CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 26/2000

PERMANENT SECRETARY OF THE DEPARTMENT OF EDUCATION, EASTERN CAPE — First Applicant

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, EASTERN CAPE — Second Applicant

versus

ED-U-COLLEGE (P.E.) (SECTION 21) INC. — Respondent

Heard on : 14 September 2000

Decided on : 29 November 2000

JUDGMENT

O'REGAN J:

[1] This is an application for leave to appeal by the Permanent Secretary for the Department of Education and the Member of the Executive Council responsible for education in the Eastern Cape against a judgment of Leach J in the South Eastern Cape High Court. It concerns the payment of subsidies to independent schools by the Department of Education in the Eastern Cape province and, in particular, the reduction of such subsidies in 1997. It also raises questions about the extent to which courts may review budgetary allocations. The respondent, Ed-U-College (P.E.), is an independent school in Port Elizabeth, established in 1995, and registered in terms of section 46 of the South African Schools Act 84 of 1996 (the Schools Act). According to Ed-U-

College, its learners are generally drawn from poor communities and it is heavily reliant on government subsidies.

[2] During 1995 and 1996, the Department of Education in the province of the Eastern Cape paid subsidies to Ed-U-College. The subsidies were calculated according to a formula in terms of which R1 560,00 was paid for each learner in grades 1 - 7, and R2 340,00 for each learner in grades 8 - 12. From April 1997, the amount of the subsidy was reduced to an amount of R700,00 for each learner in grades 1 - 9, and R1 000,00 for each learner in grades 10 - 12.

[3] In July 1998, Ed-U-College issued summons in the High Court against the two applicants in this Court. Ed-U-College claimed payment of subsidies for 1996 which it alleged had not yet been fully paid. It also claimed that the reduction of the subsidies with effect from 1 April 1997 was unlawful and therefore demanded payment of subsidies for 1997 at the rate that had been applicable in 1996. The total amount claimed was R1 252 706,50 plus interest and costs. In the alternative, Ed-U-College sought an order setting aside the decision to reduce the subsidy payment, further alternatively a declaration that it is entitled to receive subsidy payments at the rate payable prior to 1 April 1997. The application before this Court concerned the payment of subsidies for the year 1997 only.

[4] The applicants denied that there was any shortfall in the payment of outstanding subsidies for 1996. They admitted that subsidies had been reduced with effect from 1 April 1997 but pleaded that the reduction in subsidies had taken place as a result of the reduction in the amount of funds appropriated to the Education Department by the Eastern Cape Legislature, that the

reduction was not unlawful, and that the Court had no jurisdiction to hear the matter. They pleaded further that as the additional money Ed-U-College sought to recover had not been appropriated to the Department of Education by the provincial Legislature, they were unable to make payment of the amounts.

[5] When the matter came to trial before the High Court, the parties requested the presiding judge in terms of rule 33(4) of the Uniform Rules of Court[1] to determine certain questions separately from the other issues in the case. Those questions were formulated as follows:

> "1. Whether the amount set aside for private independent schools in the Eastern Cape was a matter of legislation by the Eastern Cape Legislature;

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[1] Rule 33(4) provides that:

> "If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

2. Whether the question of the allocations of money to private independent schools in the Eastern Cape for the financial year April 1997 to March 1998 is a matter on which this Honourable Court has jurisdiction to adjudicate, alternatively should adjudicate?"

As Leach J observed, these questions were not formulated as precisely as they could have been. Nevertheless, Leach J ordered that the questions as formulated be disposed of separately. The evidence of one witness, Edward Trent, chairperson of the Public Accounts Committee of the Eastern Cape Legislature, was led and a bundle of agreed documents was handed in as exhibits to the High Court. Mr Trent's evidence described the process whereby a money bill is enacted in the provincial Legislature. He said that in the 1997 budget about R5,45 billion was allocated to the Department of Education in terms of the provincial Appropriation Act 4 of 1997 (the Appropriation Act). In a detailed explanatory memorandum tabled with the Bill, it was estimated that R8,45 million would be spent on independent schools. This amount was less than the R10,32 million spent on independent schools in the 1996 financial year.

[6] In determining the above questions, Leach J held that even if the allocation of R8,45 million to independent schools constituted a legislative act, the determination of the precise subsidies to be granted to individual independent schools in the light of the overall budget was not a matter decided by the provincial Legislature but by the Member of the Executive Council (MEC) in the exercise of his discretion under section 48(2) of the Schools Act.[2] He held that the

[2] Section 48(2) provides that: "The Member of the Executive Council may, out of funds appropriated by the

determination of actual subsidies to be paid to individual independent schools did not constitute legislative action but administrative action as contemplated by section 33 of the Constitution. He concluded that the determination of the amount of the subsidies to be awarded was a justiciable matter over which the High Court had jurisdiction.

[7] Having concluded that he had jurisdiction over the determination of subsidies to be paid, Leach J then considered whether he should adjudicate upon this question. He concluded that he did not have sufficient information before him to determine this question. He therefore made an order in the following terms:

> "In regard to the issues raised for separate adjudication under Rule 33, I find as follows:
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> > (a) The passing of the Appropriation Bill first presented to the Eastern Cape Legislature on 23 April 1997, which became the Appropriation Act, 1997 and which allocated R8,45 million for private ordinary schools, was a matter of legislation by the Eastern Cape legislature;
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> > (b) The decision to allocate a subsidy of R700,00 in respect of learners in grades 1 to 9 and R1 000,00 in respect of learners in grades 10 to 12 for the period April 1997 to March 1998 constituted an "administrative action" as envisaged by s. 33 of the Constitution;
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> > (c) The question of the allocation of money to private independent schools in the Eastern Cape for the financial year April 1997 to March 1998 is a matter upon which this Court has jurisdiction to adjudicate;

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provincial legislature for that purpose, grant a subsidy to an independent school."

> (d) Whether this Court should adjudicate upon the question in (c) above is a question which cannot be resolved without evidence being led by the parties in regard to the issues relevant thereto raised in the pleadings."

He postponed the matter and reserved the question of costs for later adjudication.

[8] The applicants launched an application for leave to appeal against this order. Their notice of appeal averred amongst other things that Leach J had erred in not finding that the allocation of money to independent schools "was a matter of policy, taken by an elected person, after due deliberation" and that the courts do not have the jurisdiction to adjudicate on the matter, "alternatively, should not adjudicate on the matter". Leach J gave a positive certificate.[3] The applicants then approached this Court and the application for leave to appeal was set down for argument.

[9] There was no material dispute of fact between the parties. It was agreed that the Appropriation Act allocated a lump sum of approximately R5,45 billion to the education department in the Eastern Cape and that the explanatory memorandum attached to the Bill in the Legislature had made it clear that R8,45 million was estimated to be spent on independent schools. Upon receipt of this allocation, it is common cause that the MEC determined the formula for the subsidy amount to be paid uniformly to all independent schools, regardless of

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[3] See Constitutional Court Rules 18(2) and (6).

their respective financial situations, the financial circumstances of their pupils or any other consideration. In terms of this formula an amount of R700,00 was paid to each school in respect of each learner in grades 1 - 9 and R1 000,00 in respect of each learner in grades 10 - 12. This amount was considerably less than had been paid to independent schools in the 1996 year.

[10] The questions that arose for consideration before the High Court were the following:

(a) did the appropriation of approximately R5,45 billion to education in the Appropriation Act constitute a legislative act which is not justiciable under section 33 of the Constitution?

(b) did the appropriation of R8,45 million to independent schools as stipulated in the memorandum of the Act constitute a legislative act which is not justiciable under section 33 of the Constitution?

(c) did the determination of the precise subsidy formula which determines the amount of money to be paid to independent schools constitute a legislative act or other act which is not justiciable under section 33 of the Constitution?

Leach J answered the first two questions in the affirmative, but the third question in the negative. The application for leave to appeal is mainly concerned with the order he made in respect of this third answer. It is necessary in order to answer this question to consider the first two questions as well.

[11] As the respondent bases its claim on the right to administrative justice entrenched in section 33 of the Constitution, it is necessary to determine whether the appropriation of money for, and the determination and allocation of, subsidies constituted administrative action. Applicants relied upon *Fedsure Life Assurance Ltd and Others v Greater Johannesburg*

Transitional Metropolitan Council and Others[4] for their argument that the determination of the subsidies in this case constituted legislative action and not administrative action. In that case this Court was concerned with a series of resolutions passed by local governments in the greater Johannesburg metropolitan area. There were five local government bodies in question: the first was the Greater Johannesburg Transitional Metropolitan Council which formed the supervisory tier of local government in the metropolitan area and the remaining four local governments were the four substructure councils which constituted the lower tier of local government. Each of these five councils had, after negotiation and agreement, agreed to establish a general rate to be paid by all ratepayers throughout the area of greater Johannesburg. The rate was set by resolution in each council at 6,45 cents in the rand on land and rights in land. The five councils had also agreed that the income generated by the general rate in each of the councils would be evenly spread throughout the metropolitan area, resulting in two of the wealthier substructure councils effectively subsidising the two poorer councils as well as the metropolitan council. This scheme of resolutions was challenged on the grounds that it was administrative action which fell

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[4] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC). Although there was disagreement on certain questions, the Court was unanimous in its conclusion on the issues discussed here. See para 117 of the judgment.

foul of the requirements of the Constitution. In this regard, the Court held that the resolutions constituted legislative, not administrative action as contemplated by section 24 of the interim Constitution.[5] The Court reasoned as follows:

> "Whilst s 24 of the interim Constitution no doubt applies to the exercise of powers delegated by a council to its functionaries, it is difficult to see how it can have any application to by-laws made by the council itself. The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the

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[5] Section 24 of the interim Constitution provided as follows:

> "Every person shall have the right to —
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> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
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> (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
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> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
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> (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

electorate. Such decisions must of course be lawful but . . . the requirement of legality exists independently of, and does not depend on, the provisions of section 24(a). The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by 'every person' affected by them on the grounds contemplated by section 24(b). Nor are the provisions of sections 24(c) or (d) applicable to decisions taken by a deliberative legislative assembly. The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the Courts to judge what is relevant in such circumstances. Paragraphs 24(c) and (d) cannot sensibly be applied to such decisions.

The enactment of legislation by an elected local council acting in accordance with the Constitution is, in the ordinary sense of the words, a legislative and not an administrative act."[6] [footnotes omitted]

The Court continued a few paragraphs later:

"It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation. There is no dispute that the rate, the levy and the subsidy under consideration in this case were determined in such a way. It does not seem to us that such action of the municipal legislatures, in resolving to set the rates, to

6 At paras 41 - 42.

> levy the contribution and to pay a subsidy out of public funds, can be classed as administrative action as contemplated by s 24 of the interim Constitution."[7]

The Court thus held that a challenge to these resolutions based on the administrative action provision of the interim Constitution could not succeed. It does not follow from this conclusion that there is no other constitutional basis upon which to challenge such resolutions. However, nothing further need be said on this score in this judgment as the challenge is squarely based on administrative law principles.

[12] Following the reasoning in *Fedsure*, there can be no doubt that the answer to the first question identified in paragraph 10 above must be, as Leach J held, in the affirmative. The allocation of the amount of approximately R5,45 billion to education in this case constituted legislative action and not administrative action as contemplated by section 33 of the Constitution. Indeed, the actual allocation formed part of the legislation itself as the precise amount allocated to education appears in the schedule to the Bill. No challenge based on section 33 of the Constitution may therefore lie in respect of that allocation.

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7 At para 45.

[13] The answer to the second question is less clear. The Appropriation Act itself does not contain any specific allocation in respect of independent schools. It only contains a global allocation in respect of education. However, when the Appropriation Act was tabled in bill form in the provincial Legislature, it was accompanied by a document setting out the estimated expenditure in respect of each specified programme which was equal to the total global allocation.[8] This document is referred to colloquially by parliamentarians as the White Book.[9] It was this document which reflected that an amount of R8,45 million was to be allocated to independent schools in the 1997 financial year, some 18% less than the amount of R10,32 million allocated in the 1996 financial year.

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8 See the definition of "estimates of expenditure" in section 1 of the Provincial Exchequer (Eastern Cape) Act 1 of 1994.

9 Rule 145(2) of the Standing Rules of Procedure of the Eastern Cape Provincial Legislature provides that when an appropriation bill is introduced, "papers" may be tabled. The undisputed evidence before the High Court in this matter was that the White Book constituted such "papers".

[14] The estimates of expenditure set out in the White Book play an important role in the legislative process which leads to the approval of an appropriation bill. Those estimates often form the subject matter of debates in committee and in the Legislature itself[10] and are the basis upon which the votes in the Appropriation Act are decided. Accordingly, the estimates determined and set out in the White Book itself, that is the memorandum that is tabled in the provincial Legislature at the time an appropriation bill is introduced, constitute part of the legislative process and as such are not administrative action contemplated by section 33 of the Constitution. Although it is clear that there are circumstances in which amounts allocated to one programme in the White Book may during the year be transferred to another programme, there is a dispute between the parties as to whether such a transfer may take place in the context of the current case. This however is not a dispute that is necessary to resolve here. All that need be said is that once again I agree with Leach J that the allocation of R8,45 million to independent schools in the estimates of expenditure tabled in the Eastern Cape Legislature in support of the Appropriation Bill in the 1997 financial year did not constitute administrative action as contemplated by section 33 of the Constitution.

[15] The third question to be answered is whether the adoption of a subsidy formula by the MEC and allocations in terms thereof constitute legislation or a policy decision which does not constitute administrative action as contemplated by section 33 of the Constitution. It is clear that the precise subsidy formula was not a matter debated or considered by the provincial Legislature. It is also clear that a variety of options were open to the MEC. For example, he could have

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10 The reduced allocation to independent schools disclosed in the White Book was noted with concern by an opposition party in the Legislature. See *Hansard* Debates of the Legislature of the Province of the Eastern Cape, 4th session, first legislature, Wednesday 14 May 1997 at 40-1.

adopted an across the board subsidy per learner irrespective of the learner's grade; or a means test for the parents of learners in terms of which learners from wealthy families would not have been afforded subsidies; or a means test per school based either on school fees or accumulated reserves. All of these would have produced different results. There was nothing in the Appropriation Act which determined which outcome should be selected. The Appropriation Act merely placed a lid on the amount of money that could be spent.[11] Moreover, the Schools Act expressly confers a discretion upon the MEC in this regard.[12]

[16] In the circumstances, it cannot be argued that the determination of the precise subsidy formula by the MEC constituted legislative action. It was not action taken by the Legislature, nor was it debated or considered by the Legislature, nor did it in any way form part of the legislative process, nor did it follow as a matter of course from the legislation itself. Indeed, the determination took place in the light of a statutory power conferred upon the MEC by the Schools Act which suggests that the MEC has, as long as funds have been appropriated for the

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11 This lid, too, is not absolutely fixed. Additional Appropriation Acts may be passed by the Legislature (and nearly always are, according to Mr Trent's undisputed evidence) when expenditure exceeds the estimates approved in the first Appropriation Act.

12 See section 48(2) of the Schools Act, cited above n 2.

purpose, the power to determine when a subsidy should be granted. The applicants' argument in this respect must therefore be rejected.

[17] The applicants argued, in the alternative, that the exercise of the statutory power by the MEC involved a policy decision which either does not constitute administrative action, or if it does, was administrative action not subject to administrative review in this case. The applicants argued that the power conferred by section 48(2) of the Schools Act was political in nature and therefore its exercise does not constitute administrative action as contemplated by section 33 of the Constitution. In this regard, the applicants relied on the following dictum in the case of *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*:[13]

> "In my view, the learned Judge did not consider sufficiently the fact that s 32 of the Act reserves the decision as to what grants should be made to State-aided schools to the second applicant, a duly elected politician, who is a member of the executive council of the province. By definition, therefore, the decision to be made by the second applicant was not a judicial decision but a political decision to be taken in the light of a range of considerations. . . . [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."

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,

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[13] 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 51.

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 section 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 section 33 as the decision in *Premier, Mpumalanga* illustrates.

[18] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,[14] 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.[15] The Court noted that senior elected members of the executive (such as the President, Cabinet ministers in the national sphere and members of executive councils in the

14 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

15 At para 141.

provincial sphere) exercise different functions according to the Constitution.[16] For example, they implement legislation, they develop and implement policy, and they prepare and initiate legislation. At times the exercise of their functions will involve administrative action and at other times it will not. In particular, the Court held that when such a senior member of the executive is engaged upon the implementation of legislation, that will ordinarily constitute administrative action. However, senior members of the executive also have constitutional responsibilities to develop policy and initiate legislation and the performance of these tasks will generally not constitute administrative action.[17] The Court continued as follows:

> "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above,

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16 Section 85(2) of the Constitution regulates the exercise of national executive authority in the following terms:

> "The President exercises the executive authority, together with the other members of the Cabinet, by —
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
> (b) developing and implementing national policy;
> (c) co-ordinating the functions of state departments and administrations;
> (d) preparing and initiating legislation; and
> (e) performing any other executive function provided for in the Constitution or in national legislation."

Section 125(2) of the Constitution regulates the exercise of provincial executive authority as follows:

> "The Premier exercises the executive authority, together with the other members of the Executive Council, by —
> (a) implementing provincial legislation in the province;
> (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
> (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
> (d) developing and implementing provincial policy;
> (e) co-ordinating the functions of the provincial administration and its departments;
> (f) preparing and initiating provincial legislation; and
> (g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament."

17 See above n 14, at para 142.

> depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."[18] [footnotes omitted]

It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.

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18 At para 143.

[19] If it is decided that the exercise of the statutory power does constitute administrative action, the enquiry is not ended. It is necessary then to determine what the Constitution requires. For example, it will be necessary to decide whether the action has been conducted in a procedurally fair manner, whether it is reasonable and lawful. Determining what procedural fairness and reasonableness require in a given case, will depend, amongst other things, on the nature of the power.[19]

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19 See *Premier, Mpumalanga* above n 13 at para 39; *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 758 I - J; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* above n 14 at para 216; *Janse van Rensburg NO and Another v Minister of Trade and Industry NO and Another* 2000 (11) BCLR 1235 (CC) at para 24.

[20] In order to consider the nature of the power in this case, it will be helpful to consider the decision in the *Premier, Mpumalanga* case referred to above which was concerned with the exercise of a similar power. Indeed, the power under consideration in that case to grant subsidies was formulated in almost identical terms to the power we are considering in this case.[20] But in that case, 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 those schools to whom subsidies had been granted. This 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 whom subsidies had been granted an opportunity to be heard prior to deciding to terminate the subsidies retroactively. In reaching this conclusion, the Court held:

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20 Section 32 of the Education Affairs Act (House of Assembly) 70 of 1988 (the relevant provision in the *Premier, Mpumalanga* case) provided: "The Minister may, out of moneys appropriated for such purpose by the House of Assembly, grant a subsidy to a state-aided school on such basis and subject to such conditions as he may determine."

> "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised 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 parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. . . . Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker."[21]

It is clear, however, from the judgment in *Premier, Mpumalanga* that there was no general duty upon the MEC to afford some opportunity to be heard to all those affected by the exercise of his statutory power. The obligation only arose because, on the facts of that case, a legitimate expectation had arisen which meant that the bursaries could not be cancelled retroactively without an opportunity to be heard being given to those affected by the cancellation.[22] It is important to note that in that case the Court was concerned with a retroactive termination of bursaries already granted. By contrast, in this case, the Court is concerned with a decision to allocate subsidies in circumstances where the

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21 At para 41.

22 At paras 37 – 38.

amount available for distribution has been reduced by the Legislature.

[21] In the present case, section 48(2) of the Schools Act empowers the MEC to grant subsidies to independent schools from money allocated for that purpose by the Legislature. Clearly, therefore, unless money is allocated by the Legislature for this purpose, no subsidy may be granted. The principle of subsidy allocation to independent schools is determined in the first instance by the Legislature. Once it has allocated money for independent schools, the MEC is then empowered to determine the manner of how it is to be spent. Although there are a range of ways in which this power can be exercised, it must always be exercised within the constraints of the budget set by the Legislature. Furthermore, it is not a power which the Legislature would be suited to exercise. The determination of which schools should be afforded subsidies and the allocation of such subsidies are primarily administrative tasks. The determination of the precise criteria or formulae for the grant of subsidies does contain an aspect of policy formulation but it is policy formulation in a narrow rather than a broad sense. The decision apparently constitutes a broad policy decision because it purports to determine how the allocated budget is to be distributed and not the amount to be given to each school. However on closer scrutiny it is in fact not so broad because the MEC determines not only the formula but also in effect the specific allocations to each school. This case may be close to the borderline. However I am persuaded that the source of the power, being the Legislature, the constraints upon its exercise, and its scope point to the conclusion that the exercise of the section 48(2) power constitutes administrative action, not the formulation of policy in the broad sense as suggested by the applicants. This conclusion is consistent with the decision of this Court in *Premier, Mpumalanga* referred to above.

[22] The next question that arises is what requirements of procedural fairness and reasonableness will arise in relation to the exercise of the power. As stated above, it is clear that what this duty requires, varies depending upon the administrative action concerned. Once again this is illustrated by the decision in the *Premier, Mpumalanga* case. In that case, we held that if a legitimate expectation has arisen concerning the grant of subsidies, then any decision to alter or vary subsidies granted must be taken with due regard to the requirements of procedural fairness. Procedural fairness will not require that a right to a hearing be given to all affected persons simply because a decision is to be taken which has the effect of reducing the amount of the annual subsidy to be paid. Subsidies are paid annually and given the precarious financial circumstances of education departments at present, schools and parents cannot assume, in the absence of any undertaking or promise by an education department, that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the Legislature has reduced the amount allocated for distribution.

[23] One final argument made by the applicants requires consideration. They argued that because the Department of Education had spent the full amount of R8,45 million allocated to independent schools as estimated in the White Book and approved in the Legislature's budgetary process, it would not be competent for the High Court or this Court to make an order sounding in money against the applicants. This argument holds no water. If a court concludes that the government owes money to a litigant, the fact that the government has not budgeted for such payment cannot deprive the court of the power to make an appropriate order. Nor will it excuse

the government from an obligation to pay. It is clear, however, that the government's ability to pay may in some cases be a relevant factor both to determining whether a case has been made out in the first place and to determining an appropriate order.[23]

[24] The conclusion I have reached is consistent with that reached by Leach J. The determination of the subsidy formula and the implementation of that formula in terms of section 48(2) of the Schools Act does constitute administrative action as contemplated by section 33. However although Ed-U-College has claimed that a legitimate expectation has arisen in terms of which the MEC was obliged to give them an opportunity to be heard prior to determining the subsidies to be awarded to their schools, that has been denied by the applicants in their plea. The factual issues upon which these averments were based have not yet been fully dealt with in the pleadings and evidence. Leach J therefore correctly concluded that there were insufficient facts on the record to determine whether any legitimate expectation has arisen and what the duty to act fairly would require in the circumstances. In the absence of such facts it is not possible to determine whether the respondent has made out a case for relief or not. In these circumstances, the application for leave to appeal must be dismissed because there are no prospects at all of its success. Leach J's order will therefore stand. The matter may be re-enrolled for hearing in the High Court.

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[23] It will be relevant to the question of whether a case has been made out, particularly in the context of socio-economic rights. See, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) and *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC). See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

[25] The effect of this conclusion is that the respondent has successfully resisted the application for leave to appeal. In the circumstances, the applicants should be ordered to pay the respondent's costs in this Court, such costs to include the costs of two counsel.

Order

1. The application for leave to appeal is dismissed.

2. The applicants are ordered to pay the respondents' costs in this Court, such costs to include the costs of two counsel.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ concur in the judgment of O'Regan J.

For the applicants: PJ de Bruyn SC and LA Schubart instructed by the State Attorney, Port Elizabeth.

For the respondent: RG Buchanan SC and A Beyleveld, instructed by Kaplan Blumberg, Port Elizabeth.