



REPUBLIC OF SOUTH AFRICA

25/98

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case nr 101/96

In the matter between:

PREMIER: PROVINCE OF MPUMALANGA

First Appellant

DAVID D MABUZA NO

Second Appellant

and

**DIE HOOFBESTUUR VAN DIE VERENIGING
VAN BESTUURSLIGGAME VAN STAATS-
ONDERSTEUNDE SKOLE: OOS-TRANVAAL**

Respondent

Coram: Van Heerden DCJ, Harms, Scott JJA *et* Melunsky, Farlam
AJJA.

Heard: 6 March 1998

Delivered: 26 March 1998

JUDGMENT

FARLAM AJA.

FARLAM AJA:

The appellants in this matter, the Premier of the Mpumalanga Province (first appellant) and the member of the Executive Council of the province responsible for the provincial department of education (second appellant), appeal with leave of the Court *a quo* against a judgment given against them by **De Klerk J** in the Transvaal Provincial Division on 1 December 1995 in terms of which -

- (1) a decision made by second appellant and approved by the provincial executive council to discontinue paying all school, transport and hostel bursaries to State aided schools (the so-called "Model C schools") in the province of Mpumalanga was set aside with effect from 1 July 1995 (in what follows I shall refer to this decision which was set aside as "second appellant's decision");
- (2) the appellants were directed to continue paying the bursaries until 31 December 1995; and
- (3) second appellant, in his official capacity, was ordered to pay the costs of the application on the scale as between attorney and own client.

The bursaries to which the decision relates were bursaries granted, pursuant to the provisions of section 32 of the Education Affairs Act (House of Assembly), 70 of 1988, to parents of needy children who were attending state-aided schools to enable them to pay (i) the compulsory school fees levied by the governing bodies of the schools concerned, (ii) the cost of using school buses provided by such schools and (iii) the school hostel fees levied by the governing bodies of the schools concerned.

The applicant, at whose instance the judgment appealed against was given, is the respondent in the appeal. It is the Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal (to which I shall hereinafter refer as "the association"). The association itself, in terms of its constitution, does not have legal personality but acts through respondent which, amongst

other things, has the capacity to bring and defend legal proceedings.

The application was brought, according to the founding affidavit, in terms of the provisions of section 7(4)(b)(ii) and/or (iii) and/or (iv) and/or (v) of the Constitution of the Republic of South Africa Act, 200 of 1993 (to which I shall hereinafter refer as “the Interim Constitution”).

Section 7(4) of the Interim Constitution, which is contained in Chapter 3 and which, as the heading indicates, deals with Fundamental Rights, reads as follows:

- “(4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- (b) The relief referred to in paragraph (a) may be sought by -
 - (i) a person acting in his or her own interest;
 - (ii) an association acting in the interest of its members;
 - (iii) a person acting on behalf of another person

- who is not in a position to seek such relief in his or her own name;
- (iv) a person acting as a member of or in the interest of a group or class of persons; or
- (v) a person acting in the public interest.”

Respondent alleged in the founding affidavit that the following rights entrenched in Chapter 3 of the Interim Constitution were infringed or threatened by the second respondent’s decision:

- (a) the rights of children of needy parents to security and not to be subject to neglect (which rights are referred to in section 30(1)(c) and (d) of the Interim Constitution);
- (b) the right of such children that in all matters concerning them their best interests should be paramount (which right is referred to in section 30(3) of the Interim Constitution);
- (c) the rights of the state-aided schools concerned, the needy parents and their children to whom the bursaries in question had been awarded to procedurally fair administrative action (in terms of section 24(b) of the Interim Constitution) which is not in conflict with their legitimate expectation that any decision to discontinue or abolish the bursaries in question would only be made after the necessary consultation; and
- (d) their rights to justifiable administrative action (in terms of

section 24(d) of the Interim Constitution) where their rights are affected or threatened.

It is clear that in approaching the court respondent was acting not in its own interest but in that of its association's members or on behalf of those members or in the interest of a group or class of persons, namely state-aided schools and the parents and pupils who were affected by second respondent's decision, or in the public interest.

Second appellant denied that his decision amounted to an infringement of the constitutional rights relied on by respondent. In so far as it was contended that his decision infringed the rights of respondent's members and those of needy parents and their children in respect of whom bursaries had been granted to procedurally fair administrative action in terms of section 24(b) of the Interim Constitution he raised a number of contentions in two affidavits filed on his behalf.

These contentions related not only to the facts of the case (e.g., as to whether he had given the persons affected by his decision a hearing before making it) but also to the correct interpretation of section 32 of the Education Affairs Act (House of Assembly), 70 of 1988. He also contended that his conduct was justifiable in terms of section 24(d) of the Interim Constitution in so far as any rights which the schools, parents and children might have had were affected thereby.

After the parties' heads of argument were filed their counsel were requested to file additional heads regarding the extent to which this Court can determine the issues in dispute in this appeal in view of the provisions of section 17 of Schedule 6 to the Constitution of the Republic of South Africa, 1996, Act 108 of 1996 (to which I shall hereinafter refer as "the new Constitution") and sections 101(5) and 102(6) of the Interim Constitution.

Section 17 of Schedule 6 to the new Constitution reads as follows:

“17. All proceedings which were pending before a court when the new Constitution took effect must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.”

In addition to the two sub-sections from the Interim Constitution to which the parties’ attention was specifically drawn, it will be appropriate also to set out the wording of certain other sections, viz section 98(2)(a) and (3), section 101(1), (2) and 3(a) and section 102(1), (2), (3), (4), (5) and (12).

Section 98(2)(a) and (3) of the Interim Constitution read as follows:

“(2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including -

- (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
- (b) any dispute over the constitutionality of any executive

or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state ...”

- “(3) The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in section 101(3) and (6).”

(Section 101(6) has no application in this matter).

Section 101(1), (2), (3)(a) and (5) read as follows:

- “(1) There shall be a Supreme Court of South Africa, which shall consist of an Appellate Division and such provincial and local divisions, and with such areas of jurisdiction, as may be prescribed by law.
- (2) Subject to this Constitution, the Supreme Court shall have the jurisdiction, including the inherent jurisdiction, vested in the Supreme Court immediately before the commencement of this Constitution, and any further jurisdiction conferred upon it by this Constitution or by any law.
- (3) Subject to this Constitution, a provincial or local division of the Supreme Court shall, within its area of jurisdiction, have jurisdiction in respect of the following additional matters, namely -
- (a) any alleged violation or threatened violation of any

- fundamental right entrenched in Chapter 3;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state; ...
- (5) The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court.”

Section 102(1), (2), (3), (4), (5), (6) and (12) read as follows :

- “(1) If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.
- (2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the

Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.

- (3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction.
- (4) An appeal shall lie to the Appellate Division against a decision of a provincial or local division in terms of subsection (3).
- (5) If the Appellate Division is able to dispose of an appeal brought in terms of subsection (4), without dealing with any constitutional issue that has been raised, it shall do so.
- (6) If it is necessary for the purposes of disposing of the said appeal for the constitutional issue to be decided, the Appellate Division shall refer such issue to the Constitutional Court for its decision.
- (12) Appeals arising from matters referred to in section 101(3) and which relate to issues of constitutionality shall lie to the Constitutional Court.”

Counsel for both appellants and respondent were *ad idem* that the

interests of justice do not require this appeal to be disposed of as if the

new Constitution had been enacted and Mr *Dunn*, who appeared with Mr *Van der Westhuizen* for appellants, submitted that this Court has no jurisdiction to adjudicate upon the “constitutional issues” arising for decision in the appeal. He contended, however, that there were issues arising in the appeal which were not “constitutional issues” within the meaning of that expression as used in section 102 of the Interim Constitution. He submitted in this regard that the term “constitutional issue” as used in section 102 and the term “issues of constitutionality” in section 102(12) can, although not defined, “only relate to issues contemplated in section 98(2) of the [Interim] Constitution, over which the Constitutional Court [had] exclusive jurisdiction as the court of final instance”.

He contended further that where an appeal against a decision of a court of a provincial division does not relate solely to issues of

constitutionality, section 102(12) of the Interim Constitution is not applicable because section 102(4), read with section 102(3), provides that an appeal shall lie to this Court against a decision of a provincial division in any matter where there are both constitutional and other issues and no issue was referred to the Constitutional Court. He pointed out that in terms of section 102(5) of the Interim Constitution this Court is required to dispose of an appeal brought in terms of 102(4) if it is able to do so without dealing with any constitutional issue that has been raised. He contended, however, that this appeal cannot be disposed of without the constitutional issues which arise for decision having been determined and that this Court will have to refer these issues to the Constitutional Court for its decision.

Mr *Dunn* submitted further that the issues which he contends are “constitutional issues” should be decided by the Constitutional Court

after this Court has decided what he calls the “other issues”, some of which are factual, while the rest are legal issues such as the correct interpretation of section 32 of the Education Affairs Act and various sections of the Exchequer Act, no 66 of 1975. When pressed, Mr *Dunn* had some difficulty in defining the “constitutional issues”. Moreover he was constrained to concede that it is not the function of this Court to make findings on issues which are not material to its decisions.

Mr *Raath* who appeared for respondent submitted, on the other hand, that it may not be necessary for the case ever to be referred to the Constitutional Court. He submitted that even the issues as to whether second appellant’s conduct amounted to procedurally fair or justifiable administrative action can be adjudicated by this Court on the basis of administrative law principles derived from the common law and supplemented, where necessary, through the radiating influence of the

Constitution via section 35(3) of the Interim Constitution.

He submitted further that this Court has an administrative law jurisdiction which is derived from the common law and which is parallel to that arising from section 24 of the Interim Constitution.

Inasmuch as respondent's *locus standi* to institute the application in the court below was derived exclusively from section 7(4) of the Interim Constitution and not from the common law, he had difficulty, when arguing the matter in this Court, in explaining on what basis it was possible for respondent to rely on any such parallel administrative law jurisdiction as this Court may have.

Before the matter was argued the attention of counsel on both sides was drawn to the case of *Rudolph & Another v Commissioner for Inland Revenue*, 1996(2) SA 886 (A). In that case a contention similar to that advanced by Mr *Raath* in this case relating to the existence of a

parallel common law administrative law jurisdiction was considered by

this Court. At 891C **Plewman AJA** dealt with this submission as

follows :

“I am not satisfied that this Court does indeed have a parallel common-law jurisdiction in the circumstances I have outlined. But it seems to me, in any event, that in order to decide whether this Court would have a jurisdiction such as is contended for this Court would be obliged to interpret the Constitution, which it is not entitled to do.”

(When *Rudolph's* case came before the Constitutional Court the question

as to whether this Court has a “parallel” administrative law jurisdiction

derived from the common law did not have to be answered because the

administrative action complained of took place before the Interim

Constitution came into operation and the Constitutional Court found it

“unnecessary to express any view on what the position would have been

had the interim Constitution applied”: see *Rudolph & Another v*

Commissioner for Inland Revenue, 1996(4) SA 552 (CC) at 559 J para [16].)

In the course of argument in this Court Mr *Dunn* applied for a postponement *sine die*, with costs being reserved, so as to enable appellants to approach the Constitutional Court to ascertain whether the appeal should lie to this Court or to the Constitutional Court. He contended that this Court cannot decide on its own jurisdiction if such decision involves the need to interpret the Interim Constitution. He requested this Court to refer the question of its jurisdiction to the Constitutional Court under section 102(6) of the Interim Constitution. On further reflection, however, when it was pointed out to him that this Court appeared only to have the power to refer to the Constitutional Court under section 102(6) a constitutional issue which arose before the provincial division as contemplated by section 102(3) and that the

question of this Court's jurisdiction did not arise in the provincial division, he elected to ask for a postponement as I have indicated.

One of the problems of interpretation to which Mr *Dunn* was referred during his argument flows from the total exclusion of this Court from any "jurisdiction ... over all matters relating to the interpretation, protection and enforcement" of the provisions of the Interim Constitution "including any violation or threatened violation of any fundamental right entrenched in Chapter 3" (see section 98(2) and subparagraph (a) thereof, read with section 98(3) and section 101(3) and (5)).

Cases can arise which are only constitutional in part, either because a plaintiff's claim is based on a constitutional provision and in the alternative on a statutory (non-constitutional) provision or a rule of the common law or because the defence of a defendant (or an accused in a criminal case) is based on several grounds, one or more, (but not all) of

which arises or arise under the Constitution. In such cases there would clearly be "constitutional and other issues" to use the language of section 102(3) of the Interim Constitution. But what happens where a plaintiff or applicant comes to court solely to assert a constitutional right and where its *locus standi* to assert the right depends on constitutional provisions providing for extended *locus standi* which is only available where constitutionally entrenched rights are in issue?

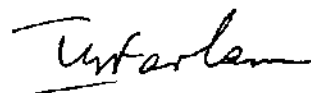
Such a case is, as far as the relief sought is concerned, solely a constitutional matter. Do the provisions in the Interim Constitution excluding this Court from any jurisdiction to interpret, protect or enforce the provisions of the Constitution, including matters relating to alleged violations (actual or threatened) of fundamental rights entrenched in Chapter 3, prohibit this Court from dealing in any way with cases which are solely constitutional in the sense explained above?

The risk exists that this Court might hold that it has the competence to determine the scope of its jurisdiction under the Interim Constitution and that it might dismiss the appeal on the ground of lack of jurisdiction, a decision against which there would be no appeal. It is conceivable, however, that the Constitutional Court may thereafter express its disagreement with such a decision which would lead to a patently unsatisfactory position. It would, accordingly, be sensible for appellants to be enabled to attempt to approach the Constitutional Court.

In my view Mr *Dunn*'s request for a postponement should be granted subject that appellants' being put to terms to take such steps as are necessary to bring this matter to finality within one month of this order, failing which respondent will be entitled to set this matter down for further determination.

The following order is made:

1. The appeal is postponed *sine die*.
2. Costs are reserved.
3. Respondent will be entitled to re-enroll the appeal if the appellants fail to take such steps as are necessary to bring this matter to finality within one month of this order.



I G FARLAM
Acting Judge of Appeal

Van Heerden DCJ)
Harms JA) Concur
Scott JA)
Melunsky AJA)