

Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case No: 1304/06
Heard: 29/03/2007
Delivered: 11/05/2007

In the matter:

THE MEC, NORTHERN CAPE PROVINCIAL
GOVERNMENT: DEPARTMENT OF EDUCATION
THE HEAD: EDUCATION: NORTHERN CAPE
PROVINCIAL GOVERNMENT: DEPARTMENT
OF EDUCATION

1st Applicant

2nd Applicant

and

BATELEUR BOOKS (Pty) Ltd
AND 9 OTHERS

Respondents

Coram: Kgomo JP et Molwantwa AJ

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

KGOMO JP

1. This is an application for leave to appeal against the judgment of **Molwantwa AJ** (in which I concurred) by the First and Second Respondents in the main application, the MEC for Education and his Head of Department, Northern Cape (the Department). The ten publishers who were applicants in the main application oppose this application, itself out of time and accompanied by an application for condonation. The granting of the condonation is not opposed by the publishers. Condonation was granted without in any way suggesting that the leave sought was meritorious. All that it signifies is that non-compliance with the time limits has been satisfactorily explained.
2. The grounds for appeal are so numerous and detailed

that adverting to all of them would encumber the judgment unduly:

- 2.1 In essence the application is against the whole of the judgment on the merits and the law;
- 2.2 We gave advance notice to the parties to file short Heads of Argument, more particularly on whether the case is not moot and therefore no longer justiciable. We are indebted to counsel for their written and oral argument in this regard.

- 3. A recital of the order that we have granted would enhance the better comprehension of this judgment:

“1. The decision of the Second Respondent (the HOD) contained in Annexure DFR 13 to the Applicants’ supplementary affidavit and in Department Circular 67/2006, dated 20 July 2006, to the extent to which the Second Respondent decided and the schools were informed that the Department of Education would be ordering Learner Teacher Support Material (LTS-Material) regarding grades 8,9 and 11 from publishers without giving any schools the right to select such material, is reviewed and set aside.

2. The decision of the Second Respondent to continue with the requisitioning and ordering process after the Department was informed of the Applicants’ objection to the above process is reviewed and set aside.

3. The Second Respondent is directed to:

- 3.1 Withdraw all orders in respect of LTS-Material for grades 8,9 and 11 which have already been placed with any of the parties to this application;*
- 3.2 Ensure that all schools in the Northern Cape receive a copy of the catalogues of approved LTS-Material for grades 8, 9 and 11;*
- 3.3 Ensure that all schools are forthwith informed of their right to select LTS-Material for procurement by the Department of Education in respect of grades 8, 9 and 11 in 2007;*
- 3.4 To collate all requisitions once received and to place such orders without delay on behalf of those schools which have not exercised their right to select LTS-Material.*

4. *The First (the MEC) and Second (the HOD) Respondents are ordered to pay the costs of this application, including the costs of the application of 3 November 2006, and which costs are to include the costs of two counsel where employed."*

4. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law: **IT Publishing (Pty) Ltd & Another v Minister of Safety & Security & Others** 1997(3) SA 514 (CC).

5. Section 21A of the **Supreme Court Act No 59 of 1959**, stipulates in part that:

"(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(2)(a) If at any time prior to the hearing of an appeal the Chief Justice or the Judge President, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the grounds set out in subsection (1), he or she shall call for written representations from the respective parties as to why the appeal should not be so dismissed.---

(c) The judges considering the matter may order that the question whether the appeal should be dismissed on the grounds set out in subsection (1) be argued before them at a place and time appointed, and may, whether or not they have so ordered-

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs."

6. We raised the issue of mootness in view of the following factors and circumstances:

6.1 Prior to 2006 the Department procured Learning and Teaching Support Material (LTS-Material) through book publishers (including the ten applicant-publishers). In about July 2006 the Department centralized the procurement system without prior notice to or consultation with the schools or publishers. The schools raised no demur. The publishers objected, in particular because some publishers were totally excluded from the system and drew no benefit at all whilst others were favoured and therefore benefited much more than others in a process that was undeniably not equitable and transparent.

6.2 On the 18th October 2006 a meeting was convened between the aggrieved publishers and the Department, the latter being represented by senior functionaries, to sort out the new procurement system and reach an amicable solution. The Department adopted the following attitudes at the meeting:

“4. The Department views this centralised procurement for the implementing grades as “a once-off” and it was stated repeatedly that things will return to normal next year (2007) and thereafter with LTS-Material being procured via the normal channels. Towards the end of the meeting, Mr Masuabi stated that the Department may, however, decide to use this centralised method of procurement for Grade 12 next year.”

6.3 During the main hearing the contention of the Department was that they centralized the procurement of the LTS-Material for Grades 8,9 and 11 because:

(a) The Provincial Government only allocated a budgeted amount of R6,3 million for 2006/2007 financial year, leaving a deficit of R33 million. Through the virement system (shifting funds designated for one purpose to another) they managed to secure the required additional R 33

million.

- (b) That the acquisition and application of this R33 million was an internal matter so closely related to policy based decisions in respect of budgetary choices and financial implementation that the HOD's decision does not constitute administrative action or if it does then the decision was not subject to administrative review.

6.4 As the main judgment and resultant order show, we found against the Department on the 21st December 2006 and delivered judgment on the 15th December 2006. The Department brought this application out of time as a result of which it could only be heard on the 29th March 2007. We were constrained to raise the question *mero motu* whether a final determination of the issues by the Supreme Court of Appeal (the SCA) will have a practical effect or result, particularly in view thereof that the process effected by our judgment has progressed substantially. In Chairperson: **Standing Tender, Committee v JFE Sapela Electronics** [2005] 4 All SA 487 (SCA) at paragraphs 28 and 29 the Court remarked:

*"[28] In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in **Oudekraal Estates (Pty) Ltd v City of Cape Town** 2004(6) SA 222 (SCA) paragraph 36 at 246D:*

"It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide."

*A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time. See eg **Wolgroeiërs Afslaeers (Edms) Bpk v Munisipaleiteit van Kaapstad** 1978 (1) SA 13 (A): see also section 7(1) of PAJA which gives statutory recognition to the rule. In a sense, therefore, the effect of the delay is to "validate" what would otherwise, be a nullity. See **Oudekraal Estates (Pty) Ltd** (supra) paragraph 27 at 242E-F. In the present case, as I have found, there was a culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its *raison d'être* was said by **Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others** 2005 (2) SA 302 (SCA) at paragraph 46 to be twofold:*

"First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions."

Under the rubric of the second I would add considerations of pragmatism and practicality.

[29] In my view, the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand."

7. Mr Jamie, SC, for the Department argued that it is quite evident from the provisions of section 21A of the Supreme Court Act, quoted hereinbefore, that it is the Court hearing the appeal that has the discretion to dismiss an appeal on the basis of mootness and not for a Court of first instance which is merely required to consider or grant leave to appeal. He could not refer us to any decision or authority for his submission nor are we aware of any. Counsel has made this concession, though, in his Heads:

"Of course, it has to be conceded that any possible still existing or live controversy between the parties will, in all likelihood, have become resolved by the time this matter eventually reaches the Supreme Court of Appeal, should leave be granted. However, and were the matter then to be moot that would be a matter for the SCA and not, with respect, for this Court."

8. This argument is without merit for the following reasons:
 - 8.1 The wording of the statute, quoted in paragraph 5 above, is very clear and unambiguous. Therefore in the interpretation thereof to establish its meaning the ordinary grammatical meaning must be assigned to each word within the context of that particular provision. The section speaks *inter alia* of when "*at the hearing of any civil appeal to --- any provincial or local division of the Supreme Court.*" It is falacious to reason that because the appeal now lies to the SCA therefore a High Court cannot refuse to grant an applicant for leave to appeal on that basis only. This is tantamount to propounding that a High Court that has heard a matter on the merits cannot refuse leave to appeal to the next tier or the SCA because it is for that Court to make the final decision; which cannot be correct.

- 8.2 In **Van Winsen, Civil Practice of the Supreme Court,**

Fourth Edition, at pp 884 and 885 the authors state:

“Broadly speaking, the same principles are applied by the courts in deciding whether to grant leave to appeal in all cases in which leave is required. Leave to appeal will be granted only when:

- (a) There is a reasonable prospect of success. (**R v Baloi** 1949(1) SA 523 (A) at 524; **R v Nxumalo** 1939 AD 580 and **R v Ngubane & others** 1945 AD 185 at 187; **Afrikaanse Pers Bpk v Olivier** 1949 (2) SA 890 (O); **Rood v Broderick Properties Ltd** 1962 (2) SA 434 (T) at 435C-F; **Odendaal v Loggerenberg en andere NNO** (2) 1961 (1) SA 724 (O) at 727B-D; **Capitol Building Society v De Jager & Others; De Jager & another v Capital Building Society** 1964 (1) SA 247 (A); **Rademwyer v Steyn** 1967 (4) SA 112 (O); **Minister of Prisons v Donono** 1974 (1) SA 323 (C).) ---.
- c) The matter is of substantial importance to one or both of the parties concerned. The fact that it involves interesting points of law which are important to the public, or to a class of the public, is no longer regarded as a reason for involving a litigant in heavy costs of appeal. (**Haine v Podlashuc & Nicolson** 1933 AD 104 at 112; **Olley v Des Fountain** 1941 AD 98). The matter must be of substantial importance to one of the parties in the proceedings, not merely in abstracto. (**African Guarantee & Indemnity Co Ltd v Van Schalkwyk & others** 1956 (1) SA 326 (a) at 328 in fine – 329A.) Leave may be granted even though the sum in dispute is comparatively small if the matter is of importance to the parties. In such a case the fact that it is also a matter of importance to the public, or a section of the public, is a factor which can be taken into account. (**Podbrey v Stern** 1946 CPD 962.) Leave will, however, be refused if the matter in dispute is of purely academic interest; (**Kanderssen (Pty) Ltd v Bowman NO** 1980 (3) SA 1142 (T); **Castel NO v Metal & Allied Workers Union** 1987 (4) SA 795 (a)); for example, the court is not compelled to undertake an inquiry into legal conundrums involved in a purely procedural dispute not affecting the real matter in issue. (**African Guarantee & Indemnity co Ltd v Van Schalkwyk & others** 1956 (1) SA 326 (A) at 329B-D.)”

Section 21A therefore merely refined a long standing

principle.

8.3 Mr Van Niekerk, SC, for the Publishers, has also drawn our attention to the dictum of the SCA in **Premier Mpumalanga en `n Ander v Groblersdalse Stadsraad** 1998(2) SA 1136 (SCA) at 1141D-E and 1143 A-C which scuppers Mr Jamie's argument. The Head Note captures Mr Van Niekerk's submission succinctly in these terms:

"Section 21A of the Supreme Court Act 59 of 1959 is aimed at alleviating the heavy workload of Courts of appeal, including and perhaps especially the Supreme Court of Appeal. It breaks away from the then vague concepts of 'abstract', 'academic' or 'hypothetical' as criterion for the exercise of the power of a Court of appeal not to hear an appeal. It now sets a direct and positive test: will the judgment or order have a practical effect or result? Given the object and clear meaning of this formulation, the question is whether the judgment in the case before the Court will have a practical effect or result and not whether it might be of importance in a hypothetical future case. Appeals should be submitted for adjudication only if there will be a real, practical effect or result of a judgment of the Court of appeal. Practitioners ought therefore to be constantly conscious of the object of s 21A; in particular in an application to appeal to a higher Court and in the prosecution, preparation and arguing of the appeal." My underlining

8.4 Mr Van Niekerk has further contended that the mootness of these proceedings does not establish any permanent bar or injunction to the Department should it wish to centralise the procurement of LTS-Material in future provided it follows the proper procedure and that procedure is later found to be permissible. He premised his argument on the following concluding paragraph in the main judgment, which bears repetition:

*"This judgment should not be understood to lay down a principle to the effect that the acquisition of LTS- Material, be that publications, title, books etc, can never be centralized by the Department. It is fundamental that the Department ought first to comply with the provisions of Section 217 of the Constitution, the relevant provisions of **PAJA(Promotion of Administrative Justice Act, No 3 of 2000)** and those of the **South African Schools Act**, 84 of 1996; there are also its own Rules and*

Regulations to be seen to before a change could be affected, if at all. Whilst the schools have not voiced any opposition to the proposed method, and possibly may never do so, it is cardinal that the attitude of the schools be canvassed timeously if the Department were to persist in its endeavours to centralise the existing procurement system. In doing so quality education must not be sacrificed at the altar of costs saving."

Needless to say, I agree with Mr Van Niekerk's submission.

9. The final contention by Mr Jamie that requires attention is one that says even if the matter is moot a judgment by the SCA would definitely have a practical effect or result as it would not only provide guidance for the Department, and indeed other education authorities throughout South Africa, should the Department embark upon a similar project (virement and centralizing procurement of LTS-material), but it would also have an important bearing on the legal relationship between education departments and section 21 schools.
10. I am unable to support this argument:
 - 10.1 The first infirmity that afflicts this contention is that the schools, let alone section 21 schools, are not party to these proceedings and have not provided any argument on this issue. The Courts are even more loath to determine moot issues which are unilateral and one-sided as such a judgment cannot be precedent setting. See **Port Elizabeth Municipality v Smit 2002 (4) SA 241 (SCA)** at 248J- 249B; **Western Cape Education Department & Another v George 1998 (3) SA 77 (SCA)** at 84E.
 - 10.2 The second weakness in the argument is that the procurement for the 2006/2007 financial year has come and gone. The deviation from the established procedure was "a once-off." This "once-off" related to the aforesaid 2006/2007 period. It is implicit in the view that the Department took that it intended to revert to the *status quo ante* or commence a fresh process. Granting leave to the SCA knowing fully well that the issues are of such a nature that the SCA judgment

or order will have no practical effect or result will defeat the very purpose of section 21A of the **Supreme Court Act, 59 of 1959**. See **Coin Security Group v S A National Union for Security Officers** 2001(2) SA 872 (SCA) at 876G-I.

10.3 The SCA has, in any event, dealt extensively with the relationship between section 21 schools and Government Departments in **Minister of Education, Western Cape v Governing Body, Mikro School** 2006(1) SA 1 (SCA).

11. For the foregoing reasons I am of the considered view that:

11.1 The issues between the parties have become moot and that another court is unlikely to come to a different conclusion;

11.2 Should we be wrong then, in that event, there are no reasonable prospects of a successful appeal on the merits. The reasons therefor emanate from the judgment of **Molwantwa AJ**.

In the result I make the following order:

The application for leave to appeal by First and Second Respondents in main application (the Department of Education) is dismissed with costs.

F D KGOMO
JUDGE PRESIDENT
Northern Cape Division

I concur

B C MOLWANTWA
ACTING JUDGE
Northern Cape Division

Reportable:	YES /
NO	

<u>On behalf of the Applicant:</u>	Adv J. Van Niekerk SC
Instructed by:	DUNCAN & ROTHMAN

<u>On behalf of the 1st & 2nd Respondent:</u>	Adv I. Jamie SC
Instructed by:	HAARHOFFS INC.