CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 12/96

DIE ORANJE VRYSTAATSE VERENIGING VIR STAATSONDERSTEUNDE SKOLE	First Applicant
DIMAKATSO ANNA NKIANE	Second Applicant

versus

DIE PREMIER VAN DIE PROVINSIE VRYSTAAT	First Respondent
DIE LID VAN DIE UITVOERENDE RAAD VIR ONDERWYS EN KULTUUR, PROVINSIE VRYSTAAT	Second Respondent
DIE LID VAN DIE UITVOERENDE RAAD VIR FINANSIES EN UITGAWES, PROVINSIE VRYSTAAT	Third Respondent

Decided on: 12 May 1998

JUDGMENT

GOLDSTONE J:

[1] During October 1995 an application was heard by Lombard J in the Orange Free State Provincial Division of the Supreme Court (as it was then called), in which the applicants sought to have a decision of the Orange Free State Provincial Administration set aside. The decision had the effect of terminating the bursaries and transport subsidies for pupils attending what were known as "state-aided schools". In addition to an order declaring the decision to be in violation of the interim Constitution,[1] the applicants also

1 The Constitution of the Republic of South Africa, Act 200 of 1993.

sought consequential relief in the form of orders requiring the respondents to reinstate and pay the bursaries and subsidies with effect from the beginning of the 1995 school year, and interdicting them from again terminating the bursaries or subsidies without having conducted the negotiations provided for in section 247 of the interim Constitution and the White Paper on Education which had been issued by the National Government on 15 March 1995.[2]

[2] Lombard J granted the declaratory order sought by the applicants and ordered the respondents to pay the applicants' costs. The applicants were aggrieved at the refusal by the learned Judge to grant the consequential relief sought by them. They applied to this Court for leave to appeal against that decision.

[3] The President of this Court issued directions for the hearing of the application for leave to appeal and set it down for hearing on 11 March 1997. However, on 23 December 1996 the applicants purported to withdraw their application. They did not tender to pay the respondents' costs. It would appear that there then followed negotiations between the parties in an endeavour to reach agreement on costs. They were unsuccessful and in a letter dated 12 August 1997 the State Attorney informed the Registrar of this Court that

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[2] Published in Government Gazette 16313.

the respondents wished to have the question of costs determined by the Court. The respondents now seek an order compelling the applicants to pay the costs incurred by them in consequence of the proceedings in this Court relating to the application for leave to appeal. After some further delay, in response to a direction issued by the President, written submissions on the costs issue were filed by the parties. According to the written submission from the applicants resisting an order for costs they explain their withdrawal of the appeal by reference to the provisions of the South African Schools Act, 84 of 1996, in terms of which "state-aided schools" were abolished with effect from 1 January 1997. The relief they sought had become moot.

[4] In my opinion we should not make the order sought by the respondents. The applicants' complaints were clearly not frivolous or vexatious and there can be no suggestion that they acted from improper motives. The withdrawal of the bursaries and subsidies was of moment to the applicants and to other parents whose children were attending "state-aided schools". As this Court has made plain on a number of occasions, litigants should not be discouraged from enforcing their constitutional rights by having to run the risk of having to pay the costs of their governmental adversaries.[3] There is no

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[3] See *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); 1996 (4) BCLR 537 (CC) at para 36; *Motsepe v Commissioner for Inland Revenue*, 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at para 30.

suggestion that the applicants withdrew their application for leave to appeal for a reason other than that stated by them.

[5] I would emphasise that I am not suggesting that the applicants were entitled to the relief granted to them by Lombard J. The merits of their case have not been argued before or considered by this Court. And it would obviously not be in the interests of justice for argument to be heard on issues which have now become moot and are no longer of any consequence to the parties or indeed anyone else. The costs of such a proceeding would greatly exceed those which the parties have incurred pursuant to the application for leave to appeal.

[6] The following order is made:

With regard to the application for leave to appeal there is no order as to costs.

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