Bel Porto School Governing Body and others v Premier, Western Cape Province and another
Case no 58/00

Explanatory Note

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This morning the Constitutional Court gave judgment in this appeal from the Cape of Good Hope High Court. The case arises out of rationalisation of the provincial school system by the Western Cape Education Department (WCED). The Court was divided: Chief Justice Chaskalson, with Justices Goldstone, Kriegler, Madlanga, Somyalo and Yacoob concurring, dismisses the appeal. Justices Mokgoro and Sachs jointly and Justices Madala and Ngcobo each individually would uphold the appeal.

When the WCED took over responsibility for schools in the Western Cape, there were gross disparities between schools formerly under the House of Assembly (HOA) Education Department, which catered for white children, and other departments which catered for other races. The WCED had to establish a single system within the province to cater for the needs of all children equally. Budgetary constraints prevented all schools being brought up to the HOA standard and posts at some had to be scrapped and new ones created at others.

Special (Elsen) schools for disabled children employ general assistants to help the children in classrooms and hostels and on buses. For this purpose the HOA subsidised its schools, letting them decide how many general assistants to employ and on what terms. In the other departments the general assistants were employed by the departments and not the schools. HOA schools had better facilities and resources and more teachers and general assistants than had the schools in the other departments. In attempting to introduce an equitable system throughout the province, the WCED left the existing arrangements in place while developing a general provisioning policy for all schools. To that end, it worked on a rationalisation and redeployment scheme under which teachers and general assistants at overstaffed schools would be moved to understaffed schools.

The governing bodies of HOA Elsen schools, now integrated schools in the WCED, complained that the subsidies they received were inadequate to cover the salaries of the general assistants they employed and requested the WCED to employ them. The WCED declined as it already had a surplus of general assistants on its establishment, some of whom would have to be retrenched when the rationalisation and redeployment scheme was implemented. The HOA Elsen schools sued the WCED in the Cape High Court, contending that the decision by the WCED to implement the rationalisation and redeployment scheme without first employing the general assistants at their schools infringed their constitutional rights to equality and to just administrative action. They claimed an order directing the WCED to employ the general assistants whom they themselves employed. Their application was dismissed by the High Court and they then appealed to the Constitutional Court.

Chaskalson CJ dismisses the appeal, holding that:

(a) There are many long-standing differences between the HOA schools and other schools, most of them to the advantage of the HOA schools. Looking at the whole picture, it could not be said that the HOA Elsen schools were worse off than the other Elsen schools or had been unfairly discriminated

against concerning the employment of general assistants.
(b) The appellant schools received adequate notice of what the WCED's intended to do and were given adequate opportunity to make representations in that regard to the WCED and at the highest level to the Premier of the province. These representations were considered but rejected and there is no basis for holding that the decision of the WCED did not meet the requirements of the Constitution for just administrative action.
(c) The appellants can also not require the WCED to take on additional staff when it already has surplus staff on its own establishment, some of whom it will have to retrench.

In their dissent, Justices Mokgoro and Sachs find that the WCED's action was substantively unfair, it not being "justifiable in relation to the reasons given for it"as constitutionally required. They hold that to be justifiable administrative action must be fair, which includes that it must be proportionate to its objective within a wide range of permissible discretionary options. While recognising the need for a programme of rationalisation to redress the inequities of the past, they hold that implementation must be fair and take account of the impact on the children with special needs and on general assistants who belong to a class that had been discriminated against, and who had given the children long care. In particular, it would not be justifiable to apply the principle of LIFO (Last In First Out) in such a way as to disregard their length of service. To retrench them in favour of general assistants from other Elsen Schools with far shorter periods of employment would not be justifiable. In the view of Mokgoro and Sachs JJ, there ought to be an order requiring that the LIFO principle be applied so as to take account of their years of service.

Madala J, agreeing with the order proposed by Mokgoro and Sachs JJ, would set aside the decision as procedurally unfair in that the general assistants employed by the applicant schools had not been afforded an opportunity to be heard on the question of their retrenchment, which they had a legitimate expectation would be afforded them.

Ngcobo J, though disagreeing with Madala, Mokgoro and Sachs JJ, holds that the WCED had acted procedurally unfairly. It ought to have consulted the appellants about implementation of the scheme in view of the impact it would have on them. He would not have granted the relief proposed by Madala, Mokgoro and Sachs JJ but would have postponed the case for additional evidence and argument as to the relief that would be appropriate.

The majority recognised the service which the assistants concerned had rendered to the children with special needs. However, those assistants were not and had never asked to be regarded as employees of the WCED, which could not be ordered to employ them. Nor is it competent to make any order which would prejudice WCED employees who were not party to the proceedings and who might lose their jobs if such an order were made. Furthermore, neither the appellants not the general assistants employed by them had raised the question of legitimate expectation nor that of unfairness in the implementation of the policy. In both the High Court and the Constitutional Court the appellants had expressly asked only for an order that the general assistants employed by them be employed by the WCED and it would not be appropriate to reopen the case to consider relief for which the appellants had not asked.