aspects of labour legislation were complied with. The applicant alleged that this time-consuming bureaucratic process (with the period to make representations in itself 90 days long) made it impossible to deliver effective teaching and learning in the meantime. In addition, the other school where some of the learners and teachers needed to be accommodated were unwilling to receive them.

In this regard, the court held:

“The department had ample opportunity to follow the procedure laid down in Section 12A to avoid litigation. The respondents failed to furnish reasons why it took so long to remedy the situation. The argument that the Department acted swiftly is without merits. The decision to relocate the learners was made after the respondents were served with the papers. The dilapidation did not start ... when the conditions of the School [were complained about]. The extent of the damage is so glaringly obvious that any caring official of the Department would have taken action without involvement on the part of an outsider. ... [T]he said swift action contravenes section 12A of the Act.”

The court also rejected the respondents’ other arguments. Relying on *Soobramoney v Minister of Health (Kwazulu Natal)*,¹⁸ the respondents argued that the department simply did not have the fiscal resources to build a new school at once. This, the respondents said, could only be done over a period of time. The court rejected this approach, as the circumstances of *Soobramoney* were vastly different from those of the applicant: In *Soobramoney*, an individual relying on section 27 of the Constitution to obtain chronic renal dialysis at the state’s expense was denied this treatment, as section 27 provided for the progressive realisation of the right to healthcare

¹⁷ South African Schools Act 84 of 1996 (hereinafter the Schools Act).

¹⁸ *Soobramoney v Minister of Health (Kwazulu Natal)* CCT32/1997 [1997] ZACC 17.

subject to the availability of resources. In *Juma Masjid* above, however, the court made it clear that the right to education was immediately (instead of progressively) realisable and, as such, the principles of *Soobramoney* did not apply.¹⁹

Another argument centred on the governing body's duty to maintain the school. In terms of section 21 of the Schools Act, a governing body can apply to the HOD for permission to maintain a school's premises and buildings, and to effect any improvements. Yet, the court found, Makangwane had never applied for such permission and, being a no-fee school situated in a remote rural area with many unemployed community members, would likely have been denied permission in any event, in light of section 21(2).²⁰ Therefore, it was unreasonable to argue that money had been allocated to the school for improvements and maintenance, thereby attempting to shift the blame onto the governing body.

The court finally turned its attention to section 36 of the Constitution. Section 36 is the so-called "limitations clause", setting out the circumstances in which a right may be limited, and the requirements for doing so. Section 29 (setting out the right to education) had no inherent limiting provisions pertaining to basic education. This meant that the right to a basic education could only be limited through the application of section 36, which the court did not feel itself at liberty to do. Such a limitation would be neither reasonable nor justifiable. Ultimately, therefore, the respondents' conduct was affirmed as unlawful and unconstitutional.

The court determined that the applicant was entitled to the orders sought. The court accordingly ordered that the respondents' failure to provide adequate school buildings, furniture and maintenance was unconstitutional and unlawful, as was the respondents' failure to develop plans to address this conduct. The respondents had a legal duty to take swift, appropriate action to remedy the

¹⁹ Section 27 of the Constitution guarantees the right to healthcare, food, water and social security. The court found that section 27(2) imposed a duty on the state to provide access to healthcare; however, it needed to develop measures and legislation to progressively effect this right. The right was automatically limited in the event of restricted resources. Mr Soobramoney, therefore, had no constitutional claim to continuous healthcare at the state's expense.

²⁰ Section 21(2): "The Head of Department may refuse an application contemplated in subsection (1) only if the governing body concerned does not have the capacity to perform such function effectively."

unsafe conditions at the school. If they were unable to do so, they should have devised a plan setting out how they intended addressing the problems.

4. Conclusion

In its order, the court addressed two critical points. The first is that the department's failure to provide the school with the necessary infrastructure, maintenance and school materials to give effect to section 29 of the Constitution was unconstitutional and unlawful. The court went even further by also declaring unconstitutional and unlawful the department's complete inaction, not even having drawn up plans to address the abovementioned failure. Thus, by including both these aspects in its order, the court confirmed that the department had an obligation not only to provide infrastructure, maintenance and materials, but also to have a plan in place indicating its implementation. Failure to fulfil this duty is not only unconstitutional, but also unlawful.

The second point in the court's order was that the department had failed to take swift and appropriate action to address the unsafe conditions at the school, which the court also declared unconstitutional and unlawful. The court's interpretation of "swift" was evident from its discussion of *Juma Masjid* and *Soobramoney*. The right to a basic education is to be made readily available, immediately. It can be limited only in terms of section 36 of the Constitution, which the court in this instance did not believe to be applicable.

In interpreting the right to a basic education, one also has to keep in mind the overall values sought by the Constitution. The values of human dignity, freedom and equality should be paramount, and any conduct contrary to these values without sound justification is unlawful and unconstitutional by default. The school's dilapidated condition not only affected the learners' rights, but the department also tried to shift the blame onto the governing body, knowing that the governing body was totally dependent on the department at every level. The court, therefore, made it clear that although the state had an obligation to ensure the right to a basic education, the attainment of this right was multifaceted. It was not simply about providing a building or premises, but also included the provision of adequate learning materials, equipment and efficient

maintenance of educational facilities so as to complement other rights in the Bill of Rights. A school, and especially a government-supported school, should be a place where a learner's rights to dignity and equality are promoted, and where every decision is made with the learners' best interests in mind. Any conduct contrary to these principles, whether allowing infrastructure to crumble, withholding necessary funds, or failure to provide learning essentials, effectively amounts to criminal and unconstitutional conduct.

5. Implications for schools²¹

Although this matter primarily pertains to no-fee schools, certain aspects apply to schools across the board.²²

5.1 No-fee schools

No-fee schools are entirely dependent on the department in terms of finances. Also in terms of infrastructure maintenance and upgrades, these schools are at the mercy of the department, who is the only party holding the necessary funds to pay for such work. The court also referred to the department's duty to put in place a plan on how it intends addressing issues of deteriorating school infrastructure. Schools should therefore establish whether these plans exist and, if not, insist that the department rectifies this.

This case further emphasised the state's neglect of learners' rights. Schools should therefore ensure that the department not only provides them with the necessary materials to enable learners to attain the rights to a dignified education, but also supplies *sufficient* materials to do so. In effect, therefore,

²¹ For a brief discussion regarding severe financial constraints suffered by schools, see FEDSAS's fifth newsletter of 2019: "Currently, schools are experiencing huge financial challenges. Governing bodies are expected to continue to provide safe learning environments for their learners with less money. Quintile 5 schools annually receive an amount of R241,00 per learner per year in terms of the Norms and Standards for School Funding, bringing the amount to R1,20 per learner per school day. It is therefore clear that the department is abandoning the schools by not providing nearly enough financial assistance. The poor funding means that the day-to-day operations of governing bodies are increasingly under pressure and its implementation is a huge challenge. Parents are therefore forced to contribute financially to their children's education. In the current economic dispensation, school fees are also heavily under pressure and the burden of school fees annually for parents becomes a greater challenge which leads to many applications for exemption. The pressure that school principals experience with less money still ensuring good teaching and learning is also well known." Accessed 3 April 2019. Available at https://www.fedsas.org.za/MailTemplates/National_Newsletter_5_2019_-_Tragedy_at_Die_Ho%C3%ABrskool_Driehoek_04_Feb_2019.html.

²² In this regard, see *Norms and Standards for School Funding*, GN 869 of 31 August 2006.

the department has a constitutional and legal duty to provide sufficient maintenance and upkeep, books, clothing, food (in certain instances), classrooms, furniture, equipment and any other requirements so that the school can give effect to learners' right to an equal and dignified education.

Schools should make certain that they are not simply a number in the department's reports, satisfying a political ideal, but that they are taken seriously. The only way to do this is by claiming the rights granted by government. This is also what the court stressed in the *Makangwane* matter: Schools should ensure that the department fulfils its obligations by insisting that their requirements are met and that departmental plans are drawn up to address any shortcomings. Should the department fail to do so, it should be held to account, even in court if need be.

5.2 Fee-paying schools

Fee-paying schools have a duty to ensure that the money they receive from the department is utilised for the earmarked purpose. State allocations may not be used to supplement other school needs. This means that money allocated for maintenance of school property should be utilised for maintenance alone; money allocated for the acquisition of learning materials should be utilised for learning materials, etc.

In terms of the Norms and Standards for School Funding, schools are allocated a certain amount for a range of school-related needs, including maintenance. Fee-paying schools are better equipped to carry out immediate maintenance when the need arises, or normally have insurance for such purpose. However, the school still has a duty to notify the department of maintenance concerns. Where, for instance, the state of infrastructure poses a serious risk to the health and well-being of learners and staff, this must be reported in writing to the provincial education department. If the provincial department fails to respond, or responds inappropriately, FEDSAS may be approached for assistance.²³ If the school is unable to effect the repairs itself, the department must assist.

²³ A contact list of provincial officials responsible for school infrastructure to whom such reports must be submitted can be obtained at [{hyperlink}](#).

Central to the court's finding in *Makangwane* was that the department cannot shift the duty to ensure that learners obtain a dignified, equal education entirely onto the governing body. Although every person in the Republic has a duty to ensure a democratic South Africa founded on the principles contained in the Bill of Rights, it starts with government and governmental entities. Therefore, even though certain schools have the capacity and authority to function more independently than others,²⁴ the department still has a duty to ensure that teaching and learning occurs in a manner and environment conducive to dignity, equality and self-worth.

Adriaan Knoetze

FEDSAS Support Services

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²⁴ See section 21 of the Schools Act.