SACHS J ABRIDGED JUDGMENT

Minister of Education v Harris

[1] On 18 January 2000 the Minister of Education (the Minister) published a notice under section 3(4) of the National Education Policy Act (the National Policy Act) stating that a learner may not be enrolled in grade one in an independent school if he or she does not reach the age of seven in the same calendar year. Talya Harris was part of a group of children who had enrolled at the age of three in the King David pre-primary school, and had spent three years being prepared for entry to the primary school in the year 2001. Her sixth birthday was due to fall on 11 January 2001, a short while before the school year would begin. Challenging the validity of the notice, her parents sought an order of court permitting her to be enrolled in grade one in the year she turned six.

[2] On 15 January 2001 in the Transvaal High Court Coetzee J declared the notice to be unconstitutional and invalid, and authorised King David Primary School to admit Talya to Grade 1, where she presently is. In a subsequent written judgment he made the following findings:

> (a) The Minister's actions discriminated unfairly on the grounds of age against Talya and similarly situated children, was not justifiable, and accordingly violated the right to equality guaranteed by section 9 of the Constitution.
> (b) By requiring Talya and other children in her position to repeat their final year of pre-primary school or to sit at home waiting for the year to pass, the Minister's actions unjustifiably violated section 28(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child.
> (c) The Notice was *ultra vires* the powers of the Minister. In terms of Section 3(4) of the National Education Policy Act of 1996, the Minister was merely authorized to

determine national policy in respect of a number of issues, including the age of admission to schools, but not empowered to make law.

(d) The Minister, being in the national government, usurped a provincial executive power in conflict with section 125 as well as section 41 of the Constitution, when he stated in the notice that the age requirement had to be applied as an additional prerequisite for registration of independent schools as determined by a provincial Member of the Executive Council (MEC).

(e) Finally, even if the notice was valid, it was so only to the extent that it enunciated national policy. Such policy was binding neither on private institutions nor on provincial education authorities, and accordingly could not provide any legal barrier to the admission of Talya to the King David Primary school in the 2002 school year.

[3] The Minister has appealed against the whole of the judgment and order. As will be seen from the reasons that follow, I have come to the conclusion that it is both unnecessary and inappropriate for this Court to rule on the broad and complex constitutional issues raised concerning equality and the rights of the child. Rather, the matter can and should be decided on an examination of the scope of the Minister's powers under the National Policy Act.

[4] I set out the notice in full and italicise the most relevant portions:

NOTICE 647 OF 2000

DEPARTMENT OF EDUCATION
NATIONAL EDUCATION POLICY ACT, 1996 (ACT NO. 27 OF 1996)

DRAFT AGE REQUIREMENTS FOR ADMISSION TO AN INDEPENDENT SCHOOL POLICY

The Minister of Education, after consultation with the Council of Education Ministers, hereby *gives notice in terms of section 3(4)(i) of the National Education Policy Act*, 1996 (No. 27 of 1996) *of the age requirements for the admission of learners to an independent school* or different grades at such a school, as set out in the Schedule.

PROFESSOR KADER ASMAL, MP

MINISTER OF EDUCATION
2000

SCHEDULE

AGE REQUIREMENTS FOR ADMISSION TO AN INDEPENDENT SCHOOL

Interpretation

1. In this notice any expression to which a meaning has been assigned in the National Education Policy Act 1996 (No. 27 of 1996) shall have that meaning.

Age requirements for admission to an independent school

2. The statistical age norm per grade is the grade number plus 6

Example: Grade 1 + 6 = age 7

Grade 9 + 6 = age 15

Grade 12 + 6 = age 18

3 *A learner must be admitted to grade 1 if he or she turns seven in the course of that calendar year. A learner who is younger than this age may not be admitted to grade 1.*

4 A learner may be admitted to grade R only if he or she turns six in the course of that calendar year. Attendance of grade R is not compulsory.

Application

5 These age requirements must be applied in addition to the grounds for registration of independent schools as determined by the Member of the Executive Council as contemplated in section 46(2) of the South African Schools Act. 1996 (No. 84 of 1996).

Short title and commencement

6 This notice is called the Age Requirements for Admission to an Independent School Policy, and it comes into effect on **1 January 2001.**

[5] In analysing the legal effect of this notice, the following facts are relevant:

(a) In 1998 the Minister had published a General Notice in terms of section 5(4) of the Schools Act 1996 which in effect applied the turning-seven rule as from the beginning of the 1999 school year to public schools. The objective of the notice under the National Policy Act, which is the subject of the present challenge, was to achieve uniformity between public and independent schools by extending the turning-seven rule to independent schools as well.

(b) King David Primary School is an independent educational institution maintained at its own expense and registered with the state in terms of section 29(3) of the Constitution. The school was satisfied that Talya was ready to enter grade one in the year she turned six.

[6] It should be pointed out that the challenge brought in the High Court on Talya's behalf was largely though not exclusively based on a demand for exemptions to, rather than a scrapping of, the turning-seven rule. The contention was that the discrimination was unfair and against the best interests of the child because the requirement allowed for no exemptions for children who did not reach seven during the year, even if they were manifestly ready for school. The initial focus on exemptions resulted in the affidavits dealing extensively with the validity of school-readiness tests in a multi-cultural society, the main disagreement between the respective experts being whether reliable and objective tests could at present be employed in South Africa. On the other hand relatively little factual information was provided to enable this Court to contextualise the broader and more complex constitutional issues raised.

[7] In 1996 two statutes were introduced to transform the system of what had formerly been apartheid education in South Africa. They were the South African Schools Act (Schools

Act), and the National Policy Act referred to above. The sweep of the proposed transformation can be gauged from the Preamble to the Schools Act:

"Whereas the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and

Whereas this country requires a new national system for *schools* which will redress past injustices in educational provision, provide an education of progressively high quality for all *learners* and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all *learners, parents* and *educators*, and promote their acceptance of responsibility for the organisation, governance and funding of *schools* in partnership with the State; and

Whereas it is necessary to set uniform norms and standards for the education of *learners* at *schools* and the organisation, governance and funding of *schools* throughout the Republic of South Africa;. . . ."

[8] The National Policy Act, as its name indicates, was introduced to complement the Schools Act by empowering the Minister to determine national policy for education. Education is classified as a functional area of concurrent national and provincial legislative competence. National legislation prevails over provincial legislation where, amongst other things,

"[t]he national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;
(ii) frameworks; or
(iii) national policies."

It is in this context that the National Policy Act has to be understood. Section 3(4) of this Act states that:

". . . the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system and, without derogating from the generality of this section, may determine national policy for—

. . .
(i) the admission of students to education institutions which shall include the determination of the age of admission to schools; . . ."

[9] The text empowers the Minister to determine national policy for the admission of students to education institutions, which shall include the determination of the age of admission to schools. It is not clear whether this provision enables the Minister him- or herself to determine the actual age of admission or merely to lay down policy for the determination of the age of admission to schools. What is clear is that national legislation (as opposed to national policy) on a matter referred to in section 3, can only be introduced after a process of extensive consultation and publication has been completed. Similarly, the Schools Act provides that an MEC must exercise any power conferred by the Act "after taking full account of the applicable policy determined" in terms of the National Policy Act. Moreover a provincial legislature is not prevented from enacting legislation for school education in its province in accordance with the Constitution and the Schools Act. The cumulative effect of these provisions is to emphasise the distinction between the determination of guiding policy on the one hand, and its translation into legally binding enactments on the other.

[10] It is also not immediately evident what the effect of a policy determination made by the Minister in terms of the specific power under section 3(4)(i) of the National Policy Act is. As Harms JA pointed out in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*, the word "policy" is inherently vague and may bear different meanings:

"It appears . . . to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children

below the age of six are ineligible for admission to a school, can fairly be called a 'policy' and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word 'young' has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear. In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear . . ." (Footnote omitted.)

[11] In the present matter we are concerned with policy determinations under the National Policy Act. In *Ex Parte Speaker of the National Assembly : In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill* this Court considered the Bill which then became the National Policy Act and stated:

"Nothing in the Bill imposes an obligation on the provinces to act in conformity with national education policy. That may possibly be achieved by Parliament through the passing of legislation which prevails over provincial law in terms of s 126(3).

. . .

There are no provisions of the Bill that oblige the provinces to follow national education policy, or that empower the Minister to require them to adopt national policy or to amend their own legislation."

Policy made by the Minister in terms of the National Policy Act does not create obligations of law that bind provinces, or for that matter parents or independent schools. The effect of such policy on schools and teachers within the public sector is a different matter. For the purposes of this case, it is necessary only to determine the extent to which policy formulated by the Minister may be binding upon independent schools. There is nothing in the Act which suggests that the power to determine policy in this regard confers a power to impose binding obligations. In the light of the division of powers contemplated by the Constitution and the

relationship between the Schools Act and the National Policy Act, the Minister's powers under section 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners. Yet the manifest purpose of the notice is to do just that.

[12] A reading of the notice makes it plain that the Minister intended it to have binding effect. Paragraph 3 of the notice provides that:

"A learner must be admitted to grade 1 if he or she turns seven in the course of that calendar year. A learner who is younger than this age *may not be* admitted to grade one."(My emphasis.)

The language of this provision is peremptory and is consistent only with an intention to create a binding obligation. Similarly paragraph 5 of the notice provides that:

"These age requirements must be applied in addition to the grounds for registration of independent schools as determined by the Member of the Executive Council as contemplated in section 46(2) of the South African Schools Act, 1996 (Act No. 84 of 1996)."

This paragraph too is formulated in peremptory and not permissive terms and is consistent only with an intention to require MECs to impose the turning-seven rule as a condition of registration of independent schools.

[13] Complex constitutional questions arise as to whether the Minister is permitted at all to oblige MECs to enforce national policy in this way. It is not necessary to decide such questions in this case, for section 3 of the National Policy Act does not accord the Minister such power. It follows that the notice purports to impose legally binding obligations upon independent schools and upon MECs, and is *ultra vires* the powers granted to the Minister by section 3 of the National Policy Act.

[14] Counsel for the Minister contended, however, that even if the notice was not valid under section 3(4) of the National Policy Act, it was valid under section 5(4) of the Schools Act which empowers the Minister to determine the minimum age requirement for admission to independent schools. That section reads:

"The Minister may by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine age requirements for the admission of learners to a school or different grades at a school."

[15] Counsel pointed out that although the section in the Schools Act was headed "Admission to Public Schools" it was notable that, unlike all the other provisions in the section which referred to "public schools", this sub-section refers simply to age requirements for admission to "a school". I will assume, without deciding, that the Minister is entitled under the Schools Act to determine the age of entry into independent as well as public schools. Counsel contended further that the fact that the Minister had mistakenly purported to exercise his powers under section 3(4) of the National Policy Act rather than correctly under section 5(4) of the Schools Act, did not mean that the notice was as a consequence *ultra vires*.

[16] For that proposition counsel relied on various cases including Latib v Administrator, Transvaal in which the court had to consider the validity of a notice declaring a public road. The proposed public road was to traverse both farmland and land falling within a municipal area. Different subsections of the Ordinance empowered the declaration of public roads over farmland on the one hand and municipal land on the other, but the notice had referred to only one of the relevant subsections. The Administrator in his affidavit indicated that this had been an oversight. In holding that the notice was in any event valid, Galgut J reasoned as follows:

"It seems clear, therefore, that, where there is no direction in the statute requiring that the section in terms of which proclamation is made should be mentioned, then, even though it is desirable, nevertheless there is no need to mention the section and, further, that, provided that the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice."

[17] However, the applicability of this line of reasoning must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting. In *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk,* the Administrator had published a notice purporting to widen a road reserve when in fact he intended to build a new exit road on the relevant land –

something which he had the power to do in terms of another provision of the Ordinance. The notice was challenged on the basis that the provision of the Ordinance under which it was made envisaged the widening of road reserves and not the building of new roads. Although upon appeal the Administrator sought to rely on *Latib*, his argument was rejected. Wessels JA held that the Administrator had consciously ("bewustelik") sought to rely on the road-widening power and had chosen not to use the alternative power in the Ordinance. The Administrator did not by oversight or administrative error designate the wrong statutory provision under which to issue the notice for the purpose he had in mind; he consciously made an election to use a different power under a different provision. This fell outside the scope of the approach adopted in *Latib*.

[18] In this case, there is no suggestion in the affidavits filed by the Minister of an administrative error. On the contrary, the notice in the present matter not only cites section 3(4)(i) of the National Policy Act three times as the source of its authority, it identifies itself with the Act by means of its heading "Draft Age Requirements For Admission to an Independent School *Policy*" (my italics). There can be little question then that the provision was deliberately chosen. It might well be that those responsible for drafting the notice had doubts about whether the powers under section 5(4) of the Schools Act could be used in respect of independent schools, a matter which I have expressly left open. They might have had other reasons for choosing to issue the notice under section 3(4) of the National Policy Act. It is not necessary to speculate. What is clear is that they consciously opted to locate the notice in the framework of section 3(4) of the National Policy Act. The result is that it is not now open to the Minister to rely on section 5(4) of the Schools Act to validate what was invalidly done under section 3(4) of the National Policy Act. The otherwise invalid notice issued under the National Policy Act can therefore not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act.

[19] Having come to the above conclusion it is neither necessary, nor in my view would it be appropriate, to enter into the other complex constitutional questions raised in the judgment of the High Court and debated in this Court. As Ackermann J pointed out in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*:

"While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

In the present matter, the issue raised in the most crisp form with the best evidential foundation was the one relating to the powers of the Minister. Having resolved that question in a manner which terminates the dispute between the parties, I decline to pronounce on the correctness or otherwise of the determinations on constitutionality made in the High Court regarding unfair discrimination and violation of the best interests of the child. In issuing the notice the Minister exceeded the powers conferred upon him by section 3(4) of the National Policy Act and accordingly infringed the constitutional principle of legality. The appeal must fail.

[20] The appeal is dismissed with costs, including the costs of two counsel.