



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

APPEAL CASE NO: CA

179/2021

In the matter between:

**THE MEC: DEPARTMENT OF EDUCATION:
EASTERN CAPE PROVINCE**

First Appellant

**THE DISTRICT DIRECTOR: DEPARTMENT OF
EDUCATION SARAH BAARTMAN DISTRICT**

Second

Appellant

BELINDA BOTHA

Third

Appellant

FUNDISWA JIM-WABANIE

Fourth Appellant

and

DOLAN GORDON COHCRANE

First Respondent

JENNIFER MAY HOPE

Second Respondent

ISAAC KELVIN KAYSTER

Third Respondent

TESSA CLAIR NEILL

Fourth Respondent

GRANT GEORGE LEMKE

Fifth Respondent

CHERYL WADDELOW

Sixth Respondent

DAVID ANDREW LANGMEAD

Seventh Respondent

DEREK LIGHT N.O.

Eight Respondent

JOHN DOUGLAS STERN N.O.

Ninth Respondent

KEVIN CHARLES WATERMEYER N.O.

Tenth Respondent

ARLAND JAMES USSHER STANLEY N.O.

Eleventh Respondent

KARIN WALTRAUD MARAIS N.O.

Twelfth Respondent

LIONEL ALEXANDER DE LA HARPE N.O.

Thirteenth Respondent

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....
DATE	SIGNATURE

JUDGMENT

POTGIETER J

Introduction

[1] This appeal, with the leave of the court *a quo*, has been confined to the following issues:

- “(a) Whether the 14 day period referred to in Regulation 19.4 of the Regulations promulgated on 16 October 2017 in Provincial Notice No. 3939 (the Regulations) constitute a procedural time bar and not a substantive time bar;*
- (b) Since the 14 day period in regulation 19.4 had elapsed, whether it was no longer open to the District Electoral Officer (DEO) to resolve the dispute which had been raised;*
- (c) Whether, having regard to the content of the answering affidavit, the DEO should not have been permitted to take longer than the 14 day period to consider and decide upon the complaints which had been received.”*

[2] Pursuant to an agreement reached among the parties, the Respondents are abiding by the decision of this court in respect of the abovesaid confined issues for adjudication on appeal and did not appear at the hearing of the appeal.

The Issue

[3] The matter concerns a dispute that had arisen with regard to the election of the School Governing Body of the Union High School, Graaf-Reinet which is a public school as defined in the South African Schools Act, 84 of 1996 (“the Act”). The First Appellant, the Member of the Executive Council for Education, Eastern Cape Province (“the MEC”), acting under delegated authority, promulgated the Regulations for the Elections of School Governing Bodies for Public Schools (“the Regulations”), in terms of the Act in Provincial Notice No. 3939 in the Provincial Gazette on 16 October 2017.

[4] The Regulations provide, *inter alia*, for a School Electoral Officer (“SEO”) to preside over local elections and to deal with any disputes that arise during the elections. Any unresolved disputes and those arising after finalisation of the elections are dealt with by the District Electoral Officer (“DEO”) who is required to decide the dispute and notify the outcome to the complainant within 14 days of receipt of the dispute. The procedure governing elections is set out in Regulation 19. In the present matter the DEO was unable to finalise the dispute that had arisen within the said 14 day period as provided for in Regulation 19.4. The real issue currently is the proper interpretation of Regulation 19.4 and more specifically whether the 14 day period constitutes a substantive or procedural time-bar provision. In the former event the DEO would be absolutely prohibited from dealing with the dispute after expiry of the 14 day period, while the period could be extended in appropriate circumstances in the latter event. This is encapsulated in the first issue that has been identified above for adjudication on appeal.

Mootness

[5] Before dealing with the merits of the matter, it is necessary to decide whether the appeal has become moot given the fact that the dispute between the parties has effectively been resolved. The determination of the remaining issues identified above cannot conceivably have any direct effect on that dispute.

[6] The issue of mootness is regulated by section 16(2)(a)(i) of the Superior Courts Act, 10 of 2013 which provides as follows in relevant part:

“When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”

[7] The subsection confers a discretion on the court (cf *Absa Bank v Van Rensburg* 2014(4) SA 626 (SCA) dealing with the similarly worded section 21A of the Supreme Court Act, 59 of 1959) which is exercised in favour of deciding the merits of appeals (which are otherwise academic) where important questions of law are at issue which are likely to arise frequently and their determination may be of benefit in other cases.

[8] It has been stated that the test is not whether the judgement might be of interest in a hypothetical future case (*Premier, Provinsie Mpumalanga v Groblerdalse Stadsraad* 1989(3) SA 1136 (SCA) at 1141 D-F). This does not, however, preclude an appeal in a true “test case” where circumstances create a practical need for the court to express its view on a particular point of law of public interest for future guidance which is bound to have a very definite practical effect (*Western Cape Education Department v George* 1998 (3) SA 77 (SCA) at 84D; *Natal Rugby Union v Bold* 1999 (1) SA 432 (SCA) at 445B).

[9] The Supreme Court of Appeal indicated in *Van Staden v Pro-wiz* 2019(4) SA 532 (SCA) at para [5] that:

“An appeal will have a practical effect or result when it raises a discreet issue of public importance, the answer to which would affect matters in the future, and on which the decision of this Court is required.”

[10] Mr Buchanan SC, who appeared on behalf of the Appellants, submitted that the remaining issues to be determined on appeal raise fundamental matters of public importance and will indeed have a direct practical effect. I agree with Counsel’s submission insofar as the first of the three remaining issues being raised on appeal is concerned, namely whether the 14 day period referred to in Regulation 19.4 constitutes a substantive as opposed to a procedural time bar. The proper and effective resolution of disputes concerning School Governing Body elections in this Province is a matter of public importance and impacts directly on the entire school community. The proper

construction to be placed upon Regulation 19.4 is an important issue of law that is likely to arise frequently and that requires clarification and the guidance of the court for the benefit of matters in the future. The appeal in respect of this issue is therefore not moot. In my view, however, the two remaining issues do not fall into the same category and do not warrant being decided in this appeal and I decline to do so. I accordingly proceed to deal with the first issue only.

Nature of the time-bar provision in Regulation 19(4)

[11] Regulation 19 provides for the election of School Governing Bodies and is to the following effect:

“19.1 The school electoral officer shall decide all matters concerned with the nomination and election of nominees in terms of all the categories;

19.2 All the disputes should be reported to the school electoral officer during the process of the elections;

19.3 The school electoral officer shall resolve all disputes to declare elections undisputed. His or her decision during the election is final;

19.4 If the school electoral officer is unable to resolve the dispute the election should be completed and the dispute can then be referred to the district electoral officer within 7 days after the election day. The district electoral officer shall inform the complainant in writing of his or her decision and the reasons therefor within 14 days after the receipt of the complaint;

19.5 In the event that the knowledge of any alleged irregularities only became available after completion of the election process, a dispute can be referred to the district electoral officer. The provisions of Regulation 19(4) and 19(6) will then apply;

19.6 An appeal may be lodged with the MEC within 7 (seven) days, should the complainant not be satisfied with the decision taken by the electoral officer;

19.7 The MEC must inform the complainant in writing of his or her decision and the reasons therefor within 30 (thirty) days of receipt of the appeal.”

[12] It is readily apparent that Regulation 19 envisages that a dispute may be raised with regard to the election of a School Governing Body during as well as after the completion of the elections. Unresolved local disputes are ultimately referred to the District Electoral Officer as are post-election disputes. The decision of the DEO together with the reasons therefor must be communicated in writing to the complainant within 14 days of receipt of the complaint.

[13] We are required to determine the proper interpretation of this time-bar provision. The crisp issue to be decided is whether the 14 day time bar in Regulation 19.4 is substantive in nature in that it constitutes an absolute prohibition against dealing with or finalising a dispute after the 14 day period had expired or is procedural in nature allowing for the 14 day period to be extended upon good cause being shown.

[14] In dealing with this aspect in its judgment, the court *a quo* concluded that Regulation 19.4 contains a substantive time bar which precluded the DEO from dealing with the relevant dispute subsequent to the expiry of the 14 day period. It held as follows in this regard:

“[22] However, given that the SEO did not implement the outcome and that the matter is now in the hands of the DEO, should the DEO be afforded time to consider the complaint?”

[23] It is common knowledge that the DEO received the dispute on 23 March 2021. Acting on the basis of section 19(4) of the regulations, she had fourteen (14) days within which to resolve it and she did not. ...

[24] Even if, for argument sake the dispute fell under section 19(4) of the regulations, the DEO ought to have dealt with it within fourteen days of receipt of the dispute. This she has failed to.” (sic)

[15] The essential distinction between substantive and procedural time bars was recently considered by the Constitutional Court in *Competition Commission v Pickfords Removals 2021(3) SA 1 (CC)* (“*Pickfords Removals*”). The court took as a useful starting point the well-established approach to statutory interpretation set out as follows in *Cool Ideas 1186 CC v Hubbard 2014(4) SA 474 (CC)* at para 28:

“ A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”

[16] The court in *Pickfords Removals* proceeded to point out that in determining the nature of a time-bar provision regard should be had to the purpose served by the provision and an interpretation should be favoured which promotes the spirit, purport and objects of the Bill of Rights.

[17] The purpose of Regulation 19.4 is to create a mechanism to expeditiously, where possible, dispose of unresolved disputes post the election process when the School Electoral Officer is *functus officio*. In the absence of this provision there would be no mechanism to determine post-election disputes. The appeal jurisdiction of the MEC in terms of Regulation 19.6 clearly only applies in respect of decisions by electoral officers and does not entail original as opposed to appellate powers to deal with disputes.

[18] There is a high likelihood in many disputes of the DEO not being able to finalise a dispute within fourteen days as occurred in the present matter. The interpretation that

Regulation 19.4 contains a substantive time bar would render nugatory the purpose of creating a post-election dispute resolution mechanism. On that interpretation the DEO would be unable to finalise an outstanding dispute and should cease all activities upon expiry of the fourteen day period no matter how close the dispute is to finalisation or despite the existence of good cause for the delay in finalising the dispute. Such a result would be absurd. While it is desirable that disputes of this nature be dealt with expeditiously, it is more important and in the public interest for disputes and complaints by interested persons concerning the election of School Governing Bodies affecting as it does, the entire school community, be disposed of and not be left, as it were, hanging in the air. An interpretation favouring the effective disposal of dispute of this nature, is to be preferred to one having the opposite effect and which renders the purpose of the provision ineffectual.

Conclusion

[19] The court *a quo* accordingly erred in concluding that Regulation 19.4 contains a substantive time bar. On a proper interpretation the 14 day period in issue constitutes a procedural time bar which can be extended in appropriate circumstances.

[20] It follows that the appeal in respect of the first issue must succeed. The Appellants are not seeking a costs order. In the result, the following order is made:

- (a) it is declared that the fourteen day period contained in Regulation 19.4 of the Regulations promulgated on 16 October 2017 in Provincial Notice No. 3939, constitutes a procedural time bar which can be extended upon good cause being shown;
- (b) there shall be no order as to costs.

D.O. POTGIETER

JUDGE OF THE HIGH COURT

I agree:

M.J LOWE

JUDGE OF THE HIGH COURT

I agree:

A DA SILVA

ACTING JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the appellants: Adv RG Buchanan SC, instructed by the State Attorney 29 Western Road, Central, Gqeberha c/o Whitesides Attorneys, 53 African Street, Makhanda

For the Respondents: No Appearance

Date of hearing: 08 August 2022

Date of delivery of judgment: 18 October 2022