THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case No: 20420/2014

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG **FIRST APPELLANT**

HEAD OF DEPARTMENT OF EDUCATION, GAUTENG **SECOND APPELLANT**

and

FEDERATION OF GOVERNING BODIES FOR SOUTH AFRICAN SCHOOLS **RESPONDENT**

Neutral citation: *MEC for Education, Gauteng v Fedsas* (20420/2014) [2015] ZASCA 149 (16 October 2015).

Coram: Mpati P, Navsa, Shongwe and Dambuza JJA and Van der Merwe AJA

Heard: 25 August 2015

Delivered: 16 October 2015

Summary: Education – public schools – powers of governing bodies to determine admissions policy and capacity of public schools not absolute – s 5(5) of the South African Schools Act 84 of 1996 must be read with other applicable law – education department exercises ultimate control – powers of the department to be exercised reasonably – parties must engage with each other in good faith – principle of co-operative governance paramount.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Janse van Nieuwenhuizen AJ, sitting as court of first instance):

The following order is made:

1 The late prosecution of the appeal is condoned;

2 The appellants are ordered to pay the respondent's costs of the application for condonation;

3 The appeal is upheld with costs, such costs to include the costs of two counsel;

4 The order of the court below is set aside and is substituted with the following:

'(a) Save to the very limited extent set out below, the application is dismissed with costs of two counsel.

(b) Regulation 2(2A) of the regulations published under the General Notice 1160 of 2012 is declared invalid and of no force and effect.

JUDGMENT

Dambuza JA (Mpati P, Navsa and Shongwe JJA and Van der Merwe AJA concurring):

[1] The dispute in this appeal arose as a result of publication, in General Notice 1160 of 2012,[1] of regulations relating to the admission of learners to public schools in the Gauteng Province. Pursuant to a challenge launched by the respondent, the Gauteng Local Division of the High Court, Johannesburg (per Janse van Nieuwenhuizen AJ) struck down some of the impugned regulations. This appeal is with the leave of the court below.

[2] The appellants also brought an application for condonation of the late filing of their notice of appeal and for reinstatement of the appeal. They explained that

[1] Gauteng Regulations on Admission of Learners to Public Schools, 2012, GN 1160, *Provincial Gazette* 127, 9 May 2012.

following the granting of the order of the court a quo an application for leave to appeal was filed, timeously, with the Constitutional Court. That application failed. Thereafter a second application was filed with the Gauteng Local Division, Johannesburg (the high court) for leave to appeal the order in question. It is as a result of that application that the appeal presently serves before us. However, the notice of appeal which should have been filed by 5 February 2014 was never filed. The reasons stated are far from satisfactory. They varied from pressures of work in the office of the State Attorney, Johannesburg; the attorney who handled the matter not 'fully appreciating the deadline'; to a 'misunderstanding' between and remissness on the part of members of the appellants' legal teams. The only basis on which the application for condonation is opposed, is lack of prospects of success of the appeal.

[3] The delay or failure in the proper prosecution of this appeal is inexcusable. No valid reasons have been given for the appellants' non-compliance with the rules of this court relating to the timeous prosecution of an appeal. However, because of the importance of the subject-matter of the appeal, which affects the rights and interests of countless children, it is in the interest of justice that the appeal be reinstated and the issues in question be considered by this court.

[4] On 18 July 2011, the first appellant, the Member of the Executive Council for Education, Gauteng (MEC) published in the General Notice 1929 of 2011[2] proposed amendments to regulations relating to admission of learners to public schools in Gauteng (the original regulations).[3] In that notice comments were invited from interested parties or organisations on the draft amendments. Pursuant to the invitation for comments the respondent, the Federation of Governing Bodies for South African Schools (Fedsas), consulted extensively with its membership in Gauteng on the proposed amendments. Following such consultations it submitted comments to the Gauteng Department of Education (GDE). The comments were broadly in line with the grounds on which Fedsas subsequently challenged the amendments in the high court application. Although Fedsas complains that its

[2] General Notice 1929 of 2011, *Provincial Gazette* 154 of 18 July 2011.
[3] The original Gauteng Regulations on Admission of Learners to Public Schools were promulgated under General Notice 4138, *Provincial Gazette* 129 of 13 July 2001.

comments only received perfunctory treatment, it admits that effect was given to some of them.

[5] In challenging the amended regulations, Fedsas contended that they were in conflict with the provisions of s 5(5) of the South African Schools Act 84 of 1996 (the Schools Act), the National Education Policy Act 27 of 1996 (NEPA), the Admission Policy for Ordinary Public Schools,[4], the Gauteng Education Policy Act 12 of 1998 (GEPA), and the Gauteng School Education Act 6 of 1995 (GSEA). It was argued on behalf of Fedsas that the regulations were *ultra vires* the enabling legislation in terms of which they were promulgated, namely, the provisions of s 11(1) of the GSEA. A further ground on which the amendments were attacked was that they were unconstitutionally promulgated in contravention of the provisions of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and s 33 of the Constitution of the Republic of South Africa, 1996 (the Constitution) in that they were not enacted in a procedurally fair manner. It was also contended that they violated the principle of legality and rationality.

[6] The high court struck down the regulations, mainly on the basis that they were in conflict with national legislation and were *ultra vires* the enabling provincial legislation. The court found that they encroached on the autonomy of governing bodies. It also found that some of the regulations were adopted in a procedurally unfair manner, and that others were not reasonable and justifiable.

[7] In this appeal the appellants, the MEC and the Head of Department of the GDE (the HOD), contended that any differences or overlap that may exist between the regulations and the national and provincial legislation in question do not constitute a conflict; they do not render the regulations invalid. Their argument was that regulations which deal with admissions to public schools and issues of capacity of those schools are within the authority provided for in the provisions of s 11(1) of the GSEA in terms of which they were promulgated, and that none of the regulations are invalid on procedural or substantive grounds.

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[4] As published by the Minister of Education in terms of s 3(4)*(i)* of NEPA in GN 2432, *GG* 19377 of 19 October 1998.

[8] Before turning to consider the specific regulations, something must be said about the nature and background which provide the context for the dispute before us. The issues raised in this appeal arose against a history of a sustained power struggle between provincial education departments and school governing bodies over governance and management of public schools in this country. This contestation has come to court on a number of occasions.[5] At the centre of these disputes is the education of the children of the country. For that reason, courts have emphasized that it is paramount that those involved should do their best to resolve the disputes with the utmost sense of responsibility.[6] However, recent history shows a regrettable enduring power struggle over authority to provide access to schools between the provincial departments of education, Fedsas and some of its affiliates around the country.

[9] Immediately after the dawn of democracy, the South African government set out to reform and democratise the education system that had, in the past, manifested in separate public schools for each of the racial groups in the country due to the system of apartheid. As with all other aspects of South African life, that system was marked by disproportionate government spending on the education of white children above the children of other racial groups, least of all black children.

[10] It is widely accepted that substantive democracy, however defined, has not been fully realized in most parts of the world because, amongst other things, the traditional models of democracy have inherent challenges such as favouring the rich and talented, oppressing minorities, self-interested decision-making, elitism, bureaucracy and other such factors.[7] It is these challenges that continue to beset our public school education system. Progress has been made however in improving the

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[5] See for example, *Premier, Mpumalanga & another v Executive Committee, Association of State Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC); *MEC for Education, Gauteng Province & others v Governing Body, Rivonia Primary School & others* 2013 (6) SA 582 (CC); *FEDSAS v MEC of Department of Education and Training, North West Province & another* [2014] ZANWHC 17; *Yolanda Tshona v Principal, Victoria Girls High School & others*, a judgment of the Eastern Cape Division, Grahamstown unreported case no 2764/2006 of 17 October 2006.

[6] See eg *Head of Department, Department of Education, Free State Province v Welkom High School & others* 2014(2) SA 228 (CC).

[7] See Marius H Smit and Izak J Oosthuizen 'Improving school governance through participative democracy and the law' (2011) 31 *South African Journal of Education* 55.

country's education system. As far back as 1994 the right to basic education was entrenched in the Interim Constitution and later in the Final Constitution. In 1996, in its preamble, NEPA provided that legislation should be adopted to facilitate the democratic transformation of the national education system such that it serves the needs and interests of all the people of South Africa. Thereafter a number of education policies were developed as well as a relatively comprehensive national and provincial legislative framework.

[11] One of the fundamental changes effected by the democratic government in reforming the country's education system, was the implementation of a participative and co-operative school governance system involving government, education authorities and local school communities represented by school governing bodies. The Schools Act was enacted in the spirit of transformation of the public school education system. It provides, inter alia, for a power sharing arrangement between the State, parents and educators. This collaborative administration system was intended to enhance access to decent basic education for all learners irrespective of race, talent, intellectual and behavioural dispositions, and to lay a solid foundation for the development of the country. In *Head of Department, Department of Education, Free State Province v Welkom High School & others* 2014 (2) SA 228 (CC) Froneman and Skweyiya JJ, in a separate concurring judgment, highlighted the need for participants in school governance to engage with each other in good faith to uphold the principles of co-operative governance and to comply with their duty to act in the interests of learners. The learned judges referred, in para 140 of the judgment, to the principles of co-operative government and intergovernmental relations that are also extended to organs of State within each sphere of government in s 41 of the Constitution. That section reads:

'**Principles of co-operative government and inter-governmental relations**

(1) All spheres of government and all organs of state within each sphere must –

. . .

(h) co-operate with one another in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.'

It must be stressed that governing bodies of public schools are state organs and discharge their duties as part of the State machinery engaged in the crucial program of providing access to basic education to all the children of the country. Courts have emphasized that public schools must be managed not only in the interests of those who happen to be learners and parents at a specific time but also in the interests of the broader community in which the schools are located and in the light of the values of our Constitution.[8]

[12] As stated, in this appeal it was submitted on behalf of the MEC that the regulations are not in conflict with legislation and policies adopted for the purpose of regulating the process of providing access to education. It was argued that even where there appears to be differences or overlaps, those involved in implementing them have a duty to read these legal instruments harmoniously. They were enacted to 'strike a balance between the interests of individual schools, their learners and parents on the one hand, and the broader public interest on the other', so it was submitted. The submissions on behalf of the MEC are correctly focused on public schools being public assets through which the right to education is realized. Accordingly, each public school has an obligation to facilitate the realization of the right to basic education to as wide a number of learners as reasonably possible.

[13] On the other hand, the approach adopted by Fedsas is that where the regulations in question relate to matters already provided for in national or provincial legislation, the overlap constitutes a conflict. In the alternative, even if there is no conflict, the power to make them has been exercised unreasonably and unjustifiably, so contends Fedsas.

[14] Cardinal to Fedsas' argument is that s 5(5) of the Schools Act places the power to determine the admission policy of a school in the hands of governing bodies of schools. Indeed s 5(5) of the Schools Act provides that:

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[8] *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC) para 80.

‘Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.’

The argument by Fedsas was that although s 11(1) of GSEA permits the MEC to make regulations for admission of learners to public schools, the authority so conferred does not mandate the MEC to make regulations relating to capacity of schools as she purported to do in the regulations. Therefore, in as far as the regulations purport to empower the MEC to exercise authority in respect of determination of the capacity of schools, they are *ultra vires*.

[15] Quite significantly, Fedsas contended that there is no factual basis for ‘the broad generalization’ by the MEC that the original regulations allowed for risk of monopolization of public assets for the exclusive benefit of current learners and their parents at the expense of the broader public interest. The contention was that the reference by the MEC, to ‘deep inequality in the distribution of public resources along racial lines’ is designed to improperly manipulate legislation and governance of schools in Gauteng.

[16] The background to which I have referred belies the contentions by Fedsas. In my view the argument by Fedsas ignores important factors that have been firmly recognized by the courts. The enduring disparities in the education system which are a legacy of the apartheid system are a matter of common knowledge and have been repeatedly acknowledged by our courts. The need for sustained reform in our public education system is firmly established. In *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC) the Constitutional Court, per Moseneke DCJ, while considering the exclusionary effect of a single-medium (Afrikaans) language policy of a school on learners, acknowledged the ‘scars’ left by the system of apartheid on the South African society, the worst of which is the vast discrepancy in access to public and private resources. The court remarked that while much remedial work has been done since the advent of constitutional democracy, deep social disparities remain. Specific reference was made to the disparities in the resourcing of black and white public schools; that while white public schools inherited and still enjoy the legacy of lavish treatment from the apartheid government, black public schools remain scantily resourced as a result of deliberate miserly funding by the government. The Court

held: 'that is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.'[9]

[17] It is in the context of the pressing need for public education reform that education is listed in Schedule 4 of the Constitution as a functional area of concurrent national and provincial legislative competence. Both Parliament[10] and the Provincial Legislatures[11] may legislate on Schedule 4 matters. Consequently, as the MEC contended, the possibility of overlap and conflict in national and provincial legislation – complained of by Fedsas – was always anticipated.[12] The Constitution regulates the approach in the event of such conflict, and the courts, in interpreting such legislation will seek a reasonable interpretation of the national and provincial legislation that avoids the conflict.[13]

[18] Notably, the criticism by Fedsas ignores the fact that the difficulties that the MEC sought to address through the regulations are broader than racial and income capacity differences in our society, they extend to even distribution of learners of various intellectual ability and behavioural dispositions amongst public schools. Indeed, the provisions of s 29 of the Constitution (the right to education) leave no room for restricted access to basic education for burdensome or less talented learners.

[19] In addition, the issues raised in this dispute have largely been settled by the Constitutional Court. The scope of policy making authority conferred on governing bodies by the Schools Act has been comprehensively considered by that court. I can do no better than refer to *Ermelo* (above) in which the Constitutional Court outlined the approach to the power of school governing bodies to determine a school's language policy as follows (paras 57 – 59):

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[9] Paragraph 46.
[10] In terms of section 44(1*)(a)*(ii) and *b*(ii) of the Constitution.
[11] In terms of section 104(1)*(b)(*i) of the Constitution.
[12] *Mashava v President of the Republic of South Africa & others* 2005 (2) SA 476 (CC) para 49.
[13] Section 150 of the Constitution, which provides:
'**150 Interpretation of conflicts**
When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.'

'The power to determine a school's language policy vests in the governing body. Section 6(2) of the Schools Act provides that the governing body of a public school "may determine" the language policy of the school. The legislation devolves the decision on the language of instruction onto the representatives of parents and the community in the governing body. It accords well with the design of the legislation that, in partnership with the State, parents and educators assume responsibility for the governance of schooling institutions. A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it.

This does not, however, mean that the function to decide on a medium of instruction of a public school is absolute or is the exclusive preserve of the governing body. Nor does it mean that the only relevant consideration in setting a medium of tuition is the exclusive needs or interests of the school and its current learners or their parents.

The power of the governing body to determine language policy is made, in so many words, "subject to the Constitution, [the Schools] Act and any applicable provincial law". This qualifier is obviously superfluous in relation to the Constitution because all law is subservient to our basic law. All that may be said is that the qualifier emphasises that the power to fashion a policy on the medium of instruction must be accorded contours that fit into the broader ethos of the Constitution and cognate legislation. In addition, it seems plain that the power must be understood and exercised subject to the limitation or qualification the Schools Act itself imposes. In a rather unusual provision, the authority to fix a language policy is conferred by national legislation, but may be further qualified by "*any applicable provincial law*". (My emphasis, footnotes omitted.)

[20] These remarks are apposite to the dispute before us. The similarity in the wording of ss 5(5) and 6(2) of the Schools Act is no mere coincidence.[14] It signifies the intention of the legislature that congruent interpretation must be accorded to these provisions.

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[14] Section 5(5) of the Schools Act provides that:
'Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.'
Section 6(2) of the Schools Act provides that:
'The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act, and any applicable provincial law.'

[21] In their own terms the provisions of the two sections are subject to 'any applicable provincial law'. Counsel for the MEC correctly submitted that the Constitutional Court has already held that the 'provincial law' referred to in *Ermelo* includes these regulations, although in their original form at the time. The GSEA which specifically empowers the MEC to make these regulations is a provincial law.[15] As will become apparent in the discussion below, the regulations do not conflict with national and provincial legislation.[16] In *Rivonia*,[17] the Constitutional Court considered the provisions of s 5(5) of the Schools Act. In doing so, it examined previous judgments relating to the interplay between the powers of the State, the provincial education department and school governing bodies, as derived from the Schools Act. At para 49 of the judgment the court outlined the principles for harmonious interpretation of relevant legislation as emanating from the relevant judgments as follows:

'(a) Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it. This is so even where the functionary is of the view that the policies offend the Schools Act or the Constitution. However, this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances.

(b) Rather, a functionary may intervene in a school governing body's policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation. This is an essential element of the rule of law.

(c) Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the governing body (or to depart from a school governing body's policy), then the functionary must act reasonably and procedurally fairly.

(d) Further, given the partnership model envisaged by the Schools Act, as well as the co-operative governance scheme set out in the Constitution, the relevant functionary and the school governing body are under a duty to engage with each other in good faith on any

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[15] Section 11(1) of the GSEA provides that:
'Subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools.'

[16] Particularly the Schools Act and the GSEA.

[17] *MEC for Education, Gauteng Province & others v Governing Body, Rivonia Primary School & others* 2013 (6) SA 582 (CC).

disputes, including disputes over policies adopted by the governing body. The engagement must be directed towards furthering the interests of learners.' (Footnotes omitted.)

The Constitutional Court also referred (para 42) to the direct role played by the provincial department of education in terms of ss 5(7) to 5(9) of the Schools Act in the admission of learners to school, as an indicator of the expressly intended interventionist role of the department in the admission of learners to schools.[18]

[22] It is against this background that the regulations and the objections thereto must be considered.

Regulation 2(2A)

[23] Regulation 2(2A) provides that:

'The Department may determine the minimum standards for the formulation of the admission policy for specialist schools, technical schools and education institutions.'

This regulation had not been part of the proposed amendments published for comment. It resulted from representations made by the Governor's Alliance, a public school governing association, pursuant to the notice and comment procedure. That association suggested that proposed regs 4(2) and (4), which relate to feeder zones, should not apply to specialist schools which focus on talent, including sport, performing arts and creative arts.[19] Effectively, reg 2(2A) recognises that the specified categories of schools may require different admission policies. The concern of the Governor's Alliance was that, because of the nature of special schools, regs 4 (2) and (4) would unduly restrict special schools from proper engagement when selecting learners to attend those schools.[20]

[24] As is apparent from its provisions, the regulation will not, on its own, have any impact even on the specified categories of schools until the minimum standards are

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[18] Section 5(7) provides that: 'An application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department.'

Section 5(9) reads: 'Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council.'

[19] Regulation 2(2) provides that:

'The admission policy of a school, determined by the governing body of that school in terms of section 5(5) of the Schools Act, may not be inconsistent with the provisions of the Regulations.'

Regulation 4 confers on the MEC authority to determine feeder zones for schools within the (Gauteng) Province and provides for a default position until the MEC makes the determination.

[20] The department realized that technical schools would also suffer the same prejudice hence the inclusion of those schools in reg 2(2A).

issued. It was common cause before us that that process constitutes administrative action, and therefore will require its own notice and comment process. The high court does not appear to have considered these factors. Its finding that this regulation impacts on the autonomy of school governing bodies to determine admission policy without executive interference, appears to have resulted from a bare textual comparison of the provisions of s 5(5) of the Schools Act with the regulation. No threat of prejudice to Fedsas could be shown. Counsel for the department indicated that the MEC would be amenable to clarification of the provisions of the regulation by adding the words 'after consultation' following the word 'may' in the regulation. Although such an amendment will, strictly speaking, be superfluous, it would put paid to any fear of the minimum standards being enacted without consultation.

[25] A further aspect, in the regulation, requires attention. Before us the parties were in agreement that the words 'and education institutions' are problematic and should be deleted from the regulation. The inclusion of these words was erroneous. Counsel for the MEC confirmed that it had not been the latter's intention to include 'education institutions' in this regulation. That much is evident from the mere reading of the regulations and the definition of "education institutions" in NEPA. [21] As already explained, the intention in promulgating this regulation was to create a special dispensation for special schools and technical schools, separate from that applicable to other public schools. The inclusion of 'education institutions' in the regulation detracts from that purpose and renders the regulations unclear and incomprehensible, especially when regulation 2(2A) is read with regulation 4 (relating to feeder zones).

[26] It is competent for this court to review delegated legislation on the grounds that it is vague, unclear or incomprehensible.[22] All laws, including delegated legislation, must be clear, comprehensible, accessible and predictable in their application. In this case there is a third aspect on which the regulation was criticised. Fedsas contended, in its founding papers, that the granting of the powers to 'the

[21] An 'education institution' is defined in s1 of NEPA as 'any school contemplated in the South African Schools Act, 1996'
[22] See eg L M Du Plessis 'Statute Law and Interpretation' in 25(1) *Lawsa* (2 ed) para 296. .

department' was improper. The MEC conceded this and suggested, in her answering affidavit, that the words 'the department' should be replaced by the words 'the MEC'. In the light of all these discrepancies and the many respects in which the regulation falls foul of the requirements for validity I am of the view that the appropriate remedy would be for it to be struck down. The MEC may apply her mind to its reformulation should she still wish to do so.

Regulation 3(7): Confidential report

[27] Regulation 3(7) provides that:

'When a learner has applied to a school, neither the governing body of that school nor any person employed at that school may request the learner's current school or any person employed at that school to furnish it with a confidential report in relation to that learner.'

[28] 'Confidential report' is defined in regulation 1 as 'a report containing information about the financial status of a parent, whether the parent can afford the school fees and employment details of a parent or any other information that may be used to unfairly discriminate against a learner'. Fedsas contended that it is entitled to this information. It complained that the regulation constitutes a serious inroad to the admission criteria of public schools; that it is *ultra vires* and in conflict with s 4 of GSEA;[23] that it is too vague and frustrates the ability of school governing bodies to discharge their responsibility to ensure safety of their learners. The MEC on the other hand contended that the regulation is not an absolute bar to obtaining information on a learner. It is intended to prevent unfavourable or potentially prejudicial information about a learner to form the basis of the decision as to whether the learner should be admitted to a school or not. On a proper reading of the regulation, once a learner is admitted to a school, the required information can be obtained to enable the new school to prepare for the learner beforehand, so it was submitted.

[29] It became apparent during the hearing of the appeal that Fedsas was mostly concerned about being unable to obtain, beforehand, information about an applicant learner who might threaten the security of other learners. I may just state that in as

[23] This section provides that: 'No power conferred by this Act shall be exercised in a manner which is unreasonable and unjustifiable.'

far as the provisions of the regulation seek to ensure that learners are not refused admission on the basis of their parent's ability to pay school fees the regulation is unassailable. Whilst the concern for the safety of learners is understandable and accords with the responsibilities of school governing bodies, it is a concern that affects all public schools. But no public school enjoys more protection from burdensome learners than others, and the constitutional right to education extends equally to all children, including those who are considered burdensome for various reasons. Therefore the regulation, in as far as it is intended to prevent unfair discrimination against those learners perceived as burdensome, is well within the responsibility of advancing the ideals of the Constitution. Indeed, a correct interpretation of the regulation is that the prohibition against obtaining the information is only effective prior to admission of a learner: 'when a learner has applied for admission'. Once the learner is admitted, before physical attendance at the school, the school may seek the information it requires in order to prepare properly for the learner concerned.

[30] In holding that the regulation is an unjustifiable and unreasonable encroachment on the functions of the governing body, the high court found that learners who have been refused admission have adequate remedies in the appeal process provided for in the Schools Act. However, that argument ignores the fact that it is the core responsibility of public schools to indiscriminately provide basic education to the children of the country; if one school is entitled to refuse admission on the grounds of the information concerned, all schools will be entitled to do so; thus avoiding their responsibility to the prejudice of the learners. Consequently the regulation is rational, reasonable and justifiable.

Regulation 4: Feeder Zones

[31] This regulation provides for determination by the MEC, of feeder zones for schools in the province. It provides that:

> '4. (1) Subject to the National Policy Act No 27 of 1996 and other applicable laws the MEC may, by notice in the Provincial Gazette, determine the feeder zone for any school in the Province, after consultations with the relevant stakeholders have been conducted.

(2) Until such time as the MEC has determined a feeder zone for a particular school, in relation to a learner applying for admission to that school, the feeder zone for that school will be deemed to have been determined so that a place of residence or work falls within the feeder zone if:

(a) relative to that place of residence or place of work, the closest school which the learner is eligible to attend, or

(b) that place of residence or place of work for that parent is within 5km radius of the school.

(3) The MEC may, by notice in the Provincial Gazette, designate one or more primary schools as feeder primary schools for a particular high school.

(4) Until such time as the MEC has designated one or more primary schools as feeder primary schools for a particular high school, in relation to a learner applying for admission to that high school, any primary school to which that high school is the closest high school which the learner is eligible to attend shall be deemed to have been designated as a feeder primary school for that high school.

(5) Subregulations (2) and (4) shall not apply to specialist schools, technical schools, agricultural schools or industrial schools.'

[32] In striking this regulation down, the high court found that it was *ultra vires* as the power to determine feeder zones is specifically conferred on the HOD by s 33 of the National Admissions Policy. That court found that neither s 5 of the Schools Act nor s 11(1) of GSEA empowers the MEC to determine feeder zones. Section 33 of National Admissions Policy reads:

'A Head of Department, after consultation with representatives of Governing Bodies, may determine feeder zones of ordinary Public Schools in order to control the learner numbers of schools and co-ordinate parental preferences. Such feeder zones need not be geographically adjacent to the schools or each other.'

Section 11(1) of GSEA reads:

'Subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools.'

[33] Initially, central to Fedsas' objection to this regulation was the view that reg 4(1) is an impermissible intrusion on the powers of school governing bodies' authority relating to admission of learners and capacity of schools. However, before us counsel for Fedsas correctly conceded that there is no proper basis for objecting

to this regulation, particularly as it is within provincial competence and provides for consultation before the MEC makes any decision on feeder zones.

[34] Regarding reg 4(2), the argument was that, because the MEC has not yet determined any feeder zones in terms of the National Admissions Policy, schools are free to determine their own feeder zones and they probably have done so. The creation of default feeder zones under reg 4(2)(b) detracts from this freedom, and is contrary to the National Admissions Policy and the *audi alteram partem* principle, so it was submitted. Moreover, so the argument went, the default position is open-ended as there is no obligation on the MEC to commence the consultation process

[35] The MEC accepted the need for consultation but argued that in the meantime, the need for a default position is inescapable. The argument was that prior to determination of feeder zones, it is untenable to leave such determination to the unsystematic, exclusive authority of governing bodies, thus allowing for the risk that some areas might be left without schools. I agree. Determination of feeder zones will entail extensive consultations. In the meantime, the default feeder zones regime as created by reg 4(2) appears to be most rational and reasonable. And although the regulation was published for comment, it does not seem that Fedsas presented an alternative default feeder zone determination system; it is not Fedsas' case that it did. The default feeder zone regime attempts to ensure that each child has ready access to a school closest to either his or her home or parent's place of employment. The regulation, in my view, meets both the rationality and reasonableness requirements. Further, as submitted on behalf of the MEC, it is a matter of logic that the power to make regulations as to admission of learners to public schools necessarily includes the power to determine the feeder zones; both entail the systematic placement of learners from specific zones at particular schools.

[36] The authority of policy made in terms of the NEPA over provincial government departments was comprehensively considered in *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 11, where the court held that such policy does not create legal obligations that bind the provinces.

[37] A further complaint by Fedsas that the default position is unworkable for boarding schools disappears when consideration is had to the fact that regs 5(11) and (12) allow boarding schools to admit learners from beyond the default feeder zones.

Regulations 5 and 8

[38] The contentious portions in these regulations may be summed up as follows: Regulation 5(7)(c)(iv) provides for learners who, at the end of an application period, have been unsuccessful in securing admission to a school, to be advised of their right to object and appeal in terms of reg 16. Regulation 5(8)(a) empowers the District Director to place any learner who has not been placed at any school 30 days after the end of the admission period, at any school which has not been declared full in terms of reg 8. Regulation 5(9) places an obligation on the HOD to secure admission to schools within the province, of learners who, under reg 5(8), remain unplaced 45 days after the end of the admission period. Regulation 5(10) provides that in effecting placement in terms of regs 5(8) and (9) the District Director and HOD must have regard to the proximity of the school to the learner's place of residence or his or her parent's place of work and the capacity of the school to accommodate the learner, relative to the capacity of other schools in the district. Regulation 8(1) empowers the HOD to determine the objective entry level enrolment capacity of a school for the purpose of placing learners whose applications for admission have not been accepted at any school. Regulation 8(2) empowers the HOD or his or her delegate to declare a school to be full for the purposes of entry level admissions at schools. Regulation 8(3) empowers the HOD or his or her delegate to declare full, a school that has reached its objective entry level enrolment capacity. In terms of reg 8(4) a school that is declared full by the HOD will be informed in writing.

[39] Again, the basis of the objection by Fedsas to these regulations was that they constitute an unjust encroachment on the powers of the school governing body. It was also contended that they are an irrational and unlawful delegation of powers, and that they are inconsistent with the provisions of s 5(7) of the Schools Act, which prescribes that an application for admission of a learner must be made to the education department. It was the view of the high court that reg 5 impermissibly

encroaches on the admissions policy-making powers of the Minister as provided for in s 5A of the Schools Act.[24]

[40] An important factor that Fedsas misses is that under reg 5 the HOD exercises the powers conferred in limited circumstances: in respect of learners whose applications for admission have not been accepted at schools in the public schooling system. The regulation is not irrational; its purpose is evident from the provisions thereof. Regarding reg 8 the contention by Fedsas, that determination of public schools' capacity is an exclusive policy of school governing bodies, is incorrect. The Constitutional Court, at para 40 of *Rivonia*, endorsed the approach of this court, that the power to determine admissions policy of a school necessarily includes determination of a school's capacity. I therefore agree with the submission, on behalf of the MEC, that the provisions of the regulation fall within the ambit of his or her powers relating to admissions. The regulation is not *ultra vires*. Neither does it constitute unlawful delegation of powers. As already stated, the department has authority to exercise reasonable control over admissions and capacity in public schools.

Regulation 11

[41] This regulation provides for transfer of a learner from one school (including an independent school) to a public school. Fedsas objected, in particular, to the provisions of regs 11(3) and (4) which authorize the District Director, for good cause, to transfer a learner to a school that has not been declared full or to admit the learner to that school, taking into account certain factors. Those factors include the reasons for leaving the first school[25] and the capacity of the school to which the learner seeks admission,[26] relative to the capacity of other schools. The high court found the regulation to be within the parameters of the MEC's statutory powers under s 11(1) of the GSEA. However, it held that, for the same reasons as in respect of regulations 5 and 8, the capacity determination power provided for in the regulation is *ultra vires* the MEC's statutory powers'. The court then ordered that the words 'that has not been declared full' be severed from reg 11(4). It also declared that regs 11(3) and

[24] See s 5A(1)(b).
[25] Regulation 11(5)(a).
[26] Regulation 11(5)(c).

11(5)(c) were *ultra vires* s11(1) of GSEA. For the same reasons stated in respect of regulation 5 and 8 that declarator falls to be set aside. It is also a relevant factor, once again, that under this regulation authority vests only in specified circumstances.

Regulation 16

[42] Regulation 16 provides that a learner who has been refused admission to a public school may first lodge an objection to the HOD; if dissatisfied with his/her decision, the learner may appeal to the MEC. It reads thus:

'**Objections and Appeals**

16. (1) If, at the end of the application period, a learner is refused admission to a school, the principal must, inform the parent, in writing, of his or her rights of objection and appeal under these Regulations.

(2) A parent of a learner, who wishes to lodge an objection against a decision contemplated in Regulation 5(7)(c)(iii) may object to the Head of Department within 7 school days of being provided with the documents listed in Regulation 5(7)(c)(iii) and (iv).

(3) A parent who lodges an objection must do so on an objection form similar to Annexure D to these Regulations.

(4) A parent who is dissatisfied with the decision of the Head of Department contemplated in subregulation (2) may, within 7 school days of being informed or of being provided with the reasons of the Head of Department, appeal against that decision to the MEC by lodging an appeal form similar to Annexure E to these Regulations.

(5) Within 15 school days of receiving an appeal contemplated in subregulation (4), the MEC must take his or her decision on the appeal and provide the parent with reasons for any decision not to uphold the appeal.'

The objection by Fedsas to this regulation was a perceived conflict with the provisions of reg 5(9) of the Schools Act. As set out before, the latter section states that a learner who has been refused admission to a public school may appeal to the MEC. The argument by Fedsas is that reg 16 introduces a new layer of appeal between the school principal and the MEC.

[43] The high court held that the MEC may not delegate his or her appeal power to the HOD. In my view, the provisions of regulation 16 do not constitute delegation of authority to an HOD to decide an appeal. As provided in s 5(8) of the Schools Act, only when the HOD confirms refusal of admission can a learner be said to have been refused admission to a public school. That section provides that where an application

for admission of a learner to a public school, made in terms of s 5(7), is refused, the HOD must inform the parent, in writing, of such refusal and the reasons therefor. Under reg 16(1) the communication of the right to object and appeal comes into play where *a principal* informs a parent of a refusal of admission of a learner. The regulation merely emphasizes that such refusal as communicated by a school principal is not final until the HOD has had the last word on it. The regulation therefore neither constitutes an additional layer of appeal, nor is it in conflict with the provisions of s 5(8) of the Schools Act.

[44] For all these reasons the following order is made:

1 The late prosecution of the appeal is condoned;

2 The appellants are ordered to pay the respondent's costs of the application for condonation;

3 The appeal is upheld with costs, such costs to include the costs of two counsel.

4 The order of the high court is set aside and is substituted with the following:

'(a) Save to the very limited extent set out below, the application is dismissed with costs of two counsel.

(b) Regulation 2(2A) of the regulations published under the General Notice 1160 of 2012 is declared invalid and of no force and effect.'

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N Dambuza
Judge of Appeal

APPEARANCES:

For the Appellant:	W Trengove SC, S Budlender and B Lekokotla Instructed by: The State Attorney, Johannesburg c/o The State Attorney, Bloemfontein
For the Respondent:	J Du Toit SC and C Dreyer Instructed by: Michael Randell Attorneys Port Elizabeth c/o Claude Reid, Bloemfontein