

**SABWIL HUMAN RIGHTS COURT THULAMELA CHAMBERS,
SANDTON**

Case no: 1212/2018

In the matter between:

PROVIDENCE HOPE HIGH

Applicant

and

MEC FOR EDUCATION, NORTH WEST

1st Respondent

MINISTER FOR BASIC EDUCATION

2nd Respondent

ABANTWANA COMMUNITY CENTRE

Amicus curiae

AMICUS CURIAE HEADS OF ARGUMENT

I. INTRODUCTION

1. The pertinent issue in this Application is whether the decision by the First Respondent, to reject the sanitary pad initiative as being outside the scope of the subsidiary allocation policy, was consistent with the South Africans Schools Act 84 of 1996.
2. This decision by the First Respondent was followed by the Applicant to this matter, referring the matter to the Second Respondent, after receiving no response from the Second Respondent, the Applicant instituted legal action.

II. DEFINITIONS

3. “**Menstruation**”, means the monthly cycle of changes in the ovaries and the lining of the uterus, preparation itself for fertilisation.¹
4. “**Sanitary products**”, means disposable sanitary pads that complies with the standards contemplated in this Policy Framework and that is provided to indigent persons free of charges.²
5. “**Sanitary dignity** “, means the preservation and maintenance of the self-esteem of an indigent girl or woman especially during menstruation.³
6. “**Child**”, means person under the age of 18.⁴

III. BACKGROUND

7. Abantwana Community Centre as amici curiae, represents the best interest of the child and agrees with the Applicant that the decision taken by the First Respondent was not in the best interest of the child. The parties to this case present different reasons for their actions leading up to this case. Whilst, the Respondents focuses on the compliance of the sanitary pad initiative to the subsidy allocation policy, these particular circumstances raise concerns of, discrimination, inequality and indignity of the children involved, those children being all female indigent pupils.
8. The Applicant’s concern is the negative effect, which the action taken by the First Respondent to reject the Applicant’s sanitary pad initiative, will have on the female learners in question and the

¹ Sanitary Dignity Policy Framework from June 2017.

² Sanitary Dignity Policy Framework from June 2017.

³ Sanitary Dignity Policy Framework from June 2017.

⁴ Section 1 Children’s Act 38 od 2005.

school. All of which would have negative repercussions on the South African schooling system, because the absenteeism of female learners, which is disproportionate to that of the male learners, will increase; as a result, the female learners' performance will continue to be lower than that of male learners; furthermore, the female learners will be prevented from obtaining scholarships to universities abroad, due to their results being prejudiced by the absenteeism. All of which is a clear constitutional violation of Children's rights, specifically female children that Abantwana Community Centre represents.

9. The Abantwana Community Centre's concern is centred around the effects which the court's judgment will have on all female children, should the First Respondent's decision be allowed to stand, because this would reduce the amount of female attendee's schools have and disenable the Principal of all schools nationwide of their Professional Administrative duty.
⁵Consequently, this would disincentive corporate investors to make donations and contributions to rural schools, particularly if those schools are in any way discriminatory towards females due to the controversial nature of this issue.
10. The core issues in this application are:
 - i. Whether the infringement of children's constitutional rights and human rights are in the best interest of the child.
 - ii. Whether the respondents have a duty to act in the best interest of the child and whether that duty extends to

⁵ Section 3(5) South African Schools Act 84 of 1996.

them ensuring that their subsidy allocation policy achieves that, and;

- iii. Whether the exclusion of the sanitary pad initiative from the subsidiary allocation policy passes constitutional muster?

IV. BEST INTEREST OF THE CHILD

Whether the infringement of a child's constitutional rights and human rights are in the best interest of the child.

RIGHT TO DIGNITY

15. Before we delve into the impairment of dignity, it is vital to understand that menstruation is a natural and involuntary biological process, experienced by every female of a reproductive age in monthly cycles.⁶ Without sanitary pads, this experience causes humiliation for female learner's, as their uniform gets soiled and they experience mockery from their peers, leading to the impairment of their dignity

16. Education is meant to be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.⁷ Human dignity and the achievement of equality are fundamental values of the Constitution.⁸

19. The Respondents' duty is to enable these female learners and all female learners, the ability to manage their menstruation with

⁶ Sanitary Dignity Policy Framework from June 2017.

⁷ Article 5 UNESCO Convention against Discrimination in Education 1960.

⁸ Section 1 Constitution of the Republic of South Africa 1996; *S v Makwanyane and another* 1995 (3) SA 391 (CC) 398.

the essential sanitary dignity required, which derives its authority from section 10 of the constitution. Inflicting on any person or group of persons, conditions which are incompatible with their dignity, by omitting to act, creates a limitation which impairs the equality of children of the opposite sex and disregards the rights of female students to exercise their right to equality and access to education, is prejudicial.⁹ The aforementioned contravention by both respondents, further discriminates against the female students of the Applicant on the ground of social origin, on the basis that these female learners come from a rural community in which they receive their basic education and cannot afford sanitary pads.¹⁰

17. The Child Grant Policy is similar to the Sanitary pad initiative in principle, in that the monthly, reoccurring need is the same, granted that certain requirements can be proven.¹¹ Proving that sanitary dignity appears to be *prima facie* different to other rights subsidised under the law, when in principle it is actually the same and deserves to be subsidised.

RIGHT TO EQUALITY AND EDUCATION

11. On one hand, everyone is equal before the law.¹² This right includes having the State promote the achievement of equality through legislative and other measures, designed to protect and advance persons disadvantaged by unfair discrimination.¹³ The grounds upon which unfair discrimination can occur include, but

⁹ Article 1 UNESCO Convention against Discrimination in Education 1960.

¹⁰ Section 28 Constitution of the Republic of South Africa 1996;

¹¹ <http://www.sassa.gov.za/index.php/social-grants/child-support-grant>

¹² Section 9(1) Constitution of the Republic of South Africa 1996.

¹³ Section 9(2) Constitution of the Republic of South Africa 1996.

are not limited to sex and social origin.¹⁴ The right to equality can be limited directly, (outright infringement of a protected right) or indirectly, (action or rule seems permissible at face value; however, the effect of the rule or action leads to the infringement of a protected right).¹⁵

12. The UNESCO Convention against Discrimination in Education provides that:

“the term 'discrimination', includes any distinction, exclusion, limitation or preference, which being based on sex has the purpose or effect of nullifying or impairing equality of treatment in education and in particular: Of depriving, limiting any person or group of persons access to education of any type or at any level; Subject to the provisions of Article 2 of the Convention.¹⁶

13. On the face of the subsidy allocation policy, there seems to be no outright violation of the right to equality or education. However, by narrowly interpreting the subsidy allocation policy to exclude the provision of sanitary pads, the policy indirectly discriminates on the female school learners on the grounds of sex, because it is specifically female learners who experience menstruation every month and who will be negatively impacted by not having access of sanitary pads.

14. The lack of access to sanitary pads infringes the female learners' right to education, because absenteeism will subsist, and compromise only female learner's performance and exclude them from being eligible for scholarships for further study. The overall effect of this, is that the female learners end up receiving

¹⁴ Section 9 (3) Constitution of the Republic of South Africa 1996.

¹⁵ Section 8 (2) and (3) Constitution of the Republic of South Africa 1996.

¹⁶ Article 1 UNESCO Convention against Discrimination in Education 1960.

education of an inferior standard as opposed to their male counterparts, who perform at an average that is 15% better than them, because the male students are not affected by this dilemma.¹⁷

V. RESPONDENTS DUTY TO ACT

Whether the respondents have a duty to act in the best interest of the child and whether that duty extends to them ensuring that their subsidy allocation policy achieves that

20. The fundamental children's rights principle, provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".¹⁸

21. In assessing the best interests of a child, the court should evaluate and balance all necessary elements, before making a decision in a specific situation for a specific group of children. The South African Children's Act elaborates in stating that all proceedings, actions or decisions concerning the child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights and the best interest of the child standard.¹⁹

22. Furthermore, it is compulsory for all learners to attend school, "from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first."²⁰

¹⁷ Article 1 UNESCO Convention against Discrimination in Education 1960.

¹⁸ Article 3 of the UN Convention on the Rights of the Child.

¹⁹ Section 6(1)(a) Children's Act 38 of 2005.

²⁰ section 3(1) South Africans Schools Act 84 of 1996.

23. The respondents are parties identified as legislative bodies and administrative bodies that have a constitutional mandate to act in the best interest of the child. This matter falls within the scope of their responsibilities, that by law obligate them to act in the best interest of this specific group of children, identified as female children. Hence the Respondent's omission to subsidise the sanitary pad initiative, after being provided with all the information regarding the cause of absenteeism of female students being due to menstruation and the lack of financial resources to aid the issue, is a breach of their constitutional duty.

VI. THE LEGAL DUTY EXISTING IN POLICY CREATION

Whether the exclusion of the sanitary pad initiative from the subsidiary allocation policy passes constitutional muster?

24. Our concern is the Respondents' failure to protect the best interest of the child, by omitting their duty to provide the necessary financial support for the sanitary pad initiative. We do not accept the exclusion of the sanitary pad initiative from the subsidiary allocation policy's scope, as valid grounds for the government to neglect their duty of protecting the interest of all children, nor do we accept the stringent nature upon which the subsidiary allocation policy is applied when considering the need of the public. The subsidiary allocation policy should be made flexible to include a broader scope that takes into account the needs of all children within the schooling system.

25. Whilst, on the other hand, everyone has the right to basic and further education, which the state, through reasonable measures,

must make progressively available and accessible.²¹ The First Respondents justification in this matter for their omission has been that the sanitary pad initiative, cannot fit in the allocation of the present budget due to budget constraints and the initiative falling outside the scope of what could be subsidised, namely, educational purposes, school administration and feeding schemes. However, with a more flexible subsidy allocation policy, the term educational purposes could be defined to include sanitary products as defined above. Thus, in expanding the scope the state can incorporate factors which affect the education such as unavailability of sanitary pads, leading to absenteeism as a provision made for educational purposes.

26. The net effect of continued absenteeism of the female learners, because of the lack of an existing policy that subsidises their need for sanitary pads, will continue to violate the Schools Act will lead to South Africa having a large population of uneducated people and unemployable people.²²

VII. CONCLUSION

27. In light of the above:

- i. The policy as it stands does not pass constitutional muster.
- ii. The respondents have an obligation to ensure the sanitary pad initiative, as this glaring omission on the part of the respondents impares the inherent right to human dignity, equality, education of Female children, who like anyone else are are human beings and should

²¹ Section 29 Constitution of the Republic of South Africa 1996

²² note 20 above.

be free from discrimination and prejudice on the basis of sex.

VIII. RELIEF

28. The Amicus supports the relief sort by the applicants as follows:

- i. An order declaring the subsidy allocation policy unconstitutional to the extent that it excludes the sanitary pad initiative.
- ii. An order mandating the respondents to:
 - a) Employ, measures to give effect to the sanitary pad initiative.
- iii. An order to:
 - a) expand the ambit of the subsidy allocation policy to include the sanitary initiative.