

Reportable:	YES/ NO
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 NUMBER: 1304/06
HEARD: 20/11/2006
DELIVERED: 15/12/2006

In the application of:

BATELEUR BOOKS (PTY) LTD	1 st Applicant
CAMBRIDGE UNIVERSITY	2 nd Applicant
CLEVER BOOKS (PTY) LTD	3 rd Applicant
HIBBARD PUBLISHERS (PTY) LTD	4 th Applicant
MACMILLAN SOUTH AFRICA (PTY) LTD	5 th Applicant
MASKEW MILLER LONGMAN (PTY) LTD	6 th Applicant
NASOU VIA AFRIKA (PTY) LTD	7 th Applicant
OXFORD UNIVERSITY PRESS (PTY) LTD	8 th Applicant
SHUTTER AND SHOOTER PUBLISHERS (PTY) LTD	9 th Applicant
VILIA PUBLISHERS & BOOKSELLERS (PTY)LTD	10 th Applicant

and

THE MEC, NORTHERN CAPE PROVINCIAL GOVERNMENT: DEPARTMENT OF EDUCATION THE HEAD: EDUCATION: NORTHERN CAPE PROVINCIAL GOVERNMENT: DEPARTMENT OF EDUCATION	1 st Respondent
	2 nd Respondent
THE PUBLISHERS LISTED ON ANNEXURE "B"	3 rd Respondent

Coram: Kgomo JP et Molwantwa AJ

JUDGMENT

Molwantwa AJ

Introduction

1. On 20 November 2006 we heard full argument from counsel (van Niekerk SC for the Applicants/Publishers and Jamie SC for the Respondents/Department). On 21 November 2006 we decided to issue the order set out below due to the pressing nature of the matter and reserved the reasons for our decision:

"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 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.*
 5. *The reasons are reserved."*
2. The Department's first decision which we set aside was contained in Annexure DRF 13(referred to above) and is dated 20 June 2006 but was signed on 15 July 2006 by the HOD, who is the decision maker, and reads as follows:

"SUBJECT HEADING:CENTRALISED PROCUREMENT OF LTSM FOR GRADES 8,9 & 11 FOR 2007.

CONTEXT

1. *This submission relates to the National Curriculum Statement (NCS) implementation as contained in the operational plan for the 2006/2007 financial year.*

AIM

2. *To obtain authorization for*
 - 2.1 *Centralised procurement of LTSM for Grades 8,9 &11*
 - 2.2 *Implementation of the above within the prevailing budgetary constraints.*

BACKGROUND

3. *As you are aware the roll-out of the NCS will continue in 2007 for grades 8, 9 &11 as planned.*
4. *The department of education and by extension all schools are expected to prioritise grades that are implementing the NCS.*
5. *The procurement of LTSM is central to ensuring effective implementation of the National Curriculum Statement.*
6. *The grade 8 and 9 procurement will be made from the provincial catalogue.*
7. *The grade 11 cataloguing process was centralised by the national department to ensure uniformity in terms of the quality of titles in the final catalogue.*

DISCUSSION

8. Most high schools will have to procure LTSM for three grades implementing NCS in 2007.
9. This places a bigger challenge for schools in terms of administration and budgets.
10. To monitor and control the timeous delivery of quality LTSM, the procurement process needs to be centralised to counter the above challenges.
11. This will also have a positive impact on standard setting, equitable distribution of materials, pacesetting, and standardized assessment.
12. While the intention is to provide each learner with a full compliment of books, schools will not be able to carry this with their section 21 allocations.
13. With the centralised procurement, a set of 6 books per learner for grades 8 and 9 is proposed .For grade 11, a set of 5 books is proposed.(See attached annexures for financial break-down)
14. Given the current situation, a centralised procurement process will be more efficient and cost-effective as a discount of up to 30% can be negotiated.
15. Learning Area Managers, Learning Area /Subject Coordinators and the LTSM section will advise on the best possible books to select and procure.

POLICY IMPLICATIONS

16. The recommendation is congruent with the policy related to the Council of Education Ministers (CEM) decision to implement the National Curriculum Statement in grades 8,9 and 11 in 2007.

LEGAL IMPLICATIONS

17. The recommendation is consistent with the applicable legislative framework.

FINANCIAL IMPLICATIONS

18. The available budget for the Learning Support Material procurement in the 2006/7 financial year is R 6, 3 Million.
19. This represents a total shortfall of R33 Million. See attached annexure A
20. To source the funding for the R33 Million shortfall available funds under programme 2 could be exploited. See attached annexure B.” (My underlining)

3. The second decision that we rescinded was contained in Departmental Circular 67/2006 (supra) that was dated 20 July 2006 but was only signed by the HOD on 01 September 2006. This circular was addressed to the MEC for Education, Chief Directors, Directors and Unit Heads, District Directors, Circuit Managers, Corporate Services and Supply Chain Management, Principals of all schools, School Governing Bodies and Educators. It reads :

"Circular 67/2006

**LEARNING AND TEACHING SUPPORT MATERIAL (LTSM)
FOR SECTION 21 AND NON-SECTION 21 SCHOOLS FOR
THE YEAR 2006/2007**

1. *The Department will be provisioning LTSM for Grades (8,9 & 11) implementing NCS (National Curriculum Statement) in 2007 centrally.*
2. *Section 21 schools however, will be responsible for procuring their own Text Reading books for all other top-up Grades, as well as the textbooks not supplied by the Department for Grades 8,9 & 11 and other areas of LTSM (Paper, Writing books & stationery) from the allocations they will be receiving.*
3. *Non-section 21 schools will place their orders from approved suppliers appointed through the bidding process via the District offices.*
4. *The approved book catalogues for all Grades except Grade 9 with copies of the Management Plan and Circular No 22 will be forwarded via the District Offices to all schools.*
5. *District Offices are kindly requested to ensure that all schools adhere to these dates in the management plan.*
6. *The Supply Chain Management Unit will be procuring the Grades 8,9 and 11 titles on behalf of the schools as follows:*
Grade 8-7 Text Books per learner (Excluding Languages)
Grades 9-7 Text Books per learner (Excluding Languages)

Grades 11-5 Text Books per learner (Excluding Languages)

7. *The Publishers will deliver the (books) directly to Head Office who will in turn be responsible for the receipt and packaging of these books to the schools via the District Offices.*
8. *Schools will in turn be responsible, as in the past, for providing regular progress reports on the ordering and delivery of all LTSM to their respective District Offices who will, in turn, have to provide Head Office with these progress reports.*

Your co-operation in this regard will be appreciated.

Signed by Deputy Director General, 01.09.06. “ (My underlining)

4. What is immediately conspicuous is that the Applicants/Publishers were overlooked as interested parties for their comments or representations or information. It will be noted that whilst the schools were notified of the change they were not asked to comment or make representations. It was undisputed that the Publishers only learned of the centralized provisioning on or about 02 October 2006. They immediately wrote a letter to the Department to this effect:

“ORDERING OF LTSM FOR THE 2007 SCHOOL YEAR

I write to you on a matter of considerable concern to our members. It has come to our notice that Northern Cape schools will not be permitted to requisition for their LTSM requirements for 2007 as the decision has been taken that your Curriculum Unit will be selecting one title per learning area to be used by all learners in the Province.

Could you please let me know urgently whether this information is correct or not?

If it is correct it has serious implications for schools and publishers. We would also like to know whether this decision applies to all Grade 8,9 and 11 learning areas.

As publishers we would expect schools to have access to the wide range of approved LTSM available, and to make their choice according to the specific needs in their schools.

Publishers were not informed in advance that the selection of LTSM would be made by the Curriculum Unit. So in good faith and in response to an invitation from your Department, publishers submitted their Grade 8 and Grade 9 titles for screening. From this screening process a catalogue of approved LTSM was compiled by your Department. Grade 11 titles were screened nationally.

Based on departmental practice of previous years, publishers then expected the approved LTSM catalogues to be sent to schools to enable them to see what LTSM were available to choose from.

At no time during the screening process and compilation of the approved catalogue were publishers informed that the ordering system would be centralised at the Curriculum Unit and that schools would not be given the opportunity to choose their requirements.

Publishers therefore embarked on their marketing activities and incurred considerable costs in doing so.

Are we now to assume that publishers have incurred the following costs with considerable uncertainty as to whether they will get any orders from the expenditure?

- **Submission costs**
 - submission fees and submission copy costs
 - courier fees
 - resubmission costs (where applicable)

- **Marketing costs**
 - marketers' salaries, accommodation and vehicle costs
 - promotion copy costs
 - cost of promotional catalogues and other promotional material.

The Department also convened road shows for both Grade 8 and Grade 9. Teachers were invited to attend these road shows and publishers were invited to display materials, which further illustrates the apparent intention of the Department to follow the usual process of allowing schools to select the LTSM that best suits their requirements.

There may be publishers who benefit from centralised ordering but there will also be publishers who will be severely prejudiced by this decision.

How will the selection of titles for use in schools be made? Who will make the decisions? What selection criteria will be used? (One assumes that ALL approved titles were measured against the selection criteria in the screening process and found to be suitable for use in the Northern Cape schools.)

We know from past experiences that as soon as a centralised system for choosing LTSM is used, it immediately creates suspicion no matter how noble the intentions are. The spectre of vested interests looms large over the process.

If it is true that only certain titles are going to be selected by the Curriculum Unit for use in Northern Cape schools in 2007, we ask that a delegation from the Publishers' Association of South Africa meet with the relevant departmental officials to discuss the matter further.

We would welcome the opportunity to enter into dialogue with you on this matter and try and resolve it to everyone's satisfaction.

I look forward to hearing from you.

Yours sincerely

Dave Ryder

CHAIRPERSON: PASA EDUCATION SECTOR”

5. On 18 October 2006 a meeting took place between representatives of the Department and a delegation of the Publishers’ Association of South Africa (PASA) of which all the Applicants/Publishers are members.
 - 5.1 During this consultation it became common cause that the Department has firmly decided it would select one title per learning area for the implementing grades, which title was to be used by all learners in the province;
 - 5.2 This system was contrary to the Department’s normal procedure which had been previously followed namely, that the Northern Cape schools could requisition any books for the implementing grades from the catalogue of approved books for their LTS-Material requirements for 2007;
 - 5.3 It was further common cause that the normal procedure was that the Department calls for the evaluation of books, that the Publishers pay a fee and submit books to the Department. Those Publishers of books that are approved are advised of that fact whereupon these approved books are listed in a catalogue;
 - 5.4 The catalogue is then circulated to all Publishers to ensure that the details are correct. The catalogue is then

distributed to schools which would then order any book from the catalogue of approved books for any given year;

- 5.5 The Publishers participate in the Department's Road shows to market their books. Publishers are also encouraged to market books at schools, to run workshops for teachers on the benefits or attributes of the books;
- 5.6 This normal procedure, it was also common cause, was oncemore followed by the Department on this occasion up to the stage where the catalogues were distributed to the schools. However, the Department deviated from that procedure thereafter in the manner already discussed.

6. The minutes, Annexure DRF 4, that were prepared by the Publishers and from which paragraph 5 of this judgment was extracted, was fairly reliable if evaluated against the Department's response to these minutes. For instance the Department says in paragraph 76.1 of its Answering Affidavit:

"In relation to the supposed minutes of the meeting of 18 October 2006, the department does not accept this document as an official minute, but acknowledges that it purports to be a record of what occurred at the meeting, albeit a record compiled on behalf of the applicants. I in particular refer to paragraphs 3 and 5 of the document, Annexure "DRF4", which correctly reflects what was said by the department officials at the meeting, and which is also in accordance with what I have said in this affidavit."

7. The Department has not denied the contents of paragraph 4 of the same minutes, Annexure DRF 4, which states:

"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 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."

I am satisfied that the Department has hereby, directly or by implication, acknowledged the existence of an established normal procedure. The matters also raised in the Publishers' letter of 02 October 2006 are valid.

8. Mr van Niekerk has argued that based on the matters that are common cause or not disputed and on the documentation supplied by the Department there cannot be any doubt that the Department has not complied with the provisions of section 217(1) of the Constitution. This section provides that:

" When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

9. Mr van Niekerk has further relied on the provisions of section 3 of the Promotion of Administrative Justice Act, No 3 of 2000. The relevant portion of this section provides that:

"3(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

2(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection(4) must give a person referred to in subsection (1)-
(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) reasonable opportunity to make representations;
(iii) a clear statement of the administrative action.”

10. Mr van Niekerk argued that as far back as 2004 the Department embraced the relationship that I have already addressed between itself and the Publishers. In a document DRF 13 – A.1 entitled “*IMPLEMENTING THE NATIONAL CURRICULUM STATEMENT GRADES 10-12: Consolidated National Strategy on the Development and Procurement of Learning and Teaching Support Materials, 2004,*” the Department acknowledges this long standing relationship. The document involves the different role-players including the Publishers and schools (without any distinction). It indicates the essential steps in the books acquisition process, the time available to implement each step and how each step will affect or impact upon the next and ultimate delivery of LTS-Material for Grade 10 - 12 implementation in 2006.

11. **THE ISSUES TO BE DETERMINED.**

11.1 The first issue that confronted us, which Mr Jamie raised, was whether the decision of the HOD to centralise the selection and procurement of LST-Material for grades 8, 9 and 11 and remove this function

from the schools, was an administrative action which is reviewable? If it is reviewable whether it will be prejudicial to the schools and the learners to set it aside;

11.2 The second issue was whether the Applicants had a legitimate expectation that LTS-Material for specified grades will be selected by schools and not centrally;

11.3 Thirdly, whether the Applicants had established grounds of review as contemplated in section 3(2) of PAJA read with section 217(1) of the Constitution. See paragraphs 8 and 9 (above);

11.4 The fourth issue concerns costs which will arise only if some of the three issues are substantially resolved in favour of the Applicants.

THE ISSUE IN RESPECT OF PARAGRAPH 11.1 (ABOVE)

12. The Department urged us to dismiss the application on the ground that the decision of the HOD is not an administrative action which is reviewable. Counsel submitted that the decision under review is so closely related to policy based decisions in respect of budgetary choices and financial implementation that it does not constitute an administrative action or if it was then it was not an administrative action that was subject to administrative review. The nub of the contention is that the decision under review was political in nature and therefore its exercise did not constitute an administrative action as contemplated in s33 of the Constitution. In this regard Counsel relied on the *dictum* in para 51 (p114D - E) of **Premier,**

Mpumalanga v Executive Committee, Association of State-Schools, Eastern Transvaal 1999 (2) SA 91 (CC) which states

that :

“(A) Court should generally be reluctant to assume the responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government. Accordingly, the Court should be slow to conclude that there is bias such as to require a Court to exercise a discretion, particularly where the discretion is one conferred upon a senior member of the executive branch of government.”

13. I am unable to support Mr Jamie's contention because it is quoted out of context. **O' Regan J** in **Permanent Secretary, Education & Welfare ,EC v Ed-u-College(PE)** 2001 (2) SA 1 (CC) at 12F-H pointed out that:

“To the extent that the applicants relied upon this case to establish that a decision to allocate subsidies is not reviewable as administrative action in terms of the Constitution, they were mistaken. The case is authority for the contrary proposition. This dictum is concerned not with the question of the character of the power exercised by the official and whether it was administrative action or not but with the question of when it is appropriate for a court to substitute its decision for that of an administrative official. The Court was considering the appropriate remedy that should be ordered once it had already concluded that the decision to cancel grants had been found to fall short of the requirements of the administrative justice provisions of the interim Constitution. To the extent that the applicants rely on this dictum to determine whether the exercise of a power under s 48(2) of the Schools Act constitutes administrative action, it is therefore of no assistance to the applicants' case. Furthermore, the fact that a decision has political implications does not necessarily mean that it is not an administrative decision within the meaning of s 33 as the decision in Premier, Mpumalanga illustrates.”

14. The Respondent's counsel contended further that the decision does not have any direct, external and legal effect on the Applicants in terms of PAJA as the HOD owes no duty of care to the Publishers but it does so to the schools and learners which the Publishers cannot claim to represent. Section 1 of PAJA defines an administrative action as *"any decision...by ...a public organ of state when exercising any such public power or performing a public function in terms of any legislationwhich adversely affects the rights of any person which has a direct, external legal effect"*
15. In **Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others** 2005 (6) SA 313 (SCA) at 323D-F **Nugent JA** had this to say on the definition of an administrative action:
- "While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterized by its effect in particular cases (either beneficial or adverse) seems to me paradoxical and also finds no support from the construction that has until now been placed on s33 of the Constitution. Moreover, that literal construction would be inconsonant with s3 (1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external effect', was probably intended rather to convey that the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."*

16. In my view when the HOD made the decision which we have set aside it was not a decision made by the legislature, nor was it debated or considered by the legislature, neither did it form part of the legislative process , nor did the decision follow as a matter of course from the legislature itself. Indeed the decision took place in the light of the challenge of the new *curricula* which the schools were facing. The funds had already been appropriated for purposes of being disbursed by the Department of Education. The HOD was simply determining how it should be spent. This is evidenced by the fact that the decision to shift funding for this specific purpose was taken first whereafter the decision to procure the material by the Department followed. It ought not to have had any bearing on the right of the schools to select their own material. The Department's argument in this respect must therefore be rejected.

The Point in Limine By The Respondent

17. The Respondents raised a point in limine to the effect that the arrangement for the selection and procurement of specific LTS-Material is a matter between the Department and the schools to the exclusion of the Publishers and that, consequently, the Department owes them no duty to consult with them before any decision is taken as it has no external effect at this stage of the process. Such external effect only arises when orders are placed with specific publishers, so the argument proceeded. In the premises, it was submitted, the Publishers-Applicants have

no standing to challenge the decision of the HOD as they are not acting and cannot act in the interests of the schools and learners of the Northern Cape.

18. Mr van Niekerk, made it plain that it is not the case of the Publishers that they are representing the schools or learners of this Province. He alluded to the symbiosis which exists between the Department, the schools and the publishers. He pointed out that the Department cannot exist without the schools nor can the schools function without the intervention of the Department. On the other hand the Publishers and their publications are indispensable to both the Department and the schools. Counsel contended that the Publishers are representing their own legitimate interests borne out by a long-standing and well established business relationship which the Department has directly or by implication acknowledged. I agree. ***This point in limine can therefore not succeed.***

19. Mr Jamie contended that the additional funding made available for procurement of LTS-Material for the specified grades was appropriated from another allotment and therefore could not be dealt with in accordance with the ordinary process set out above because:

- 19.1 The total budgetary allocation to schools for learners in grades 8, 9 and 11 for the 2007 financial year was R6.3 million. This amount, it was said, covered all categories of expenditure and only a portion thereof was awarded for

the acquisition of LTS-Material. That the accrual requirement to purchase the required new LTS-Material for the aforesaid implementing grades was about R37 million and that the resultant shortfall was almost R32 million;

19.2 The HOD has the prerogative to deal with the funds as he deems fit and in line with his mandate as an Accounting Officer;

19.2 This case has vast implications for the principle of the separation of powers which prescribes that Courts should not be allowed to prescribe to the Executive what to do with State revenue or how to deal with its funding.

20. I have great difficulty with this contention. In **Permanent Secretary, Education & Welfare, EC v Ed-u-College(PE)**

(*supra*) at paragraph 18 **O'Regan J** remarked :

"In President of the Republic of South Africa and Others v South African Rugby Union and Others 2000(1) SA 1 (CC) this Court held that, in order to determine whether a particular act constitutes administrative action, the focus of the enquiry should be the nature of the power exercised, not the identity of the actor".

It is not in dispute that the funding in issue was public funds determined after deliberations by democratically elected representatives as contended by the Respondents. However, the administrative action is a power which is and must be exercised within the confines of the Constitution. Public funds no matter what label or name is attached to it or whether it be Special/Additional funding or where they are shifted from will

remain subject to public scrutiny, must be accounted for and audited in accordance with the Constitution, the Financial Regulations and Treasury Instructions. Dealing with such money will always amount to administrative action. That is so because the decision taken by an organ of state which wields public power or performs a public function in terms of the Constitution or legislation where the decision materially and directly affects the legal interests or rights of an affected party (in this case the Publishers) is administrative. See: **Jurgens Johannes Steenkamp N.O v The Provincial Tender Board of The Eastern Cape** CCT 71/05; **Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others** 2005 (6) SA 313 (SCA) at para21-24; **Logbro Properties CC v Bedderson N.O and Others** 2003 (2) SA 460 (SCA).

Did The Applicants Have A Legitimate Expectation That LTS-Material For Specified Grades Will Be Selected By Schools And Not Centrally?

21. The Department argued that the Publishers did not have a legitimate expectation that LTS-Material for specified grades will be selected by schools and not centrally. They submit that one of the conditions of the transfer of the aforesaid additional funding was that LTS-Material would be selected and procured by the Department. The reasons the Department proffered for this situation were that:

21.1 The centralised selection would “assist with standard setting, the equitable distribution of LTS-Material, and the

standardized assessment of learners' performance"; See paragraph 11 of DFR13 quoted at paragraph 2 (above).

- 21.2 The centralised bulk procurement would furthermore allow the Department to obtain a substantial discount as high as 30%. See paragraph 14 of the same Annexure DFR 13.
22. The contention has no sound basis. The right of schools to select their own material has been acknowledged on various occasions and instances by the Department. The Publishers, as stated, were all along involved in the incremental implementation of the new grades. This acknowledgment is reflected in a letter of March 2005 ("DRF 7") in which the good working relationship was acknowledged by the Department. The contents of this letter also correspond with that of a letter that was circulated by the Department a year later in March 2006 containing an agreement between the Department and the Publishers pertaining to procurement time frames. It is evident that all parties were in agreement that deliveries will continue until January 2007. As the decision ("DRF 13") stands it is clear that it does not suggest that the additional funds were to be used conditionally as contended for by the Department or that it was necessary to take away the right of the schools to select their LTS-Material.
23. It is undisputed that prior to the Department's centralization the Publishers were invited by them to make submissions which the

Publishers paid for. The Publishers participated in road shows at the instance of the Department. They exhibited their material including the LTS-Material under discussion. This whole exercise, in my estimation, created a legitimate expectation in the Publishers' minds that their material will be bought or at least that they will be heard before any decision changing the acknowledged and commonly applied practice is taken away.

24. The case of **South African Veterinary Council and Another v Szimanski** 2003(4) SA 42 (SCA) at 49E-H sets out the requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely as pertinently drawn together by **Heher J** in **NDPPv Phillips and Others** 2002 (4) SA 60 (W) at 27-28 as follows:

"The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit) [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril. ii) The expectation must be reasonable: Administrator, Transvaal v Traub (supra [1989(4)SA731(A) at 7561-757B]; De Smith, Woolf and Jowell (supra at 417 para 8-037. The representation must have been induced by the decision maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050; Attorney General of Hong Kong

v Ng Yuen Shiu[1983]2 All ER 346 (PC) at 350h-j iii)The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate:*Hauptfleish v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E-G.”.This exposition is also supported by the Constitutional Court in **President of the Republic of South Africa and Others v South African Rugby Union and Others** 2000(1) SA 1(CC) at para 216.

25. Adopting this exposition, in my view, the Applicants justifiably relied on the clear and unambiguous LTS-Material acquisition practice which existed prior to 14 July 2006 .Their expectation that the Department would rely on the practice was reasonable and legitimate. I accordingly endorse these views.

Have the Applicants established grounds of review as contemplated in terms of section 3(2) PAJA read with section 217(1) of the Constitution which provides for lawful, procedurally fair and justifiable process?

26. Having set out above that the decision of the HOD is an administrative action in terms of section 1 PAJA, it will helpful to consider the decision of the **Premier, Mpumalanga v Executive Committee, Association of State –Schools, Eastern Transvaal** (supra) relied on by the Respondents. The MEC for Education in Mpumalanga had decided summarily to terminate with retroactive effect subsidies he had already formally granted. In so doing, he did not afford any hearing to schools to which the subsidies had been granted. The court found that in the circumstances of that case a legitimate

expectation had arisen which required him to give reasonable notice of the decision to terminate the subsidies or to afford those schools to which subsidies had been granted an opportunity to be heard prior to the decision to terminate the subsidies retroactively.

27. The **Premier, Mpumalanga** case (*supra*) is apposite to this case. On the facts a legitimate expectation had arisen which meant that the right of the schools to select and procure their own material directly from the Publishers could not be cancelled without an opportunity to be heard. By necessary implication the Publishers also had to be heard in terms of the symbiosis factor that Mr Van Niekerk spoke of.
28. The issue that remains to be determined is then whether the process was procedurally fair and justifiable. Section 3(2) of PAJA requires that administrative action which affects or threatens legitimate expectation has to be procedurally fair. The right to just administrative action is a constitutional imperative. Section 33(1) of the Constitution provides: *“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”*
29. A process was already started in 2005 or even in 2004 with discussions between the Department and the Publishers regarding the implementation of LTS-Material. This was continued up until July 2006 when without any notice to the

Publishers a different process was adopted. It is clear that prior to the meeting of 18 October 2006 the Applicants had not been informed by the Department of the HOD's decision as per "DRF 13". At this meeting the Applicants' objections and concerns were made public. Yet the Department proceeded to select and procure materials from certain selected publishers.

30. **O'Regan J** remarked in **Premier Mpumalanga** (*supra*) at paragraph 41 that : *"In determining what procedural fairness means a court should be slow to impose obligations upon government which inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording other parties an effective opportunity to make representations would flout another important principle, that of procedural fairness..."*. See also **Logbro Properties CC v Bedderson NO and Others** 2003(2) SA 460 (SCA) at 466H-467C.

31. All this has to be seen in the overarching purview of section 217 of the Constitution which provides that when an organ of State in the provincial sphere of government contracts for goods or services, it must do so in accordance with a system which is

fair, equitable, transparent, competitive and cost-effective. The Department's submission that the process followed by the HOD satisfied these requirements is flawed. It is not clear how equity will be achieved by a process which by its very nature has excluded some publishers without any sound basis whatsoever. There is no reason advanced why the centralization was kept under a cloak of secrecy until such a late stage (02/10/2006). There was, without doubt, no transparency at all. The process has not been shown to have been cost effective or to promote competitiveness. The Department's contention that this is not a tender process which has to promote competitiveness is not persuasive. Competitiveness in this context can only be healthy when it is allowed to be determined and driven by the market forces and not by the Department on undisclosed criteria. This process can only be achieved when all publishers are given an equal opportunity to market their products to the schools and then be supported and chosen on the quality of their products. In their own words, captured in their Answering Affidavit, the Department states that schools can still procure the material of their choice by using their inadequate allocated funding or private funds to acquire publications or titles of their choice.

32. A final aspect argued by Mr Jamie was that in the event of the Court granting the order sought by the Publishers then the time-frames previously agreed upon for the delivery of the LTS-Material agreed upon will not be achieved. The process would have to start afresh. The Department reckoned that to allow

the schools to select the materials would leave no time to deal with the orders as teachers who are responsible to select LTS-Material would not be available due to end of the year examinations and the imminent closure of schools by the first or fifth of December 2006. Counsel argued that even if we found that the decision in DRF 13 and Circular 67/2006 were invalid we should exercise our discretion not set them aside as set out by **Erasmus J** in **Chairperson: Standing Tender Com v JFE Sapela Electronics** [2005] 4 All SA 487(SCA) at para 27-28 because the process has progressed substantially.

33. In my view the time-frames are substantially achievable. Mr Ryder has dealt succinctly with the impact and feasibility of reversing the decisions. He stated that more publishers would be incorporated to share the responsibility and the efforts to deliver would be increased. This submission was not contradicted or denied in the papers. I have no reason to doubt that all parties will act speedily and in the best interests of the learners.
34. In the circumstances of this case, I find that the Applicants have established that there are grounds of review for the following reasons:
 - 34.1 There is clear evidence that there was a legitimate expectation which arose from the existence of a regular practice which the Publishers reasonably expected to continue;

- 34.2 The decision of the HOD to cancel the right of the schools to select and procure LTS-Material in respect of grades 8,9 and 11 without giving prior notice to the Publishers was an administrative action which is subject to review;
- 34.3 The HOD failed to adopt a procedurally fair and justifiable process in terms of section 217 of the Constitution read with section 3(2) of PAJA.
35. Having found that the Applicants have established grounds of review as outlined above it follows, in my view, that the decision as contained in Annexure DRF 13 and Circular 67/2006 were invalid and could not be allowed to stand.

Costs

36. It is a fundamental principle that, as a general rule, the party which succeeds should be awarded its costs, and that this rule should not be departed from except on good grounds. See **Pelser v Levy** 1905 TS 466 at 469 and **Price Waterhouse Meyernel v Thoroughbred Breeders Association** 2003 (3) SA 54 (SCA) at 61E. The Department was informed at the meeting of 18 October 2006 of the Publishers' objection against the centralised system and the Annexure DRF 13 decision and what the impact on all Publishers was or would be, yet the Department proceeded with selecting and procuring LTS-Material in respect of the specified grades. The Publishers contend that contrary to what the Department professes, they

made every effort through a meeting and other communications to try not to bring this application but their efforts fell on deaf ears. In the circumstances I find no culpable delay on the part of the Publishers. In fact I agree with the Publishers that this unilateral process which had the strong potential of adversely affecting the learners of the Northern Cape could have been avoided prior to the Department taking the decision to centralise or at the latest at the meeting of 18 October 2006.

ORDER

It is for the foregoing reasons that we made the order set out in paragraph 1 of this judgment.

**BC MOLWANTWA
ACTING JUDGE
NORTHERN CAPE DIVISION**

I have read the judgment of my Sister Molwantwa AJ and concur therein. 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 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 alter of costs saving.

F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

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