

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 2015/18246

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

FEDSAS

APPLICANT

And

**THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF BASIC EDUCATION,
GAUTENG PROVINCE**

1ST RESPONDENT

**THE HEAD OF DEPARTMENT:
DEPT. OF BASIC EDUCATION
GAUTENG PROVINCE**

2ND RESPONDENT

J U D G M E N T

WRIGHT J

1. The applicant is the Federation of Governing Bodies of South African Schools. On 26 February 2015 Mr Ngobeni the head of department for Gauteng Province, Education signed a document headed "*Process of Admission*". In it he set out a timetable indicating various stages in the process for the admission of learners to schools in Gauteng. Sometime after this there appeared on the Department's website a document which gives the applicant reasonable cause to think that the rights enjoyed by schools, as recognised in the 26 February 2015 document, have been taken away to some extent by the more recent website document.
2. The document of 26 February 2015 recognises, in paragraph 2.5 that schools may submit copies of waiting lists to the District Director for approval and placement of learners by the District Director. It is common cause that paragraph 2.5 is lawful. However, in the later website document, more particularly in paragraph 2, bullets 2 and 3 Mr Ngobeni writes "*Schools with Internet connectivity will be able to draw reports and Waiting Lists to be signed off by District Directors.*" Mr Ngobeni also writes that "*Schools without Internet connectivity will receive reports and Waiting Lists from the District Director. This process is equated to the signing off of Waiting Lists as outlined in the Regulations.*" This difference leaves the applicant with the reasonable fear that the schools will no longer be allowed to author and submit their own lists.
3. Under section 5(5) of the South African Schools Act 84 of 1996 "*Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.*" In my view schools' governing bodies are entitled, if not obliged to formulate admissions policies. The Legislature could not have intended these policies to operate in a vacuum. Under section 6(2) the governing body of a public school may determine the language policy of the school subject to the Constitution, the Schools Act and any applicable provincial law.
4. Under section 5(1) of the Schools Act "*a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.*" Under section 5(7) "*An application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department.*" In paragraph 52 of the decision in

MEC for Education, Gauteng Province v Governing Body Rivonia Primary School 2013 (6) SA 582 CC it was held that the Department maintains ultimate control over the implementation of admission decisions. It was held in paragraph 60 that the decision of the Gauteng Head of Department to admit a learner in terms of Regulation 13(1)(a) constitutes administrative action and that the Department has a duty to act fairly.

5. In my view the District Director and Head of Department must consider, along with all other considerations, the admission and language policies of schools when making a decision under section 5.

Order:

1. Pending the final determination of Part B of the application as contained in the notice of motion dated 19 May 2015 the following order will operate.
2. Schools are entitled to prepare and submit waiting lists A and B.
3. In so doing, schools may take into account their admission and language policies.
4. The District Director and the Head of Department must, when considering the lists, take into account, along with all other relevant and lawful considerations, the schools' admission and language policies.
5. The question of costs is reserved for determination by the court hearing Part B.

GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

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|------------------------------|---------------------|
| On behalf of the Applicant: | Adv JI Du Toit SC |
| | Adv MJ Engelbrecht |
| Instructed by: | Hurter Spies Inc |
| | 012 664 0708 |
| On behalf of the Respondent: | Adv M Sikhakhane SC |
| Instructed by: | The State Attorney |
| | 011 330 7600/35 |
| Dates of Hearing: | 26 May 2015 |
| Date of Judgment: | 26 May 2015 |