

DISPUTE RESOLUTION AND EDUCATION ALERT



IN THIS ISSUE

THE CONSTITUTIONAL COURT CLARIFIES THE POLICY-MAKING AUTHORITY OF SCHOOL GOVERNING BODIES

Education in South Africa is everyone's concern. Each year the state, companies, non-governmental organisations, families and individuals spend billions of Rands on education in the belief that it is a primary vehicle to develop individual talents and build a stable, vibrant and economically active democracy. Since only 4.1% of the country's 12.8 million learners are in independent schools, the overwhelming majority of people living in South Africa come into contact with public schools, or independent schools receiving state subsidies. Thus when the Constitutional Court pronounces on the powers of school governing bodies, its decision is especially resonant and important to note.

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At the heart of the Applicant's complaint was its concern that the Regulations trespassed on the power of a School Governing Body (SGB) to determine school admission policies.

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Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another [2016] ZACC 14 concerned the validity of certain amendments to the Regulations relating to the admission of learners to public schools published in 2012 (Regulations) applicable to schools in Gauteng. At the heart of the Applicant's complaint was its concern that the Regulations trespassed on the power of a School Governing Body (SGB) to determine school admission policies.

Public schools are run through a partnership involving SGBs (representing the interests of parents and learners), teachers, principals and provincial education departments. In particular, SGBs wield great power and responsibility at the coalface of education. Indeed, the South African Schools Act (Schools Act), No 84 of 1996 obliges SGBs to supplement the resources provided by the state to improve the quality of education at individual schools. By way of example, SGBs can:

- set compulsory fees;
- lease, burden or alter immovable public property;

- hire additional teachers; and
- permit business activity on their premises.

In addition, a SGB can set a school's language policy, admissions criteria and dress code - each of which has implications for the manner in which a SGB can regulate admission and influence quality at an individual school.

However education is a functional area of concurrent national and provincial legislative competence. The powers of SGBs, conferred by the Schools Act, can and often do conflict with the powers and interests of provincial education authorities. In this regard, where provincial executives have encroached on what has been perceived as the SGBs' exclusive turf, unfortunate and tense clashes have led to costly and protracted litigation.

With this context in mind, the Court has now settled that provincial education departments have the authority to exercise reasonable control over admissions and capacity in public schools. It emphasised that schools are public assets and must be used to ensure

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that all children are afforded access to education, remarking that:

“[Public] schools are not rarefied spaces only for the bright, well mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education.”

SGBs and provincial education departments must co-operate and engage meaningfully in this endeavour.

In addition the Court upheld certain regulations that will affect school admissions policies in Gauteng as follows:

- Public schools are prohibited from requesting confidential information from a prospective learner’s current school before making the admission decision. Thereafter the school may call for the information on the learner it has already admitted.
- The MEC for Education in Gauteng must set feeder zones for all public schools by 20 May 2017, in consultation “with relevant stakeholders”.
- The Head of Department has the power to determine an individual school’s enrolment capacity and

declare that a school is full, if the school has reached its enrolment capacity.

- The District Director may, at the end of an admission period, place an unplaced learner “at any school”, that has not been declared full and where all learners on the waiting list have been accommodated.
- The District Director may consider the relative capacity of other schools in a district as a criterion for placing a learner in a particular school.
- A parent of a learner who wishes to lodge an objection against a decision refusing admission to a school may object to the Head of the Department, before appealing directly to the MEC.

In his last and unanimous judgment, Deputy Chief Justice Moseneke has provided much needed clarity in “the murky waters of the shared space between [SGBs] and provincial executives charged with the regulation of public schools.” Parents, SGBs and governing body federations ought to take heed of the Regulations in formulating and revising school admissions policies in the future to ensure compliance with provincial laws and the imperative to further equitable access to education.

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