IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1830/2015
DATE HEARD: 11/06/2015
DATE DELIVERED: 26/06/15
REPORTABLE

In the matter between:

TRIPARTITE STEERING COMMITTEE	**FIRST APPLICANT**
THE GOVERNING BODY MASIVUYISWE SECONDARY SCHOOL	**SECOND APPLICANT**
and	
MINISTER OF BASIC EDUCATION	**FIRST RESPONDENT**
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**SECOND RESPONDENT**
MEC FOR EDUCATION: EASTERN CAPE	**THIRD RESPONDENT**
MEC FOR TRANSPORT: EASTERN CAPE	**FOURTH RESPONDENT**
MEC FOR PROVINCIAL PLANNING AND FINANCE: EASTERN CAPE	**FIFTH RESPONDENT**
GOVERNMENT OF THE EASTERN CAPE PROVINCE	**SIXTH RESPONDENT**
ACTING SUPERINTENDENT-GENERAL OF THE EASTERN CAPE DEPARTMENT OF	

EDUCATION **SEVENTH RESPONDENT**

JUDGMENT

PLASKET J

[1] Section 29(1)(a) of the Constitution provides to everyone a fundamental right to basic education. This right has been the subject of much litigation in the Eastern Cape province over the last few years. This case concerns a discrete aspect of education policy that none of the other cases has, to my knowledge, dealt with.

[2] This case concerns, in the first instance, whether the right to basic education includes as part of it a right to be provided with transport to and from school at State expense for those scholars who live a distance from their schools and who cannot afford the cost of that transport. It also concerns the validity of decisions taken by officials of the Eastern Cape Department of Education (the department) to refuse a number of scholars transport to and from school, a failure to provide others with transport after undertaking to do so and whether mandatory relief should be granted in connection with a process currently underway to formulate a new scholar transport policy.

Introduction

[3] The first applicant, the Tripartite Steering Committee, is a body formed by the school governing bodies of three Mdantsane schools, SK Mahlangu Senior Secondary School, Sakhisizwe Senior Secondary School and Mizamo High School. Its main object is to uphold and promote the right to education. The second applicant is the school governing body of Masivuyiswe Secondary School, a school in the Alice area.

[4] The first applicant litigates in its own interest and in the interest of children who attend the three schools; on behalf of school children in the Eastern Cape who do not have access to scholar transport and who cannot act in their own name; in the interest of scholars in the Eastern Cape who qualify for scholar transport but who are not included in the scholar transport program; and in the public interest. In other words, it claims standing to vindicate the right to basic education in terms of ss 38(a), (b), (c) and (d) of the Constitution.[1]

[5] The second applicant brings its application in its own interest and in the public interest. It claims standing, in other words, in terms of ss 38(a) and (d) of the Constitution.

[6] The respondents are part of two spheres of government. The first respondent is the Minister of Basic Education in the national sphere of government and the second respondent is the Government of the Republic of South Africa. They are cited as respondents because, in March 2011, the national government intervened in the administration of the department in terms of s 100(1)(b) of the Constitution[2] and, in so doing, assumed obligations co-extensive with the province in relation to education.[3]

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[1]Section 38 of the Constitution provides:
'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

[2]Section 100(1) provides:
'(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

(a)issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
(b) assuming responsibility for the relevant obligation in that province to the extent necessary to-
(i) maintain essential national standards or meet established minimum standards for the rendering of a service;
(ii) maintain economic unity;
(iii) maintain national security; or
(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.'

[3]*Centre for Child Law & others v Minister of Basic Education & others (National Association of School Governing Bodies as amicus curiae)* [2012] 4 All SA 35 (ECG) paras 5-8.

[7] The third and seventh respondents are the MEC for Education in the province and the department's Acting Superintendent-General. The MEC is cited as the nominal respondent on behalf of the Government of the Eastern Cape Province, the sixth respondent, and the political head of the department. The Acting Superintendent-General is cited as the administrative head of the department.

[8] The fourth respondent, the MEC for Transport in the provincial government is cited as a respondent because the Department of Transport is responsible for the management of the scholar transport program in the province. The fifth respondent, the MEC for Provincial Planning and Finance in the province, is cited as a respondent because of his responsibility to monitor expenditure, in this particular instance in the education sector, in the province.

[9] The relief claimed by the applicants, in an amended notice of motion, takes two forms. In the first instance, they seek orders:

'2. Directing the Respondents to:

2.1 provide scholar transport, within 30 days, to the individual learners identified in **annexure A1** to the notice of motion;

2.2 assess, within 15 days, the 33 learners identified in **annexure A2** who were absent from school when the "Harris report" was compiled, and provide scholar transport to those learners that qualify in terms of the current policy within 30 days;

2.3 provide scholar transport within 30 days to the individual learners identified in **annexure A3**, alternatively, within 15 days, reconsider whether to provide scholar transport to them on the basis of an appropriately flexible approach, having regard to the rights and best interests of the learners listed in **annexure A3**.

3. To the extent necessary, reviewing and setting aside the refusal to provide scholar transport to the individual learners identified in **annexure A1-A3** to the notice of motion, alternatively the failure to take a decision on their applications for scholar transport.'

[10] Annexures A1, A2 and A3 to the notice of motion contain the names of scholars from the four schools represented by the applicants who have been denied scholar transport and who, the applicants assert, should be transported to and from school at State expense.

[11] In the second place, the applicant seeks orders:

‘4. Directing the Respondents to:

4.1 Finalise and publish the criteria used to determine which learners qualify for the learner transport program within 15 days of this order;

4.2 Publish an accurate record/database of learners at public schools in the Eastern Cape who qualify for scholar transport within 30 days of this order, which shall record the names of learners who qualify for transport, the schools they attend, and the routes they must be transported on;

4.3 Make the database available on the department’s website within 30 days of the order, and send a circular via all district offices to all schools informing them that the database may be inspected online, or at their local district office;

4.4 Allow all learners, parents, and public schools in the Eastern Cape 30 days from the date of publication of the database to examine the database and make submissions regarding any scholars which they submit should be included in the scholar transport programme.

4.5 Designate a specific person or office to receive the submissions and publish the person or office’s name and contact details in the circular referred to in paragraph [4.3] above and also on the department’s website;

4.6 Ensure that the person or office referred to in [4.5] above shall consider and investigate all submissions made for learners’ inclusion in the program and take a decision on whether or not they qualify for scholar transport within 30 days of the deadline for making submissions.

4.7 Provide scholar transport to all scholars who qualify for transport within 90 days of the decision being taken to provide transport; and, if the scholars do not qualify, provide written reasons for their exclusion from the program to the learner’s school within 90 days of the date of this order.

4.8 Maintain and updated database of the scholar transport program and remain open for public scrutiny and comment;

4.9 File a report on oath with the Registrar of the court and the applicants’ attorneys every 30 days from the date of this order, setting out all steps taken to comply with the order.

5. Permitting any party to re-enrol the matter, on reasonable notice to all parties and on duly supplemented papers, to seek relief arising from the implementation of this order;

6. Directing the respondents to pay the costs of this application in the event of their opposition, the one paying the other to be absolved, and such costs are to include the costs of two counsel where used and all costs incurred up to the finalisation of this matter and the fulfilment of the order by respondents.’

Scholar transport: a right?

[12] It is a notorious fact, detailed in the papers before me, that in this province large numbers of scholars of all ages live far from the schools they attend and, if they are not provided with transport to and from their schools by the State, they have to walk, come rain or shine, to and from school each day.

[13] Not only is the distance and the time taken to walk it each day a problem. Issues of safety, implicating the fundamental right to freedom and security of the person, including the right to be 'free from all forms of violence from either public or private sources' loom large in our shockingly violent, and often predatory, society.[4]

[14] The result is that a great burden, both physical and psychological, is placed on scholars who are required to walk long distances to school. They are often required to wake extremely early, and only get home late, especially if they engage in extramural activities at school, with the result that less time than would be desirable is available for study, homework and leisure. That, in turn, has a knock-on effect on performance at school, attendance at school, particularly during periods of bad weather, and it increases the dropout rate.

[15] In *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995*[5] the court, in dealing with the interim Constitution's right to basic education[6] held that 'a positive right that basic education be provided for every person' by the State was created and 'not merely a negative right that such a person should not be obstructed in pursuing his or her basic education'.

[16] The importance to the right to basic education was highlighted in *Governing Body of the Juma Musjid Primary School & others v Essay NO & others (Centre for Child Law & another as amici curiae)*[7] in which Nkabinde J stated:

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[4]Constitution, s 12.
[5]*Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), para 9.
[6]Interim Constitution, s 32.
[7]*Governing Body of Juma Musjid Primary School & others v Essay NO & others (Centre for Child Law & another as amici curiae)* 2011 (8) BCLR 761 (CC), para 43.

'Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and world opportunities. To this end, access to school – an important component of the right of basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.'

[17] In judgments of the Eastern Cape High Courts it has been held that the right to basic education has been implicated where posts, both professional and administrative, have not been filled[8] and where school furniture has not been provided to schools.[9] Further afield, it was held by Kollapen J in *Section 27 & others v Minister of Education & another*[10] that the 'provision of learner support material in the form of text books, as may be prescribed is an essential component to the right to basic education'. Elsewhere in the judgment Kollapen J spoke of the compelling argument that the right to basic education, in order to be meaningful, includes 'such issues as infrastructure, learner transport, security at schools, nutrition and such related matters'.[11]

[18] In my view, Kollapen J is correct. The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, text books from which to learn and transport to and from school at State expense in appropriate cases.

[19] Put differently, in instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education. As Pickering J pointed out in *Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department*

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[8] *Centre for Child Law & others v Minister of Basic Education & others (National Association of School Governing Bodies as amicus curiae)* (note 3); *Linkside & others v Minister of Basic Education & others* ECG undated (case no. 3844/13) unreported. See too *Federation of Governing Bodies of South African Schools & others v MEC for the Department of Basic Education & another* ECB 2 March 2011 (case no. 60/11) unreported.
[9] *Madzodzo & others v Minister of Basic Education & others* 2014 (3) SA 441 (ECM).
[10] *Section 27 & others v Minister of Education & another* [2012] 3 All SA 579 (GNP), para 25.
[11] Para 23.

of Transport, Province of the Eastern Cape & others[12] the reality of the situation is that if the provincial government does not provide scholar transport 'many thousands of scholars would simply not be able to attend school'.

The denial of the right

The policy

[20] It is common cause that scholar transport is provided in terms of a policy adopted in 20O3 by the provincial government. This policy was published in the *Provincial Gazette*.[13] Since then various draft policies have been formulated but they do not appear to have been adopted. The policy has never been converted into legislation. It is the framework within which scholar transport as an aspect of s 29 of the Constitution is applied.[14]

[21] The introduction to the policy records the department's concern that 'there are learners who walk long distances to and from school' and that in 'many instances this has resulted in poor attendance by learners; increased dropout rates and, in some remote areas, a start to schooling at a late age by some learners or even failure to obtain any schooling at all'. The department hoped to address these problems by introducing 'a system of subsidised transport or boarding for certain learners'. It committed itself to providing a boarding allowance or transport subsidy 'to all learners who qualify' but, because of financial constraints, it decided that 'priority will be given to learners in the most disadvantaged communities and those very far from the nearest school'. It committed itself to the expansion of the program with the availability of more funds.

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[12] *Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape & others* ECG 4 December 2014 (case no. 3611/13) unreported, para 12.

[13] 'Determination of Policy Relating to Scholar Transport' Provincial Notice No. 67, *Provincial Gazette* 1010 of 12 May 2003.

[14] For a similar situation (although not on all fours with the facts of this case) where the national government acted without the empowerment of ordinary legislation but in direct reliance on its constitutional obligations to people rendered homeless by floods and in accordance with policy, see *Minister of Public Works & others v Kyalami Ridge Environmental Association & another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC), para 51.

[22] Section 4 of the policy defines who qualifies for scholar transport. In answer to the question 'WHO MAY APPLY/WHO QUALIFIES', the policy stated:

'4.1 Learners who live in and attend school in the province of the Eastern Cape

AND

4.2 Who have to walk a distance of 10 km or more to and from school (ie 5 km one way)

OR

Who have to walk a distance of less than 10 km (minimum of 2.5km, but who are in grade R/the Foundation Phase or who have physical disabilities

AND

4.3 Who do not receive a hostel boarding allowance

AND

4.4 Whose parents' gross annual family income in below the relevant salary indicated on the current approved sliding scale

AND

4.5 Who are attending the nearest suitable school.'

[23] Then, in s 5, a procedure is set out for applying for scholar transport. It requires the involvement of parents (who must, for instance, complete an application and hand it to the school), the principal and school governing bodies of schools (who must ensure, for instance, that application forms are given to parents timeously) and district offices of the department, which must, inter alia, receive applications from schools, ensure they are processed and inform schools 'which applications have been approved before the school opens for educators' at the beginning of a year.[15]

[24] Despite the fact that the procedure set out in s 5 is intended to be completed before the commencement of an academic year, provision is made for later applications. Section 5.1.5 provides that the consequence of an incomplete or late application form is that the scholar concerned will not be provided with transport 'until after the form has been processed and approved'. Section 5.2.5, which is to much the same effect, also states that no back-dated payments may be made where application forms were at first incomplete or were handed in late.

[25] The system that is administrated in terms of the policy has been beset with many problems over the years since its inception. In *Trackstar Trading 256 (Pty) Ltd*

[15]Policy, s 5.3.3.

t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape & others,[16] Pickering J described the system as having been 'deficient and ineffective in important respects', stated that corruption and maladministration were rife within the system and observed that '[h]uge sums of public money were being expended without an adequate reliable service being provided'.

[26] That said, however, despite the problems – which the respondents acknowledge – in the region of 56 900 scholars are transported every school day by 1 317 licensed operators at an annual cost, this financial year, of R432 000 000.

[27] A process is underway – and I shall deal with this in due course – to develop a new policy that will overcome problems in the current policy and which, when adopted, may be converted into legislation.

[28] It is not in dispute that applications for scholar transport were made on behalf of the scholars, from the four schools concerned, whose names are listed in annexures A1, A2 and A3 to the notice of motion.

[29] Before turning to the applications, it is necessary to say something about annexures A1, A2 and A3, and the Harris report mentioned in the notice of motion.

[30] After this application was launched, the department engaged the services of Mr Ewan Harris, the chief executive officer of Socio-Econometrix Services, to conduct an *ex post facto* verification of the scholars at the four schools who had applied for scholar transport. The Harris report provides the results of that process. It verified the distance, taken from a central point, from each village or settlement where applicant scholars lived, to their schools, as well as that the scholar attended the school mentioned in the application.

[31] Annexure A1 to the notice of motion contains the names of all of those who the Harris report verified to be scholars of their particular schools and who lived more than five kilometres from their schools (on the basis of the method chosen to measure distance). Those listed in annexure A2 were not present at school when the

[16]Note 12, para 10.

verification process was conducted. Some live more and some less than five kilometres from their schools. Annexure A3 contains the names of those who Harris found to have lived less than five kilometres from their schools. Pursuant to the verification process, it was found that 12 scholars had left the schools that they had attended when applications were made on their behalf. Their names are not part of annexures A1, A2, and A3.

[32] It is necessary to stress three points. First, the Harris report has no bearing on the validity of the decisions concerned in this case because it was an investigation conducted after the decisions were taken in an apparent attempt to find if justification for them existed. Secondly, as far as the distances from the schools are concerned, it is important to bear in mind that the Harris report did not measure from each scholar's home to his or her school but from a central point in each village or settlement to each of the schools. The measurement of distance is thus, at best, a rough guide as to who may or may not fall within the distance requirement of the policy. Thirdly, the Harris report did not consider any factors listed in s 4 of the policy other than distance.

The applications for scholar transport

[33] It is necessary to distinguish between the applications made on behalf of scholars attending the three Mdantsane schools, on the one hand, and those attending Masivuyiswe Secondary School, on the other. I shall deal first with the applications of the Masivuyiswe scholars.

[34] The school governing body was informed on 25 January 2015 that the 26 scholars who had applied for scholar transport would be transported to and from school from April 2015 onwards. This allegation was not denied by the MEC in his answering affidavit. In the result, the applications of all of these scholars, whether they are listed in annexures A1, A2 or A3 were successful. Despite that the department has not provided the transport that it is obliged to provide. The administrative action involved here comprises of the decision taken and its implementation.[17] The decision has been taken but has not been implemented.

[17]Baxter *Administrative Law* at 353.

There is no discretion vested in anyone to decide whether to implement the decision or not. The department is obliged, having taken the decision, to implement it. That being so, it will be necessary to issue a mandamus to compel the department to provide scholar transport to these 26 scholars, and to do so by a particular date, namely the first day of the next term.

[35] In the case of the Mdantsane schools, applications for scholar transport were made on behalf of 146 scholars. According to the deponent to the founding affidavit, representatives of the first applicant were informed verbally by representatives of the department that all of these applications had been refused 'due to insufficient funds'.

[36] In his answering affidavit, the MEC did not confirm that this was the true reason for the refusal. He was silent on the issue. It can, in my view, be rejected as the reason in the light of the reasons given by him. He referred first to the Harris report and asserted, erroneously, I might add, that a 'very substantial portion of the children which form part of the ***"test case"*** brought by the applicants, do not qualify, even in respect of the current ***"policy"***',[18] that the applications were submitted late and no financial information had been furnished as to the means of the parents or guardians of the scholars concerned.

[37] When the MEC dealt with the allegation in the founding affidavit that '[d]espite qualifying for transport in terms of the Department's criteria, the application for all of the children was rejected', he added a further reason: that the applications had not been 'previously verified by the district office of the Department of Education'.

[38] In the replying affidavit, the points are made that the Harris report's method of measuring distance is arbitrary; that the applications submitted by each school, which are attached to the founding affidavit, establish objectively that they were submitted timeously; and that no information concerning financial means was furnished because this was not asked for by the department. This is apparent from the forms attached to the founding affidavit and is thus objectively established. To the extent, therefore, that the MEC's answering affidavit raises disputes of fact, it is not a

[18]This statement is erroneous because according to the Harris report, only 48 scholars out of more than 170 from the four schools were found to have lived less than five kilometres from their schools. The Harris report only considered the distance that scholars lived from their schools.

genuine one in the sense that his version that is in conflict with the documents that have been put up by the applicants is not creditworthy and can be rejected. What is not in dispute, however, is his statement that the department took a decision refusing the applications of all of the scholars from the Mdantsane schools who applied and it did so without verifying any information.

[39] In paragraph 2 of the notice of motion, the applicants seek orders that the department provide transport to those scholars listed in annexure A1; assess the applications of those listed in annexure A2 and then provide transport to those who qualify for it; and provide transport to those listed in annexure A3 or reconsider whether to provide them with transport 'on the basis of an appropriately flexible approach' to the implementation of the policy having regard to their rights and their best interests.

[40] What paragraph 2 seeks, in effect, is the direct enforcement of the right to scholar transport as an aspect of the right to basic education despite the fact that an adverse decision has already been taken by the department. This approach cannot avail the applicants because the adverse decision stands until it is set aside.[19] Furthermore, it has been accepted by the parties – and correctly so, in my view – that the decision was an administrative action. The decision was taken by an organ of state exercising a power that arose implicitly from obligations in terms of the Constitution to promote and fulfil the rights of scholars to basic education through the implementation of the policy adopted for this purpose, and which had adverse effects on the rights of those scholars as well as a direct, external legal effect.[20]

[41] The principle of subsidiarity – that a 'lower-order and more detailed norm' must be relied upon 'in preference to a higher-order and more general norm'[21] – and the logic of giving effect to the legislation that has been enacted to give effect to the

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[19]*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), para 26; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 219 (SCA), paras 19-22; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC), paras 90-92, 100-106.

[20]Promotion of Administrative Justice Act 3 of 2000, s 1. The definition of administrative action includes a decision taken by an organ of state when 'exercising a power in terms of the Constitution or a provincial constitution'.

[21]Hoexter 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 *SALJ* 207 at 221.

right to just administrative action mean that the relief claimed in terms of paragraph 2 of the notice of motion is not competent. The decision must be reviewed in terms of s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). This was recognised by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[22] in which O'Regan J held:

'The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.'

[42] The court was more explicit in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)*,[23] holding:

'A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.'

By the same token, when, as in this case, administrative action has infringed the fundamental rights of the scholars concerned to basic education, they cannot avoid the PAJA by seeking to rely directly on that fundamental right.

[43] I turn now to the review of the decision to refuse scholar transport to all of the scholars from the Mdantsane schools. This is competent relief because paragraph 3 of the notice of motion seeks this relief to 'the extent necessary'. Two issues arise: first, whether grounds of review have been established on the basis of which the decision may be set aside; and, if so, whether the decision ought to be remitted to the department for fresh decisions, or whether I may and should take the decisions that ought to have been taken.

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[22] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), para 25.

[23] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC), para 96. See too on the principle of subsidiarity, *Mazibuko & others v City of Johannesburg & others* 2010 (4) SA 1 (CC), para 73.

[44] A blanket decision was taken, without any verification of information having taken place, to refuse the applications of every scholar from the three Mdantsane schools who applied for scholar transport. The reason given initially – the insufficiency of funds – is clearly not the true reason because the MEC does not rely on it.

[45] It appears to me that the decision falls to be set aside because it was an arbitrary one in the sense that a blanket decision was taken without a consideration of the merits of each applicant's application.[24] No attempt appears to have been made, for instance, to even ascertain who lived further than five kilometres and who lived closer than that distance to their schools. This too is indicative of arbitrariness.[25] The MEC sought to justify the decision on the basis that what he described as a substantial number of scholars did not qualify in terms of the policy but there are two problems with that as a reason. First, it was only when Harris was engaged that any form of verification occurred: the decision-maker did not know, when taking the decision, who qualified and who did not. The information in the Harris report came to light after the fact and so could not be relied upon as a reason. Secondly, even those who did qualify, on the MEC's version, were refused scholar transport, a further indication of arbitrariness.

[46] The MEC relied upon two further reasons, namely that the applications were submitted late and that no information concerning financial need was provided in any of the applications.

[47] The first reason is bad because the policy does not contemplate a late application as a basis for a refusal. To the extent that this is a reason, rather than an ex post facto attempt to justify the decision, the decision is reviewable on the basis that the decision-maker committed a material error of law[26] and also took into account an irrelevant consideration.[27] The second reason – that no financial

[24] *Johannesburg Liquor Licensing Board v Kuhn* 1963 (4) SA 666 (A) at 671C-D.
[25] See *Similela & others v Member of the Executive Council for Education, Province of the Eastern Cape & another* (2001) 22 ILJ 1688 (LC), paras 49-50, 54-55.
[26] The PAJA, s 6(2)(d). See too *Hira & another v Booysen & another* 1992 (4) SA 69 (A).
[27] The PAJA, s 6(2)(e)(iii). See too *The Free Press of Namibia (Pty) Ltd v Cabinet of the Interim Government of South West Africa* 1987 (1) SA 614 (SWA); *Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).

information was provided – is not a good reason either: the application form that the department required applicants to complete does not ask for financial information to be supplied. The decision-maker by taking into account the absence of information that was never required was swayed by an irrelevant consideration.

[48] My conclusion is therefore that the decision to refuse scholar transport to all of those from the three Mdantsane schools who applied is invalid and must be set aside. What I now have to consider is whether I should remit the applications for fresh decisions or take the decisions myself.

[49] Section 8(1)(c) of the PAJA provides:

'The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

. . .

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action.'

[50] The default position, when administrative action is reviewed and set aside, is for the decision to be remitted to the original decision-maker to decide again, with the benefit of the court's findings as to where he or she erred initially. That is consistent with the idea that administrators, and not judges, should take administrative decisions entrusted to them. The reasons are not hard to find: administrators often have expertise and understanding of policy, and they also have the means to investigate and ascertain facts if they have to; judges, on the other hand, lack, more often than not, the institutional competence, the administrative resources and the expertise to take many administrative decisions. The default position is also consistent with the doctrine of the separation of powers that plays a central role in our Constitution (and is central too to administrative law), and the very idea of review

which is concerned with the way in which decisions are taken rather than whether they are 'correct' decisions.[28]

[51] Section 8(1)(c)(ii)(aa) of the PAJA recognises, like the common law does, that there may be circumstances in which justice and equity require a deviation from the default position.[29] In the application of this section, the courts have tended to simply apply the pre-existing common law principles concerning substitution of decisions. So, for instance, if a decision is a foregone conclusion and remittal would be a waste of time; or where the delay occasioned by remittal would cause unjustifiable prejudice to a party; or where the decision-maker has displayed such a level of bad faith or bias that it would be unfair to subject the applicant to that jurisdiction again, a court may take the decision itself.[30]

[52] The first precondition for a court making an administrative decision is, in my view, that the court is in as good a position as the administrator to take the decision.[31] It must, in other words, have all of the facts necessary to do so and if it does not have the necessary information, it cannot take a proper, rational decision.[32]

[53] I am not in a position to take the decision that ought to have been taken in respect of the applications for scholar transport made by the scholars from the three Mdantsane schools. The policy requires a consideration of factors apart from the distance from a scholar's home to his or her school. In particular, these include: the financial means of a scholar's parents or guardian – and that requires information as to the 'gross annual family income' and whether it is 'below the relevant salary indicated on the current approved sliding scale'; and whether applicants attend the

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[28]See Baxter *Administrative Law* at 681; Hoexter *Administrative Law in South Africa* (2 ed) at 552.
[29]See *Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA), para 28.
[30]See for example, the *Gauteng Gambling Board* case (note 29), paras 38-40; *Mlokoti v Amathole District Municipality & another* 2009 (6) SA 354 (E) at 380I-381B; *RHI Joint Venture v Minister of Roads and Public Works & others* 2003 (5) BCLR 544 (Ck), para 49. For cases involving bias and bad faith, see *Mahlaela v De Beer NO* 1986 (4) SA 782 (T) at 795D-F; *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 494F-G; *Pillay v Licensing Officer, Umkomaas & another* 1930 NLR 111 at 117.
[31]For a good example see *Traube v Administrator, Transvaal & others* 1989 (2) SA 396 (T).
[32]*Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape & another* 2007 (6) SA 442 (Ck), para 43.

‘nearest suitable school’, which in turn may require investigation of the subject choices of particular scholars and the subjects offered by particular schools.

[54] I realise that these issues were not investigated when the decision was taken but they will have to be before fresh decisions are taken. So too, I imagine, the distance of each scholar from the nearest suitable school will have to be determined. I say this because, it seems to me, the Harris report’s methodology of measuring distance from a central point in each village or settlement to each of the schools is bound to give inaccurate and arbitrary results. A further issue that makes it impossible for me to take the decisions is the fact that the policy must be applied with a measure of flexibility. That can only be achieved on a case-by-case basis with a full set of facts and relevant circumstances available to the decision-maker. As the policy has been adopted, as I understand it, to guide decision-making as to who requires scholar transport most in the context of the budget allocated for it, an understanding of how far the budget is or is not stretching is also needed, and that is knowledge I most certainly do not have.

[55] Administrators are entitled to have policies that guide how they go about their decision-making. Policy guidelines tend to make for more consistent decision-making. But the courts have stressed that policies cannot be applied rigidly. In *Kemp NO v Van Wyk*,[33] Nugent JA dealt with the issue as follows:

‘A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this Court in *Britten and Others v Pope* 1916 AD 150 and remain applicable today.’

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[33] *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA), para 1. See too *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & another* 2006 (5) SA 483 (SCA), para 19; *National Lotteries Board & others v South African Education and Environment Project* 2012 (4) SA 504 (SCA), para 9.

[56] The policy with which this case is concerned has been formulated in order to guide departmental officials in the identification of those who require scholar transport in order to have access to basic education. Its two main components, it seems to me, are the distance requirement and the financial need requirement.

[57] The distance requirement of five kilometres from school is arbitrary, but understandably and unavoidably so: a distance had to be settled upon and it could just as easily have been four or six kilometres. This element of arbitrariness is one reason why the policy has to be applied flexibly. Otherwise deserving scholars may live 4.9 or 4.8 kilometres from their schools; or a very young scholar who is no longer in grade R may only live 4.7 kilometres from school. In my view, the distance requirement is a guideline which has to be applied flexibly in order to achieve the ultimate purpose of providing scholar transport to all of those who need it. Precisely the same considerations apply to all of the other aspects of the policy. In its application, it must be borne in mind that the policy is not an end in itself but a means to the department's end of meeting its obligations in terms of s 29 of the Constitution.

[58] Having found that the decision to refuse scholar transport to the applicants from the three Mdantsane schools is invalid, and having decided that the matter must be remitted for fresh decisions in terms of the policy, flexibly applied, one further issue remains. That is the time within which fresh decisions must be taken. It seems to me that with at least some of the verification work having been done by Harris, the department can complete the process fairly quickly. I intend ordering that the decisions be taken and communicated to the applicants by 31 July 2015.

The formulation of a new policy

[59] There appears to be a common view that the present policy requires revision. That process is already under way. Mr HL Smith, the chief law advisor in the provincial government is in charge of that process. He has produced a white paper, dated May 2015, containing a draft of the new policy. He has also produced a document setting out timeframes for the process to be completed. It is envisaged that the white paper and its policy will have been considered and, hopefully,

approved by the executive before the end of June 2015, and that the policy will be given legislative form by the end of August 2015.

[60] The applicants seek, in essence, two forms of relief in relation to the adoption of the new policy. In the first place, they seek orders directed at compelling the provincial government to complete the process of adopting the new policy, to publish it and to report to the court on compliance with these duties. Secondly, they seek orders directed at compelling the provincial government to include particular mechanisms and procedures in the policy.

[61] As for the first issue, Mr Buchanan who, together with Mr Ntsaluba, appeared for the respondents was willing to commit the respondents to reporting to the court on the acceptance of the new policy. I shall, in due course, make an order along the lines suggested by him. I may add, however, that that order will only relate to the adoption of the new policy. Once that is in place it can be implemented immediately in the same way as the current policy is implemented. The conversion of the policy into legislation may take a long time, even if Mr Smith believes it will be done by the end of August 2015 and, whilst it is being considered by the legislature, the provincial executive cannot be held to account for any delay that may then occur. I do not intend keeping the department under an obligation to report until that process is completed.

[62] I turn now to the second issue. In paragraph 4 of the notice of motion detailed orders are sought to compel the respondents to compile, publish and maintain a database of scholars who attend public schools in the province who qualify for scholar transport and to compel the respondents to put in place certain procedures in relation to applications and decision-making for scholar transport. In other words, the applicants seek orders that have the effect of dictating the content of the policy that is currently being formulated.

[63] It is trite that the development and formulation of policy lies within the exclusive domain of the executive branch of government. It is not the function of the courts to dictate to the executive what its policy in respect of any of its functions ought to be. The executive is free to choose whatever policies it wishes and the

wisdom of its choices is not a justiciable issue.[34] When, however, policy, once adopted and implemented, has an impact on rights, a court may scrutinise the policy for constitutional compliance.[35]

[64] Whether the provisions that the applicants want to be part of the policy are sensible or not, practical or not, or will be to the ultimate advantage of the scholar transport system or not, are all issues that fall outside of the scope of my functions as a judge. It is for the executive to decide whether they ought to be included in the policy and I am sure that if the applicants make representations in this regard, they will be considered seriously. But the ultimate decision rests with the executive, and not with the court.

[65] In the result, the orders relating to the database and the procedures for the implementation of the new scholar transport policy cannot be granted.

Conclusion

[66] To sum up, the applicants are entitled to orders: (a) directing the respondents to provide scholar transport to the scholars from Masivuyiswe Secondary School who applied for it; (b) reviewing and setting aside the decision to refuse scholar transport to the scholars from the three Mdantsane schools who applied for scholar transport, and remitting these applications to the department for new decisions to be taken: and (c) directing the respondents to report to the court on progress in the adoption of the new scholar transport policy. They are not entitled to the remainder of the relief sought in the notice of motion. As they have been substantially successful, however, they are also entitled to their costs.

[67] I make the following order.

(a) The respondents are directed to provide scholar transport, by 20 July 2015, to the scholars who attend Masivuyiswe Secondary School and whose names appear in annexures A1, A2 and A3 to the notice of motion.

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[34] *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC), para 67; *Helen Suzman Foundation v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC), para 75.
[35] *Minister of Health & others v Treatment Action Campaign & others (No. 2)* 2002 (5) SA 721 (CC), paras 98-99.

(b) The decision to refuse scholar transport to the scholars who attend SK Mahlangu Senior Secondary School, Sakhisizwe Senior Secondary School and Mizamo High School in Mdantsane and whose names are listed in annexures A1, A2 and A3 to the notice of motion is set aside.

(c) The decisions whether to provide scholar transport to the scholars mentioned in paragraph (b) above are remitted to the seventh respondent, who is directed to take and implement new decisions by 31 July 2015 in accordance with this judgment.

(d) The respondents are directed to report to this court, on affidavit, by 14 August 2015 on their progress in adopting a new policy on scholar transport and how and when it either has been or will be published.

(e) The respondents are directed, jointly and severally, to pay the applicants' costs, including the costs of two counsel.

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C Plasket

Judge of the High Court

APPEARANCES

For the applicants: J Brickhill and E Webber instructed by the Legal Resources Centre, Grahamstown

For the respondents: R Buchanan SC and TM Ntsaluba instructed by NN Dullabh and Co, Grahamstown.