

Case Summary

Minister of Basic Education v Basic Education for All (20793/2014) [2015] ZASCA 198

1. Reference Details

Jurisdiction: The Supreme Court of Appeal of South Africa

Date of Decision: 02 December 2015

Link to full case: http://www.justice.gov.za/sca/judgments/sca_2015/sca2015-198.pdf

2. Facts of the Case

The case relates to a failure to ensure access to textbooks in some public schools in Limpopo province in South Africa by the Department of Basic Education (DBE) and LDOE (Limpopo Department of Education) (“the Appellants” in the instant case). The case out of which this appeal arose was brought by Basic Education for All (BEFA), a voluntary organisation working in Limpopo, 22 members of school governing bodies, and the South African Human Rights Commission (“the Respondents” in the appeal).

In 2012, the Department of Basic Education (DBE) adopted a new curriculum, predicated on the new Curriculum and Assessment Policy Statements (CAPS), which was to be introduced incrementally over a three year period across South Africa. As a result of the changes, new textbooks were required and following initial implementation problems a national catalogue of prescribed textbooks was compiled by the DBE, which was finally completed in 2014. Each provincial Department of Education was required to procure the textbooks for the forthcoming academic year. In the Limpopo province, procurement of the relevant course materials was not conducted efficiently, with many children lacking access to the required textbooks. These problems were unique to the Limpopo province – no other province in South Africa suffered the same shortfall in textbooks.

On 17 May 2012, a court order declared the failure of the Appellants to provide the textbooks a violation of the Constitution, and ordered their provision. The Appellants were given two weeks (between 31 May and 15 June 2012) to provide the textbooks, and were required to develop a “catch-up plan” for affected year ten learners, submitting monthly reports as to the plan’s implementation. This time-scale was not met, resulting in further litigation in June 2012 and an amended timeframe. An independent expert was subsequently appointed to monitor the procurement of textbooks. That expert noted continuing failures which were publically denied by the DBE, resulting in yet further litigation and additional Court Orders.

Whilst there were notable improvements in the textbook delivery system in 2013, some schools were still left waiting. According to the DBE’s own records, by March 2014, 39 schools in the province faced a shortfall of 22,045 textbooks, not accounting for shortfalls in previous years. By 27 March 2014, there remained a shortfall in textbooks and following unsuccessful attempts to resolve the issue, the Respondents launched further legal action, alleging a violation of the Constitutional rights to education, equality and dignity. The North Gauteng Division of the High Court, Pretoria, found in their favour, however refused to hold that the DBE had failed to comply with previous court orders. Both the parties appealed the judgment. Leave was granted for the case to proceed to the Supreme Court of Appeal.

3. Law

- The Constitution of South Africa, Sections 9; 10; and 29(1)(a).

4. Legal Arguments

Appellants' Arguments

The Supreme Court of Appeal noted the difficulty it faced in trying to establish the precise contours of the DBE's argument. In the first instance, the DBE appeared to argue that it had attempted to provide the relevant materials but faced both external difficulties including a lack of cooperation from the affected schools and budgetary constraints. With respect to the latter, the DBE argued that it had not been allocated appropriate funds to allow it to procure the required books. The decision was made that the outstanding books could only be purchased under the 2014/15 budget. Were the department to spend beyond their allocated sum they would be placed in breach of the Public Finance Management Act. According to the Appellants, who cited the doctrine of separation of powers, the Court did not have the authority make an order in the face of such budgetary constraints and should not interfere with the running of the department.

In the second instance, the DBE appeared to argue that the Constitutional right to education did not mandate the provision of a textbook to "each learner in every school". The measures it had taken met the obligation of a basic education as set out in Section 29 (1)(a). Teachers would copy the content of the textbooks on a blackboard for all students during lessons. Relevant sections of text could be photocopied from borrowed books, and textbooks from the previous curriculum could still be used, provided that "differences in methodology" were reflected.

Respondents' Arguments

The Respondents alleged that the repeated failings of the DBE and LDOE to procure and distribute the required textbooks constituted a violation of the Constitution. Specifically, the respondents alleged a violation of Sections 9 (Equality); 10 (Human Dignity) and 29(1)(a) (Basic Education) of the Constitution.

5. Decision

The Court found that the Appellants had violated Section 29(1)(a), Section 9, and Section 10 of the Constitution by failing to provide learners in Limpopo with "every prescribed textbook before commencement of the teaching of the course for which they were prescribed". Moreover, both departments had failed to comply with a Court Order requiring that they "deliver all textbooks to schools for grades 4, 5, 6 and 11 for the 2013 year by 15 December 2012". Section 29(1)(a) entitled each student in the province to textbooks required for their course prior to the commencement of teaching.

Right to Education

The Court began by examining the content of the Section 29(1)(a) obligation. Under the South African Constitution, every individual has a right to a "basic education". It noted that the Constitutional Court had previously recognised the importance of education given its transformative qualities and its capacity to address entrenched inequalities. The Court acknowledged that during apartheid, black schools were poorly resourced, and students disadvantaged and the Constitution was drafted in order to address this "social unevenness" through a "radical transformation of society as a whole and education in particular." Having examined the relevant domestic legal framework, the Court concluded that:

The constitutional and statutory scheme applicable to education is one in terms of which there is an interconnection between national and provincial government to ensure constitutional compliance. The right to a basic education is thus constitutionally entrenched and statutorily enforced.

That textbooks are central to the realisation of the right to basic education was uncontested. In failing to provide a textbook for each student, the DBE failed to achieve its own objectives as set out in its Action Plan and demonstrated through its policies and actions. The Court found that the DBE's management plan was "inadequate and its logistical ability woeful". The failings of the textbook procurement and delivery system were largely due to DBE's organisational inadequacies. The DBE had not provided evidence to the Court as to why it could not submit an amended budget. The Court further rejected the claim that a finding against the Appellants would breach the doctrine of the separation of powers. The Court found "no intrusion by the judiciary into the domain of the other two arms of government", and described the DBE's submission to that effect as "fallacious" and "contrived".

The Court found that there was nothing preventing the DBE from vindicating learners' rights under Section 29 of the Constitution. As had been previously established, the right to education was "immediately realisable."

Non-Discrimination

Section 9 of the South African Constitution provides that everyone is equal before the law and entitled to equal enjoyment of rights and freedoms. The state may not unfairly discriminate either directly or indirectly against individuals on the basis of their personal characteristics. Discrimination is "unfair unless it is established that the discrimination is fair".

The Court stated that the concepts of direct and indirect discrimination (in relation to the then Interim Constitution) were developed in *Pretoria City Council v Walker*. Even conduct that appears neutral and non-discriminatory may result in discrimination. Non-discrimination was concerned with the "consequences rather than the form of conduct". The Court cited *Harksen v Lane NO & others*, in which a two stage test for determining whether differential treatment could amount to unconstitutional discrimination was expounded by the Constitutional Court. Under that test, the first question to be asked is whether differentiation amounts to discrimination. If the differential treatment is based on a specified ground the answer is affirmative. If not, a finding of discrimination will depend on whether "the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner". The second question concerns whether such discrimination is "unfair". This test focuses on the impact of the discrimination on the complainant and other persons in the same situation.

The Court noted the racial inequality and segregation upon which the education system was originally built and the obligation to remedy this past injustice. It also acknowledged that the textbook shortages were not a problem in provinces other than Limpopo (in which the Court had previously explained most of the students were poor black children). According to the DBE, approximately 97% of students had access to textbooks across the province; meaning that at least 3% of students were being treated differentially. For the Court, these students were being discriminated against and this discrimination was unjustified. Learners without access to textbooks were adversely affected:

Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken

schools and learners have to be put to the expense of having to photocopy from the books of other schools?

The Court stated that vulnerable individuals, including the rural poor and children required this constitutional protection.

6. Remedy

In addition to making a number of declarations of violations by the Appellants of constitutional rights and of the Appellants having failed to comply with the earlier Court Order, the Court ordered that the Appellants pay the costs of the Respondents, including the costs of two counsel.