

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2017/01217

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	07/02/2017
	DATE
	<i>J. Mabebele</i>
	SIGNATURE

In the matter between:

DESMOND MAHAPA

Applicant

and

**THE HONOURABLE MINISTER OF
HIGHER EDUCATION**

First Respondent

**NATIONAL STUDENT FINANCIAL AID SCHEME
(NSFAS)**

Second Respondent

J U D G M E N T

MABESELE, J:

[1] This matter came before me by way of urgency, on 19 January 2016, for an order, directing the second respondent (a) to allocate funds to the applicant to further his studies, in 2017; and (b) provide written reasons as to

why the applicant was not allocated a bursary in 2015 and 2016, respectively; and (c) direct the first respondent to protect the applicant's constitutional right to education.

[2] The applicant is Desmond Mahapa. He is currently serving a lengthy sentence in the Johannesburg Medium "B", Correctional Centre. He is 36 years old.

[3] The first respondent is the Minister of Higher Education. The second respondent is National Student Financial Aid Scheme (NSFAS).

[4] The applicant appeared in person.

[5] After I had considered the arguments by both the applicant and the counsel for the respondents, I dismissed the application with no order as to costs. The written reasons for that order are now furnished.

[6] The facts are as follows: The applicant is studying for law degree at the University of South Africa, known as UNISA. He registered for this degree towards the end of 2016.

[7] According to a copy annexed to the papers, marked "DM04", which serves as proof of registration for academic year 2017, the applicant has registered for the following modules:

- 7.1 Civil Procedure
- 7.2 African Customary Law
- 7.3 Labour Law
- 7.4 Law of Succession
- 7.5 Law of Delict

[8] Demonstrating his inability to pay university fees, the applicant annexed to the papers a copy of an affidavit, marked "DM03", deposed to by his mother, stating that she is a pensioner and cannot afford to educate the applicant.

[9] In 2015, the applicant applied for an admission at UNISA, to study for LL.B degree. His application was successful. Subsequently, he applied for a bursary from the second respondent, through an email, dated 28 October 2015. He did not receive response from the second respondent. As a result, he did not pursue his studies that year.

[10] In 2016, the applicant submitted a new application for a bursary, through an email, dated 18 May 2016, to the second respondent, to pursue his studies in the academic year 2017. The applicant did not receive a response from the second respondent. Despite that, the applicant managed to secure registration fee, for the academic year 2017.

[11] During arguments, the applicant brought to the attention of the court that his application for a bursary, for academic year 2017, was still being

considered by the second respondent. In view of that information, counsel for the respondents made a suggestion to the applicant to wait, first, for the decision of the second respondent. The suggestion was accepted, resulting in the applicant abandoning prayer (a) of the notice of motion. He, subsequently, abandoned prayer (b) after it was pointed out to him that same was not urgent and that he should request written reasons from the second respondent, for its failure to provide reasons for not awarding a bursary to him, in 2015 and 2016, respectively. The applicant then proceeded with prayer (c).

[12] The applicant contended that he is entitled to education at tertiary level. He said since he cannot afford university fees, due to poor family background, the first respondent, acting on behalf of government, is obliged to secure funds for him to further his education. He relied on section 29(1)(b) of the Constitution,¹ which he read into the record. I will deal with this section later.

[13] In contrast, counsel for the first respondent argued, on the strength of section 36(1) of the Constitution, that the first respondent has no obligation to provide funds to the applicant to further his education.

[14] Section 36(1) reads as follows:

“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

¹ Constitution of the Republic of South Africa, 1996.

“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

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- (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.”*

[15] Education is an instrument for development. It is as important as the air that one breathes. It is a vehicle for the promotion of self-dependence and self-worth. It liberates the mind from self-oppression and promotes positive thinking. Important, it protects one’s dignity.

[16] The writer, in his book,² emphasised the importance of education as follows:

“Somewhere at the back of your mind and mine are different university textbooks which we bought at reasonable price during our school days. The information which is contained in them is known to you and me. If you and I, without competing with each other, can share this information with at least one in every hundred of the poor, both our children and grandchildren will respect our bones.”

[17] In order to demonstrate the importance of section 29(1) of the Constitution, it is appropriate, first, to give a brief history of educational system

² Stillborn Child Is Better Than Oppression, p.11

insofar as it applied to the majority of African children who qualified for admission to basic education, during the apartheid era.

[18] The laws and policies that governed and regulated that system of education has since been repealed. Therefore, it will not be necessary to refer to them, save to demonstrate their adverse impact on the education of an African child.

[19] Over the years, educational policies were carefully and deliberately formulated on the basis of discrimination, with the primary intention to prevent an African child, in particular, from thinking independently, debating issues constructively and becoming self-reliant.

[20] In terms of the policies, the schools were deliberately not built in most of the rural areas and farms where African families reside. The families were allowed to stay on the farms on condition that heads of families and older children offered cheap labour to the farm owners. Young children, regardless gender, looked after cattle.

[21] The introduction of industries and other development institutions in the cities, resulted in the migration to the cities by most families, to look for employment opportunities, better life and education for their children. Their presence in the cities resulted in the building of few schools for their children. Clearly, the schools did not accommodate all the children.

[22] Since education was not free and compulsory, some of the few children who were admitted to the schools “*dropped out*” from school, due to non-payment of school fees and the fact that their parents could not afford school uniform. They earned little wages as a result of them being classified as unskilled workers and certain categories of employment reserved for a particular racial group. Some children “*dropped out*” from school due to poverty in their homes, malnutrition and teaching that took place under the trees. That situation produced the exact results expected by the authorities.

[23] Moseneke DCJ, in *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*³ highlights the impact of that educational system on the Africans, as follows:

“Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us. It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.”

³ 2010 (2) SA 415 (CC) at 430, paras [45]-[46].

[24] The emergence of section 29(1) of the Constitution put to rest the aforesaid draconian laws and policies.

Section 29 reads:

“(i) *Everyone has the right –*

(a) To basic education, including adult education; and

(b) To further education, which the state, through reasonable measures, must make progressively available and accessible.”

[25] The right to basic education is immediately realisable. In this regard the Constitutional Court held, in *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others*,⁴ as follows:

“It is important for the purpose of this judgment, to understand the nature of the right to ‘a basic education’ under s. 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’”. The court held that this right may be limited only in terms of the law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[26] Our courts had, on numerous occasions, ordered the state to comply with section 29(1)(a) in order to fulfil its constitutional obligation. This is evident in *Tripartite Steering Committee and Another v Minister of Basic Education and Others*⁵ wherein the Minister was directed to provide scholar

⁴ 2011 (8) BCLR 761 (CC) para [37].

⁵ 2015 (5) SA 107 (ECG).

transport to the scholars. The court was of the view that the right to basic education is meaningless without transport to and from school, at state expense, in appropriate cases.

[27] Navsa JA, in *Minister of Basic Education and Others v Basic Education For All and Others*⁶ expressed the same view as Kollapen J, in *Section 27 v Minister of Education*⁷, that failure to provide textbooks to learners in schools in Limpopo was a violation of the rights to a basic education, equality and dignity. He added that the Minister, acting in terms of the Constitution and legislation, took a decision that textbooks were essential to promote and protect the right to basic education. He said those children without textbooks were being unlawfully discriminated against.

[28] He was of the view that the children who live in the rural places are vulnerable and deserve constitutional protection⁸.

[29] It is apparent from the above that section 29(1)(a) is intended to address the imbalances of the past.⁹

[30] The applicant relies on section 29(1)(b) of the Constitution, for the relief sought.

⁶ 2016 (4) SA 63 (SCA) at 80, para [46].

⁷ 2013 (2) SA 40 (GNP).

⁸ Supra, p82, para [(C)]

⁹ See, also, *Mpumalanga Department of Education v Hoërskool Ermelo*, supra, p 430, para [47].

[31] Unlike section 29(1)(a), this section, in my view, has internal limitation, requiring the state to be obliged, through reasonable measures, to make further education “*progressively available and accessible*”. Regrettably, this right is distinct from right to basic education, which is immediately realisable, and with no internal limitation requiring that it be ‘*progressively realised*’ within ‘*available resources*’ subject to ‘reasonable legislative measures’¹⁰. In addition, section 29(1)(b), to my understanding, is intended to enhance one’s knowledge and equip one with necessary skill for one to become self-dependent and contribute meaningfully to the socio-economic development of the country, whereas section 29(1)(a) is intended to eradicate illiteracy and promote literacy to enable everyone to understand the society in which they live and to fit well in that modern society. Therefore, it should follow that section 29(1)(a) must take preference and be protected. Therefore, the applicant’s argument cannot stand. It stands to reason, therefore, that the first respondent has no obligation, arising from section 29(1)(b), to protect the applicant’s right to further his education, by providing him with funds.

[32] For these reasons, I dismissed the application.

¹⁰ See, Governing Body of Juma Masjid Primary School and Others, *supra*, para, 37

A handwritten signature in black ink, appearing to read 'M. M. Mabebele', is written over a horizontal line.

M. M. MABESELE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing : 19 January 2017

Applicant : Mr Desmond Mahapa (in person)

Attorneys for the Respondent : State Attorneys