IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.: 1133/13.

In the matter between:

FEDSAS **Applicant**

and

THE MEC OF DEPARTMENT OF EDUCATION AND TRAINING, N.W. PROVINCE **1ST Respondent**

THE HEAD OF THE DEPARTMENT OF EDUCATION AND TRAINING, N.W. PROVINCE **2ND Respondent**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**13 MARCH 2014**
DATE OF JUDGMENT	**:**	**01 AUGUST 2014**
FOR THE PLAINTIFF	**:**	**Adv. J. du Toit (SC)**
FOR THE RESPONDENT	**:**	**Adv. M Khoza (SC) (with Him Adv S. Senatle**

JUDGMENT

KGOELE J:

A. INTRODUCTION

[1] The applicant is the Federation of Governing Bodies of South African Schools (**FEDSAS**), a national representative organisation for School Governing Bodies (**SGB's**) constituted in terms of the South African Schools Act 84 of 1996 as amended (**SASA**). It operates in the nine provinces. Among its members nationwide, more than 140 represent public schools in the North West Province, whilst 43 of them provide accommodation for learners in hostels. The applicant further contends that it represent the SGB's of the public schools providing accommodation in hostels to learners in the North West Province, and the interests of parents and learners of the North West Province public schools as groups or classes as envisaged in Section 38 (c) of the Constitution of the Republic of South Africa (**The Constitution**).

[2] The first respondent is the Member of the Executive Council, of the Department of Education and Training North West Province **(the MEC)** and the second respondent, the Head of Department of Education and Training, North West Province **(HOD)**.

B. BACKGROUND

[3] Since the advert of the South African Schools Act 84 of 1996 (**SASA)** on 1 January 2007, SGB's in the North West Province governed and managed hostels in those instances where schools were equipped with hostels facilities and chose to utilise the immovable property under their control as hostels. They did so because of the power

invested in them by virtue of Section 20 (1) of SASA and more particularly Section 20 (1) (g).

[4] On 8 September 2011 the first respondent published draft regulations regarding the administration of public schools' hostels (**the regulations**) for comment. The said draft regulations are attached to the applicant's papers as annexure "PC3". When the first respondent invited some comments from various stakeholders, the applicant responded thereto and raised some concerns regarding the validity of the regulations.

[5] On 31 August 2012 the first respondent promulgated these regulations in the North West Extraordinary Provincial Gazette no 7031. This was distributed on 1 October 2012 by the Acting Director: Legal Services of the Department of Education and Training, North West Province (**ADLS**) to all Executive District Managers and District Directors, accompanied by the instruction that 2013 had to be used to implement the measures, for full compliance by 2014. The applicant alleges that it only became aware of the actual promulgation of the regulations when members of the applicant informed it on 19 October 2012.

[6] The regulations did not address many of the objections to the draft regulations raised by the applicant in the letter they wrote to the MEC, in particular, it ignored the critically important issue, namely the question as to what the source of the first respondent's power was to make the regulations in question.

[7] On 25 October 2012 the applicant's attorney wrote to the first respondent to raise the applicant's concerns regarding the validity of

the regulations. A copy of the letter was forwarded to the Acting Director Legal Services. It was apparent that a material dispute was at hand. The applicant subsequently consulted its members in the North West Province affected by the regulations. Counsel's opinion was obtained by 8 April 2013, as a result of which the applicant considered it prudent to resume the correspondence with the first respondent. Applicant's attorneys accordingly wrote a letter of demand dated 15 April 2013 to the first respondent insisting on the withdrawal of the regulations. The first respondent responded to the letter by seeking time to consider the matter.

[8] Not having heard anything from the first respondent or the ADLS, the applicant's attorneys wrote another letter on 16 May 2013 reminding the first respondent that a response was due. There was no reply forthcoming from the MEC. The applicant, seeing that the practical implementation of the regulations was imminent, launched the present applicant.

[9] According to Schedule 2 of these regulations the application and purpose of the regulations is to regulate the administration and control of hostels, the admission of learners to hostels, disciplinary procedures and matters related thereto. Schedule 3 thereof which deals with governance and administration of hostels provides that the governance of a hostel is vested in the governing body of the school which shall perform its functions and obligations in accordance with the provisions of these regulations. Amongst matters related thereto the regulations deals with hostel fees, prohibited practices, suspension from hostels etc.

[10] The application accordingly relates to the validity of the regulations which the applicant contends are unlawful in their entirety because:-

10.1 they were promulgated without the necessary authority and also fail to pass the test of constitutional legality;

10.2 alternatively, should there be a finding that the first respondent was so empowered, the regulations are in conflict with the provisions of SASA, being national legislation of the kind described in Section 146(2) of the Constitution of the Republic of South Africa (the Constitution) and to that extent are *void* and/or unenforceable;

10.3 as a further alternative, that several individual regulations are *Ultra vires* and invalid and require to be struck out;

10.4 as a further alternative to the above, that the regulations are invalid for, *inter alia*, one or more or all of the following grounds if reference is had to Section 6 of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**):-

10.4.1 6(2)(a)(i) – administrative action not authorised by the empowering provisions;

10.4.2 6(2)(a)(ii) - acting under delegation of power which was not authorised by the empowering provisions;

10.4.3 6(2)(f)(i) - the action itself contravenes a law or is not authorised by the empowering provision;

10.4.4 6(2)(1) - the action is otherwise unconstitutional or unlawful at least to the extent that it does not comply with the imperatives of SASA.

In the event of this court holding that relief is to be had under the provisions of PAJA, the applicant further seek for an order directing that the 180 days period referred to in s 7(1) of PAJA be extended in terms of the provisions of Section 9 (1) thereof.

[11] The first respondent opposed this application and maintains that she had the necessary authority in terms of SASA and the North West Schools Act No 03 of 1998 (**The Provincial Act**) to promulgate this regulations, alternatively, she had a general constitutional duty and/or obligation to issue regulations in facilitating access to education as envisaged in the Constitution and SASA. Furthermore, that all the regulations in question are valid and must be given the necessary force of the law.

C. ANALYSIS

South African Schools Act 84 of 1996

[12] In terms of section 12 (1) of SASA the first respondent must provide public schools for the education of learners out of funds appropriated by the Provincial Legislature. Section 12 (2) thereof provides that the provision of public schools referred to in Section12 (1) may include the provision of hostels for the residential accommodation of learners. According to Senior Advocate Khoza who appeared on behalf of the respondents, he contended that it is clear that this forms part and parcel of the broader State obligation to make basic education available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress. Section 12(1) and (2) of SASA, therefore, contemplates that there can be public schools

with hostel facilities. Taking the context into account, he submitted, it is clear that the provision of hostels is an integral part of the educational obligation that rest on the State. Thus a public school to which the provisions of SASA are applicable, includes also those with hostels. To want to treat hostels separately from the school, he submitted, is incorrect. This, according to him, empowers the MEC to be able to regulate the hostels facilities it provides.

[13] In terms of section 13(3) of SASA, the right of a public school to immoveable property owned by the State may indeed be restricted by an MEC in cases where the immoveable property is not utilised by the school in the interests of education. According to Advocate Khoza Senior, this section should be interpreted to include "fully utilised" and utilised in the "best interests" of prospective learners who are children in terms of the Constitution. This according to him entails the duty to ensure the children's safety while in those hostels. He urged this Court to remember that should any harm befall these children, it will be the Provincial Government as represented by the respondents who will be liable as they owe these children a duty to prevent faceable harm to them. Accordingly, he argued that, the MEC has power to promulgate these regulations because the right to close hostels is inherent of the obligations she has towards these children.

[14] In terms of section 20(1) (g) of SASA, the governing body of a public school must administer and control the school's property, buildings and grounds occupied by the school, including school hostels. However, the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of the Department in

terms of any law or policy. Senior Advocate Khoza submitted further that the regulations are the result of a decision taken by the MEC in terms of this section, the Provincial Act and the General Policy of the Provincial Government to foster the right of the child in hostel to access quality education.

[15] In further developing this argument Senior Advocate Khoza on behalf of the respondent emphasized that:-

15.1 The avowed purpose of the SASA is to give effect to the Constitutional right to education. Its preamble records that the achievement of democracy has consigned to history of the past system of education which was based on racial inequality and segregation, and that the country requires a new national system for schools which will redress past injustices in the provision of education and will provide education of a progressively high quality for all learners. The new education system must lay a foundation for the development of all people's talents and capabilities and advance the democratic transformation of society, and combat racism, sexism, unfair discrimination, and contribute to the eradication of poverty. The preamble also expresses the intent to advance diverse cultures and languages and to uphold the rights of learners, parents and educators. It also makes plain that the statute aims at making parents and educators accept the responsibility for the organisation, governance and funding of schools in partnership with the State. He submitted that it is their view that SASA must be interpreted not only purposively but also within the context of its miellieu;

15.2 Its purpose is clearly set out in its preamble. Its context can be gleaned from its provisions. Viewed purposively and contextually it is clear that SASA intended to usher in a new approach to education. It intends to make a complete break with the past by obliging the State to take full charge of the education and the educational needs of a child. It is through this Act that the State seeks to ensure that all barriers that can impede the educational endeavour are removed. It would not be peering excessively into its language if this Court were to find that the regulations were indicated in terms of this Act;

15.3 To seek to confine it to the provision of educational resources in the classroom would, in our respectful submission, be putting more emphasis on matters of practical pedagogy and overlooking intangible factors that form an important part of the educational endeavour. In the **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)** case **Sachs J** went on to state that:

> "…What goes on at schools can have direct implications for the cultural personality and development of groups spreading far beyond the boundary fences of the schools themselves"

15.4 It is the first respondent's submission that the Regulations, viewed in context, enhance rather than hinder this endeavour. The Provincial Governance decision to regulate the hostels it provides and funds find support not only in the Constitution and the Provincial Act but also in SASA.

[16] Senior Counsel Johan du Toit on behalf of the applicant on the contrary submitted that SASA does not give the MEC power to regulate public schools hostels in the North West Province. He maintained that the legislature ostensibly recognised that arrangements for the accommodation of learners did not require intervention by provincial departments of education, hence the allocation of the power to SGBs and the deliberate negation of such powers to any sphere of government, save to the limited extent of the use of school property for other purposes upon a decision made by an MEC. The power to make a decision in terms of Section 20(1) (g) of SASA referred to by the respondent's counsel must derive from a law or policy. The MEC's purported intervention in the management of hostels does not constitute a decision in terms of a law or policy, and can accordingly be discounted for purposes hereof.

[17] Senior Counsel Johan du Toit further emphasized that there is one very important qualification which must not be lost sight of on the original legislative powers that provincial legislatures have when it comes to education legislation which is Section 2(3) of SASA (which is national legislation). It provides that: *"[n]othing in this Act prevents a provincial legislature from enacting legislation for school education in a province in accordance with the Constitution and this Act"*. According to him, he submitted that, it is quite obvious that provincial legislation must be in accordance with the Constitution. Equally, provincial education Acts must be 'in accordance with' SASA: it must be in agreement with or in conformity with SASA. This provision curtails the power of provincial legislatures considerably. So, if SASA is silent about the management of hostels, so should the Provincial Act be. If SASA has something to say on the management of hostels, the Provincial Act may say something too, as

long as it does not deviate from the provisions of SASA. By logical inference, applied to the facts of this matter, he argued that the Provincial Act cannot, on the one hand, be in conformance with SASA but on the other authorise its MEC to do something which is not in conformance with SASA. It would simply amount to an unlawful authorisation with concomitant unlawful regulations which turned out to be not in conformance with SASA. According to him this is the crux of the applicant's case and submitted further that on this ground alone the regulations should be set aside in its entirety.

[18] In addition to the above applicant's counsel reiterated that:- National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if certain conditions are met: That is the case if, amongst others, the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing norms and standards; frameworks; or national policies. To further substantiate and elaborate on this he maintained that:-

18.1 SASA is an Act as contemplated in section 146(2) since:

18.1.1 It expressly determines that uniformity of its application is required across the nation;

18.1.2 It indeed makes provision for the determination of norms and standards and/or frameworks and/or national policies;

18.1.3 Its preamble makes it abundantly clear that it is intended to operate nationally and that it provides for norms and standards to be applied nationally.

18.1.4 SASA accordingly *prima facie* prevails over the Provincial Act where there are any differences between the two Acts.

[19] Applicant's counsel urged this court to also have regard to certain pivotal provisions of SASA as part of the interpretation exercise: According to him, he submitted that despite its long title and considerable wide-ranging content, it does not deal with the organisation, control or management of hostels or their administration. The furthest it goes in relation to hostels, is the following:

19.1 It prohibits initiation practices against a learner at a school or in a hostel accommodating learners of a school;

19.2 An MEC such as the first respondent is permitted (but not obliged) to provide the physical facility of hostels at public schools, but in no sense does it allow an MEC to govern the hostels so created in any manner other than the limited scope for intervention provided by section 20(1)(g) discussed above;

19.3 An SGB of a school with hostel facilities is empowered to administer and control, i.e. govern, a hostel - in fact if they do not do it, no provision has been made in SASA for anybody else performing the function;

19.4 By section 21(1) SASA a SGB may apply to the HOD for the authority to maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable. This provision carries with it the clear implication that the state's involvement in hostels amount to the maintenance and improvement of the physical structures until that function had been allocated to schools. The school would have had control of the immovable property in any event, by virtue of the provisions of section 20(1) (g).

[20] He further maintained that in view of the innovative manner in which the MEC sought to redefine concepts provided for in SASA, certain definitions in SASA ought to be emphasised:

20.1 **'public school'** means a school contemplated in Chapter 3 – and that does not include a hostel;

20.2 **'school'** means a public school or an independent school which enrols learners in one or more grades from grade R (Reception) to grade twelve;

20.3 **'learner'** means any person receiving education or obliged to receive education in terms of SASA (and not persons residing in hostels);

20.4 **'school activity'** means any official educational, cultural, recreational or social activity of the school within or outside the

school premises – and that does not include the provision of accommodation;

[21] According to him an important directive for interpreting SASA and the Provincial Act, is the provisions of section 2(3) which were discussed above and further a Code of Conduct which is provided for in section 8 and section 9 that deals with suspension and expulsion from a public school (and not from a hostel at all).

[22] He concluded by submitting that Section 61 provides for the Minister making regulations over a broad spectrum of education activities. There is no provision remotely authorising the making of any regulations regarding hostels. If the Minister does not have such power, any such power purported to be granted by a Provincial Act to an MEC, will not conform to SASA and will hence be inoperative in terms of section 150 of the Constitution.

[23] In addition to the submissions made above that the pre-requisite for valid regulation-making on the topic of hostels are absent and therefore perforce invalid, counsel for the applicant submitted that every individual regulation, promulgated by the MEC but for a portion of regulation 3(1) is contrary to Section 3(2) and 20(1) of SASA and accordingly unlawfully promulgated and of no force and effect.

[24] Before dealing with sections 27 of the Provincial Act or section 9(3) of SASA, it is prudent to have regard to the principles underlying the interpretation of statutes. The approach to the interpretation of statutory instruments has recently been authoritatively and comprehensively dealt with by the Supreme Court of Appeal in **Natal**

Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593(SCA). The following paragraph from this case deserves emphasis:

> [18] … The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[25] Regulations cannot be used '*to enlarge the meaning*' of a statute: **Moodley and Others v Minister of Education and Culture, House of Delegates & Another 1989 (3) SA 221 (A), 233 E-F** (**Hoexter JA**: and see also **Mvabasa v Commissioner of Prison, Ciskei and**

Another 1988 (4) SA 348 (Ck), 351E-352D (right conferred by an Act or another Act).

[26] In the case of **Head of Department of Mpumalanga Education and Another vs Hoer Skool Ermelo and Another 2010 (2) SA 415 (CC) at para 49(b)** the Constitutional Court said:-

> "Rather, a functionary may intervene in a school governing bodies making rule or depart from a school governing bodies policy making rule or depart from a school governing bodies policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation" [My own Emphasis]

[27] An SGB of a school with hostel facilities is empowered to administer and control a hostel (section 20, and in particular section 20(1)(g)of SASA). This fact is not disputed by the respondents but the respondent contends that this does not prevent or restrict the MEC to take any action in the enhancement of the Constitutional and Legislative mandate placed on the State to facilitate the right to basic education. A thorough analysis of the SASA as correctly submitted by the applicant's counsel reveals that it deals with hostels only in the following four aspects:-

- In Section 10 A, which deals with "Prohibition of initiation practices"
- In Section 12(2) which permissively opens ways for an MEC to provide for hostels
- In Section 20(1)(g) which places on obligation on SGB to administer and control a hostel

- In Section 21(1)(a) which provides for an SGB applying to the Head of Department for authority to maintain and improve the school's property buildings, grounds and hostels where applicable.

[28] When looking at the wording of Section 12(2) of SASA, it is clear that it is an enabling provision to ensure that the MECs would have power to provide hostels – nothing more and nothing less. This section as correctly submitted by the applicant's counsel, has to do with physical supply of hostels and nothing to do with the control and administration of hostels in any sense. The control and administration of hostels deals with mainly the governance thereof. This interpretation was endorsed by **Pickering J** in the matter of **Tshona v Victoria Girls' High School and Others [2006] ZAECHC 49 (17 October 2006)**. In my view, the legislature deliberately placed the governing bodies with the exclusive powers to govern the hostels in schools. The words used by the legislature in section 20(1)(g) is "**must**", which signifies that it is peremptory, and further that it imposes an obligation upon them to do that. It never was the MEC or HOD's function or contemplated to have been their function in terms of SASA.

[29] The phrases "governance", "administer" and "control" are not defined in SASA and the Provincial Act therefore the ordinary meaning should be adopted. The definition of "govern" is very important in determining the meaning of governance. Govern means to regulate the affairs of (body of persons) (**The Shorter Oxford English Dictionary on Historical principles Volume 1 page 874**). Governance is defined as the action or manner of governing. (**The Shorter Oxford English Dictionary on Historical principles Volume 1 page 874**) The

definition of Administration provides guidance which means management. The word administer can be defined to mean to manage. (**The Shorter Oxford English Dictionary on Historical principles Volume 1 page 25**). Control means to exercise restraint or direction upon the free action of; dominate command. (**The Shorter Oxford English Dictionary on Historical principles Volume 1 page 416**). The regulations attempt to restrict the powers of the SGBs. The effect of the regulation is that the MEC now has appropriated the power to govern, administer and control the school hostels.

[30] **Snyder JA** in the **Hoerskool Ermelo and Another** matter quoted above**,** made the following point regarding the appropriation of powers allocated to the Governing Body in terms of SASA:

> "[21] The Act authorises only the governing body to determine the language policy of an existing school, and nobody else. As nobody else is empowered to exercise that function, it is inconceivable that section 22 was intended to give the head of department the powers to withdraw that function, albeit on reasonable grounds, and appoint somebody else to perform it, without saying so explicitly"

It should be note that **Hoerskool Ermelo and Another** matter dealt with the powers to determine language policy. In my view, the same sentiments are applicable in the present case. The functions allocated to the Governing Body in terms of section 20 are allocated to the governing body, and nobody else.

[31] Section 9 of SASA deals with the suspension and expulsion from public school. Sub-section 9(3) reads:-

> "(3) The Member of the Executive Council must determine by notice in the Provincial Gazette –

(a) The behaviour of a learner at a public school which may constitute serious misconduct;
(b) Disciplinary proceedings to be followed in such cases
(c) Provisions of due process safe guarding the interest of the learners and any other party involved in disciplinary proceedings"

This sub-section also does not in any manner provide the scope for the regulation's assertion that they are authorised by it. The plain language thereof does not allow for such an inference or interpretation. It has nothing to do with discipline in hostels. At best, Section 9(3) permits a "notice" and not a "regulation" – to be issued in respect of the matters it pertains to. Discipline of hostel dwellers become subject to the governance of an SGB not because of the provisions of Section 9, but as a consequence of the SGB's powers in terms of Section 20(1)(g). The respondent's reliance on Section 9(3) is also misguided and unjustified to the extent that it is employed as a key to the authority of the first respondent to promulgate the regulations here in question.

[32] If one examines the regulations themselves, one is similarly driven to conclude that the MEC was not possessed of the necessary authority to make them. In particular, in regulation 2(1) the purposes of the regulations is stated as follows:- *regulate the administration and control of hostels, the admission of learners to hostels, disciplinary measures and matters related thereto*. However, Section 9(3) of the South African Schools Act does not empower the MEC to regulate on any of these matters indicated herein including disciplinary measures in hostels.

The North West Schools Education Act 03 of 1998 (the Provincial Act)

[33] In terms of section 27 of the Provincial Act the following is provided:

> "(1) The Member of the Executive Council in consultation with the Head of the Department *may make regulations which are not inconsistent with any law*, as to -
>
> (a) Any matter which shall or may be prescribed by a regulation under this Act;
>
> (b) *Any matter which the Member of the Executive Council may deed necessary or expedient to prescribe in order to achieve the objectives of this Act; and*
>
> (c) Without restricting the generality of the aforementioned ……" (Emphasis added)

[34] At paragraphs 3-17 of its answering affidavit the first respondent deals with challenges faced by learners who live far from public schools and are unable to access after school support for their educational needs. It also highlight the problems posed by expulsion of learners from hostels "which often lead to drop out of school; the charging of high and exorbitant boarding fees and school fees, as well serious discrepancies in the way school fees and boarding fees are charged". The first respondent further highlighted the incapacity of the school governing bodies as well as discrimination experienced in hostels. Senior Advocate Khoza argued that governance of hostels, especially if conducted in an unfair and/or discriminatory manner may lead to the denial of the right guaranteed by the Constitution. A child dismissed from a hostel may result in him/her being unable to obtain education.

Accordingly, he submitted, it falls within the purview of "*any matter which the [First Respondent] may deem necessary or expedient to prescribe in order to achieve the objectives of this Act."*

[35] Although Senior Advocate Khoza conceded to the fact that it is correct that the school governing body administer and control school hostels, he submitted that, this does not prevent or restrict the respondents to take any action in the enhancement of the Constitutional and Legislative mandate placed on the State to facilitate the right to basic education. According to him, it would be irresponsible for the Department to remain supine and not seek to address these problems. Quite clearly in dealing with these challenges, he argues that, the respondent was not supposed to wait until the problem became worse but was required to peer into the future as exhorted by **Sachs J** in the **Gauteng Education Bill** case already quoted above. The abstract questions of law posed by the Department's experiences had to be considered in the concrete context of the Constitutional guarantee.

[36] He further submitted that Section 12 (2) of SASA envisages that the positive duty imposed on the State by section 29 of the Constitution cannot be fulfilled unless the State were to provide public schools which includes hostels for the residential accommodation of learners. There was, therefore, according to him, absolutely nothing wrong in the first respondent acting in terms of section 27(1)(a) and/or (b) of the Provincial Act. In support of this proposition he referred the Court to the case of **Section 27 and Others v Minister of Education and Another 2013 (2) SA 40 (GNP)** wherein the Constitutional Court per **Kollapen J** held the following:

"[1] Most societies, ours included, place high premium on education. Not only is it the means by which individuals are able to fulfil their potential, but it also provides, in a wider sense, the basis for development and upliftment. Accordingly, in context of international human rights law, and increasingly in the context of national legal systems, it is not a privilege but a right, creating with it duties and obligations, and where the right was violated, activating the need to craft appropriate remedies.

[2] In South Africa education is recognised both as an important policy imperative that government has committed itself to, as well as a central and interlocking right in the architecture of the rights framework in the Constitution. The preamble to the Constitution contains a commitment to "improve the quality of life of all citizens and free the potential of each person."

[3] Education is critical in both freeing and unlocking the potential of each person. Section 29 of the Constitution provides as follows:

"Everyone has the right ….

(a) to basic education, including adult basic education; and

(b) to further education, which the State, through reasonable measures, must make progressively available and accessible."

[4] The right to education, however, is not a standalone right, but a means through which other rights are realised. General comment 13, on the right to education, in respect of Article 13 of the International Covenant on Economic, Social and Cultural Rights, captures the foundational character of the right as follows:

"Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty

and obtain the means to participate fully in their communities. Education has a vital role in improving women, safeguarding children from hazardous labour and social exploitation, promoting human rights and democracy, and protecting the environment and controlling the population growth."

[37] In addition and as a basis for his submission he furthermore referred to the general Constitutional duty imposed on the State which according to him was emphasised by **Chaskalson P**. in the Constitutional Court matter of **The Minister of Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC)** wherein he held as follows:

"[51] … The provision of relief to the victims of natural disasters is an essential role of government in a democratic State, and government would have failed in its duty to the victims of the floods if it had done nothing. There was no legislation that made adequate provision for such a situation, and it cannot be said that in acting as it did, government was avoiding a legislative framework prescribed by Parliament for such purposes. Nor can it be said that government was acting arbitrarily or otherwise contrary to the rule of law. <u>If regard is had to its constitutional obligations, to its rights as owner of the land, and to its executive power to implement policy decisions, its decision to establish a temporary transit camp for the victims of the flooding was lawful</u>."

[38] Applicant's counsel agreed with the proposition that subsection 27 (1) (b) of the Provincial Act relied by the respondents entitles the MEC to determine aspects which she deems "necessary" or "expedient" to prescribe in order to achieve the objectives of the Act. He indicated to

the court that although this is the case, this apparent entitlement is circumscribed by:-

38.1 The self-imposed qualification that it may not be inconsistent with any law;

38.2 The provision that the first respondent's deliberation must be informed by asking not only whether the contemplated regulation is necessary or expedient, but that it is necessary or expedient to achieve the objectives of the Provincial Act;

38.3 The objectives of the Provincial Act, in turn, must be consonant with the objectives of SASA;

38.4 As will appear from the analysis below, these pre-requisites for valid regulation-making on the topic of hostels are absent, and the resultant regulations are perforce invalid.

[39] As a basis to support the above applicant's counsel submitted that the Provincial Act was promulgated on the 27 February 1998 and only came into operations on 15 March 2003. SASA was already in force since January 1997. SASA is intended to operate nationally. The MEC purported to make the regulations in terms of Section 27 of the Provincial Act read with Section 9(3) of the SASA. This proposition is clearly not correct according to the applicant's counsel. He argued that there is no indication anywhere in the Provincial Act requiring, suggesting or authorizing the MEC to make regulations regarding hostels. In fact, the sum total of possible powers granted expressly to the MEC in the Provincial Act is that she does have express and direct authority to determine Norms and Standards in respect of language

policy **(Section 8(1)** and implied to also make policies in respect thereof **(Section 8(2)(c)**. Accordingly, he submitted, the MEC does not derive his regulation making authority from Section 27(1)(a).

[40] As regards Section 21(1)(b) the MEC is of course entitled to determine aspects which he deems "necessary or expedient" to prescribe. However, applicant's counsel in developing this argument submitted, this must firstly be qualified by reasonableness and secondly, his deliberation must be informed by the question whether the contemplated regulation is necessary or expedient to achieve the objectives of the Provincial Act. From reading the Provincial Act, it does not appear to be any matter whatsoever which was left open or omitted which makes it necessary to make regulations regarding hostels. "Expedient" means *convenient, appropriate, suitable, advisable or proper*. *Ex facie* the regulations, hostels do not fall within the ambit of this sort of expediency ie. to achieve the objectives of the Provincial Act.

[41] Lastly he argued that, in determining the objectives of the Provincial Act, the Act should be considered in its entirety. This is evident firstly from its *preamble* which reads as follows:-

"To provide for a uniform system for the organization and funding of schools; to amend and repeal certain laws relating to schools; to cater mainly for the best educational interest of the child by providing an education of progressively high quality and upholding the rights of learners, parents and educators, and to promote their acceptance of responsibility for the organization, governance of schools in partnership with the State, and to provide for the matters connected therewith".

He unequivocally emphasized that making regulations regarding hostels is not a phenomenon appearing anywhere from the *preamble* and it could therefore neither be considered necessary nor expedient for the purposes of those *criteria* envisaged in the *preamble*.

[42] I fully agree with the submissions made by applicant's counsel that a traversal of the Provincial Act itself also provides no basis or authority to introduce and/or promulgate the regulations. The closest the entire Act comes to deal with hostels, is Section 12 which determines that if a school does have a hostel, a learner who is resident at such hostel shall be elected as a member of the Governing Body. It certainly would not appear to be either logical or rational that this could provide a basis for extensively regulating various aspects that deals with governance administration and control pertaining to hostels.

[43] The regulation – making powers of the MEC has been determined by Section 27 of the Provincial Act. Although the section provides that he/she may make regulations which may deem necessary or expedient in order to determine the objective of this Act (the Provincial Act), sub-section (1) thereof provides that the said regulations should not be inconsistent with any law. As the applicant counsel correctly submitted, SASA does not concern itself with the management of hostels issues, but leaves it in the hands of SGB's where a school has hostel facilities. The Provincial Act may accordingly not deal with it. Any endeavour to exclude, diminish or add to such powers granted in terms of SASA, will be in conflict with SASA. Consequently, if the Provincial Act cannot deal with it, much less so may any regulation by an MEC deal with it. There does not appear to be any matter

whatsoever which was left open or omitted in the Provincial Act which made it "necessary" to make regulations regarding hostels as applicant's counsel submitted above. After all, the MEC cannot substitute the legislature to fill the gaps unless expressly authorised. Nor the regulations cannot be used to enlarge the meaning of a statute.

[44] The MEC's (or rather the official making the answering affidavit) profound statement on which her entire defence is built, namely:-

'Hostel accommodation is contemplated in SASA as part of the State's obligation of improving access to quality education'

is factually and in law incorrect and unsustainable. These laudable aims expressed by the first respondent, "**quality education and/or" "high quality education"** can hardly be faulted, although quality education and/or high quality education is not an object of either SASA or the Constitution as seen from their respective *preambles*.

[45] The objectives of the Provincial Act require further scrutiny. Even if it could be said that it was reasonable or expedient to make the regulations, the next jurisdictional prerequisite for the validity of the regulations is that it must have been directed at the fulfilment of the objectives of the Provincial Act. The Provincial Act should be considered in its entirety to determine its objectives, keeping in mind that it cannot go any further than SASA and must be consonant with the latter legislation.

[46] With reference to the constituent phrases of the *preamble* of the Provincial Act, it appears that making regulations regarding hostels, is neither necessary nor expedient for purposes thereof as it refers to:-

46.1 **a uniform system for the organisation and funding of schools** – something which is adequately and extensively dealt with by SASA and Norms and Standards and other measures promulgated under SASA;

46.2 **amending and repealing certain laws relating to schools** – which is irrelevant for current purposes;

46.3 **catering mainly for the best educational interests of the child by providing an education of progressively high quality** – an issue totally divorced from any issue pertaining to hostel accommodation;

46.4 **upholding the rights of all learners, parents and educators** – the rights of these stakeholders do not encompass anything in relation to hostels other than the right of hostel dwellers in the North West Province to have a representative on the SGB by virtue of the provisions of section 12 of the Provincial Act.

46.5 **promoting the stakeholders' acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State** – it is virtually impossible to detect any provision in the Provincial Act dealing with such 'acceptance' of responsibilities, and then certainly not in relation to the management of hostels;

46.6 **providing for matters connected therewith**: if the preceding components were inapplicable, then there is no relevant matter connected therewith that can direct one to a power entitling the MEC to make hostel-related regulations.

The Constitution

[47] In developing the third leg upon which the first respondent relied as the authority that gave the MEC the powers to promulgate the regulations Advocate Khoza Senior submitted that this case is not about the wisdom, the need, or appropriateness of the regulations, it is about their constitutionality. It therefore implicates the principle of legality.

[48] He referred this court to the case of ***Fedsure Life Assurance Ltd v Greater Johannesburg Traditional Metropolitan Council*** **1999 (1) SA 374 (CC)** wherein the Constitutional Court identified the principle of legality and described it as an aspect of the rule of law. He emphasized that the principle of legality was held to imply that a body exercising public power had to act within the powers lawfully conferred on it.

[49] He submitted further that this principle applies also in instances involving the right to education. In support of this proposition he referred to a case of **MEC for Education - Gauteng Province and**

Others v The Governing Body, Rivonia Primary School 2013 (6) SA 582 (CC) the Constitutional Court after analysing judgments dealing with powers relating to school capacity said; *inter alia*:

3.1.1 " [36] The Schools Act envisages that public schools are run by a three-tier partnership consisting of: (i) national government; (ii) provincial government; and (iii) the parents of the learners and the members of the community in which the school is located.

3.4.2 " [49]

(a) Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it. This is so even where the functionary is of the view that the policies offend the Schools Act or the Constitution. But this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances.' *(*His Emphasis*)*

[50] He maintained that Section 29 of the Constitution guarantees everyone the right to basic education. He again referred to the Rivonia case, wherein the Constitutional Court stated that Section 29 contains a promise, which is still inaccessible to a large number of South Africans because of the legacy of apartheid. He quoted the following remarks from the **Rivonia** case to support this proposition:

> "[2] Continuing disparities in accessing resources and quality education perpetuate socio-economic disadvantages, thereby reinforcing and entrenching historical inequity. The question we face as a society it is not whether, but how, to address this problem of uneven access to education. There are various stake holders, diversity of interest and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we managed those competing interest and the spectrum of views that is pivotal to developing a way forward. The constitution provides us with a reference point- the best interest of our children (Our emphasize). The trouble begins when we lose sight of that reference point-when we become more absorbed in staking out the power to have the final say, rather than enforcing partnerships to the educational needs of children."

[51] This, he submitted, is the problem in this matter. According to him the applicant brought this case merely to claim what they believe is a right of the governing bodies to manage and control school hostels. In the process it lost sight of the fact that its powers derived from SASA are to be exercised against the backdrop of the reference point of "the interest of the minor child being "supreme". He referred to the sentiments by **Nkabinde J** in the Constitutional Court case of **The Governing Body of the Juma Musjid Primary School and Others v Essay No and Others 2011 (8) BCLR 761 (CC)** where the following was said :

> "The guarantee in terms of section 29 is immediately realisable".

[52] According to respondent's counsel the regulations on the other hand foster cooperation between the different stakeholders in the interests of the learner minor child. They take nothing from the school

governing bodies. All that they are intended to achieve is that learners who happen to be at hostels are not worse off than those who are not. He emphasized the fact that the realization of the right to education cannot be approached with blinkers. It must, perforce, take into account the challenges posed by the legacy of apartheid especially the dire circumstances that certain learners find themselves in.

[53] In his view, whilst the issue of provisions of resources in and around the school is a given, ignoring other factors that impact on the child's ability to receive education can also amount to a denial of this basic right. He contended that these factors were recognized in the case of **Brown v Board of Education, 347 U.S. 483 (1954)** when **Chief Justice Warren** in delivering the opinion of the Court referred to qualities which are incapable of objective measurement but which may impact on the education of a person. He emphasized the fact that to simply ignore the plight of learners especially those from rural communities, to want to subject learners in hostels to a different treatment regime than those who are not, may amount to a denial of the right to education. He maintained that it ought to be remembered that learners who do not reside in hostels cannot be vacated from the education system.

[54] In reply to the above applicant's counsel submitted that if the regulation-making powers granted by either of the spheres of legislature to the executive (predominantly National Ministers or MECs), result in regulations, those regulations can be classified as subordinate legislation. Those functionaries, when making their sub-ordinate laws, do not do so as representative of the electorate, but as delegatee of the original legislature. As such, such an authorisation

must be executed within the limits of the power granted by the empowering Act. If the execution falls outside of the parameters of the authorisation granted by the original legislature, the conduct is *ultra vires*, or, put differently, not complying with the rule of law. He referred the court to the case of **Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others (No. 1) 2008 (3) SA 91(E) paragraph 66** as a basis for the above submissions wherein the following was said:-

> 'The first set of grounds of review relates to the lawfulness of the administrative action taken against the applicants. At its most basic, and in general terms, the right to lawful administrative action means that 'administrative actions and decisions must be duly authorised by law, and that any statutory requirements and preconditions that attach to the exercise of power must be complied with'. Administrators may only exercise powers that have been lawfully reposed in them, and when they exercise such powers they are required to stay within the four corners of their empowerment. They have no free hand to stray outside of the boundaries of their empowerment. The fifth respondent only had power to discipline in terms of the prescribed procedure. He had no power to abandon it and discipline employees in terms of an ad hoc procedure that he decided was expedient in the circumstances. By doing so he violated the fundamental rights of the applicants to lawful administrative action because he was not authorised to take the administrative action that he did. The ground of review contained in s 6(2)(a)(i) of PAJA has thus been established.'

[55] He emphasised the fact that *ultra vires* legislative administrative action means, in its simplest form, action which had not been authorised by a statutory empowering provision. He argued that for a conduct to be *ultra vires* is a conclusion that need to be drawn from the action in

question. The doctrine of *ultra vires* is not in itself a ground of review, but a consequence of unlawful administrative action. The unlawfulness manifests in the exercise of powers which the law- or decision-maker does not have. Having a statute made by an original legislature set aside, is quite a different and much more difficult act to follow than the setting aside of subordinate legislation, because the latter is arrived at by functionaries, whose administrative action is reviewable. In addition he submitted that it follows that the purported execution of that power when the MEC made the regulations in this instance, constitutes administrative action, governed by the provisions of PAJA and reviewable in terms thereof as well.

[56] Senior Counsel Johan du Toit in developing the above argument further on behalf of the applicant reiterated the submissions he made in the paragraphs above that dealt with the issue that relates to SASA and the Provincial Act in support of his view that the regulations stand to be struck down in their entirety, on the basis that they were promulgated without the necessary authority. According to him they fail to pass the test of constitutional legality. They are void since their promulgation. The same applies to all the individual regulations lacking authority for their existence. As such the applicant is, according to his view, entitled to an order declaring them invalid as being unconstitutional.

[57] In a further alternative, he submitted that the regulations are invalid for, *inter alia*, one or more or all of the following grounds if reference is had to Section 6 of PAJA:

57.1 6(2)(a)(i) – administrative action not authorised by the empowering provision;

57.2 6(2) (a) (ii) - acting under delegation of power which was not authorised by the empowering provision;

57.3 6(2) (f) (i) - the action itself contravenes a law or is not authorised by the empowering provision;

57.4 6(2) (i) - the action is otherwise unconstitutional or unlawful at least to the extent that it does not comply with the imperatives of SASA.

[58] He persuaded this court that in the event of this court holding that the relief that the applicant seeks is to be had under the provisions of PAJA, section 7 of PAJA determines that the application for review ought to have been brought within 180 days from the date of gaining knowledge of the administrative action, whereas section 9 permits a court to grant condonation for applications brought outside the prescribed period if it would be in the interests of justice to do so. The respondents do not dispute the grounds advanced by the applicant in substantiation of the condonation sought in this matter. He suggested that an order in terms whereof applicant is granted condonation should then follow.

[59] The Constitution is the Supreme Law of the Republic of South Africa. Provincial Legislatures also possess of original legislative authority, to the extent permitted by the Constitution. See: **Schedule 4** and **Section 146** of the Constitution.

[60] Even before the current Constitutional dispensation, the *ultra vires* doctrine was linked to the principle of legality. Irregularity and illegality are grounds embraced by *ultra vires.* **Wiechers** correctly regards the doctrine as falling within the broader concept of legality and connects the latter concept intimately with the intention of the legislature:- He remarked as follows at **page 178** of his book **"Administrative Law, Butterworths 1985:**

> "This general principle of legality provides that an administrative act must not only be performed within the scope of the conferred powers and the requirements embodied in the empowering statute, but must also be in accord with those rules and pre-scripts of the common law, which postulates the intention of the ideal legislature."

That is then a requirement of reasonableness which would fall within the principles of legality, rather than indicating that the public authority had acted *ultra vires.* Accordingly, determining whether the MEC's conduct falls within or without her powers, involves an application of no more or less than the principle of legality.

[61] I fully agree with the applicant's counsel that the particular section of the Constitution that were referred to by the respondent's counsel as the basis from where the MEC derived its powers including the aims and objectives thereof were clearly misconstrued by respondents. The regulations fail to pass the constitutional legality and are therefore *ultra vires*. The Constitution does not deal with boarding facilities at schools. It provides for a right to basic education but not for a right to housing, boarding or any other form of residential accommodation at a school. There is therefore in my view no causal connection in the

argument presented by the respondents between the desire to give access to learners on the one hand in compliance with Constitutional demand; and access to something more superior namely:- "*quality*" or "*high quality*" education. It may be so that the word quality appears in the preamble of the Provincial Act, but this cannot be an attempt to justify the making of the regulations.

[62] Section 12(2) of SASA provides that 'the provision of public schools referred to in subsection (1) may include the provision of hostels for the residential accommodation of learners' (**own emphasis**). There is, to repeat, no obligation by the MEC to provide hostels. A careful reading of the National Norms and Standards for School Funding, 2006 (**the NNSSF**) reveals that new hostels facilities may be built also. This is provided in **clause 83** thereof where it deals with the criteria to be applied. Hostels costs and fees thereof are also provided in **clause 146** and **147** thereof.

[63] Other than that, the plain meaning of the sub-section is to provide residential accommodation: there is nothing in that provision which implies that learners in hostels will receive better education than those less fortunate learners who only have access to schools during ordinary school hours; there is absolutely nothing implying that accommodation will provide a better quality education; there is nothing stating or implying that hostels will be super-schools or super centres of learning providing better education or improving the quality of learning received at schools.

[64] Furthermore, on a factual basis there is no evidence that hostels accommodation will realise the ideal of progressively high quality

education. In addition, there is no evidence on record that schools with hostels offer better quality education than schools without hostels.

[65] As indicated above, the purpose of these regulations are clearly an advocacy in providing a solution for learners having difficulty to access schools, by providing an increase in the provisions of hostels. Hostels will then provide the necessary academic support for those learners after hours, which in my view is a different debate not relevant in this matter. Quality education, how high can it be, is not determined by the absence or presence of hostels at schools, but by the quality of tuition offered in the class-room. It is noteworthy to mention that not all hostels dwellers thrive emotionally well in hostels, separated from their family.

[66] In addition to the above, there is no factual allegations under-pinning the startling proposition that hostels may be “potent weapons” of dealing unfairly and unconstitutionally with learners. As indicated by the applicant’s counsel, the allegations of neglect, selective disciplinary actions and floating of the provisions of SASA made against the SGB’s are baseless as no single fact or piece of evidence in substantiation thereof was presented by the respondents. It surprises that if these allegations were in their views so serious that the respondents needed to intervene, why could they not resort to section 22 of SASA and stripped the SGB of their powers. In my view, the learners and the respondents have sufficient avenues open for redress in terms of SASA. The regulations are not the solution to the perceived problems.

D. CONCLUSION

[67] It is clear that SASA is a National Act which prevails over provincial legislation, it therefore prevails over the Provincial Act and any regulations purportedly promulgated in terms thereof. The achievement of higher quality education by the provision of hostels is not a Constitutional imperative nor is it otherwise founded in any legislation including the Provincial Act. The regulations are therefore declared unlawfully promulgated and of no force and effect by virtue of the fact that they were promulgated without the necessary authority. Having arrived at these conclusions, it is apparent that the need to deal with the other legs upon which the applicant relied on as the basis for the relief it sought although meritorious as well, fell away. On this ground alone, the application is bound to succeed.

E. ORDER

[68] Consequently the following order is made:-

68.1 The "**Regulations relating to the administration of public school hostels" published in the North West Provincial Gazette Extraordinary No. 7031 dated 31 August 2012** are hereby reviewed and set aside, and furthermore, declared unlawfully promulgated, *ipso facto void* and of no force or effect.

68.2 The respondents are ordered to pay the costs of this application including costs occasioned by employment of a Senior Counsel.

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A M KGOELE
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPLICANT	:	Minchin & Kelly Inc. Kelgor House 14 Tillard Street MAHIKENG
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