

Head of Department et al and Hoerskool Ermelo et al¹ Judgment: A Critique

Hlako Choma^{*}

Abstract

It is common cause that the Government has committed itself to quality education since its inception, it is also noted that many children are still suffering the effects of apartheid. In the areas where black people lived, there were very few schools. Apartheid laws and policies ensured that black people were either denied education or received poor quality education. The previously white schools still have more resources and are able to provide a better quality education. Most of these schools are a long distance away from where black children live and are not accessible to black children².

Section 29 (1) (a) of the Constitution³ provides that everyone has the right to basic education, it includes disadvantage groups, such as women, persons living with disabilities, refugees and children, “hence transformation is encouraged.”

1. Introduction

The process of transformation must be carried out in accordance with the Constitution⁴. It is submitted that there are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving transformation. Such difficulties must not be underestimated. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged

¹ Case CCT 40 / 09; (2009) ZACC 32

^{*} Senior lecturer and HOD :Public Law University of Venda, South Africa

² Liebenberg S *et al A Resource book, Socio-Economic Rights in South Africa* 349

³ Act 108 of 1996

⁴ *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another* 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC)

communities. Be that as it may, though transformation is a process, it should be urgently realized. The Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve the result.

The South African society is required to do more than that to eliminate the indirect discrimination. The effects of discrimination may continue indefinitely unless there is a commitment to eradicate it.

It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on-going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.⁵

The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution⁶. That provision makes it clear that under the Constitution,

equality includes the full and equal enjoyment of all rights and freedoms. And more importantly for present purpose, it permits legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. These measures may be taken to promote the achievement of equality.

2. Background of the Case

⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC)

⁶ Act 108 of 1996

The Hoerskool Ermelo dispute concerns the right to receive education in the official language of one's choice in a public educational institution. It emerged from a dispute between the Head of Department of Education of the province of Mpumalanga. Head of Department (HOD) is the first applicant and a public high school in his area of jurisdiction known as Hoerskool Ermelo (the school) and its governing body, cited as the first and second respondents respectively. The dispute arose from the school's language policy. The language policy stipulates Afrikaans as the only medium of instruction⁷.

The question to be answered is whether the Head of Department may lawfully revoke the function of the governing body of a public school to determine its language policy and confer the function on an interim committee appointed by him.

The second question to be answered is whether the interim committee appointed by the Head of Department can lawfully determine a new language policy for the school.⁸

It was submitted that the school's Afrikaans language policy had effectively prevented one hundred and thirteen learners from being admitted to the school and that for that reason the school's governing body had been stripped of its power to determine its language policy.

2.1 North Gauteng High Court

The above case was decided in favour of the Head of Department (HOD) and the Minister of Education, in particular that the interim committee had lawfully altered the language policy of the school. The Head of Department (HOD) and the

⁷ *In Casu*

⁸ Section 25 of the School Act provides that if the Head of Department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of this Act or has failed to perform one or more of such functions, he/she appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months.

Minister of Education appeared to have relied on the provision of section 25(1) of the School Act. This section regulates and / or applies when the governing body fails to perform its function. The High Court correctly concluded that *ex facie*, the governing body had unreasonably refused to review its language policy, and it therefore actuated the refusal to admit the one hundred and thirteen learners who chose English as their official language of choice. Section 22 of the School Act entitled the Head of Department to step in and appoint interim committee determine the language policy where the school and its governing body fail to perform its function, while section 25 confers the power on an interim committee.

It is the researcher's submission that the ruling of the High Court is in accordance with the process of transformation.⁹ The School Act should emphasise the need for decision that will facilitate the process of transformation, rather than the substantive and procedural fairness which were later relied on by the Supreme Court of Appeal and the Constitutional Court in reversing the North Gauteng High Court decision. The manner in which transformation is to be achieved, is left to the discretion of decision – maker.¹⁰ The School Act should be tailored in manner that the decision - maker must be able to interpret the Act pursuant to the needs that will allow admission to schools and restructure the admission requirements to address historical imbalances.¹¹ It is contended that the power to review parliamentary acts is derived directly from the Constitution. The Constitution is the supreme law of the Country (South African) and all laws that are inconsistent with the Constitution are *ipso facto* unconstitutional and invalid. The Constitution is therefore a *grundnorm*.

2.2 Supreme Court of Appeals

⁹ Section 172 (1) (b) of the Constitution read with *Hoffmann v South African Airways* (2000) ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 12 11 (CC) provides that when the Court decides a constitutional matter within its power it "may make any order that is just and equitable. The test will be whether considerations of justice and equity in a particular case dictate that the order be made, the order must be fair and just within the context of a particular dispute.

¹⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC)

¹¹ *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC)

This Court set aside the decision of the North Gauteng High Court and ruled in favour of the School and its Governing body. The Court decided that the decision to amend language policy and that the language of teaching at school would be English and Afrikaans is hereby dismissed. The Court ruled that the decision to amend the language policy by the Head of Department (HoD) and the interim committee was taken without consulting with the school governing body, the teaching staff, the learners already admitted to the school and their parents. It was further submitted that the members of the interim committee, being outsiders to the school, did not have the benefit of the views and concerns of all stakeholders, nor did they gather any information on the school's language policy save that provided by the Head of Department (HOD) in his letter of mandate.

It would appear that the Supreme Court of Appeal reversed the North Gauteng High Court's decision holding that the dispute is characterised solely by the rule of law and not the language policy. It is on this basis that the researcher submits that Supreme Court of Appeal should have emphasised on the purposive approach as the basis of its interpretation as encapsulated and mandated in the Constitution.

The Supreme Court of Appeal concluded that the Head of Department (HOD) had no power to revoke the competence of the school to determine language policy. The power to determine language policy vests exclusively in the governing body.¹² It was further held that, even if the Head of Department (HOD) had the power contended for under section 22 of the Schools Act, the exercise of the power was vitiated by procedural unfairness arising from the manner in which the committee had been appointed and the procedure it had followed in setting the revised language policy.

¹² Contrary to the interpretation of section 22 of the School Act in *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006(1) SA 1 (SCA); 2005 (10) BCLR 973 (SCA)

The school and the governing body relied on the principle of legality and the proper exercise of administrative power, the language policy was never prioritized as a *prima facie* source of dispute. The Head of Department (HOD) and the Minister of Education correctly spelt out the core of the dispute as the appropriateness of the school's language policy.¹³

The Supreme Court of Appeal ought to have adopted O'Regan J's stance which pronounce as follows:

This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured.¹⁴

Section 29 (2) of the Constitution provides the right to receive education in the official language of one's choice in public educational institution where it is reasonably practical. A duty is imposed on the state to consider all reasonable educational alternatives, including single medium institution, taking into account what is equitable, practicable and addresses the results of past racially discriminatory laws and practices. It is evident that the School Act must be seen to give effect to this constitutional safeguard.

2.3 Constitutional Court

¹³ Section 172(1) (b) of the Constitution confers wide remedial powers on competent court adjudication a constitutional matter. The remedial power envisaged in section 172 (1) (b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1) (a). A just and equitable order may be made even in instances where the outcome of constitutional dispute does not hinge on constitutional invalidity of legislation and conduct.

¹⁴ *Premier, Mpumalanga and Another v Executive Committee, Association of State – Aided, Eastern Transvaal* (1998) ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC)

The Constitutional Court is the Court of last instance in terms of constitutional interpretation. It promotes, protects and enforce constitutional rights and obligations. It is unfortunate that the Constitutional Court upheld the decision of the Supreme Court of Appeal and rule in favour of the School and the Governing body.

In Conclusion

It is evident that one had the right to be taught in the official language or languages of his or her choice in public educational institutions. It is further contended that education in the language of one's choice must be reasonably practicable in taking decision that the language is reasonably practicable, the Constitution mandates the State to consider the following factors:

- Equity
- How practical it is to implement, and
- The need to redress the results of the past racially discriminatory laws and practices.

It is on this basis that the admission requirements of learners to schools ought to address the historical imbalances and transformation be the order of the day.