SACHS J ABRIDGED JUDGMENT

Bel Porto School Governing Body and others v Premier, Western Cape Province and another

Mokgoro and Sachs JJ:

[134] *Introduction* This case raises important questions about when it is appropriate for a court to intervene in matters of public administration. Section 33 of the Constitution gives everyone the right to administrative action that is procedurally fair and that is justifiable in relation to the reasons given for it. The majority judgment prepared by Chaskalson CJ comes to the conclusion that the educational authorities in the present matter behaved in a manner that was procedurally fair, and that, insofar as the papers can be said to have made out a challenge based on justifiability, acted in a justifiable way.

[135] In our view, the majority judgment places undue emphasis on the circumstance that the general assistants at the appellants' schools did not have a contract of employment with the Western Cape Education Department (WCED) and that the WCED therefore had no obligation to give them the consideration they claimed. We are of the view that although formally employed by the appellants' schools and not by the Department, such assistants were in effect public servants working in government schools in exactly the same way as the general assistants at other ELSEN schools. As such, administrative justice required that they be given a right to participate in negotiations as to retrenchment similar to that afforded to their counterparts in other ELSEN schools. Furthermore, when it came to the implementation of the redeployment scheme, it was unjustifiable to operate the Last-In-First-Out (LIFO) principle in a manner which categorically disregarded the dedicated years which many had spent in government schools looking after children who were autistic, without sight or hearing, affected by cerebral palsy or other disabilities.

[136] We do not suggest that this case presents an example of egregious targeting or intentional neglect based on unacceptable considerations. On the contrary, the papers indicate conscientious attempts to reconcile a vast range of competing considerations with as much overall fairness as could be achieved. We accept that in the present matter the WCED inherited not only a fragmented education system, but a grossly inequitable one. Redistribution of resources was necessary. One cannot deny that for a young democracy facing immense challenges of transformation, the need to ensure the ability of the executive to act efficiently and promptly is important.[1] The overall scheme the WCED produced was

negotiated over many years and has a number of interrelated dimensions, making it necessary to have regard for the package as a whole. It is not always easy or appropriate to disentangle one particular aspect from the rest. Decisions of an economic nature involving policy considerations as to allocation of resources were, in the absence of more, a province of the Province.

[137] Nevertheless, in the hurly-burly of the process, the appellants' schools were knowingly, even if not maliciously, left by the wayside. We believe that the administration has to be disciplined by the principles of fundamental fairness as set out in section 33 of the Constitution, and that the categorical exclusion of the general assistants at the appellants' schools both from the processes concerned with re-deployment, and from the right to have their length of service taken into account, manifested unfair treatment, and entitled them to judicial relief.

The Factual Background

[138] Since 1976, and particularly during the 1990s, the appellants' schools frequently raised their concerns about the unfair consequences of their general assistants not being on the "Official Establishment" of the schools with the relevant education department. As soon as the WCED was created, it acknowledged that there were disparities which had to be addressed. The issues had, however, never been resolved.

[139] The attitude of the WCED to the appellants, not always consistent, can be gleaned from the papers. Mrs. W.T. Wilkinson, Acting Head of Education, in a letter to Mr. Van der Merwe, chairman of the Bel Porto Governing Body (the First Appellant), noted in 1995 that there was a need to provide uniform establishments for the general assistant posts for schools, and that negotiations should take place between experts of the former departments, and the educational guidance service, and school principals. The Sub-Directorate: Work Study should be utilized to determine the envisaged staff provisioning scales as soon as possible.

[140] The Head of Education, responding in 1996 to a letter of Dr. Patrick Normand, chairman of the Vera School Governing Body (the Second Appellant), stated that:

"Most of the non-teaching personnel to which you refer in your letter will be placed on the staff establishment of the Western Cape Education Department once these new staffing scales have been approved and made official."

[141] In 1997, the appellants, through rumour we are told, had heard that retrenchments were looming in the WCED, as a consequence of the staff rationalisation which they had heard formed part of the education transformation process[2] and was to be embarked upon by the WCED. The appellants became concerned about the possibility of retrenchments at their schools, and the implications for staff and learners that would ensue. That their already unbearable financial situation would be compounded, intensified their concern. They themselves, as opposed to the WCED, would have to bear the cost of retrenchments when they could least afford it. They began to press the WCED vigorously for details about its plans, particularly after some initial very general information about the WCED's plans was disclosed.

[142] On 16 May 1997, the Chairman, Board of Management of Dominican-Grimley School (the Third Appellant), wrote to the head of the WCED, as follows:

"The future status of Board employees vis-a-vis Department employees
From information given at the ELSEN Principals' Meeting held at the Eros School on 5 May, it seems that there is a strong possibility that the services of General Assistants paid by the Board might have to be terminated in order to create vacancies for employees of the Department who, for whatever reason, have been declared redeployable. In ordinary terms such treatment of loyal and, in many cases long-standing, employees would amount to rank injustice to an already disadvantaged category. In terms of the Constitution of South Africa we are advised that "unfair discrimination" and "unjust administrative procedures" could be cited.
The Department is earnestly requested, firstly, to expedite the distribution of the official Establishment for Non C-S Educators. Secondly, the Department is requested to devise a just and equitable policy specifically applicable on a once-off basis to accommodate the needs and rights of General Assistants presently employed by Boards of Management at ex House of Assembly Schools for Specialized Education."

On 2 June, 1997, Dr Theron of the Department responded:

"The rectification of disparities in the working conditions and benefits of workers in the former Departments of Education has been delayed by the process of establishing the new Western Cape Education Department (WCED), with a new Act, supported by the appropriate

Regulations, having to be drafted and promulgated, but I am pleased to inform you that the WCED is at last in a position to resolve this issue.
The new South African Schools Act stipulates that all schools will soon become either public or private institutions. This means that workers at public schools, of which Dominican Grimley will be one, will become civil servants, irrespective of their former Departmental affiliations, and will enjoy equally the benefits applicable to their ranks and vocational categories.
Regarding the position of General Assistants paid by the Board when schools become public institutions, I want to assure you that the WCED will strive to avoid any unfairness or injustice in the handling of this matter."

On 8 August 1997, the school wrote to the Department, imploring the WCED to indicate when the matter would be finalised. On September 30, the Department responded as follows:

"As stated in our letter of 30 May 1997 the South African Schools Act, 1996 (Act 84 of 1996) made it possible for all general assistants to become civil servants irrespective of their former status as employees of governing bodies of state subsidized schools. This ruling will also be applicable to the general assistants at the Dominican Grimley School.
However, due to a number of factors this issue could not be finalised yet. The various trade unions and other stake holders must still be consulted, a cut back of 12% of all non-educator posts must be implemented and the financial implications must be taken into consideration before a final decision could be taken on this complicated issue. The Western Cape Education Department (WCED) will however try to accommodate as many general assistants as possible but no guarantee of the number can be given."

The appellants sought information about the WCED's rationalisation plans in letters dated 27 October and 9 December 1997. They sought the information in order to determine the extent to which these plans would affect their schools. The response which was received from Dr. Theron of the Department on 12 December in essence stated:

1. The great majority of the general assistants at the former Department of Education and Culture, Administration: House of Assembly's state-sponsored schools for Special Education (Elsen Schools) were not public servants of the Department or another government department, but were employed through the governing bodies of these schools and their

salaries were paid by the schools out of their own funds and/or through subsidies received from the government. For this purpose, all of these schools must register as employers. These schools, like the former Model C schools, handled the personnel in question. The general assistants in question were therefore under the management of the schools concerned, and not therefore of the government. It should be mentioned that the schools decided themselves about the number of personnel they would appoint.

2. The abovementioned personnel at equivalent schools of the Department of Education and Culture; Administration: House of Representatives were, however, in the employ of the government.

3. After the former Department of Education and Culture, Administration: House of Assembly was established, the schools concerned began suffering financial hardships, and rationalisation of posts was beginning, so the abovementioned 12 schools thereafter made demands for the general assistants to be placed on the establishment of the WCED.

4. The WCED, however could not do this, considering that a new establishment for non-CS educators had to be created and negotiated, the Department's budget had been drastically reduced, and in the first place the WCED had to make provision for its own staff who might become redundant. The process of determining staffing norms is presently under discussion in the bargaining chamber with the relevant unions. In the meantime, ad hoc subsidies were being given to these schools concerned to specifically subsidies their personnel expenses.

5. It should be pointed out that the WCED cannot construct these new conditions of service necessarily in terms the personnel needs of the schools, but in terms of what the WCED is able to finance.

6. Furthermore, it should be pointed out that the new concept for schedules of service makes provision for equal conditions of service in respect of the relevant former schools. The same norms would be applied to all schools.

7. If in terms of the abovementioned rationalisation scheme there should be posts vacant after the rationalisation and re-deployment of departmental personnel, the general assistants at the schools could apply for positions. However, no assurance could be given that they would be appointed.

The letter did not provide sufficient information to enable the appellants to determine the extent of the impact upon their schools, their general assistants and learners, of the WCED's plans. They could not therefore respond to the WCED and present proposals to mitigate the effects of the Personnel Provisioning Measures (PPM).

[143] This letter made it clear that staffing levels had not yet been finalised, and that further negotiations were continuing. Although we were not told in the papers or in Court why an application was not launched until November 1999, it is possible that the appellants hoped that they would receive information, and perhaps even be included in discussions regarding the WCED's plans and their implementation. The appellants stated that when further information was not forthcoming, they resorted to an application in the High Court to compel the respondents to provide them with the necessary information. They further sought an order permitting them to approach the High Court once the respondents had provided the information if it proved necessary. The appellants stated that they felt left in the dark, as there was no consultation, and averred that the Department did not properly investigate the situation at their schools. Chaskalson CJ in his judgment for the majority notes that it is not surprising that the appellants were unable to get clear answers at the meetings between the WCED and the principals as to what the policy would be, since the policy was only finalised shortly before the proceedings were commenced.[3]

[144] Only some of the information was provided in the answering affidavits of the respondents, including, most notably, the envisaged rationalisation blueprint of the WCED: the PPM. After reading the PPM, it was clear to the appellants that the WCED had no intention of appointing the general assistants at the appellants' schools to the posts to be established. The appellants amended their notice of motion, applying for an order:

" 1. Declaring the Respondents' failure to employ the general assistants presently employed by the Applicants, to be in conflict with the fundamental rights entrenched in chapter 2 of the Constitution of the Republic of South Africa and therefore unlawful.
2. Directing the Respondents to employ the general assistants presently employed by the Applicants.
3. Granting further and/or alternative relief.
4. Directing the respondents to pay the costs of the application relating to:
4.1 the aforesaid relief.
4.2 the relief sought in prayer 1 of the notice of motion prior to the amendment thereof."

[145] The Cape High Court rejected their application with costs, Brand J declaring that the WCED could not be compelled to renege on its agreements with trade unions and their

individual employees.

[146] In the papers, and at the hearing of this case, the WCED clearly expressed the view that it was not necessary in connection with provisioning, to consult with the appellants' schools or to make any efforts to consult with their general assistants, although they well knew that the general assistants would be affected by the implementation of their policy. The evolution and communication of this policy of categorical exclusion is fully dealt with in the majority judgment. Mr. O'Connell for the WCED, in his affidavit sums up the position with the blunt statement that "[t]he provisioning of posts is not a matter to be negotiated between the governing bodies of schools and the WCED."

[147] Having eliminated the appellant schools from negotiations over implementation, the WCED in fact held consultations with six unions representing employees within the WCED.[4] From the papers, and oral argument presented by counsel for the respondents, it is apparent that the WCED was negotiating only with representatives of current employees of the Department. There were no representatives bargaining on behalf of the general assistants at the appellants' schools.

The issues before the Court

[148] The appellants raised several issues before this Court. They argued that the failure of the WCED to appoint their general assistants and pay their salaries, as is the case with other ELSEN schools in the Western Cape, creates inequality between the former and the latter. Unless this inequality is corrected before the implementation of the PPM, they averred, such implementation will result in the appellants being unfairly discriminated against in violation of their constitutional right to equality in terms of section 9 of the Constitution. They also argued that there was a violation of their right to just administrative action in terms of section 33.[5] Their basic argument on this score was that the failure of the WCED to give them a proper hearing prior to the implementation of the PPM violated their right to procedurally fair administrative action. In the letter of demand which preceded their institution of proceedings in the High Court however, they stated that the actions of the administration were in fact unjustifiable. In the flurry of amendments intended to respond to the information provided in the respondents' affidavit, they did not expressly go on to pursue an argument based on absence of justifiability. Nor in argument before this Court did they in terms raise the question of whether or not the refusal of the WCED to employ the general assistants resulted in administrative action that was not justifiable in relation to the reasons given. They did

nevertheless consistently maintain that the process had led to results that were unfair, unreasonable and unjustifiable. This in fact was the basis for the contention that they were being denied their right to equality.

[149] It is unfortunate that the issue of the justifiability of the administrative action was not argued as such before us. We do believe, however, that it was implicit in the claim being made, particularly in respect of the disproportionately harsh impact that the measures would allegedly have on the appellants' schools. This is an area of considerable novelty and controversy. The common law in our country and abroad has been undergoing notable evolution. The impact of the Constitution has been touched upon but not fully explored in our jurisprudence. We accordingly believe that in the present matter, which is concerned with questions of basic fairness rather than matters of form, it would be inappropriate to exclude from consideration constitutional claims which were vigorously advanced with strong factual foundations, because the format used turned out not to present the appellants' claims at their strongest. The central focus of the case has always been the basic fairness or unfairness of the procedure followed and the outcome arrived at.[6] In our view, the same factual considerations which were fully canvassed in respect of the argument relating to irrationality, are foundational to the question of justifiability, which we believe lies at the heart of the matter.

[150] It should be stressed that in this Court the appellants made no challenge to the PPM themselves, but merely sought to rectify what they considered to be an injustice in the way the measures were to be implemented. Similarly, with respect to their argument on the right to just administrative action, what was under attack before the High Court was the unfairness of the procedure adopted and the disparate impact of the PPM on the appellant schools. In this Court, the appellants' challenge went to the unfairness of the effect of implementing the PPM without due consideration of their interests. It is clear that the remedy they seek is to correct the unfairness which they consider the implementation will give rise to, rather than to try to turn the clock back and have the whole scheme revisited. For reasons which follow, we have come to the conclusion that their right to just administrative action has been infringed and that appropriate relief of a feasible and practical kind can be granted. As a result, we do not find it necessary to deal with the arguments raised on the question of their right to equality.

[151] There was clearly a dispute between the parties on the papers and in argument

regarding the duty of the WCED to consult with the appellants or with representatives of the general assistants at the appellant schools, and whether or not such a duty to consult as existed was carried out. In light of our findings on the issue of whether the WCED's decision was justifiable in relation to the reasons given, we do not feel it necessary to deal with the issue of procedural fairness.

The right to just administrative action in terms of section 33

[152] Section 33 enumerates four aspects of just administrative action. Prior to the enactment of the Promotion of Administrative Justice Act[7] item 23(2)(b) of schedule 6 to the Constitution provided that section 33 is deemed to read as follows:

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

The theme of fairness must be seen as governing the manner in which the four enumerated sections must be interpreted.[8] The words themselves have no fixed and self-evident meaning. Unless animated by a broad concept of fairness, their interpretation can result in a reversion to what has been criticised as the sterile, symptomatic and artificial classifications which bedevilled much of administrative law until recently.[9] Undue technicality and artificiality should be kept out of interpretation as far as possible; the quality of fairness, like the quality of justice, should not be strained. There are at least three respects in which the concept of fairness should be seen as animating section 33. The first is to provide the link between the four enumerated aspects so that they are not viewed as separate elements to be dealt with mechanically and sequentially, but, rather, as part of a coherent, principled and interconnected scheme of administrative justice. Secondly, the interpretation of each of the individual subsections within the framework of the composite whole must be informed by the need to ensure basic fairness in dealings between the administration and members of the

public. Thirdly, the appropriate remedy for infringement of the rights must itself be based on notions of fairness.

[153] The jurisprudence of transition is not unproblematic. This Court has emphasised the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society.[10] This relates to substantive fairness, which focuses on the effect or impact of government action on people. This Court has also emphasised the obligation upon the government to exhibit procedural fairness in decision-making. A characteristic of our transition has been the common understanding that both need to be honoured. The present case highlights a particular aspect of that complex process, in which a court may be called upon to examine both the procedural fairness of the decision and substantive fairness, or fairness of the effect or impact, and in that examination these two aspects may to some extent become intertwined. It is necessary to determine the circumstances in which a court, looking at a scheme that as a whole passes the test of constitutional fairness, can and should detach a detail which, viewed on its own would be constitutionally unfair. Although there is disagreement between us and the majority on procedural fairness, we do not find it necessary to decide the procedural question. In our view the impact on the appellants of the manner in which the scheme was to be implemented is disproportionately deleterious and unjustifiable. We proceed to give our reasons.

[154] Before applying this section to the present case, we make two general observations. First it is necessary to underline the importance of acknowledging that courts will be reluctant to intervene in policy questions and anxious to avoid unduly clogging the functioning of government.[11] As was emphasised in *Premier, Province of Mpumalanga*[12] a court should be slow to impose obligations upon government which will inhibit the government's ability to make and implement policy effectively. This principle is well recognised both in our common law and in the jurisprudence of other countries; in the celebrated words of Holmes J, "[t]he machinery of government would not work if it were not allowed a little play in its joints."[13] No challenge was made to the scheme as a whole and there is nothing on the papers to suggest that it was not compatible with constitutional principles. The process of change inevitably has uneven consequences. The fact that a measure is harsher for some than for others does not make it constitutionally unfair. In general then, the development of schemes to overcome disadvantage and achieve equality must be regarded as central to, rather than inconsistent with, constitutional endeavour. This

judgment should not be understood in any way as suggesting that sacrifice and burden-sharing in the interests of the greater good by themselves indicate administrative impropriety. Similarly, it would be manifestly inappropriate for courts to remain oblivious to the need for fiscal discipline, which by its very nature necessitates hard choices.[1][4]

[155] At the same time, the importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.[1][5] Furthermore, in our view, the Constitution prohibits administrative action which, however meritorious in its general thrust, is based on exclusionary processes, applies unacceptable criteria and results in sacrifice being borne in a disproportionate and unjustifiable manner, the more so if those who are most adversely affected are themselves from a disadvantaged sector of the community.

[156] A second preliminary observation flows from the first. It relates to the broad circumstances in which a court will either more readily defer to the discretion of the authorities or more easily consider intervening. The wider the ambit of the decision, and the more it relates to general policy, the more will it fall within the discretion of the authorities and the less appropriate will it be for the court to intervene.[1][6] On the other hand, the more limited, discrete and particular the number of persons involved, and the more serious the impact on their lives, the more readily will the court infer a possible need to intervene. This is not to suggest that there is a clear cutting-off point between policy on the one hand and implementation on the other. Implementation can involve considerations of policy, but such implementation should follow principles that do not discriminate in an unfair way, are within the powers of the authority concerned, are accomplished in a procedurally fair manner and are not disproportionate or unjustifiable in their impact. There are circumstances where fairness in implementation must out-top policy.[1][7]

The right to administrative action that is justifiable in relation to the reasons given

[157] The issue of administrative justice that arises in the present matter and is the focus of this decision is whether or not there was an infringement of the right of the appellant schools to be furnished with reasons and to have administrative action that is justifiable in relation to those reasons. As we have stated, this issue was not raised in these terms on the papers or in argument. The letter which preceded the institution of proceedings, however, expressly alleged that the way in which the general assistants at the appellant schools were being treated was unjustifiable. It was stated in the papers and reaffirmed in oral argument that

when redeployment took place, the length of service of general assistants at the appellant schools would not be considered at all. It is this stance by the respondents that calls upon us to examine the justifiability of the decision in question.

[158] One of the strongest complaints of the appellants was that at no stage before the proceedings were instituted were they given information as to how the WCED intended to deal with the status of their general assistants, let alone offered reasons for the decision not to treat their general assistants as members of the staff complement in the same way as general assistants at other ELSEN schools. Moreover, not only were reasons not given, but the decision itself was not communicated until after the appellants had instituted their action for information.

[159] The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review.[1][8] Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully.[1][9] Moreover, as in the present case, the reasons given can help to crystallise the issues should litigation arise.

[160] The failure to give reasons timeously, or at all in the present matter, prejudiced all these objectives and precipitated the litigation in this matter. The reasons provided by the respondents during the course of this application will be dealt with more fully later but they may be summarised as follows:

(a) The fact that the general assistants were not employees of the state was the result not of a state initiative but of a decision made under the old regime by the governing boards of the appellant schools themselves. Also, the appellant schools were not singled out for disadvantageous treatment, but rather, subjected to the same principles as applied to all schools. This will be referred to as the *'own fault' rationale.*
(b) The general assistants were not specialists and the appellant schools would not suffer if they were replaced by similar functionaries drawn from other schools. This will be referred to as the *transferability rationale*.

(c) The implementation of the scheme in the manner proposed would save costs, and formed an integral part of a polycentric scheme from which it was not possible to detach an ingredient. In any event, it was necessary to comply with an agreement collectively bargained between the WCED and six unions representing employees at the other schools. This agreement did not allow for any exceptions in terms of the implementation of the LIFO principle. This will be referred to as the *comprehensive scheme rationale.*

[161] Two different types of justifiability attacks may be launched upon administrative action. First, the action may be unjustifiable on its face. This is the case where any implementation of the act would be unjustifiable. Secondly, the action may be valid on its face, but nonetheless unjustifiable as applied in certain circumstances, as is alleged in the present matter.

[162] The right to administrative action that is justifiable in relation to the reasons given incorporates the principle of proportionality, fundamental to a constitutional regime. This would ordinarily require that the effects of the action be proportionate to the objective sought to be achieved. In this respect it involves an element of substantive review - it relates not simply to procedure but to substance. Yet, while obliging a court to enter into the merits, it does not require the court to substitute its own decision for that of the administration.

[163] [In *Carephone (Pty) Ltd v Marcus NO and Others*[2][5] Froneman DJP helpfully stated that the particular conception of the state and the democratic system of government as expressed in the Constitution should determine the power to review administrative action and the extent thereof; the concept of separation of powers grants the courts the authority to examine the functioning of the state administration, while the foundational values of accountability, responsiveness and openness, provide the broad conceptual framework within the public administration must function and be assessed on review. He continued:

"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinions on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

[164] In our view, the concept of justifiability requires more than a mere rational connection between the reasons and the decision, such as that the general assistants in question were technically not in the employ of the WCED. Although a rational connection would certainly be necessary, it would not on its own be sufficient. All exercises of public power have to have a rational basis, this is one of the foundations of legality, or lawfulness as required by section 33(a). Justifiability as required by section 33(d) on the other hand, must demand something more substantial and persuasive than mere rational connection. At the same time justifiability presupposes what could be considerably less than what the court itself might have considered the best possible outcome if it had had to make the decision. The test in each case for appropriately locating the action between these two extremes has to be a flexible one, bearing in mind the problems of the country, the complexities of government and the need for officials to exercise a genuine discretion in the fulfilment of their functions.

[165] Both courts and academic commentators have suggested that when examining whether or not a decision is justifiable, the decision-making process must be sound, and the decision must be capable of objective substantiation by examination of the facts and the reasons for the decision. Put another way, there must be a rational and coherent process that would tend to produce a reasonable outcome. The suitability and necessity of the decision are to be examined, and in this regard, a number of factors might have to be considered: the nature of the right or interest involved; the importance of the purpose sought to be achieved by the decision; the nature of the power being exercised; the circumstances of its use; the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; the broad public interest involved. It might be relevant to consider whether or not there are manifestly less restrictive means to achieve the purpose.

[166] In our view, the question to be asked is whether, bearing in mind such factors described above, the decision can be defended as falling within a wide permissible range of discretionary options. In this respect the principle of proportionality is particularly relevant. Ultimately, the issue is a robust one of basic fairness and proportionality, necessitating a contextualised judicial determination of whether the decision is a defensible one on the basis of the reasons given, or whether it is so out of line and tainted with unfairness as to demand judicial intervention. Each of the reasons advanced by the respondents for the decision will now be considered.

Own fault rationale

[167] The historical basis for maintaining the distinct and disadvantageous situation is that the general assistants concerned happened to be employees at what were formerly whites-only schools. Yet such general assistants were not themselves the beneficiaries of sustained privilege. Their low salaries and their names indicate that they come from a section of the community that has been both racially and economically disadvantaged. The children for whom they cared originally were all white, but today are predominantly black. Yet the albatross of working in schools which once were reserved for whites only is placed around their necks. The fact that these schools were once privileged and ended up with greater accumulated resources than other ELSEN schools is a good reason for opening them up to all, not for bringing about the dismissal of their long-service employees who themselves come from disadvantaged backgrounds.

Transferability rationale

[168] The potential impact of the transfer of general assistants from other ELSEN schools to the appellant schools was one of the matters hotly contested on the papers. It is not possible to resolve the dispute simply on the contradictory contentions in the affidavits. It is significant, however, that the assertions on behalf of the respondents were made by educational administrators who did not claim to have any expertise on the specific problems faced by ELSEN schools. We believe it would be wrong to assess the justifiability of the scheme insofar as it had an impact on the appellant schools purely in quantitative terms, or by assumptions about the non-specialist nature of the work of general assistants. These are special schools dealing with children with special needs. However important generic and transferable elements such as training and organisation might be for them, as they are for other schools, the ELSEN schools by their nature are particularly dependent on teamwork and the experience of dedicated employees. A worker used to cleaning and feeding autistic children, or helping them onto a bus or giving them food, might not have the skills necessary to tend to children without sight or hearing, or those living with cerebral palsy. If all schools need good management and well qualified people, collegial integration and institutional ethos are also of the greatest importance to each individual institution. In the appellant schools they are doubly, trebly so.

[169] Furthermore, the interests of the children are also relevant. It is to be expected that children develop special relationships with individual care-givers who become familiar to them. A disruption of such bonds would be particularly poignant for those children who

would have been disadvantaged before by being excluded from schools because they were not white, to be disadvantaged again because the schools they attend happened once to have been for whites only. In a sensitive environment involving children who are particularly vulnerable, any substantial threat to disturb the equilibrium that was not necessitated by the circumstances would require well-supported justification.

Comprehensive scheme rationale

[170] There can be no objection to rigorous bookkeeping to ensure that state monies are effectively used. Yet the bottom line of the constitutional enterprise is not to be found at the foot of a balance-sheet, but rather in respect for human dignity. Fairness in dealings by the government with ordinary citizens is part and parcel of human dignity. As Wilson J said in *Singh et al. v Minister of Employment and Immigration et al.*:

". . . the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles."

In the present matter a relatively small number of employees was involved, namely those at eleven out of seventy-eight ELSEN schools and less than one percent of the 1750 schools falling under the WCED. By not counting the length of service of general assistants at the appellant schools, the WCED would undoubtedly benefit to some small extent in two ways: more posts would be available for general assistants retrenched from other ELSEN schools, and the WCED would not be liable for the costs of retrenchment of the long-serving employees at the appellant schools. We do not have clear information as to precisely what the extra costs for the WCED would have been if the period of service of the employees at the appellant schools for purposes of LIFO were taken account of rather than disregarded, but it would at most represent an infinitesimal part of the total budget.

[171] The respondents contend that they were obliged to honour the terms of an agreement

produced by collective bargaining with a number of trade unions. It is understandable that the unions involved worked assiduously to defend the interests of their members and to protect the PAWC Personnel Plan as elaborated by means of the collective bargaining process. Yet as this Court held in *Larbi-Odam and Others v MEC for Education (North-West Province) and Another*:

"Although it may be that in certain circumstances the fact that a provision is the product of collective bargaining will be of significance for s 33(1), I cannot accept that it is relevant in this case. Where the purpose and effect of an agreed provision is to discriminate unfairly against a minority, its origin in negotiated agreement will not in itself provide grounds for justification. Resolution by majority is the basis of all legislation in a democracy, yet it too is subject to constitutional challenge where it discriminates unfairly against vulnerable groups."

We accept that the concept of justifiability for the purposes of limitation analysis as in *Larbi-Odam* will normally require considerably more persuasive evidence from the State than in the case of justifiability of reasons given for administrative action. Nevertheless, the broad principle must be that the mere fact that a measure has its origin in a negotiated agreement will not in itself serve conclusively as justification. Equally, one can uphold the collective bargaining rights of organized workers - bravely fought for over generations - without accepting the effective exclusion from an agreement of workers who sought to be included but were kept out on an arbitrary basis, namely, that although employees of a state institution fulfilling public functions, they were for reasons of historical accident and despite protest to the contrary technically not state employees.

[172] Although the general assistants at the appellant schools were technically employees of the appellants, the appellants were not governing bodies of private and/or independent schools. They were governing bodies of WCED schools who were under the authority of the WCED. The WCED provided subsidies towards the payment of salaries of the general assistants. These general assistants were public servants and in our view deserved the same opportunity to make representations as was in fact given to their counterparts in other ELSEN schools. It is clear from the papers that the general assistants at the appellant schools were being regarded as "outsiders," to whom the WCED owed no obligation. Their fate was viewed as being entirely in the hands of the appellants. The situation in reality was far more complex than that. Government is responsible to all citizens, and must have a concern for the

welfare of all citizens, not the least for those working on its behalf in the public sector. The appellants were in a different situation from many other employers.

[173] Whereas employers generally have the freedom to determine their employment policies in accordance with economic realities and relevant labour legislation, the latitude of the appellants in the area of employment, in contrast, is limited. The PPM and the Provincial Administration Western Cape (PAWC) Personnel Plan which governs the redeployment and retrenchment of WCED employees dictated that in the appellant schools many of the general assistants would have to be retrenched. The WCED is thus in effect dictating who should be employed at these schools. Unlike all the other employees directly on the payroll of the WCED, the affected general assistants were not in any way involved in the formulation of this policy or in the labour relations processes which came into operation under the PPM. An examination of the history of legislation relating to the provision of special education indicates that what are presently called governing bodies of such schools were statutory bodies and were delegated authorities of the government.

[174] We accept that, technically speaking, a rational basis derived from formal employment history, might exist for not treating the general assistants at the appellant schools as government employees. Yet in our understanding of what the Constitution as opposed to the law of contract requires in the circumstances of this case, such technical rationality does not in itself satisfy the test of fundamental fairness required by administrative justice. The test in our opinion is not what the erudite lawyer would say is technically legal, or the experienced accountant would declare to be the most cost effective, but what the ordinary person, steeped in our social reality and imbued with the general values of the Constitution would regard as fundamentally fair in all the circumstances, bearing in mind the urgent need for transformation in our country and the real difficulties faced by government. In our view, for reasons which follow, such an ordinary person would definitely regard the treatment to be meted out to the appellants and their general assistants as fundamentally unfair.

[175] Before doing so, however, we will deal with the respondents' assertion that there was a need to view the situation of the appellant schools in the context of a polycentric scheme, in respect of which any special consideration given to a particular school or group of schools could have unpredictable and unacceptable knock-on effects on the others and on the balance of the scheme as a whole. In this respect it is instructive to refer to the article by Fuller which introduced the concept of polycentricism into legal discourse. After arguing that polycentric

problems do not readily lend themselves to adjudication because of the multiplicity of affected persons, Fuller goes on to point out that:

". . . if it is important to see clearly what a polycentric problem is, it is equally important to realize that the distinction involved is often a matter of degree. There are polycentric elements in almost all problems submitted for adjudication."

He further emphasised that:

"It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication had been reached."

In the matter before us, we believe that aspects of the implementation of the scheme which impinge negatively on the appellant schools are readily identifiable and detachable. A relatively small number of general assistants at the appellant schools seek to be treated in the same way as general assistants at other schools for purposes of LIFO. This will not challenge the principles of LIFO but, rather, ensure that they are implemented in a manner that is substantively equal for all. The collective bargaining agreement with the unions would accordingly not have to be altered, but at a relatively small cost to the WCED, would have to be applied in an across-the-board manner to all workers affected by the scheme.

[176] [This Court has on more than one occasion isolated and dealt with a particular aspect of a broad educational budget. In *Premier, Province of Mpumalanga* it dealt with a decision by the Provincial Minister of Education to stop payments for the bussing of white children which had been taken without the affected schools having been given an appropriate hearing. The effect of the order of the Court was not to require the Provincial Education Department to revisit the whole budget for the year, but to insist that the subsidies continue until the end of the year as the period regarded by the Court as reasonable in all the circumstances. It is clear that despite the polycentric nature of the issues involved and the budgetary implications of the court order, this Court felt it appropriate and necessary to intervene, and did so not simply by setting aside as unlawful a decision relating to a detail of the overall financial administration,

but also by finalising the matter in accordance with principles of fundamental fairness.

[177] [In *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc* the Court was able to separate out from an overall educational scheme and budget certain elements in respect of which procedural fairness might have required a hearing for particular groups. Again, there was no suggestion that the particular aspect complained of was so interwoven with the general scheme that it could not be detached and dealt with separately, nor that potential budgetary implications ruled out a re-consideration.

Conclusion

[178] The LIFO principle is a widely acknowledged principle of labour law, and uses objective criteria to introduce fairness into the practice of retrenchment and redeployment. Yet the LIFO principle, fair as it is, is set to be implemented in a manner that operates perversely against the general assistants at the appellant schools. They are categorically, and, in our view, unjustifiably excluded from its operation. The only justification offered for facing them with the inevitable prospect of being dismissed from their jobs and replaced with strangers, is that this will save the Department money and facilitate the redeployment of supernumeraries from other schools. The result would be to apply the LIFO principle in a manner that requires that the last-in from the other ELSEN schools will replace the longest-in from the appellant schools. This inversion of the effect the principle is intended to have, is not an unavoidable consequence of the need to rectify inherited injustices or maintain the integrity of the scheme as a whole. On the contrary, it is defended as a device to save the Department some money and to facilitate redeployment of more favoured workers who, unlike the workers at the appellant schools, were represented through their unions at the bargaining table when implementation was being determined.

[179] Our assessment of the facts drives us to the conclusion that decisions taken on implementation threaten in practice to: disregard the length of service of existing staff at the appellant schools only, and hence unfairly make such assistants candidates for unemployment; disrupt the delicate equilibrium at the special education schools; impact negatively on the welfare of the school children; and require the appellant schools to find their own resources for payment of retrenchment costs in respect of employees who, in fairness, should be kept on rather than fired. In effect, workers at the appellant schools,

themselves from a disadvantaged section of the community, were bureaucratically, *en bloc*, without having had a meaningful say and without being given a satisfactory explanation, unjustifiably converted from being workers in the school system, doing the same work as those in other schools, into supernumeraries to be retrenched and replaced.

Remedy

[180] There are several provisions in the Constitution which are important to bear in mind when considering constitutional remedies, in particular sections 38, 172(1), 8(3), and 39(2). Section 172 provides that if a court finds law or conduct inconsistent with the Constitution, it must declare that law or conduct to be invalid to the extent of its inconsistency. In addition to the declaration, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own. The constitutional defect might lie in the incapacity of the common law or legislation to respond to the demands of the Bill of Rights. Section 8(3) then requires that the court should develop a suitable remedy. No particular remedy, apart from the declaration of invalidity, is dictated for any particular violation of a fundamental right. Because the provision of remedies is open-ended and therefore inherently flexible, Courts may come up with a variety of remedies in addition to a declaration of constitutional invalidity. An "all-or-nothing" decision is therefore not the only option. In *Fose v Minister of Safety and Security* this Court stated that:

"It is left to the courts to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."

Kriegler J in *Sanderson v Attorney-General, Eastern Cape* underlined the fact that "our flexibility in providing remedies may affect our understanding of the right."[4][6]

[181] The flexibility in the provision of constitutional remedies means that there is no constitutional straightjacket such as suggested in the High Court or in argument in this Court. The appropriateness of the remedy would be determined by the facts of the particular case. In

a constitutional state with a comprehensive Bill of Rights protected by a judiciary with the power and duty to do what is just, equitable and appropriate to enforce its provisions, it is not hard cases that make bad law, but bad cases that make hard law.

[182] Even before the English Human Rights Act began to have its effect, English law recognised the need for flexibility in the granting of remedies to allow the provision of relief appropriate to the particular circumstances. The authors of one of the leading textbooks on administrative law ask:

"What remedies should be at the disposal of a court supervising the public law functions of the modern state? First, the court should be able to set aside (quash) an unlawful decision. Secondly, it should be able to refer the matter back to the decision maker for further consideration in the light of the court's judgment. In some circumstances it might be desirable to permit the court, even though it is exercising review rather than appeal powers, to substitute its own decision for that of the impugned one. Thirdly, the court should be able to declare the rights of the parties, perhaps also on an interim basis until it is able to consider the matter fully. Fourthly, the court needs power to direct that any of the parties do, or refrain from doing, any action in relation to the particular matter. In addition, compensation or restitution may be needed where a citizen has suffered loss as the result of the unlawful administrative action. Finally, effective interim remedies- to "hold the ring" until full determination of the matter- are essential."

[183] The contention by the respondents in our view exemplifies an inappropriate all-or-nothing approach that could be damaging for the development of administrative justice. Such a totalist perspective risks either forcing government to grind to a halt, or else completely subsuming legitimate claims by individuals or groups into the greater good. The particularised fairness in the context of balancing public and private interests that section 33 contemplates, would be lost.

[184] The objective of judicial intervention under that section is to secure compatibility with fundamental notions of fairness in relation to the exercise of administrative power. Once it has been established that conduct is inconsistent with the Constitution the court, in addition to declaring such conduct to be invalid to the extent of its inconsistency, may make any order that is just and equitable. Thus, it would not be just and equitable to remedy unfairness to

some by imposing unfairness on others. On the other hand, the constitutional rights of some cannot be withheld simply because of some potential knock-on effect on others. The test is one of fairness, not legality. In some circumstances fairness may require a setting aside of a whole scheme so as to enable a significant part to be revisited, in others the scheme can go ahead in general with a part being re-examined and necessary adaptations made. If this were not so the interest of minority groups could always be overridden by invoking the principle that what matters is the greatest good for the greatest number. Alternatively and conversely, it could mean that the majority could be made to suffer unfairly in order to accommodate the interest of the minority. It is particularly important when a proposed measure is likely to have a disproportionate impact on a certain group that such group be given a meaningful opportunity to intervene and have its interests considered in a balanced way. This becomes even more significant when the group is vulnerable and disempowered. To say that it matters little because only a relative handful of persons were treated harshly, is to suggest that fairness can be equated with or subordinated to utility. The concept of the greatest good for the greatest number can in appropriate circumstances be an important element in determining what is fair or justifiable, but it cannot serve as its sole measure otherwise there would be little scope left for administrative justice.

[185] We cannot, therefore, accept the gist of the respondents' arguments regarding remedies, namely, that it is impossible to do virtually anything at this stage to meet the appellants' claims; that requiring the government to consult at this stage with the appellants and their general assistants, or to employ the general assistants, would cause effects which would require essentially a reconsideration of the entire policy; that the collective labour agreements which form the backdrop of the PPM would necessarily be breached, and the PPM would have to be redesigned.

[186] It would indeed be most unsatisfactory and have negative consequences for constitutionality to fail to provide a remedy where there has been an infringement of a constitutional right. While courts should exhibit significant deference towards the administration and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account. It is the remedy that must adapt itself to the right, not the right to the remedy.

[187] Section 33 does not require a court to say that because a scheme is defective in part, the scheme as a whole has to be invalidated and revisited. Just as severance is a permitted method of detaching a defective part of the statute from the body of the legislation as a whole, and as reading-in is an appropriate method of filling an easily definable gap in a measure that constitutionally-speaking is under-inclusive, so should appropriate techniques be developed to fashion remedies for administrative injustice. Thus, establishing unfairness of process or unjustifiability of result should not inevitably vitiate the scheme as a whole, particularly if further unfairness would result. Unlike questions of legality, where the exercise of a power either is lawful or it is not, fairness can be a matter of degree. In this respect we can do no better than repeat what Steyn J recently said in *Regina v Secretary of State for the Home Department, Ex parte Pierson*:

"It was suggested that severance would involve 'a rewriting' of the policy statement. This is a familiar argument in cases where the circumstances arguably justify a court in saying that the unlawfulness of part of a statement does not infect the whole. The principles of severability in public law are well settled. . . . Sometimes severance is not possible, e.g. a licence granted subject to an important but unlawful condition. Sometimes severance is possible, e.g. where a byelaw contains several distinct and independent powers one of which is unlawful. Always the context will be determinative. In the present case the power to increase the tariff is notionally severable and distinct from the power to fix a tariff. . . . It is an obvious case for severance of the good from the bad. To describe this result as a rewriting of the policy statement is to raise an objection to the concept of severance. That is an argument for the blunt remedy of total unlawfulness or total lawfulness. The domain of public law is practical affairs. Sometimes severance is the only sensible course."

[188] (In *Premier, Province of Mpumalanga* just such a practical approach was adopted, and we believe such a practical approach should be followed here. To insist on a hearing now on the limited aspect touching on the rights of the workers, the children and the schools as a whole, would serve little practical purpose. The issues have been canvassed on the papers and in court. The basic scheme of re-deployment as negotiated with the unions would remain intact, save for the excision of a manifestly indefensible and relatively tangential aspect of unfairness in its implementation. Endless hearings involving all the workers at all ELSEN schools at this stage would not be in anyone's interest. The workers at the other ELSEN schools have already taken part in negotiations, and their interests have been resolutely defended by respondents in these proceedings. We may assume that they will continue to press for

their particular interests to be protected. Yet it is not for them, but for the Court to determine what is constitutionally fair. If the respondents remain fixed in their reasons for leaving the appellant schools on the margins as far as employment of general assistants is concerned, the unjustifiable impact of the scheme would continue.

[189] In the circumstances of the present case we feel that it is clear what justice and equity require: in order to cure the infringement of rights to just administrative action under section 33, the period of service of the general assistants at the appellant schools must be considered in the same way as that of their counterparts in other schools. What is important to note is that the proposed remedy leaves the general policy undisturbed. The rationalisation process and the allocation of posts to the different schools will also not be affected. The only difference will be that when decisions are made as to who are to occupy the posts, the LIFO principle will be applied in a manner which takes account of the long service of the existing general assistants. Its only effect is to ensure that the policy is applied in a fair and uniform manner to all who are affected by It.

[190] In our view, this Court should uphold the appeal, issue a declaration to the effect that the rights of the general assistants, the children and the appellant schools as a whole have been infringed in terms of section 33(d), to the extent of depriving their general assistants of the right to have their length of service taken into account when the PPM is implemented, and order the WCED to take account of the length of service of the general assistants at the appellant schools when implementing the PPM.