CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/98

THE PREMIER, PROVINCE OF MPUMALANGA First Applicant

DAVID D MABUZA NO Second Applicant

versus

EXECUTIVE COMMITTEE OF THE ASSOCIATION
OF GOVERNING BODIES OF STATE-AIDED SCHOOLS:
EASTERN TRANSVAAL Respondent

Heard on : 3 November 1998

Decided on : 2 December 1998

JUDGMENT

O'REGAN J:

1. This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the

common understanding that both need to be honoured.

2. During August 1995, the second applicant, the Member of the Executive Council responsible for education in the province of Mpumalanga, decided that bursaries that had been paid for certain needy students in state-aided schools in the province would no longer be paid with effect from July 1995. That decision was challenged on the basis that it was unfair administrative action. Because the bursaries in question were paid to schools which, in the main, educated white students, there was no dispute between the parties in this case that the bursaries were one of the unfair legacies of the past which had to be terminated. The only dispute between the parties concerned the manner of their termination.

3. An application was brought in October 1995 in the Transvaal High Court (then still the Transvaal Provincial Division of the Supreme Court) by the Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal (the respondent before this Court). The respondent was acting in the interests of its members, about one hundred governing bodies of state-aided schools situated in the eastern Transvaal, now known as the province of Mpumalanga. The respondent challenged the second applicant's decision to terminate bursaries paid to certain pupils on the grounds that it was procedurally unfair and unjustifiable and therefore in breach of section 24 of the Constitution

of the Republic of South Africa Act 200 of 1993 (the "interim Constitution"). It sought an order setting aside the decision as well as an order requiring the applicants to pay the bursaries till 31 December 1995. Relief was granted in those terms by De Klerk J on 1 December 1995. The applicants then sought and obtained leave to appeal to the Supreme Court of Appeal (then still the Appellate Division of the Supreme Court).

4. When the case came before that court, the 1996 Constitution had come into force. Prior to the matter being argued before it, the Supreme Court of Appeal requested further written argument from counsel on the question of whether it had jurisdiction to determine the issues in the appeal. Doubts arose on this score because of the provisions of section 101(5) of the interim Constitution which provided that:

> "The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court."

The Supreme Court of Appeal drew counsel's attention to its decision in *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (2) SA 886 (A) at 891B-C in which Plewman AJA said:

> "Counsel for the appellants conceded that the common-law grounds of attack upon the validity of the authorisations and any actions taken in terms thereof could, if his

> arguments were well-founded, constitute a breach of appellants' constitutional rights under s 24 of the Constitution. He contended, however, that this Court enjoyed some form of parallel jurisdiction which entitled it to entertain the appeal. I am not satisfied that this Court does indeed have a parallel common-law jurisdiction in the circumstances I have outlined. But it seems to me, in any event, that in order to decide whether this Court would have a jurisdiction such as is contended for this Court would be obliged to interpret the Constitution, which it is not entitled to do."

During argument before the Supreme Court of Appeal, counsel for the applicants applied for a postponement *sine die* with costs reserved to enable the applicants to approach this Court so that the question of the jurisdiction of the Supreme Court of Appeal could be determined. An order was made in those terms.[1]

5. Since the Supreme Court of Appeal made that order, another case raising the issue of the jurisdiction of the Supreme Court of Appeal in relation to administrative action under the provisions of the interim Constitution has been decided by this Court, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT 7/98, an as yet unreported judgment of this Court delivered on 14 October 1998). In *Fedsure*, it was unanimously held that:

> "[I]t is hard to avoid the conclusion that has been reached by the Appellate Division, that

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[1] The judgment of the Supreme Court of Appeal is now reported: *Premier, Provinsie van Mpumalanga en 'n Ander v Hoofbestuurder van die Vereniging van Bestuursliggame van Staatsondersteunde Skole, Oos-Transvaal* 1998 (8) BCLR 968 (SCA).

> under the interim Constitution it has no jurisdiction over matters concerning "administrative action" as contemplated by section 24 of the interim Constitution." (At para 105.)

The Court went on to hold, however, that:

> "[O]ur view is that it is in the interests of justice that in respect of constitutional issues under the interim Constitution which may in future come before it, the SCA, as the successor of the Appellate Division, should exercise the jurisdiction conferred upon it over constitutional matters by chapter 8 of the 1996 Constitution. Its exercise of that jurisdiction, however, will not affect the principle articulated in *Mhlungu* and *Du Plessis* in terms of which the constitutionality of an act is to be determined by the substantive provisions applicable at the time." (At para 113)

6. After the Supreme Court of Appeal postponed this matter *sine die*, the applicants approached this Court for direct access and a declaration that they had correctly appealed to the Supreme Court of Appeal. Alternatively they sought leave to appeal to this Court against the whole of the judgment and order of De Klerk J in the High Court, as well as condonation for their failure to comply with the provisions of Rule 18, including their failure to obtain a certificate from the High Court. Before the Supreme Court of Appeal, counsel for both parties had agreed that the interests of justice did not require the appeal to be disposed of by the Supreme Court of Appeal in terms of its powers under chapter 8 of the 1996 Constitution.[2] In the light of the *Fedsure* decision, however, it is apparent that that

[2] Id at 973 A.

attitude was mistaken and that it would have been in the interests of justice for the Supreme Court of Appeal to have exercised the jurisdiction conferred upon it by the provisions of chapter 8 of the 1996 Constitution when it heard the appeal in this matter. In the interests of curtailing costs and achieving finality in this matter, and particularly in view of the fact that this matter was referred to this Court and enrolled for hearing before the judgment in *Fedsure* had been handed down, this Court should not refer the matter back to the Supreme Court of Appeal at this stage, but should grant leave to appeal and deal with the matter itself.

The Merits

7. The dispute that arose in this case needs to be understood against the background of constitutional and social transformation that is under way in South Africa. Under the former apartheid government, schools were generally racially divided with separate government schools for African, coloured, Indian and white children. Different ministries were responsible for the administration of these separate schools. In line with government policy, significantly more government funds were expended for each white child who attended school than were expended for each black pupil. As a result, schools for white children were generally well-equipped with classrooms, sports facilities and qualified teachers. Schools for black children were often dilapidated, with poor facilities and

underqualified teachers. This unjust and harmful state of affairs could clearly not continue for long under our new Constitution. Nor, however, could transformation be achieved overnight. Eradicating the racial discrimination rooted in our education system is not a quick or easy task. Indeed, the eradication of unfair discrimination throughout our society remains a complex challenge. The Constitution dictates not only the end, which is the establishment of a non-racial, non-sexist democracy, but also regulates the means, including the obligation to observe procedural fairness.

8. The system of state-aided schools was at the time regulated by the Education Affairs Act (House of Assembly) 70 of 1988 ("the Act") which was originally concerned primarily with education for white children.[3] In terms of section 29(2A) of the Act, the Minister of Education may declare a public school to be state-aided, whereupon that school becomes a juristic person in which the ownership and control of movable and immovable property relating to the school is vested.[4] The management and control of a state-aided school vests in its governing body.[5] Once a state-aided school is established, it is responsible for its own financial affairs, and must draw up annual financial statements which must

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3 The Act has since been substantially amended, in particular, by the South African Schools Act 84 of 1996 which came into operation on 1 January 1997.

4 Section 31A(1)(a) of the Act.

5 Sections 31(1) and 31A(1) of the Act.

be audited.[6] The financial year of state-aided schools runs from January to December.[7] Originally, two kinds of state-aided schools were envisaged: "Model D" schools which were to be non-racial, and "Model C" schools which, prior to the enactment of the interim Constitution, were generally racially exclusive. Most Model C schools were formerly government-owned schools providing education for white children. In this case, we are concerned only with Model C schools.

9. In addition to the school fees they charge, state-aided schools may receive grants from the government. Section 32 provides that:

> "The Minister may, out of moneys appropriated for such purpose by the House of Assembly, grant a subsidy to a state-aided school on such basis and subject to such conditions as he may determine."

In fact, the salaries of most teachers at state-aided schools are paid by the government in terms of such grants. Parents who send their children to state-aided schools are obliged to pay the school fees, and where their children live in the school hostel, the appropriate boarding fees that are levied by the governing body of the school.[8] I shall return to consider the proper interpretation of section 32 below.

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6 Section 36(2),(3) and (4) of the Act.

7 Section 36(1) of the Act.

8 Section 102A of the Act.

10. It was common cause between the parties that at least since 1992, a system of financial assistance by the government had been in place for indigent children in state-aided schools in Mpumalanga. The bursaries payable in that province were regulated in terms of a series of departmental circulars issued by the Transvaal Education Department which, until 1994, was responsible for the administration of the Act. Bursaries were established to subsidise school fees, transport fees and boarding fees of needy pupils.

11. According to Transvaal Education Department circular 30 of 1992 dated 16 June 1992, indigent parents who needed financial assistance to pay school fees in state-aided schools could complete application forms for such assistance which were then forwarded by the schools to the department. Pupils who received financial assistance were normally required to attend the state-aided school nearest to their parental home. Because bursaries were valid for only one school year at a time, parents had to re-apply for financial support each year. Bursary amounts were payable directly to schools quarterly in arrears, although school principals could make application for advance payments where the financial circumstances of the school required it. Where pupils left the school during a school year, amounts paid to that school in respect of that pupil had to be repaid proportionally to the department by the school. The amount paid depended upon the income of the parents. However, the maximum amount payable under the sliding scales

established in 1992 was R500 per year for secondary school pupils and R400 per year for primary school pupils.

12. Transport bursaries were similarly regulated by a series of departmental circulars. Until 1994, school transport was subsidised to state-aided schools under certain conditions. From the beginning of 1994, however, only indigent pupils were provided with financial assistance for transport. Notice that the system of general transport bursaries would terminate at the end of 1993 was given to school governing bodies by circular 100 of 1992 dated 17 July 1992. In terms of the departmental circulars, parents had to make application for transport bursaries which would be granted to indigent pupils in circumstances where the pupils were attending the nearest school to their home and no form of public transport was available. As in the case of tuition bursaries, the amount of the bursary depended upon the income of parents. The maximum amount payable per child per term was R386. The bursaries were payable directly to the schools which were responsible for entering into contracts with transport companies to provide the necessary transport. Financial assistance for boarding fees was granted in a similar fashion to children from indigent families or in circumstances where the children had been placed in hostels in terms of the Child Care Act 74 of 1983. Once again, individual schools were responsible for entering into the necessary contractual relationships with suppliers and staff to enable the hostels to operate.

13. On 27 April 1994, the first democratic elections were held and the interim Constitution came into force. In terms of schedule 6 of the interim Constitution, responsibility for primary and secondary education was shared between national government and provincial governments. On 31 October 1994, responsibility for the administration of the Act was assigned by the President to the second applicant in terms of section 235(8) of the interim Constitution. The task facing the second applicant at that stage was immense. Prior to April 1994, education in Mpumalanga had been administered by nine different departments of education, four of them being the formerly racially segregated education departments in terms of South African legislation, and the others being the education departments of Bophuthatswana, Lebowa, KaNgwane, KwaNdebele and Gazankulu. Huge disparities in the quality of education existed within the province. Although administrative responsibility for the Act was assigned to the second applicant at the end of October 1994, financial responsibility was assigned only with effect from the new financial year which commenced on 1 April 1995.

14. On 12 October 1994, shortly before the administration of the Act was assigned to the second applicant, the Transvaal Education Department sent circular 103 of 1994 to, amongst others, all school principals and secretaries of school boards, announcing that the Minister of Finance had approved boarding bursaries with

effect from 1 January 1995 for a period of twelve months or until the new provincial government decided otherwise.

15. Similarly, on 8 November 1994, just over a week after the second applicant had been assigned the administration of the Act, the Transvaal Education Department sent a further circular, 111 of 1994, to school principals and the secretaries of school boards advising that the Treasury had approved transport bursaries with effect from 1 January 1995 for twelve months or until the new provincial governments decided otherwise.

16. It is common cause that no equivalent circular was sent out in relation to tuition bursaries. It is also common cause that bursaries were paid by the department to schools in the first term of 1995. There is some disagreement on the papers as to whether bursaries were paid for the second term. The respondent filed affidavits from two school principals, which were not contradicted by the applicants, to which they annexed documentation establishing that, at least in respect of those two schools, bursaries were paid by the Mpumalanga Education Department for the second term of 1995.

17. On 31 May 1995, during the second term, the second applicant presented his first departmental budget for approval to the Mpumalanga provincial legislature. In his budget address, he noted the tremendous challenges that faced his department. In

particular, he referred to the need to transform the existing education system in the province from one characterised by racial disparities and inequalities to "a democratic, non-racial and non-sexist education system that will provide education of equal quality to all the learners of the province." This task, he emphasised, was rendered particularly difficult in the context of the budgetary constraints faced by the province. He observed that transformation would require the shifting of resources from one area to another. He also observed that the 1995/6 budget had been drawn up on the basis of the 1994/5 budget and was therefore a "holding" budget which did not fully address the needs of transformation. In relation to bursaries, he stated the following:

> "1. All bursary promises and contracts signed by ex-departments in 1992, 1993, 1994 had to continue. This creates a tremendous disparity.
> 2. The Education Department of the Eastern Transvaal has taken the following policy decisions:
> 1. All students must apply for a bursary
> 2. All automatic bursaries are discontinued
> 3. Bursaries being paid to private schools 'model c' to be reviewed. — 95/96 Budget.
> 4. Bursaries will not be handed as cash to students to squander."

18. The second applicant sought in his affidavits to place reliance on his budget speech to establish that he had given notice in that speech of his intention to discontinue bursaries during the 1995 school year. I cannot accept that this is so. It is clear from the speech, and indeed must have been clear to any school

principal in Mpumalanga in any event, that the policies and programmes of the past which had led to racial disparity in educational opportunities could not continue forever, and would need to be changed. In particular, the bursary system would be reviewed. However, the speech did not make it clear that the second applicant intended to withdraw subsidies in respect of the 1995 school year. Indeed, it is common cause between the parties that the budget which was presented at the time that the speech was made sought the allocation of R9 million for the payment of bursaries during the 1995/6 budget year out of an overall budget of R1,79 billion. The allocation for bursaries for the full 1995/6 year therefore constituted considerably less than 1 per cent of the total budget.

19. On 28 July 1995, the Mpumalanga Education Department sent a circular to the secretaries of all governing bodies of schools in the province inviting them to attend a meeting to be held on 5 August 1995. According to that circular, the agenda was "Bursaries and Subsidies". That meeting was addressed by Dr K Paine, the head of an agency formed in 1994 to give administrative assistance to new provincial education departments, as well as by Ms F Sithole, the head of the Mpumalanga Education Department, and the second applicant.

20. There is a dispute on the papers as to what precisely happened at this meeting. The second applicant filed two answering affidavits. In the first, he states that he

did not finally decide to cut bursaries until 31 August 1995 . He states that at the meeting of 5 August he proposed a cut in subsidies and asked for submissions from interested parties concerning such a proposal and that he read a speech which contained the following passage:

> "The intention of the Department as clearly indicated at several forums and in the budget speech, is to embark upon shifts in the budgetary allocations. One area where effective shifting of allocations is being considered is, bursaries and subsidies for transport of pupils and officials and I talk about 100% shift. It is quite sensitive to many who see a bus carrying few pupils to school while other pupils have [to] walk long distances to school. The principle of equity is becoming increasingly crucial in our allocation of funds. As humans, we all realize how sensitive issues of bursaries and subsidies are. Let me assure all stakeholders that our redistribution mode towards equity, should not be reduced to simplistic terms of taking from the 'haves' and giving to the 'have nots'. We need to be guided by the principles of fairness. I shall be expecting your final input on these proposals and intentions. Our change of stance will depend on how convincing your input for otherwise would be. Should that be the case, we would have to revisit the issues before us."

It is important to note that, in his speech, the second applicant recognised that in seeking to achieve a more equitable education system, something which the Constitution obliges him to do, he should be guided by the principle of fairness, something which the Constitution also requires. According to the second applicant's first affidavit, in the weeks that followed the meeting, he considered all representations made to him and on 31 August 1995 took a final decision that the subsidies would not be paid.

21. In his second affidavit, which the High Court permitted him to file, he tells a different story, namely that he had never taken a decision to grant bursaries during the 1995/6 budget year, and at the meeting of 5 August 1995, he decided to grant bursaries for the first quarter of that budget year only. He asserts that without a decision to grant the bursaries, no such bursaries could be paid. The invitation to make representations that he made at the meeting of 5 August 1995, was an invitation relevant to the decision to grant bursaries for the balance of the year, not an invitation in relation to a decision to cancel payment of the bursaries. De Klerk J held that the two affidavits filed by the second applicant could not be reconciled. There can be no doubt that the two affidavits do conflict in significant respects, and that both affidavits also conflict in some respects with the documentary evidence annexed to the affidavits of both the second applicant and the respondent. The second applicant explains these conflicts only on the basis that he had very little time to consult with his advocate and attorney before his first affidavit was prepared. As a result of these conflicts, De Klerk J concluded that the second applicant had acted vexatiously and in a manner which was susceptible to censure. He accordingly awarded costs to the respondent against the second applicant on an attorney and client basis. The second applicant also appeals against this costs order. I shall return to this question later.

22. Despite these conflicts in the evidence, it is clear that at the meeting of 5 August

the second applicant initially proposed that no bursaries should be paid at all for the budget year which had commenced on 1 April 1995. However, thereafter, and during the course of the meeting he made it plain that bursaries would be paid for the second school term of the year which had commenced in April and ended in June.

23. The second applicant asserts that at the meeting he invited interested parties to make submissions to him concerning his decision, but the respondent denies this. The respondent does not deny however that in a departmental statement (which apparently was circulated to schools) issued by the Mpumalanga Education Department on 7 August 1995 concerning the meeting the following was said:

> "The MEC for Education, Mr D. D. Mabuza made an announcement on 100% cut on bursaries and other related subsidies (transport for pupils and officials, hostel accommodation). Due to the fact that the announcement was not made in time, he committed the department to pay for all expenses of the 1st quarter (April 1st - July 1st 1995) only. The 100% cut thus becomes a 75% cut.
> A period of two weeks (7th - 21st August 1995) has been given to all stakeholders to make submissions to the MEC's office pertaining (sic) the above-mentioned announcement."

24. It is common cause that many representations were sent to the second applicant as a result of this invitation. However, before the time period for representations had elapsed, the second applicant prepared a memorandum for the provincial cabinet in which he proposed that it approve the decision to halt the payment of

subsidies in the following terms:

"*Recommendations*

1. For equity to prevail, the playing field must be levelled through cuts and shifts of allocations.
2. With salaries taking 87% of the budget, very little money is left for capital projects — hence need to cut subsidies.
3. Department has to be selective in granting of bursaries — ie. to needy areas of study (Mathematics, Science and Accounting). No need for blanket awards and bursaries for general studies.
4. Parents who want Model C schools and other private schools must pay the real economic fees for their children.
5. Parents who cannot afford must put their children in state schools where tuition is free."

This recommendation was approved by the provincial cabinet on 16 August 1995.

25. A further meeting was held between second applicant and representatives of state-aided schools on 21 August 1995. A minute kept of that meeting by a member of the respondent reads as follows:

"1. Mr Pienaar introduced the subject by acknowledging the budget problems the Minister was facing but asked him to consider the fact that state aided schools had prepared their budgets in September 1994 for the year January to December 1995. Contracts and commitments had been entered into on the basis of these budgets and now that the subsidies on transport, school fees and hostel fees had been summarily cut, there was going to be great difficulty in achieving these budgets.
2. Mr D Mabuza advised that he had communicated his intention of cutting

> subsidies. He did not want to collapse the state aided schools but he had no option. He was faced with a strong demand from state schools for equitable treatment in terms of transport and other bursaries. He had not (sic) budget allocation to grant these subsidies and therefore the only option was to cut the subsidies to state-aided schools. This was necessary to make his government legitimate. The principle was most important.
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> 3. Mr Pienaar advised that the Association fully accepted the principle, but the summary withdrawal of the bursaries had created a crisis. Time to re-organise and replan budgets was needed.
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> 4. Mr Mabuza note the acceptance in principle but he was unable to make any allocation out of the current year's budget. However, he was prepared to listen to approaches from individual schools and he committed himself to going outside of his budget to see if additional funds could be raised from alternative sources so as to help these individual schools. He needed to be informed of the amounts involved."

It should be recorded that the second applicant disputes the accuracy of these minutes to the extent that they create an impression that a decision had already been taken to discontinue the subsidies summarily. He states that he had only communicated his intention of discontinuing the bursaries. What is not disputed by the second applicant, however, is that the meeting took place after the provincial cabinet had already met and approved the second applicant's proposal that the bursaries be terminated with effect from the beginning of July 1995.

26. On 31 August 1995, a letter was written to school principals by Ms Sithole headed "Cutting of Subsidies and Bursaries for State-Aided Schools". The letter went as

follows:

> "Thank you for the submissions forwarded to the department following the announcement made on 5 August 1995 on the above-mentioned subject. However, after thorough consideration of the submissions, it was found that the circumstances which led to the announcement on the cutting of the above-mentioned, remain the same and therefore the decision cannot be reversed. I regret any inconveniences caused by this announcement."

In his first affidavit, the second applicant says that this letter reflected the final decision taken by him on 31 August 1995 to cut subsidies with effect from July 1995. In his second affidavit, he states that it reflected his final decision not to grant bursaries for the remaining three quarters of the 1995/6 budget year.

27. Counsel for the second applicant argued that the ordinary rule in motion proceedings should apply and that where there was a dispute of fact on the affidavits between the applicants' version and the respondent's version, we should accept the respondent's version (which in this case would be the version of the second applicant). There can be no quibble with this submission and where there are such disputes on the affidavits, the second applicant's version has been accepted. The difficulty for the second applicant in this case arises because the major disputes of fact arose not between the versions of the applicant and the respondent, but between the first and second affidavits filed by the second applicant himself. The most important dispute related to the question of whether

or not the second applicant had made a grant of bursaries for the 1995/6 financial year or not. The second applicant's second affidavit was supported by the affidavits of Mr Lubbe and Dr Paine who gave an account of the manner in which bursaries had been granted in previous years. However, Dr Paine's account is disputed by Mr de Jager on behalf of the respondent.

28. De Klerk J concluded that the version given by the second applicant in his second affidavit should be rejected and he found that a decision had been made by the second applicant to grant bursaries for the year 1995/6. In my view, that conclusion is correct. In reaching this conclusion, I have considered the facts set out above. It is particularly important to note that the second applicant himself sought the approval of the provincial legislature for a budget which expressly appropriated funds for the payment of such bursaries. The text of the budget speech indicates that the second applicant intended reviewing the payment of such bursaries during the year. It is impossible on these facts to reach any conclusion other than that the second applicant had granted funds for the payment of bursaries by expressly allocating such funds in his departmental budget. It may be that the second applicant believed that, in the circumstances, he had not made any grant of bursaries in terms of section 32. However, his subjective state of mind is irrelevant to the present enquiry. An objective evaluation of the relevant facts which are undisputed leads inevitably to the conclusion that the bursaries were

granted.

29. In addition, it must be emphasised that the fairness of administrative action cannot be determined by a consideration only of the second applicant's state of mind, but rather on the course of conduct which had been followed prior to August 1995. There was no dispute concerning the material facts which I have outlined above and which are relevant to the constitutional question of procedural fairness to which I shall now turn.

30. The respondent's case was that the procedure followed by the second applicant which led to the summary and retroactive termination of tuition, transport and boarding bursaries, was unconstitutional in that it was in breach of section 24 of the interim Constitution. Section 24 provides as follows:

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

In particular, the respondent argues that the decision to terminate bursaries was administrative action that was procedurally unfair in breach of section 24(b) and unjustifiable in terms of section 24(d).

31. The respondent did not seek to assert, nor was there any cogent evidence, that a contractual relationship existed between school governing bodies and the government, or between parents and the government, in terms of which the government had contractually undertaken to pay bursaries for those needy pupils whose applications had been received by it and in respect of whom bursary amounts had been paid to the schools for the first two school terms of 1995. In the absence of any evidence, it is not possible to conclude that a relationship giving rise to rights in contract existed between parents and the department or between school governing bodies and the department (cf *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 (1) SA 257 (A)). The precise ambit of the concept of "rights" employed in section 24 need not be explored here.[9] Nor is it necessary to decide whether the respondent's members could show a "right" as contemplated by section 24(b) because it is clear, for the reasons that follow, that the school governing bodies had a "legitimate

[9] It may be that a broader notion of "right" than that used in private law may well be appropriate. Such a conception was adopted, for example, in *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A) at 18. In that case which was concerned with a claim in terms of an export incentive scheme, the details of which had been published in the *Government Gazette*, Botha JA held that although no contractual relationship had been established between the appellant and the respondent, the state had unilaterally incurred liability in terms of the scheme.

expectation" as contemplated by section 24(b), which gave rise to a right to procedurally fair administrative action.

32. The term "legitimate expectation" appears first to have been used in the context of administrative law in a decision of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA). The applicants in that case argued that the refusal of the Home Secretary to renew their study permits was invalid in that he had failed to accord them a hearing prior to making the decision to refuse to renew the permits. Lord Denning observed:

> "... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say." (At 170 E-F.)

He went on to hold that in the circumstances of the case, the two applicants had neither a right nor a legitimate expectation that a hearing would be afforded to them. The notion of a "legitimate expectation" has since been used frequently in many jurisdictions, including our own.[10]

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[10] The concept of legitimate expectation has been used by the House of Lords. See, for example, *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237 (HL); *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374; and by the Judicial Committee of the Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629. It has also been adopted in Australia, see, for example, *Kioa and Others v Minister for Immigration and Ethnic Affairs and Another* (1985) 62 ALR 321 (HC) at 347; *Cunningham v Cole and Others* (1982-3) 44 ALR 334 (FC); *Attorney-General, New South Wales v Quin* (1990) 93 ALR 1 (HC) and, on occasion, by Canadian courts. See, for example,

33. In *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A), Corbett CJ considered in detail the origins and development of the concept of "legitimate expectation" in English law. He noted that a legitimate expectation must have a reasonable basis and in considering what conduct would give rise to a legitimate expectation, he cited (at 756 I) the speech of Lord Roskill in *Council of Civil Service Unions and Others v Minister for the Civil Service* as follows:

> "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 practice which the claimant can reasonably expect to continue*." (Emphasis of Corbett CJ).

34. The learned Chief Justice went on to observe that in Australia and New Zealand the concept of "legitimate expectation" had been employed by the courts in the context of judicial review of administrative action. He concluded:

> "In my opinion, there is a similar need in this country. There are many cases where one can visualise in this sphere ... where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which

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Old St Boniface Residents Association v Winnipeg (City) [1990] 3 SCR 1170 (SCC); *Reference re Canada Assistance Plan (BC)* (1991) 83 DLR (4th) 297 (SCC). The concept of legitimate expectations has also given rise to a rich academic discussion: See, for example, J Hlophe "Legitimate Expectation and Natural Justice: English, Australian and South African Law" (1987) 104 *South African LJ* 165; J Grogan "When is the 'Expectation' of a Hearing 'Legitimate'?" 1990 *SA Journal on Human Rights* 36-47; PP Craig "Legitimate Expectations: A Conceptual Analysis" (1992) 108 *Law Quarterly Review* 79-98; P Craig "Substantive Legitimate Expectations in Domestic and Community Law" (1996) 56 *Cambridge LJ* 289-312; C Forsyth "The Provenance and Protection of Legitimate Expectations" (1988) 47 *Cambridge LJ* 238; D Wright "Rethinking the Doctrine of Legitimate Expectation in Canadian Law" (1997) 35 *Osgoode Hall LJ* 139-194; M Paterson "Legitimate Expectations and Fairness: New Directions in Australian Law" (1992) 18 *Monash University Law Review* 70-90.

> was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration." (At 761D-G).

On the facts of the case before him, he held that the applicants had a legitimate expectation that their applications to be appointed as Senior House Officers in the employ of the respondent would be favourably considered and/or that they had a legitimate expectation that if their applications were to be rejected they would be given a fair hearing before the decision to reject their applications was made (At 762B-C).

35. Corbett CJ also recognised that a legitimate expectation might arise in at least two circumstances: first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing; and secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made. (At 758D-F).

36. The concept of "legitimate expectation" employed in section 24 of the interim

Constitution needs to be interpreted in the light of the concept of "legitimate expectation" that sprang from Lord Denning's judgment in *Schmidt* and that has been adopted in a wide variety of jurisdictions as mentioned above. Expectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind. There are also circumstances in which a legitimate expectation will arise which has inter-related substantive and procedural elements as Corbett CJ also recognised in *Traub* (at 758F). Once a person establishes that a legitimate expectation has arisen, it is clear from the language of section 24(b) of the interim Constitution that he or she will be entitled to procedural fairness in relation to administrative action that may affect or threaten that expectation. It is not necessary for us to decide in this case, in what circumstances, if any, a legitimate expectation will confer a right to substantive relief beyond that ordinarily contemplated by a duty to act fairly.[11]

37. In this case, there is no dispute between the parties that a system whereby government paid tuition, transport and boarding bursaries to schools on behalf of needy pupils had been operating for some years. That system originated under the

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[11] There are cases in which the English courts, in particular, have held that a legitimate expectation will give rise to some form of substantive relief. See, for example, *R v Secretary of State for the Home Department, ex parte Khan* [1985] 1 All ER 40 (CA); *R v Secretary of State for the Home Department, ex parte Ruddock and Others* [1987] 2 All ER 518 (QB); *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (QB), but for a different view see *R v Secretary of State for Transport, ex parte Richmond upon Thames London Borough Council and Others* [1994] 1 All ER 577 (QB) at 594-6. On the other hand, the Australian High Court and the Canadian Supreme Court appear to have rejected this notion. See, for example, *Attorney-General, New South Wales v Quin* (1990) 93 ALR 1 (HC) and *Reference re Canada Assistance Plan (BC)* (1991) 83 DLR (4th) 297 (SCC).

former government and favoured white pupils at the expense of black pupils in the education system. Bursaries were generally paid quarterly in arrear. Accordingly, debts had to be incurred by governing bodies in the expectation that the bursaries would be paid in due course. There can be no doubt that this system could not continue for long under the new constitutional dispensation. Nevertheless, governing bodies of schools were obliged to budget each year for the operating costs incurred by the school in the provision of tuition, transport and boarding bursaries. Towards the end of the 1994 school year, notice was given to the governing bodies that payment of transport and boarding bursaries would continue until the end of 1995 or until the new provincial governments decided otherwise. As it happened, bursaries were paid for the first term and at least in some schools for the second term of 1995. What is more, the budget proposed by the second applicant in May 1995 allocated sufficient funds for the payment of bursaries until the end of the 1995/6 year, although in his budget speech the second applicant did state that bursaries would be reviewed during the course of the year.

38. In all these circumstances, it is clear that the governing bodies of schools had a legitimate expectation that government bursaries would continue to be paid during the 1995 school year subject to reasonable notice by the government of its intention to terminate such payment. Such legitimate expectation that bursaries would continue to be paid subject to reasonable notice meant that if the second

applicant wished to terminate the bursaries he could not do so unless he gave reasonable notice prior to termination. Once, however, he had given reasonable notice there would have been no obligation to consult with the governing bodies or the schools concerned. This legitimate expectation, therefore, is one which has intertwined substantive and procedural aspects as discussed above. There can be no doubt that when the second applicant notified school principals on 5 August 1995 that he intended to terminate bursaries with effect from July 1995, no reasonable notice of termination had been given to the respondent's members. It is equally clear that the letter of 31 August 1995 does not constitute reasonable notice because, at best for the second applicant, it represented a decision to terminate the payment of bursaries with effect from a date more than a month before the date of that letter.

39. The question that arises is whether the second applicant acted procedurally fairly in the context of the legitimate expectation that the respondent and its members entertained. It needs to be emphasised that section 24(b) requires that administrative action which affects or threatens legitimate expectations be procedurally fair. That does not mean that in all circumstances a hearing will be required. It is well-established in our legal system and in others that what will constitute fairness in a particular case will depend on the circumstances of the

case.[12]

40. In this case, it is clear that before the meeting of 5 August 1995, no notice had been given to the members of the respondent that a termination of bursaries with effect from the beginning of the third term was contemplated by the second applicant. Nor did the notice of the meeting itself intimate that the second applicant intended terminating the payment of bursaries. The members of the respondent were therefore given no opportunity to restructure their contractual obligations with transport companies or suppliers or staff in the light of the diminished income that they would receive as a result of the retroactive termination of the bursaries. At the meeting of 5 August 1995, or shortly thereafter, they were afforded a period of two weeks in which to make representations to the second applicant, concerning the particular financial difficulties they would face if the bursaries were summarily, indeed retroactively, terminated. It appears from the papers filed in this case that many of them took advantage of that opportunity. However, before that period had ended, the second applicant had reported to the provincial cabinet recommending that retroactive termination be approved. Although the second applicant avers that he sought the approval of the provincial cabinet "in principle"only, it appears from the

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[12] See, for example, *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 758 I-J; *Du Preez and Another v Truth and Reconciliation Commissio*n 1997 (3) SA 204 (A) at 231I-232C citing with approval from the speech of Lord Mustill in *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) at 106 d-h.

memorandum that he prepared and circulated to his colleagues in the provincial cabinet that his recommendation went beyond a decision "in principle". He unqualifiedly recommended termination of the payment of bursaries. The respondent and its members were finally informed by a letter dated 31 August 1995 of the second applicant's decision to terminate the bursaries with effect from 1 July 1995.

41. In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. This is a principle, which the second applicant himself recognised as important in his speech on 5 August 1995 (See para 19 above). Indeed, it may be that in many cases a retroactive termination of benefits will not be fair no matter what process is followed unless there is an overriding public interest, as the European Court of Justice has held on

several occasions.[13] In the light of the conclusions I reach, it is not necessary to explore that issue further in this case. 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. In this regard, there are similarities between the facts of this case and those in the recent decision of the English Court of Appeal, *R v Devon County Council ex parte Baker and another; and R v Durham County Council, ex parte Curtis and another* [1995] 1 All ER 73 (CA) in which the court was faced with the closure of state-run residential homes for old people. It was held that there was a duty on the county councils concerned to consult the permanent residents in the homes before the decision to close the homes was taken. In one of the cases heard on appeal, the court held that the failure to consult prior to the taking of the decision rendered the decision susceptible to judicial review.

42. I conclude that in the circumstances of this case the decision by the second applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in section 24(b) of the interim Constitution. It is not necessary, therefore, to

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[13] It is not surprising that the European Court of Justice has taken the view that the retroactive implementation of policy changes by government will be unlawful unless it can be shown that the retroactivity is justified by an overriding public interest. See, for example, *J Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321; *Karl Spagl v Hauptzollamt Rosenheim* [1990] ECR 4539; and the discussion in Schwarze *European Administrative Law* (1992) at 867-8.

consider the merits of the respondent's reliance on the provisions of section 24(d) of the interim Constitution. In this case, in relation to the breach of section 24(b), no question of justification in terms of section 33 can arise as the decision taken by the second applicant did not constitute "a law of general application" as required by that provision.

43. Two further arguments of counsel for the second applicant remain to be considered before I turn to the question of the order. First, counsel argued that section 32 of the Act (cited in full in para 9 above) permitted the second applicant to make a grant to state-aided schools only after moneys had been allocated for this purpose by the provincial legislature. This argument assumes that in each financial year, as a matter of law, there needs to be a fresh policy decision to grant bursaries. Consequently, he argued, there could have been no lawful grant of bursaries by the second applicant for the 1995/6 financial year (which commenced on 1 April 1995) until the 1995/6 budget was passed by the provincial legislature (this only happened during June 1995). I cannot accept that this is the proper interpretation to be given to section 32. It is clear that financial appropriations for bursaries and other departmental expenditure are made annually by the provincial legislature in the provincial departmental budget. This budget is often adopted only after the beginning of a new financial year. The policy decision to grant bursaries need not be taken each year, but may simply run from year to year

subject to the allocation of funds for the bursaries by the provincial legislature. In this case, the budget did allocate funds for the bursaries and in seeking approval of that budget, the second applicant effectively made a grant as contemplated by section 32. We do not need to consider therefore what would have happened had no such funds been allocated by the legislature. Nor do we need consider, for the purposes of this case, the basis upon which bursaries paid during April, May and June 1995 were or may have been paid, as nothing turns on it.

44. The second argument raised by counsel for the applicants that remains to be dealt with was the argument that because the bursaries were discriminatory in effect, their existence was unconstitutional, and that any means employed to terminate them could not be subject to constitutional challenge. In my view, this is too sweeping a proposition. A harmonious balance needs to be found between the urgent need to eradicate unfair discrimination on the one hand, and the obligation to act fairly, on the other. There is no doubt that, in the process of transition upon which we have embarked, we need to remain committed to the goal of equality, but that goal must be pursued in a manner consistent with the other constitutional requirements, including procedural fairness, enshrined in section 24 of the interim Constitution.

The Order

45. I turn now to consider the appropriate order to be made in this case. Judgment in the Transvaal High Court was handed down on 1 December 1995. De Klerk J, having reached the conclusion that the decision to terminate the subsidies should be set aside because it was procedurally unfair, also concluded that in the circumstances of the case the matter should not be referred back to the second applicant. He held that the second applicant would not be able to act impartially in the circumstances. After a consideration of the factors he considered relevant, he determined that the second applicant had to be compelled to continue to pay the bursaries till the end of the 1995 school year and he made an order to that effect. The applicants have appealed against that order.

46. Section 4 of the interim Constitution provides that:

> "(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
>
> (2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government."

Having concluded that the second applicant's decision to terminate the payment of bursaries to state-aided schools was taken in breach of the right of the members of the respondent to procedurally fair administrative action, it follows that the decision itself is in conflict with the Constitution and is therefore invalid. In substance, therefore, that

aspect of De Klerk J's order should be upheld.

47. The next question to be considered is the effect of an order declaring the second applicant's decision to terminate the bursaries invalid. It is clear from the facts outlined above that the bursaries were, in any event, only payable until the end of 1995. It is also clear that they were payable until the end of 1995 unless a valid decision to terminate them during that year was announced. The effect of declaring the second applicant's decision to terminate the bursaries invalid, is that the bursaries continued to be payable until the end of the 1995 school year in the absence of any other order by this Court. In the present case, an order which has the effect that the bursaries will continue to be paid for the remaining terms of the 1995 school year, is not an unjust or inequitable one given the overall circumstances of the case. In reaching this conclusion I am mindful of the following facts:

(a) that these bursaries were payable to schools that had benefited under apartheid education policy;

(b) that the second applicant's decision to change the policy relating to bursaries was one which accorded with the goals of the Constitution;

(c) that the procedure followed to achieve the change in policy did not accord with the requirements of the Constitution;

(d) that the bursaries were to be paid to assist indigent students to attend school;

(e) that the amount of money concerned was, in the context of the departmental education budget, very small;

(f) that when the second applicant finally gave formal notice of his decision to terminate the payment of the bursaries on 31 August 1995, the third term of the school year had nearly run its course. At that stage, it would have been difficult for members of the respondent to rearrange their affairs for the fourth term. It is doubtful, therefore, whether notice given at that stage to terminate bursaries at the end of the third term would have been reasonable notice.

(g) that, on balance, the potential disruption to schools of what would in effect, be a retroactive termination of the bursaries seems to outweigh the potential advantage that could be gained from the reallocation of those funds at this stage.

I cannot, in the light of these considerations, conclude that it would be unjust or inequitable for the bursaries to continue to be paid for the balance of the 1995 school year.

48. It is not necessary to decide whether, in different circumstances when a benefit is payable for an indefinite period and invalidly withdrawn, the benefit will continue to be payable indefinitely until validly terminated. There may be times, however, where it would be necessary for a court, in order to provide just and equitable relief, to make an order to terminate the payment of the benefits as from a date before the date of that court's order. Crucial to the making such an order would

be the nature of the legitimate expectation concerned and the reasonable period of notice for termination of the benefits.

49. De Klerk J made an order that the bursaries should be paid until the end of the 1995 school year after concluding that it would be an appropriate case for him to substitute his decision for that of the second applicant. I cannot agree that this is a case in which such substitution would be appropriate.

50. Although the general principle in our common law is that the courts will be reluctant to substitute their decision for that of the original decision maker, our courts have recognised that there are circumstances where it is appropriate for a court to do so. In *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 76D-G, Hiemstra J identified the principles as follows:

> "1. The ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.
> 2. The Court will depart from the ordinary course in these circumstances:
> (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by the reference back is significant in the context.
> (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to submit to the same jurisdiction

again."

In this regard, our courts have shown themselves more willing to step into the shoes of the decision maker than have the English courts. In *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 143h-j, for example, Lord Hailsham said the following when speaking of the new RSC Order 53:

> "But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law." (See also the speech of Lord Brightman in the same case at 156).[14]

51. In this case, De Klerk J concluded that the second applicant could not make an objective or unbiased decision concerning the bursaries. In reaching this decision, he took the following factors into account: that the second applicant had been someone who had suffered as a result of the policies of apartheid; that he had been influenced by political pressures; that he did not change his mind concerning the termination of the bursaries even when representations were made to him by members of the respondent and that the question of bursaries in the light of the injustices of the past was a highly emotional matter. In my view, the learned judge

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[14] A similar approach is adopted by the Australian High Court, see, for example, *Attorney-General, (NSW) v Quin* (1990) 93 ALR 1 at 25.

did not consider sufficiently the fact that section 32 of the Act reserves the decision as to what grants should be made to state-aided schools to the second applicant, a duly elected politician, who is a member of the executive council of the province. By definition, therefore, the decision to be made by the second applicant was not a judicial decision but a political decision to be taken in the light of a range of considerations. For the reasons given by Lord Hailsham in the *Evans* case, a court should generally be reluctant to assume the responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government. Accordingly, the Court should be slow to conclude that there is bias such as to require a court to exercise a discretion particularly where the discretion is one conferred upon a senior member of the executive branch of government. I think that the factors identified by De Klerk J are clearly not sufficient in all the circumstances of the case to warrant the conclusion that the second applicant was not in a position to make an unbiased decision concerning the bursaries.

52. I have found above that the effect of an order of constitutional invalidity is that the bursaries will be payable by the second applicant until the end of the 1995 school year and that this result is neither unjust nor inequitable. The question that arises is whether this is an appropriate case in which to refer the matter back to the second applicant. For the reasons already given, it will often be appropriate to

refer a matter back to the relevant organ of state. However, this does not seem to be a case in which the matter can be referred back to the second applicant in order for him to act in a way which will cure the unconstitutional action. The decision to terminate the bursaries was invalid because it failed to provide the respondent and its members with reasonable notice of termination and to give them an effective opportunity to be heard in connection with the proposed termination. The bursaries were, however, only payable until the end of 1995. That time is long past. The period for which the bursaries were to run has expired. It would be futile to return the matter to the second applicant at this stage for he cannot now give parents and school governing bodies reasonable notice that he intends to terminate bursaries which have, in fact, been terminated by the passage of time. Nor is he able now to act in a manner which would accord procedural fairness to parents or the members of the respondent in relation to his purported termination of the bursaries. For substantially the same reasons, it would have served no purpose for De Klerk J, when he made his order on 1 December 1995, to have referred the matter back to the second applicant. The school year was at an end, and nothing could effectively have been done by the second applicant before the expiration of the bursaries on 31 December 1995. It follows that, albeit for different reasons, I have reached a result that calls for no change to be made to the order of De Klerk J.

53. One further matter remains to be considered and that is the question of the special costs order made against the second applicant by the Transvaal High Court. The well-established principle of our common law is that in awarding costs, a court of first instance exercises a judicial discretion and a court of appeal will therefore not readily interfere with the exercise of that discretion.[15] The circumstances in which a court of appeal would interfere with a costs order were summarised by Corbett JA in *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D-F as follows:

> "The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The court of appeal cannot interfere merely on the ground that it would itself have made a different order."

54. De Klerk J made the order of attorney and client costs against the second applicant because he concluded that the second applicant had acted in a blameworthy and vexatious manner. There can be no doubt that there are material inconsistencies between the two affidavits filed by the second applicant in this matter, as I have said above. There are also inconsistencies between those affidavits and the documentary evidence annexed to those affidavits, and to the affidavits of the respondent. The second applicant gives no explanation for these inconsistencies

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15 *Neugebauer & Co Ltd v Hermann* 1923 AD 564 at 575; *Penny v Walker* 1936 AD 241 at 260; *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963(A) at 976G-H; *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D-E.

beyond stating that he had too little time to consult with his legal representatives. This explanation is not adequate to explain the very clear contradictions between the two sets of affidavits. In the circumstances, I cannot find that De Klerk J did not have reasonable grounds for making the costs order that he did.

55. It does not follow however that when a court refuses, upon appeal, to set aside an award of costs on an attorney and client scale, that a similar award should be made upon appeal. A court should be slow to inhibit the right of appeal (*Ward v Sulzer* 1973 (3) SA 701 (A) at 707B) and I accordingly conclude that the respondent is entitled to its costs before this Court only on a party and party basis.

56. 1. Leave to appeal is granted.

2. The appeal is dismissed with costs.

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

For the Applicants:	EW Dunn SC and JA van der Westhuizen instructed by the State Attorney, Pretoria.
For the Respondent	RJ Raath instructed by Ross & Jacobsz Attorneys.