Governing Body of Bopasetjhaba and Others v Premier of the Free State Province and Others (2238/2003) [2005] ZAFSHC 5 (17 March 2005)

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2238/2003

In the matter between:

THE GOVERNING BODY OF BOPASETJHABA 1st Applicant

RICHARD ALAN MAGAU 2nd Applicant

DANIEL MOLEJANE 3rd Applicant

SIMON NKOE 4th Applicant

MOLATLHEGI WILLIAM DITLHAKANYANE 5th Applicant

GONEEMANG MAGDELINE GIBSON 6th Applicant

JOSEPH PHUTHA 7th Applicant

CHRISTINA MATLA 8th Applicant

MOSENYEHI LETHOPO 9th Applicant

SYLVIA MAHLANKU - TU 10th Applicant

and

THE PREMIER OF THE FREE STATE 1st Respondent

PROVINCE

MEMBER OF THE EXECUTIVE COUNCIL 2nd Respondent

FOR EDUCATION, FREE STATE PROVINCE

THE HEAD OF EDUCATION, FREE STATE 3rd Respondent

PROVINCE

CORAM: VAN COPPENHAGEN J *et* WRIGHT J

JUDGMENT: VAN COPPENHAGEN J *et* WRIGHT J

HEARD ON: 7 MARCH 2005

DELIVERED ON: 17 MARCH 2005

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[1] In the notice of motion the applicants move for an order in the following terms:

"1. The decision of the first, alternatively the second, alternatively, the third respondents determining not to erect school buildings for the Bopasetjhaba Primary School is reviewed and set aside.

2.

2.1 The respondents are ordered to take all such actions as may be necessary to erect the buildings in the current financial year, alternatively the 2004/5 financial year.

ALTERNATIVELY

2.2 The respondents are ordered to grant the applicant a hearing on all relevant issues in regard to any decision not to erect buildings for the Bopasetjhaba Primary School.

3.

3.1 It is declared that the Bopasetjhaba Primary School is not closed, merged or amalgamated, alternatively has not been lawfully closed, merged or amalgamated.

3.2 The decision to close, merge or amalgamate the Bopasetjhaba Primary School is reviewed and set aside

4. The decision to withdraw the functions of the first applicant is reviewed and set aside.

5. Such of the respondents as oppose the relief sought are ordered, jointly and severally the one paying the other to be absolved, to pay the applicant's costs of this application."

[2] The respondents in their opposing affidavit deposed to by one T.N.T. Lioma duly authorised to do so, conceded the relief claimed in paragraphs 3 and 4 of the notice of motion. No concession was made regarding costs which issue remains alive.

[3] The facts relevant, which are mostly common cause and on which the matter must be adjudicated, are uncomplicated. (cf. **NGQUMBA EN 'N ANDER/DAMONS NO EN ANDERE/JOOSTE v STAATSPRESIDENT EN ANDERE** 1988 (4) SA 224 (AA) at 259 C – 261 H)

[4] Bopasetjhaba Primary School in Tumahole (Bopasetjhaba) is a primary school as contemplated in section 1 of the Free State Schools Education Act, Act 2/2000.

First applicant is the governing body of Bopasetjhaba.

For a variety of reasons, the most obvious being a shortage of accommodation, Bopasetjhaba was platooned (the sharing of the same facilities albeit during different periods per day by different schools) with another school to wit Lembede Primary School. Since 2001, the classes of the two schools have simply sat together, leading to classes, in some instances, of over fifty learners. To overcome the untenable situation occasioned by the platooning, the Free State Department of Education over a period of at least a year made repeated and numerous representations to first respondent and other interested parties that a new school with *inter alia* twenty classrooms would be erected for Bopasetjhaba. In fact, by January 2002 the Free State Education Department had decided, and so advised first applicant, to erect buildings for Bopasetjhaba and that construction should commence by March 2003.

However, in a letter by the Member of the Executive Council, i.e. second respondent, dated the 12th March 2003, to the Premier of the Free State, i.e first respondent, it was advised that “the process of merging

the school with Lembede Primary School has been successfully completed".

Shortly thereafter, it is during April 2003, first applicant was advised that it was "withdrawn" and that seventh applicant was suspended as principal of the school.

Subsequent to the service of the application the "withdrawal" of first applicant and the suspension of seventh applicant were revoked.

[5] The only issue remaining is respondents' decision not to erect buildings for Bopasetjhaba.

Applicant contends that the unilateral decision not to erect the buildings should be construed as an "administrative action". So construed, applicant submits that it should at the very least have been afforded the opportunity to be heard before the decision was taken.

[6] Respondent contends that a decision to erect school buildings is the prerogative of the second respondent and the decision not to erect

school buildings likewise. In exercising the prerogative, so respondents contend, a policy, commercial and financial decision was made which was not susceptible to judicial review either under the common law or the provisions of the Promotion of Administrative Justice Act, Act 3/2002.

As rationale for the change in policy respondents refer to the decline in the number of learners at Bopasetjhaba School, thus obviating the need for the construction of a new school with new buildings.

[7] To be judicially reviewable in terms of section 33 of the Constitution, Act 108/1996 and section 3(1) of the Promotion of Administrative Justice Act, Act 3/2002, the decision of respondents, particularly the second respondent, not to erect buildings for Bopasetjhaba School must qualify as an "administrative action". The definition of administrative action in section 1 of Act 3/2002, (hereinafter referred to as "the Act") relevant to the issue under consideration reads:

> "'**Administrative action**' means any decision taken, or any failure to take a decision, by –

1. an organ of state, when –

i. exercising a power in terms of the Constitution or a provincial constitution or

ii. exercising a public power or performing a public function in terms of any legislation; or

2. a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include - ……"

[8] Assuming, without so deciding, that the Provincial Government can be obliged to make schools available, it does not follow that the Provincial Government can be dictated to as to the size and type of facilities that must be made available. The latter function is the prerogative of the MEC for Education (section 12(1) of South African Schools Act, Act 84/1996).

In **PERMANENT SECRETARY OF THE DEPARTMENT OF EDUCATION, EASTERN CAPE v ED-U-COLLEGE (P.E.) INC** 2001 (2) BCLR 118 (CC) at 130 paragraph 21 O'Regan J, in dealing with the argument that

the allocation of subsidies to a school by the MEC should not be considered and interpreted as administrative action, held:

> ‘‘[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."

The decision to have the buildings erected for Bopasetjhaba School and the revocation of that decision by the MEC, it is second respondent, *in casu*, cannot, as far as the status thereof is concerned, be differentiated from the actions of the MEC in the dictum quoted above.

The decision by second respondent not to erect a school building for Bopasetjhaba is clearly or clearly constitutes an administrative action as provided for and contemplated in the Act.

[9] The aforegoing conclusion is not an end in itself; the Constitution dictates that an enquiry into the fairness of the procedure adopted by the

respondents and the reasonableness and lawfulness of the action be undertaken.

[10] Applicants aver that over a period extending from January 2001 to December 2002 in particular second respondent and officials of the Free State Provincial Administration not only presented but confirmed the promise that buildings would be erected for Bopasetjhaba School. These averments by applicants are fully confirmed by the undisputed correspondence and records.

Applicants' averments that they subjectively held the expectation that the undertaking would be honoured, were not disputed.

Adopting the approach by Corbett C J in **ADMINISTRATOR, TRANSVAAL, AND OTHERS v TRAUB AND OTHERS** 1989 (4) SA 731 (AD) 756 who with apparent concurrence referred to the speeches of Lord Fraser and Lord Roskill in **ATTORNEY GENERAL OF HONG KONG v NG YUEN SHIU** 1983 (2) ALL ER 346 (PC) stating:

> ‘‘But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the court will protect his expectation by judicial review as a matter of public law . . . . .Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from *the existence of a regular practise which the claimant can reasonably expect to continue*…….”

it must follow that in view of the promises and representations made in this matter, applicants could have had a legitimate expectation that the buildings would be erected for Bopasetjhaba School (or at the very least would have the legitimate expectation that they would be heard before a decision to the contrary was taken). See **ADMINISTRATOR, TRANSVAAL, AND OTHERS v TRAUB AND OTHERS** (*supra*) at 758 F and, in general, **SOUTH AFRICAN VETERINARY COUNCIL AND ANOTHER v SZYMANSKI** 2003 (4) BCLR 378 (SCA)

[11] Mr. Gough, on behalf of respondents, argued that before a legitimate expectation is created, a right must be effected. He also argued that a benefit or privilege must have been obtained and that before a legitimate expectation can arise the person in question must have

suffered prejudice and that the decision maker must have acted to the person's detriment. The view that a right must be affected (which was evidently the view of Goldstone J in **MOKOENA AND OTHERS v ADMINISTRATOR, TRANSVAAL** 1988 (4) SA 912 (WLD)), was specifically disapproved by Corbett C J in the **TRAUB**-case where he came to the conclusion (on page 754 F) that the respondent's refusal to appoint the applicants did not effect an existing right. His views with regard to the correct understanding of a legitimate expectation appear from the following paragraph on page 758 D – F:

> ''As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.....
>
> In practice the two forms of expectation may be interrelated and even tend to merge. Thus, the person concerned may have a legitimate expectation

that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing."

Special emphasis must be placed on the fact that the privilege or benefit is referred to which could be obtained (which is triggered by a regular practice or a specific representation or promise as in the present application) and to the use of the word and before the words "which it would be unfair to deny such a person without prior consultation or a prior hearing". These considerations dispose of Mr. Gough's submissions and confirm that the consequences of a legitimate expectation are generally limited to the implementation of procedural fairness (as set out in the next paragraph). Compare also the specific wording of the Act where section 3 dealing with "procedurally fair" administrative action, specifically refers to legitimate expectations, in comparison with say section 5 and certain other sections of the Act.

[12] Once a legitimate expectation is established as *in casu*, procedural fairness in relation to administrative action that may affect that expectation is a constitutional and legal imperative. (Per O'Regan J in **PREMIER OF MPUMALANGA AND ANOTHER v EXECUTIVE**

COMMISSIONER OF STATE-AIDED SCHOOLS, EASTERN TRANSVAAL 1994 (1) BCLR 151 (CC) at 164 – 165 paragraph 36.)

[13] In the present matter it is common cause that the decision not to erect the buildings was taken unilaterally and without reference to applicants.

> ‘‘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.”

Per O’Regan in **PREMIER OF MPUMALANGA AND ANOTHER v EXECUTIVE COMMITTEE OF STATE-AIDED SCHOOLS, EASTERN TRANSVAAL,** (*supra*) at page 167 paragraph 41 – an opinion which we respectfully endorse.

As appears from a document dated 31 January 2003 emanating from second respondent’s departments, it was foreseen that proper consultation with the shareholders had to take place before acceptance of the recommendation not to proceed with the building of the school should be implemented.

Applicants' expectations were breached *in casu* by reason of not being afforded the opportunity to be heard.

[14] Advocate Campbell, for applicants, confronted with the realities, i.e. the impracticality or near impossibility of executing of an order enforcing the erection of buildings, conceded that the order as prayed for cannot be justified.

He, however, asked that the decision not to erect buildings for Bopasetjhaba School be rescinded and set aside and that first and second respondent with the exclusion of officials in the Provincial Administration for the Free State be ordered to consider the erection of the buildings for Bopasetjhaba School and in so doing to afford applicants' the opportunity to make representations and to take into account applicants' legitimate expectation that buildings would be erected for Bopasetjhaba School.

[15] The highhanded conduct by at least third respondent to illegally "withdraw" first applicant and illegally suspend seventh applicant, merely

because they endeavoured to protect what they considered to be their rights in a legitimate manner, i.e. requesting intervention and/or mediation by approaching first respondent, the Human Rights Commission and ultimately obtaining legal representation, is in my opinion sufficient reason to doubt the objectivity and the impartiality of second respondent or any of the officials of the Provincial Administration to adjudicate on the relevant issues. A likelihood of prejudging the issue seems on probabilities to be possible.

[16] It seems doubtful whether an order, as requested by Mr. Campbell (see paragraph [14]), can be made in a case like the present where the applicant's legitimate expectation can only entitle him to be heard before the decision is made.

If we are wrong in this respect, section 8(1)(c) of the Act specifically provides that the reviewing court may only in exceptional cases grant an order "substituting or varying the administrative action or correcting a defect resulting from the administrative action". The general principle is set out as follows in **MASAMBA v CHAIRPERSON, W CAPE REGIONAL COMMITTEE, IMMIGRANTS SELECTION BOARD** 2001 (12) BCLR 1239 (C) at 1259 D – G:

‘‘The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to insure that the limits to the exercise of public power are not transgressed, not to give courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State administration is vested in the Legislature, the executive authority in the Executive, and the judicial authority in the courts. The Constitutional Court has held that both the interim and the final Constitutions provide for such a separation of powers and that this separation must be vigilantly upheld, ‘otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined’ (per Chaskalson P in *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at paragraph 26, further paragraphs 21-25 and the other authorities there cited……”

The question whether a departure from the Act is justified, depends on the entire context of the case as well as fairness to all the parties concerned. Factors mentioned by De Ville Judicial Review of Administrative Action in South Africa 2003 pp 336 – 337 include the question of the competence of the court *vis-à-vis* that of the administrator in deciding the matter. See also **COMMISSIONER, COMPETITION COMMISSION v GENERAL COUNCIL OF THE BAR SOUTH AFRICA AND OTHERS** 2002 (6) SA 606 (SCA) paragraph 15 and **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND OTHERS** 2004 (7) BCLR 687 (CC) paragraph 48.

The question of the courts ability to decide the question on the (in various respects disputed) material before it is decisive against applicants' contentions in this matter.

[17] No reason suggests why second to tenth applicant should not be awarded their costs up to the stage when the opposing affidavit conceding their claims was filed.

Likewise no reason suggests itself why first applicant should, as substantially successful party, not be entitled to its costs.

[18] The following order to issue:

1. First, second and third respondents are ordered, jointly and severally, to pay second to and inclusive of tenth applicants' costs up to the stage of the filing of the opposing affidavit.

18.2 The decision by second and third respondents or either of them not to erect school buildings for Bopasetjhaba Primary School be rescinded and is set aside.

3. First and second respondent, with the exclusion of any official in the Free State Provincial Administration, be ordered to consider the erection of school buildings for Bopasetjhaba School and in so doing to afford first applicant and any interested party to make representations with regard to its decision.

3. Second and third respondents to pay the costs of the first applicant.

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G. VAN COPPENHAGEN, J

I concur.

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G.F. WRIGHT, J

On behalf of applicants: Adv. J. Campbell

Instructed by:

c/o Horn & Van Rensburg

BLOEMFONTEIN

On behalf of respondents: Prok. I.P. Gough

Instructed by:

c/o State Attorney

BLOEMFONTEIN