

IN THE 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
MINISTER FOR BASIC EDUCATION

1st RESPONDENT

2ND RESPONDENT

APPLICANT'S HEADS OF ARGUMENT

1. Introduction:

- 1.1. The background to the arguments and submissions made by the Applicant in this matter, are captured in the preamble to the Constitution of the Republic of South Africa (1996), which seeks to ultimately "*...improve the quality of life of all citizens and free the potential of each person*"
- 1.2. It is on the basis of the above, that Applicant will advance arguments in favour of the Sanitary Pad Initiative being included into the Subsidy

Allocation Policy for an educational purpose, and therefore falling within the right to a basic education encompassed under Section 29 of the Constitution.

2. DOES THE SANITARY PAD INITIATIVE FALL UNDER THE RIGHT TO EDUCATION?

- 2.1. Section 1(a) of the Constitution emphasizes that its provisions are based on the values of human dignity, equality and basic human rights and freedoms.
- 2.2. In particular, the right to Dignity (Section 10) and the right to Equality (Section 9) will be considered in unpacking the right to basic education.

The right to Basic Education is mutually inclusive of the right to human dignity

- 2.3. In the case of *Minister of Home Affairs and Others v Watchenuka and Others 2004 (1) All SA*, the court held that the right to Dignity is an inherent right, to be afforded to all persons irrespective of their social standing. Dignity, like the right to equality under Section 9 of the Constitution, does not discriminate based on race, gender, sexual orientation or religious belief.

2.4. The court in *Minister of Home Affairs v Watchenuka*, expanded on the connection between the right to education and human dignity in particular, stating that:

“Freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfillment.

Furthermore, it is expressly protected by Section 29(1) of the Bill of Rights, which guarantees everyone the right to basic education...”¹

2.5. Further, Section 6(2) (b) of the Children’s Act No. 38 of 2005, mandates that any actions or decisions taken with regards to children must respect their inherent dignity. Therefore, there cannot be a determination on the right to education for child learners, which does not take into consideration their dignity as well as what is in the best interests of such learners.²

The right to education is a key socio-economic right

2.6. The court in *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others 2011 (8) BCLR (CC)*, explained that the right to basic education is a fundamental socio-economic right, which

¹ Para [36].

² Section 2(b)

is positioned at: "... promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential...". This argument is reiterated in the preamble to the Constitution and as quoted in the introduction to the Applicant's argument.

An interpretation of Section 29(1) which excludes the Sanitary Pad Initiative would go against the values and rights of Dignity and Equality, and therefore be unconstitutional

- 2.7. It has already been established above, that the right to basic education cannot be interpreted or read without balancing the right to dignity with it. Education and dignity are therefore mutually inclusive.
- 2.8. In addition, Section 9 of the Constitution indicates that all persons are to be treated and regarded equally, meaning that no person should be discriminated against on the basis of, amongst others, their gender. In this case, the girl child would be discriminated against and denied access to education on the basis of a natural,

biological occurrence which happens to take place for learners of the female gender.

- 2.9. Section 36 of the Constitution only allows a limitation on a right contained in the Bill of Rights, where such interpretation is reasonable and justifiable in an open and democratic society and is based on human dignity and equality. An exclusion of the Sanitary Pad Initiative from Section 29(1) would constitute an unreasonable and unjustifiable limitation on the right of the girl child to attain basic education, as it would go against their rights to dignity and equality as above argued.
- 2.10. Therefore, on the question of whether the Sanitary Pad Initiative falls Section 29(1), Counsel for the Applicant puts forward that it in fact does fall within this right, read together with Section 1(a), 9, 10 and considering Section 36 of the Constitution.

3. CAN THE SANITARY PAD INITIATIVE BE SAID TO FALL WITHIN THE SUBSIDY ALLOCATION POLICY?

- 3.1. In the MEC's explanation to Rev. Molopo on the scope of the Subsidy Allocation Policy ("The Policy"), it was pronounced that there are 3

main areas which the Policy covers, and which warrants the Department of Education to allocate funding to a school for, namely: (a) an Educational Purpose; (b) School administration and (c) Feeding schemes. The Applicant's position in this respect, is that the Sanitary Pad Initiative does fall within the scope of the Policy as an educational purpose as will be shown.

The exclusion of the Sanitary Pad Initiative from the Subsidy Allocation Policy contradicts the 'educational purpose' element of the Policy

- 3.2. The findings of Rev. Molopo and Professor Mbokodo in relation to the absenteeism of girl learners at Providence High, confirm the far reaching impacts on the right to education that failing to provide for Sanitary Dignity could have.
- 3.3. Providence High reported an average of 15% drop in the educational performance of girl learners from boy learners in 2016, due to lack of access to sanitary products, which resulted in non-attendance at school. Without Sanitary dignity, the number of girls who recorded as absent increase, meaning the educational success rate of many girl children in this country could be jeopardized.

3.4. It is therefore submitted by the Applicant, that Sanitary Pad Initiative can be included in the Subsidy Allocation Policy as an educational purpose, given the far-reaching consequences and limitations it would have on access to education for many disadvantaged girl learners in South Africa.

4. CAN THE MEC REJECT THE APPLICATION FOR SUBSIDIZING THE SANITARY PAD INITIATIVE?

4.1 According to section 7(2) of the Constitution “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.³”

4.2 It is therefore self-evident that section 7(2) places an obligation on the MEC, as a representative of an organ of State, to protect the rights of learners.

4.3 It is the Applicant’s argument that the MEC has erred in stating that the initiative had no bearing on education. The lack of sanitary

³ Act 108 of 1996.

pads for female students is at the core of the exclusion of these students from school.

4.4 Section 34(1) of the South African School's Act⁴ mandates that the State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.

5. IS THE SUBSIDY ALLOCATION POLICY UNCONSTITUTIONAL INsofar AS IT EXCLUDES THE SANITARY PAD INITIATIVE?

5.1 Section 2 of the Constitution stipulates that "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."⁵It is, therefore, our submission that the exclusion of the Sanitary Pad Initiative from the Subsidy Allocation Policy would be inconsistent with

⁴ NO. 84 of 1996.

⁵ Act 108 of 1996.

the Constitution's provisions, and that the Initiative therefore falls within the ambit of an educational purpose in the Policy.

5.2. In particular, the obligation to "protect" the right to education must be read in the light of section 1(c) of the Constitution, which states that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the rule of law.⁶" The state's obligations must thus be discharged in accordance with the rule of law.

5.3 Section 27(1)(a) of the Constitution states that "everyone has the right to health care services, including reproductive health care."⁷ Effective sanitary dignity is also vital to the health, education, well-being and empowerment of indigent persons.

5.4. It cannot be in the spirit of the Subsidy Allocation Policy, that girl learners habitually miss school, because they do not have access to sanitary products. As earlier put forward, Sanitary dignity amongst

⁶ Act 108 of 1996.

⁷ Act 108 of 1996.

indigent persons is critical to ensure their meaningful and effective participation in society.

5.5. Section 28(2) of the Constitution further states that “A child’s best interest are of paramount importance in every matter concerning the child.⁸” There is thus a strong relationship between education, health and dignity, all of which could be influenced negatively by the lack of access to affordable sanitary products.

6. IS THE MEC ENTITLED TO REJECT THE CALL FOR SUBSIDY IN RESPECT OF THE SANITARY PAD INITIATIVE DUE TO BUDGETARY CONSTRAINTS?

6.1 Section 29 (1)(b) of Act 108 of 1996 clearly states that ; “ Everyone has the right to further education , which the state through reasonable measures must make available and accessible”

6.2 In respect of the Sanitary Pad Initiative , the MEC is not entitled to reject the call for funding thereof, as that would amount to discrimination

⁸ Act 108 of 1996.

and would unreasonably and unjustifiably limit the right to education for girl learners as provided for in Section 29 of the Constitution of 1996⁹.

6.3. The MEC would therefore be required to take all reasonable steps to ensure against the discrimination of girl learners from attending school due to lack of access to affordable sanitary products, and making the budgetary adjustments required to realize this right immediately.

6.4 Providence High receives about 90% of its budget from State subsidies¹⁰. Failure of the MEC and his department in providing the access to sanitary products, is tantamount to breaching his mandate in terms of Section 29 as set out at paragraph 6.2. above.

7. WHAT IS THE APPROPRIATE RELIEF IN THIS MATTER ?

7.1. Earlier this year in October the Minister of Finance announced during the Medium term budget policy statement that consumers will no longer pay Value added tax (VAT) on sanitary pads. This can be seen as one of the ways in which Government has tried to remedy the lack of access to affordable sanitary pads products for all girls and women.

⁹ Act 108 of 1996

¹⁰ Para 2 of #s29 SHRC scenario

- 7.2. It is therefore submitted by the Applicant, that the MEC for Education in the North West is obligated to adopt the Sanitary Pad Initiative into the Subsidy Allocation Policy, because it falls within the subsidy allocation policy as explained in paragraphs 3 and 5 above. Failing to do so would amount to a violation of the girls right to education as entrenched in S 29 (1)(b) of the Constitution, infringing on the rights to dignity and equality.
- 7.4. The Applicant requests that the decision to reject the policy by the MEC be declared invalid, and the Initiative be included in the Policy.
- 7.5. The Applicant further requests that the Respondents to the application attend to the allocation of a budget towards the Sanitary Pad Initiative, and as mandated by Section 29 of the Constitution.
- 7.6. The Applicant's further request that legal costs of this application be borne by the Respondents.