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 1st Respondent

MINISTER FOR BASIC EDUCATION 2nd Respondent

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4. INTRODUCTION

- We respectively submit that the sanitary pad initiative does not fall under the right of education.
- We respectively submit that the sanitary pads initiative cannot be said to fall within the subsidy allocation policy.
- We respectively submit that the MEC for education does not have the inherent power to reject or approve the application for subsidising the sanitary pad initiative.
- We respectively submit that the subsidy allocation policy is Constitutional.
- We respectively submit that that no right is absolute, and the Appellants rights are limited in terms of the law of general application.

5. ARGUMENT

5.1.1 Does the sanitary pad initiative fall under the right to education?

5.1.2 Chiedza Simbo in his article stated that the lack of a concrete and precise definition of 'basic education' means that no one knows what the term exactly means in South Africa and compliance with section 29(1) (a) by the government is therefore difficult.[1] It is of paramount importance to understand whether the term refers to the learner's right to merely attend school for a specified schooling period or the learner's right to receive a quality of education during a certain schooling period[2]. We ought to distinguish between the right to basic education and the right to have access to education.

5.1.3 In the Khosa[3] case the court dealt with the exclusion of permanent residents from social assistance legislation. The Court emphasied the significance of the values of human dignity and equality in evaluating the reasonableness of the exclusion. This precedent persuades my argument to envisage that there are not constitutional or any legislative obligations on the Department of Education to provide sanitary pads to female learners, consequently, any damage to the dignitas of the learners premised on the lack of sanitary towels, cannot be accounted for by the Department of Education but the Department of Social development.

5.1.4 This Court must consider that the initiative in issue is of a discriminatory nature, on the basis that it will result on a larger amount of the school budget to be directed

[1] CHIEDZA SIMBO "Defining the term basic education in the South African Constitution: An international law approach" (2012) 163.
[2] Ibid.
[3]

to cover for a social need of female learners. This conduct will constitute unfair discrimination on the grounds of gender in terms of section 9[4] of the Constitution. Therefore the school will also be compelled to fund for initiatives which are exclusively for male learners, i.e the Male circumcision initiatives.

5.1.5 Can the initiative be said to fall within the subsidy allocation policy, or does it fall outside the policy?

5.1.6 In dealing with this issue the court must firstly draw attention to the constitutional principle of legality and proper exercise of administrative power. The subsidy allocation policy forms boundaries beyond which the school and the governing body cannot legitimately travel.

5.1.7 Allowing the school and the governing body to allocate funds for an initiative which falls outside the scope of the policy, will amount to an infringement of the constitutional principle of legality and abuse of administrative power.

5.1.8 In the Hoerskool Ermelo case[5], the H.O.D incorrectly invoked section 25 of the Schools Act and appointed an interim committee for the school which was in concern. The court reasoned that the H.O.D acted unlawfully and in breach of the constitutional principle of legality[6]. Consequently, all the conduct premised on the provisions of section 25 were of no legal force or effect[7].

[4]

[5] HEAD OF DEPARTMENT: MPUMALANGA DEPARTMENT OF EDUCATION v HOËRSKOOL ERMELO [2009] ZACC 32

[6] Ibid.

[7] Ibid.

5.1.9 In the case *of Minister of Education v Harris*,[8] Where the court was confronted by the question whether a notice issued by the Minister for Education on the age requirements for the admission of learners was valid. The Court held that, in issuing the notice, the Minister had exceeded the power conferred on him by the statute and accordingly infringed the constitutional principle of legality[9].

5.1.10 Secondly the Court must consider the reasonable practicability of the sanitary pads' initiative. If the Court condones the implementation of the initiative, this will place a heavy financial burden on the State, precisely the Department of Education. The State is already providing Child-care grants which most learners are earning and sufficiently covers for their basic needs. The subsidy allocation policy solely provides for initiatives which are for educational and not personal purposes. The initiative will be reasonably practicable if there is sufficient budget for the school.

5.1.11 In *Soobramoney[10],* the applicant was denied access to dialysis because he suffered from a chronic renal failure. The Court based its decision on the fact that the applicant was sought access to treatment of a going, chronic condition, not of an emergency kind. The essence of this judgement is that the State can make special provisions to a demand of a person, only if it is of an emergency kind and not of an on-going concern. The Court acknowledged the significance of the availability of resources in Grootboom,[11] explaining that 'both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the

[8] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).
[9] Ibid.
[10] Soobramoney

[11] Grootboom

measures employed to achieve the result are governed by the availability of resources.

6. If the sanitary pads initiative falls within the subsidiary allocation policy, can the MEC nevertheless reject the application for subsidising the initiative?

6.1.1 Section 8(1) of The Constitution of the Republic of South Africa, 1996 provides that;

"The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state"

6.1.2 Section 1(c) of the Constitution provides that;

"The Republic of South Africa is one sovereign, democratic state founded on the following values:

(c) Supremacy of the Constitution and the rule of Law.

61.3 Section 41(1) of the Constitution provides that;

41. (1) All spheres of government and all organs of state within each sphere must –

(e) respect the constitutional status, institutions, powers and functions of government in other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform functions in a manner that does not encroach on the geographical, functional or institutional integrity of the government in another sphere;

(h) Co-operate with one another in mutual trust and good faith by-

(iii) informing one another of, and consulting one another on, matters of common interest;

6.1.4 Honourable Justices in light of the above, we submit that the MEC for Education does not have the inherent power to approve or reject the application for subsidising the sanitary pads initiative and that the decision as to whether to reject or approve the application for subsidising the sanitary pad initiative is a comprehensive one determined by all the three spheres of government in consultation with each other as contemplated in chapter 3 of the Constitution.[i]

6.1.5 *Section 12(1) of the SASA provides that;*

12. Provision of public schools

"The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature"

6.1.6 Honorable Justice in light of the above provision in the SASA, we submit that it would be wrong to assume that funds for schools are provided to the provincial education department by the MEC.

6.1.7*Section 215(2) of the Constitution provides that;*

(2) National legislation must prescribe –

(a) The form of national, provincial and municipalities budgets;

(b) When the national and provincial budget must be tabled; and

(c) That budgets in each sphere of government must show the source of revenue and the way in which the proposed expenditure will comply with national legislation.

6.1.8 In the Government of the Republic of South Africa v Grootboom,[12] it was held that,

"It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis"

5.1.9*Section 125 (2) (a) provides that;(2) The Premier exercises the executive authority, together with other members of the Executive Council, by*

(a) Implementing provincial legislation in the province;

7. If the sanitary pad initiative falls outside the policy, is the policy unconstitutional?

7.1.1 Honorable Justices, we submit that the subsidy allocation policy is constitutional and goes to great length to fulfil the constitutional mandate of the MEC to provide for the right to an education.

7.1.2 Honorable Justices we further, submit that due to budgetary constraints faced by the department of education, the department follows a set policy in regards to the allocation of funds. The policy sets out guidelines for the allocation of budgets to schools.

7.1.3 According to the guidelines the policy provides that;

> *"That the subsidies would only be provided to schools for educational purposes, school administration and feeding schemes.*

7.1.4 In this regard, honorable Justices we submit that the subsidy allocation policy makes it easy for the state to fulfil its primary obligation under section 29 (1) (2) of the Constitution to provide education to "everyone" within its available resources.

7.1.5 In Soobramoney v Minister of Health (KZN), it was held that

[12] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000

"If section 27 (3) were to be construed in accordance with the applicant's contentions it would make it substantially more difficult for the state to fulfil its primary obligation under section 27(1) and (2) to provide health care services to everyone within its available resources"

7.1.6 Honorable Justices we submit that in an event where, this Honorable court were to find that the subsidy allocation policy is indeed unconstitutional in that it limits the right to education and equality

7.1.7 We submit that the abovementioned rights may be limited in terms of Section 36 of the Constitution when taking into account the nature of the right in section 29 of the constitution.

7.1.8 Section 36(1) of the Constitution Provides that;

7.1.9"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose

7.1.10 In *S v Makwanyane*[13] and others it was held that where capital punishment was abolished. The protection and promotion of a permissible or lawful public interest will be important when consideration the limitation and its purpose. Further, the Constitution requires a less restrictive means to be considered, rather than limiting the right of an individual, in achieving that purpose

[13] S v Makwanyane 1995 (3) SA 391 (CC)

7.1.11 *In Soobramoney v Minister of Health (KZN) in para 43 the court held the following;*

" the guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources "to achieve the progressive realization of each of these rights.In its language, the Constitution accepts that it cannot solve all our society's woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution's guarantee is that of limited or scarce resources."

8. Subsidy in respect of the sanitary pads initiative rejected due to budgetary constraints

8.1.1 Honorable Justices we submit that in dealing with the issue of budgetary constraints, we need to shift our focus back to the right to a basic education-what the right entails and what could be subsided under this right. We have already emphasised that the sanitary pad initiative does not fall under the right to basic education, the initiative does not fall under the existing policy of what could be subsided by the state and is not included in the provincial budget.

8.1.2 Should the MEC of Education authorise the sanitary pads initiative, the MEC must consciously consider the availability of the resources of the state . The court needs to acknowledge that, the enforcement of all the rights has resource implications. The challenge that we are faced with is that, the claim for sanitary pads initiative will cause extensive and provision of resources and such provision has not been included in the existing budgetary policy. In the case of Soobramoney v Minister of Health,[14] the court acknowledged the significance of the availability of resources, explaining that both the content of

[14] Soobramoney v Minister of Health, KwaZulu Natal 1993 (1) SA 765 (CC)

the rate which it is achieved as well as the measure employed to achieve the result are governed by the availability of resources.

8.1.3 If the state is to divert its resources to the sanitary pads initiative, other important parts of the education system would suffer, such as the feeding scheme and the transportation initiative. In the case of Mazibuko, the court was asked to determine whether the Johannesburg's policy with regard to the supply of free basic water of six kilolitres per household per month (Free Basic Water Policy) was in conflict with the right of access to sufficient water provided for in section 27 of the Constitution. The court held that the right of access to sufficient water does not require the State to provide sufficient water upon demand to every person. The right, according to the court, only requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right within available resources.

8.1.4 The Mazibuko case[15] emphasises our point that the state will first need to allocate funds for respective initiatives. The MEC cannot therefore, authorise funds for an initiative that had not previously been included in the provincial budget and existing policy.

8.1.5 The limitation of the right to have access to sanitary pads for female learners in public schools and jurisprudence of progressive realization

8.1.6 Section 36 of the Constitution[16] provides for the limitation of rights. It states in Section 1 that the rights in the Bill of Rights may be limited only in a reasonable and justifiable manner. The refusal by the MEC to authorise the initiative in question is based on resources made available by the provincial legislature, which are limited. The court needs to take due regard to the fact that the state does not have unfettered discretion to do as it pleases when it comes to the fulfilment of socioeconomic rights. This means that the State will

[15] Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)
[16] The Constitution of the Republic of South Africa Act 108 of 1996

need to take effective steps to achieve the authorisation of the sanitary pads being subsidised. This is a fair and justifiable limitation of the right in question. Progressive realisation is defined as the acknowledgement that the full enjoyment of socio- economic rights will generally not be able to be achieved in a short period of time[17]. The right will be limited in order for the State to take timely and effective steps in realising the right to the provision of sanitary pads for female learners.

8.1.7 In Khosa[18], the Court considered the reasonableness of the exclusion of permanent residents from the Social Assistance Act in terms of the right of access to social security entrenched under section 27(1)(c) read with (2) of the Constitution. The Court noted that the Constitution confers the right of access to social security on everyone. In this case, the Court addressed Section 9 of the equality clause. The authorisation of the sanitary pads initiative will have to be accounted for by the provincial and national legislation. This means that the provision of sanitary pads initiative will have to benefit every female learner in need of sanitary pads. It would be self-defeating to authorise the initiative only for the Providence Hope High female learners and not make provision for other schools. There will have to be a provincial or even a national policy for the right to equality for all to be promoted across all schools.

8.1.8 Taking into consideration the argument that the state has limited resources, the provision of sanitary pads will not happen overnight, as the state does not have the right to subsidies initiatives without taking reasonable measures, thus the rejection of the call to subsidies the sanitary pads initiative.

[17] Khululeni Moyo "The Jurisdiction of the South African Constitutional Court on Socio Economic Rights"
[18] Khosa and Others v Minister of Social Developmen t and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC)

PRAYERS

9. Honorable Justices we humbly requests this court for the following

9.1.1 A declaratory order, declaring that the sanitary pad initiative does not fall under the right to education.

9.1.2 A declaratory order, declaring that the sanitary pad initiative does not fall under the subsidy allocation policy.

9.1.3 Party – to – Party costs

[i] Chapter 3 of the Constitution of the Republic of South Africa,1996