THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 865/13

In the matter between:

MINISTER OF EDUCATION FOR THE WESTERN CAPE	**FIRST APPELLANT**
WESTERN CAPE EDUCATION DEPARTMENT	**SECOND APPELLANT**

and

BEAUVALLON SECONDARY SCHOOL	**FIRST RESPONDENT**
SCHOOL GOVERNING BODY OF BEAUVALLON SECONDARY SCHOOL	**SECOND RESPONDENT**
BERGRIVIER NGK PRIMARY SCHOOL	**THIRD RESPONDENT**
SCHOOL GOVERNING BODY OF BERGRIVIER NGK PRIMARY SCHOOL	**FOURTH RESPONDENT**
BRACKENHILL EK PRIMARY SCHOOL	**FIFTH RESPONDENT**
SCHOOL GOVERNING BODY OF BRACKENHILL EK PRIMARY SCHOOL	**SIXTH RESPONDENT**
DENNEPRAG PRIMARY SCHOOL	**SEVENTH RESPONDENT**
SCHOOL GOVERNING BODY OF DENNEPRAG PRIMARY SCHOOL	**EIGHTH RESPONDENT**
KLIPHEUWEL PRIMARY SCHOOL	**NINTH RESPONDENT**
SCHOOL GOVERNING BODY OF KLIPHEUWEL PRIMARY SCHOOL	**TENTH RESPONDENT**
KROMBEKSRIVIER NGK PRIMARY SCHOOL	**ELEVENTH RESPONDENT**
SCHOOL GOVERNING BODY OF KROMBEKSRIVIER NGK PRIMARY SCHOOL	**TWELVTH RESPONDENT**
LK ZEEMAN PRIMARY SCHOOL	**THIRTEENTH RESPONDENT**
SCHOOL GOVERNING BODY OF LK ZEEMAN PRIMARY SCHOOL	**FOURTEENTH RESPONDENT**
LAVISRYLAAN PRIMARY SCHOOL	**FIFTHTEENTH RESPONDENT**

SCHOOL GOVERNING BODY OF LAVISRYLAAN PRIMARY SCHOOL	**SIXTEENTH RESPONDENT**
PROTEA PRIMARY SCHOOL	**SEVENTEENTH RESPONDENT**
SCHOOL GOVERNING BODY OF PROTEA PRIMARY SCHOOL	**EIGHTTEENTH RESPONDENT**
REDLANDS PRIMARY SCHOOL	**NINETEENTH RESPONDENT**
SCHOOL GOVERNING BODY OF REDLANDS PRIMARY SCHOOL	**TWENTIETH RESPONDENT**
RIETFONTEIN NGK PRIMARY SCHOOL	**TWENTY-FIRST RESPONDENT**
SCHOOL GOVERNING BODY OF RIETFONTEIN NGK PRIMARY SCHOOL	**TWENTY-SECOND RESPONDENT**
RONDEVLEI EK PRIMARY SCHOOL	**TWENTY-THIRD RESPONDENT**
SCHOOLGOVERNING BODY OF RONDEVLEI EK PRIMARY SCHOOL	**TWENTH-FOURTH RESPONDENT**
URIONSKRAAL NGK PRIMARY SCHOOL	**TWENTY-FIFTH RESPONDENT**
SCHOOL GOVERNING BODY OF URIONSKRAAL NGK PRIMARY SCHOOL	**TWENTY-SIXTH RESPONDENT**
VALPARK PRIMARY SCHOOL	**TWENTY-SEVENTH RESPONDENT**
SCHOOL GOVERNING BODY OF VALPARK PRIMARY SCHOOL	**TWENTY-EIGHTH RESPONDENT**
WANSBEK VGK PRIMARY SCHOOL	**TWENTY-NINETH RESPONDENT**
SCHOOL GOVERNING BODY OF WANSBEK VGK PRIMARY SCHOOL	**THIRTIETH RESPONDENT**
WARM BAD-SPA PRIMARY SCHOOL	**THIRTY-FIRST RESPONDENT**
SCHOOL GOVERNING BODY OF WARM BAD–SPA PRIMARY SCHOOL	**THIRTY-SECOND RESPONDENT**
WELBEDACHT UCC PRIMARY SCHOOL	**THIRTY-THIRD RESPONDENT**
SCHOOL GOVERNING BODY OF WELBEDACHT UCC PRIMARY SCHOOL	**THIRTY-FOURTH RESPONDENT**
THE SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	**THIRTY-FIFTH RESPONDENT**

Neutral citation: *Minister of Education for the Western Cape v Beauvallon Secondary School* (865/2013) [2014] ZASCA 218 (9 December 2014)

Coram: Brand, Maya, Leach and Willis JJA and Mathopo AJA

Heard: 17 November 2014

Delivered: 9 December 2014

Summary: Closure of schools under s 33 of Act 84 of 1996 – nature of reasons to be given under s 33(2) – gist of reasons sufficient – effect of new reasons emerging during consultative process – SADTU need not be consulted before school closed.

ORDER

On appeal from: Western Cape High Court, Cape Town (Bozalek, Le Grange, and Dolamo JJ sitting as court of first instance):

(a) The appeal succeeds to the extent that paras 1 and 3 of the order of the court a quo are set aside and substituted with the following:

'1 (a) The first respondent's decision to close Beauvallon Secondary School (the first applicant) with effect from 31 December 2012 is reviewed and set aside;

(b) The review application in respect of the first respondent's decision to close another 16 schools with effect from 31 December 2012 is dismissed;

. . .

3 The first and second respondents are ordered to pay the costs of the first and second applicants jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.'

(b) (i) The first and second appellants are to pay the first and second respondents' costs of appeal, jointly and severally, the one paying the other to be absolute.

(ii) Save to the extent in (b) (i) above, there will be no further order as to costs of the appeal.

(c) No order is made on the cross-appeal.

JUDGMENT

Leach JA (Brand and Maya JJA and Mathopo AJA concurring)

[1] The dispute between the parties arises from a decision taken by the first appellant, the Minister of Education in the Western Cape Government ('the Minister') acting under s 33 of the South African Schools Act 84 of 1996 ('the Act') to close a number of schools in the province. Eighteen of the affected schools and their respective school governing bodies ('SGBs') launched an application seeking, inter alia, an order reviewing and setting aside the Minister's decision. The South African Democratic Teachers Union (SADTU), a trade union representing the interests of certain teachers, also joined the fray as the thirty seventh applicant. However one of the schools and its SGB withdrew and were no longer parties when the matter came before the court a quo. Those that remained are the first to thirty fourth respondents in this appeal.

[2] Cited as respondents in the application were the Minister as well as the Western Cape Department of Education, the second appellant in this appeal ('the department'), and two ministers in the national government, the Minister of Basic Education and the Minister of Justice and Constitutional Development. The last-mentioned has played no part in any of the proceedings whilst the Minister of Basic Education ('the National Minister') joined the fray solely to

defend the provisions of s 33(2) of the Act, the constitutionality of which was sought to be impugned.

[3] The matter came before a full court of the Western Cape High Court which unanimously rejected both the attack upon the constitutionality of s 33 and the Minister's contention that his decision to close the schools was not reviewable under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). But although the court was also unanimous that the decision to close the Beauvallon Secondary School (the first respondent in this appeal) should be set aside under PAJA, its members were not ad idem in regard to the remaining 16 schools. The majority (Le Grange and Dolamo JJ) concluded that their closures should also be set aside whilst the minority (Bozalek J) concluded otherwise. The order of the court, reflecting the findings of the majority, was thus as follows:

'1. The first respondent's decision made on or about 15-16 October 2012, to close the affected schools with effect from 31 December 2012 is reviewed and set aside;

2. The application for declaratory relief in relation to s 33(2) of the South African Schools Act, 81 of 1996 is dismissed;

3. The first and second respondents are ordered to pay the applicants' costs (except the costs of the 35th applicant, SADTU), jointly and severally, the one paying the other to be absolved and such costs to include the costs of two counsel.

4. In respect of the 35th applicant, SADTU, each party to pay its own costs.'

[4] The Minister and the department were granted leave to appeal to this court against paras 1, 3 and 4 of this order (and for convenience I intend to refer to them collectively as 'the appellants'). On the other hand, the schools, their SGBs and SADTU (collectively 'the respondents') applied for leave to conditionally cross-appeal against the order in para 2 that s 33 was not unconstitutional. That application was dismissed but leave on this issue was granted by this court. It was solely on this issue that the National Minister

entered the lists in the appeal to defend the constitutionality of the section. As things turned out, as more fully set out below, this issue largely became something of a damp squib.

[5] The material facts relevant to the review of the Minister's decision to close the affected schools are not in dispute. It is common cause that for some years the policy of the national education authorities has been to close small and under-performing public schools. The national Department of Education, in its guidelines given to provincial departments of education to expedite this process, identified a number of reasons justifying such action. These include the number of learners at each school, as a declining number of learners 'at rural or farm schools challenges the costs effectiveness of maintaining such schools', and that a low learner enrolment 'results in schools being unable to provide adequate curriculum choices'. Other considerations recorded are that it is undesirable for educators 'to teach many grades across phases in one classroom' and that a lack of adequate facilities has led to many rural and small schools failing to function properly. It also stressed the advantage of merging small schools in close proximity to each other so as to provide for infrastructure in addition to classrooms, such as libraries, laboratories, sports fields etc.

[6] The national guidelines go on to outline a suggested process to be followed in the merger or closure of public schools, and that a provincial co-ordinating team should be established to guide the merger and closure process. This end was facilitated at provincial level by the department adopting guidelines to effectively and fairly manage the closure of non-viable public schools so as to best promote the interests of learners concerned and the interests of sustainable quality schooling. The provincial guidelines also detail

various reasons for closing a public school, echoing in broad terms the problems identified in the national guidelines.

[7] In the Western Cape there are approximately 1450 public schools, more than 10 per cent of which have less than 100 learners. However, the department's view is that in order to provide an acceptable level of educational, extra-curricular and social opportunities, and having regard to budgetary restraints and its resources, it can maintain and resource only approximately 1000 schools having more than 100 learners. That many small and under-performing schools should be closed is therefore part of the policy adopted at both national and provincial levels of government. Indeed, in the 12 years immediately preceding the institution of these proceedings in the high court, more than 2 500 such schools were closed country wide.

[8] In order to facilitate this policy and in an effort to improve levels of education by obliging many learners to attend schools 'that are better equipped to provide a quality education', the provincial guidelines lay down an annual process for each district office to identify public schools 'that are no longer educationally viable and which in the interests of sustainable quality schooling, should be considered by the Minister for closure' and state:

'The (Department) must identify public schools within the province for closure as follows:

- With reference to the guidelines . . . each district office must identify public school(s) within its area of jurisdiction for closure; and
- Each district office must then prepare an application for the closing of each school identified . . . and submit this application to the Head of (the department) not fewer than 10 working days before the end of the first term of the school year.'

[9] In 2012, the department in this way identified 27 schools in the Western Cape as candidates for possible closure, and submitted a recommendation in this regard to the Minister in respect of each school. In respect of each such school, the following process was adopted:

(a) The district office, on recommending closure, submitted a written application form completed by the director of the education district and the circuit manager of the relevant region to the head of the department. Completed in line with the department's guidelines for the closing of non-viable public schools, this application contained, inter alia, particulars of the school, the number of learners in each grade, its proximity to nearby schools, the number of educators in each grade, each educator's post-level, the post-level of other members of its staff, the reasons for recommending closure and the comments of various senior department officials on closure.

(b) On receipt on this application, the Director: Infrastructure Planning and Management prepared a report with a recommendation addressed to the Minister containing information in regard to the school, the current enrolment of learners, the grades taught and the primary reasons for the suggested closing of the school, as well as where the learners and staff could be accommodated at other schools if the school be closed. This report's recommendation was supported by various senior members of the department including the Chief Director: Physical Resources, the Chief Director: Districts, the Deputy Director-General: Education Planning, the Deputy Director-General: Institutional Development and the Head of Department. The report was then forwarded to the Minister for consideration.

(c) The Minister, in turn, addressed a letter to the SGB of the school giving notice of his intention to close the school under s 33(2)*(a)* of the Schools Act (the provisions of which are dealt with in more detail below) giving his reasons

for doing so and inviting the SGB, should it so wish, to make representations either orally at a meeting to be held with the department's officials or in writing using a standard form.

(d) At a subsequent meeting between officials of the department and the SGB, the latter submitted representations it considered relevant to the school's closure. Thereafter the department submitted a further report to the Minister detailing the SGBs' objections to the proposed closure but recommending the continuation of the closure process.

(e) The Minister decided to continue with the process, and notices were published informing the public both of his intent to close the school and of a public hearing to be held on a particular date to discuss the proposal; and inviting written representations in respect of the matter. A public hearing was thereafter held and a transcript of the proceedings prepared. So too were minutes of the meeting and a report by the presiding official to which were attached any written representations that had been made.

(f) A final report to which all relevant documentation was attached and supported by the recommendations, once more, of a number of senior departmental officials was then made available to the Minister who took the final decision on closure (his decision was to close 20 of the 27 schools) and a notice to this effect giving his reasons for closure was published in the Provincial Gazette on 16 October 2012.

[10] As already mentioned, in considering the lawfulness of the Minister's decision to close these schools, both the majority and minority judgments in the court below held that it had been an administrative action reviewable under PAJA. The appellants argued on appeal that the court a quo had erred in this regard and that, in deciding to close the schools in question, the Minister had

performed not an administrative but an executive function that is not subject to review under PAJA.

[11] Courts are so often called upon to decide whether or not a decision by a public official is administrative in nature that one is left to ponder to what extent PAJA has in fact muddied the waters rather than provided certainty on the issue. Part of the problem is the definition of 'administrative action' set out in PAJA. Variously and correctly described as being 'extremely narrow and highly convoluted'[1] and 'cumbersome',[2] it embraces the concept of an action or decision taken by a public body, official or functionary of 'an administrative nature'. Conduct of that nature was described, in broad terms, by this court in *Grey's Marine*[3] as 'the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals'. And although administrative action excludes 'the executive powers or functions of the Provincial Executive' – which clearly include the formulation of government policy – the implementation of policy is generally regarded as being administrative in nature.[4] Moreover, a procedural requirement affording affected parties a hearing before a decision is taken (the purpose of which is of course to ensure that there has been a full and proper appraisal of the relevant facts and circumstances, including possible alternatives to the proposed action) is the hallmark of administrative action.

---

[1] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 195.
[2] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) para 48 where Nugent JA found it unnecessary to set out the definition beyond stating that it requires a decision of an 'administrative nature' that has various features including that it 'adversely affects the rights of any person'.
[3] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 24.
[4] *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 18 and Hoexter at 177-178.

[12] There is no simple litmus test to determine whether a decision by a public official is administrative or executive in nature, and in order to determine the issue a close analysis needs to be undertaken of the nature of the public power or function in question[5] in the light of the facts of each case.[6] In doing so, it is important to remember that a decision heavily influenced by considerations of policy is a clear indication of it being executive, rather than administrative, in nature. In *Scalabrini*, dealing with the closure of a refugee reception office, Nugent JA stressed the importance of the separation of powers and that a court's primary responsibilities do not include making decisions reserved for the other branches of government[7] before going on to say:

'The question whether a Refugee Reception Office is necessary for achieving the purpose of the Act is quintessentially one of policy. Where, and how many, offices should be established will necessarily be determined by matters like administrative effectiveness and efficiency, budgetary constraints, availability of human and other resources, policies of the department, the broader of political framework within which it must function, and the like. I do not think courts, not in possession of all that information, and not accountable to the electorate, are properly equipped or permitted to make those decisions.'[8]

[13] It is significant that that in order to give effect to the right to procedurally fair administrative action, s 4(1)*(b)* of PAJA provides for a 'notice and comment procedure' as a possible measure to be adopted where an administrative action materially and adversely affects the rights of the public. Section 4(3) goes on to provide:

'If an administrator decides to follow a notice and comment procedure, the administrator must-

(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;

---

[5] *Sokhela & others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & others* 2010 (5) SA 574 (KZP) para 61 quoted with approval in *Scalabrini* para 52.
[6] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 37.
[7] Paras 54-56.
[8] *Scalabrini* para 58

(b) consider any comments received;

(c) decide whether or not to take the administrative action, with or without changes; and

(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.'

[14] In the present case, not only was a notice and comment procedure adopted by the Minister but the procedure followed was specifically prescribed by ss 33(1) and (2) of the Schools Act. Echoing the notice and comment procedure in s 4(3) of PAJA, these sections provide:

'33(1) The *Member of the Executive Council* may, by notice in the Provincial Gazette, close a *public school*.

(2) The *Member of the Executive Council* may not act under subsection (1) unless he or she has-

(a) informed the *governing body* of the *school* of his or her intention so to act and his or her reasons therefor;

(b) granted the *governing body* of the *school* a reasonable opportunity to make representations to him or her in relation to such action;

(c) conducted a public hearing on reasonable notice, to enable the community to make representations to him or her in relation to such actions; and

(d) given due consideration to any such representations received.'

[15] The respondents' argument, as I understood it, was that the necessity to follow a notice and comment procedure under s 33(2) before closing a school under s 33(1) is a clear indication that even though such decision may well be influenced also by factors such as budgetary constraints, national and provincial policies relevant to education, resources and administrative efficiency, it materially affects the rights of members of the public, amounts to an implementation of policy, and is administrative rather than executive in nature; so that the court a quo correctly held PAJA to be applicable.

[16] Attractive though this argument may be, I do not think it is necessary in the present circumstances to reach a final decision on the issue. I am aware that as a rule a court considering the review of a decision of a public official should determine whether or not the proceedings are governed by PAJA.[9] But I do not believe that rule to be rigid and inflexible, as it is indeed now well established that even in cases where PAJA is not of application, the principle of legality may be relied upon to set aside an executive decision made not in accordance with the empowering statute.[10] And in the present case the statutory incorporation into s 33(1) of the Schools Act of a notice and comment procedure essentially the same as that envisaged by s 4(3) of PAJA renders superfluous any attempt to pigeon-hole the decision to close the schools as either executive or administrative in nature. After all, however it may be categorised, if the Minister's decision was taken without proper compliance with that prescribed procedure it must fail for lack of legality.

[17] In the light of this consideration both sides did not press their respective arguments on the precise nature of the Minister's decision with any great vigour and contented themselves in the main with the issue of legality, to which I now turn.

[18] The principal issue debated in this court in regard to the question of legality was whether the Minister, in acting under s 33(2), gave the affected schools sufficient information for them or their SGBs to make meaningful representations relating to their closure. In contending the Minister had not, the respondents submitted that the reasons provided in the May 2012 letter warning them of possible closure and calling for representations on the issue were

---

[9] *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC) paras 436-438.
[10] See eg *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA) para 29 and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 48-50.

'shockingly short' and did not adequately set up 'the nature and substance of the case that they had to meet', and that at the very least the length of the department's report to the Minister recommending the closure of each school ought to have been matched.

[19] In considering this argument, it must be remembered that although the fairness of any procedure followed will depend on the circumstances of each particular case,[11] a person affected by a decision usually cannot make meaningful representations without knowing what factors are likely to be taken into account. Accordingly, in a test regularly approved by this court, 'fairness will very often require that he is informed of the gist of the case which he has to answer'.[12] As long as the gist of his reasons was conveyed, the Minister was thus not obliged to spell out in great detail why the particular schools were being considered for closure. In this regard, the reasons given in the May 2012 letter to each SGB were the same as those set out in the department's recommendation, and although the latter document was not attached to the letter that in itself does not result in the letter falling short of the mark.

[20] Similarly, in my view, the Minister was not obliged to inform the schools of 'adverse policy considerations' and information concerning the department's finances and resources to facilitate their making of proper representations, as the respondents further argued. This argument loses sight of the realities of what the Minister was about. It was for him to consider what was in the best interest not only of the learners and staff of the affected schools, but of education in the

---

[11] *Joseph & others v City of Johannesburg & others* 2010 (4) SA 55 (CC) para 56.
[12] *Doody v Secretary of State for the Home Department & other appeals* [1993] 3 All ER 92 (HL) at 106*b-h* cited with approval in this court, inter alia, in *Chairman, Board on Tariffs and Trade & others v Brenco Inc & others* 2001 (4) SA 511 (SCA) para 13 and *Du Preez & another v Truth & Reconciliation Commission* 1997 (3) SA 204 (A) at 232C.

province as a whole, taking into account budgetary restraints, available resources and the implementation of both provincial and national policies relating to education. Those policies are in the public domain and, if disputed, are matters for debate in the forums in which they were determined, but not between the functionary charged with their implementation and those who might be affected.[13] Policies such as multi-grade teaching and the desirability of closing small rural schools were therefore not issues on which the Minister needed to consider the views of the affected schools and it would have been wholly unnecessary and superfluous for him to have called for their input thereon. Accordingly, in my view, the majority in the court below wrongly concluded that the failure to provide a brief background to the department's policy regarding the closure of the schools had impeded effective and proper representations and fell short what had been required under s 33(2).

[21] I turn to consider the reasons given more closely. They were undeniably terse, but that of course does not mean that they could not be addressed. Although somewhat differently worded in the case of different schools, certain of the reasons were common to most. The most common was 'dwindling learner numbers', a reason offered in respect of all but two of the schools, the only exceptions being the Beauvallon Secondary School (the first respondent) to which I shall refer in more detail later, and the Wansbek VGK Primary School (the 29th respondent). The second most common reason was 'multi-grade teaching', which national education policy regarded as undesirable, was taking place at the school. This was a reason given in respect of nine of the 17 schools (the third, fifth, and seventh, eleventh, nineteenth, twenty first, twenty third, thirty first and thirty third respondents). These two main complaints were the sole reasons given in respect of five schools (the third, fifth, seventh, eleventh and thirty first respondents) but I do not see that anyone could have entertained

[13] Compare *Scalabrini* para 67.

any doubt as to why the closure of those schools was being considered. Nor for that matter could there have been such doubt in the cases where in addition to the two main considerations was added a further reason: for example, 'poor LITNUM results of the school' in the case of the nineteenth respondent; 'learners can be accommodated at [neighbouring schools]' in the case of the twenty first respondent; and that learners were being transported from another town in the case of the twenty third respondent. In the result I once again find myself in respectful disagreement with the majority in the court below who concluded that reasons such as dwindling learner numbers and learners not benefitting from multi-grade teaching were too brief for any of the meaningful representations to be made.

[22] Similarly where, such as in the cases of the thirteenth and fifteenth respondents, the reason of dwindling learner numbers was supplemented by the further reason of there being sufficient accommodation for learners at neighbouring schools, those affected could have had no doubt as to why the schools were being considered for closure. And in the case of the 29th respondent in which the sole reason given was that its 'learner enrolment is lower than 25' the reason behind its possible closure was clearly self-evident and did not need to be spelled out any clearer. Indeed one is hard pressed in this last case to consider what else could have been said.

[23] I do not think it is necessary to consider the reasons given in respect of any of the schools in any greater detail. In none of the cases can it be said that the gist of why closure was being considered was not apparent from the initial reasons. That being so, the conclusion of the court below that there was a failure to meet the requirements of s 33(2) which justified it interfering with the ultimate decision is unsustainable.

[24] This leads me to consider a further issue arising from the initial reasons given by the Minister in his letter of May 2012. In certain instances the reasons for closure of the schools finally set out in the media statement issued by the Minister on 16 October 2012 differed somewhat from those initially given to the SGBs of the schools and in the notice of the public hearings. It was argued on behalf of the respondents that as these reasons had not been disclosed at the outset, the schools and the public had not been in a position to deal with them in making their representations to the Minister rendering the final decision to close those schools procedurally unfair. It was indeed on this process of reasoning that the court a quo concluded that the closure of the first respondent, Beauvallon Secondary School, should be set aside.

[25] As a starting point in considering this argument, I accept that the circumstances of a matter may be such that procedural fairness will demand that in the event of a fresh reason arising after the Minister has given initial reasons, interested parties should be given the opportunity to comment thereon before a final decision is taken. That may particularly be the case where the ultimate decision is taken on the strength of a new reason forthcoming from the department in respect of which no comment had been called for nor made during the s 33(2) process. But this does not mean that comment must be called for in all cases in which these fresh reasons emerge during the course of that process. To hold otherwise would require the Minister to embark upon a lengthy, drawn-out investigative process – a potentially 'never-ending story' – before making a decision, and the importance and necessity of the executive being able to act efficiently and promptly has been authoritatively stressed.[14] This is particularly so in context of education and the need to close public

[14] *Premier, Mpumalanga & another v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 41.

schools to benefit learners and husband the department's finances and resources to the best advantage.

[26] Thus, for example, in the case of thirty third respondent where parents of learners had expressed the view during the consultative process that the quality of education was higher at a school proposed as an alternative, it would be ridiculous to suggest that this be ignored until such time as the school, its SGB and the public be asked to comment further on the issue. Indeed the consultative process envisaged by s 33(2) is to ensure that the Minister, in taking a final decision, has all the available facts on the circumstances of the school and whatever views there may be on closure available in order to take an informed decision. For him to have closed his mind to this additional information would have subverted that process.

[27] Consequently, the fact that the Minister's ultimate reasons for closure may not have tallied precisely with his initial reasons does not mean either that his final decision is vitiated by procedural unfairness or that additional reasons emerging during the process prescribed by s 33(2) cannot be taken into account and relied upon without giving further notice to the schools or public.

[28] Different considerations may apply where the additional reason or reasons ultimately relied upon did not emerge during the consultative process but were forthcoming from the department itself, especially where those reasons were known to the department before notice of intention to close the school had been given to the relevant SGB and public under s 33(2). In such a case the Minister would not have complied with his obligation under s 33(2)*(a)* to inform the SGB of his reasons for intending to close the school, and a subsequent final decision would thus be one taken without complying with the necessary statutory requirement. But this is a far cry from the Minister taking

into account a reason which emerged during the process of receiving representations invited under the section.

[29] Bearing this in mind, it is necessary to consider in more detail the position of the first respondent, Beauvallon Secondary School. The initial reasons given for closure were stated by the Minister as being 'consistent under-performance in the NSC examination as well as grades 8-11' and 'high dropout rate'. However, in the media statement on 16 October 2012, it was stated that the school was to be closed as its infrastructure was becoming increasingly unsuitable, that this impacted on the safety of learners and teachers, the security of the school and its ability to retain learners, and that its learners could be accommodated at the nearby John Ramsay High School which had achieved better academic school results, had a better retention rate and offered safe facilities. The court below concluded that the unsuitable school infrastructure and its consequences for the school and its learners was a significant, if not the primary reason, for Beauvallon's closure and that, as this reason had not been raised in the s 33(2) process, the Minister's decision to close it had been procedurally unfair.

[30] The Minister, in his answering affidavit, alleged that his reasons for closing the school, namely, the under-performance in examinations, the high drop-out rate, the unsuitable infrastructure and the problems relating to the security of the school and its learners, had been known to all concerned since at least 2010. And it is indeed so that in the department's initial application to the Minister for closure of the school both the IMG Advisor (who alleged that the school's building 'was not conducive to teaching and learning') and the Circuit Team Manager (who stated, inter alia, that a learner had been fatally stabbed in March 2012 and that the poor condition of the infrastructure was 'an injustice to the school community') had raised not only the reasons initially given but the

further additional reasons that were, at the end of the day, also relied upon by the Minister.

[31] However, the fact that all the final reasons for Beauvallon's closure had been known to the appellants before the commencement of the closure process makes it surprising, to say the least, that they were not mentioned by the Minister in giving his reasons at the commencement of the s 33(2) process. But the additional reasons relating to infrastructure, safety and security were not given, and those concerned were thus not called on to make representations in regard to them as they had not been raised. Significantly, the response of the school's SGB dealt with the reasons that had been given and further mentioned vandalism and burglaries at the school, but did not address the additional reasons, presumably as those issues had not been raised as reasons for closure. Furthermore, the additional reasons were not ventilated or raised during the public hearings. The only reference to the aspect of safety and security that one can extract from the transcript of those proceedings was a statement made in support of the school not being closed to the effect that, due to gangster activity and violence, the learners would not be safe if they were to attend another school outside of the area in which Beauvallon was situated.

[32] Consequently, material reasons on which the Minister based his decision to close Beauvallon were not given under s 33(2)*(a)* and no representations were made to or received by the Minister relevant to those reasons. The procedure followed in regard to these particular schools was thus fatally flawed as, simply put, the Minister did not comply with the provisions of the section by properly giving his reasons, nor even the gist of his reasons, for considering closing the school. That being so, his final decision in respect of the school offends the principle of legality and the court a quo correctly set it aside. The appeal in regard to Beauvallon must accordingly fail.

[33] Beauvallon was not the only school where the final reasons for closure in the media statement of 16 October 2004 included reasons additional to those initially given by the Minister. Thus in the case of Klipheuwel Primary School (the ninth respondent), where the initial reasons had been simply that there was no 'feeder community' and dwindling numbers, the final reasons included the fact that the school relies on multi-grade teaching, that the learner number of 31 was low, that no viable solutions to increase the learner numbers could be identified, and that the learners could conveniently be accommodated at a nearby school where there are better literacy and numeracy development opportunities. Similarly in the case of Urionskraal NGK Primary School (the twenty fifth respondent), in which the initial reasons were identical to those given in the instance of Klipheuwel, it was stated in the final reasons that learner numbers were low at 34 learners; that the school relies on multi-grade teaching with the staff of two educators required to teach 34 learners across grades 1-6; that the 34 learners could be accommodated at a nearby primary school; and, most importantly, that during the public participation process it had been noted not only that the principal of the school was transporting almost a third of the learners in a single vehicle, but that the school's SGB had expressed its support for the proposed closure.

[34] I do not think it is either necessary or useful to embark upon further analysis of the differences between the Minister's initial and final reasons. The instances quoted above indicate that in most cases certain facts emerging during the course of the consultation process or reflected in national educational policies were mentioned in the final reasons, and that the original reasons were either expressed somewhat differently or were substantiated by the recommendations made during the participation process under s 33(2). However, as the minority in the court a quo correctly held, a decisive consideration is that apart from the instance of Beauvallon, none of the other

schools relied upon any differences between the initial reasons and those later given to suggest that the process under s 33(2) had been procedurally unfair. Consequently, apart from the instance of Beauvallon, the procedure followed by the Minister complied with the requirements of s 33(2) and the majority in court a quo erred in reaching a contrary conclusion.

[35] The respondents argued further, however, that the Minister had failed to comply with his obligations under s 33(2) in that he had failed to consult with the thirty fifth respondent, SADTU, before taking his final decision to close the schools. This argument, advanced in the papers but rejected in the court a quo, was put forward once more in the respondents' heads of argument in this court. But although not abandoned, it was not presented within any vigour by respondents' counsel, whose hesitancy on this score is understandable.

[36] The simple fact is that consultation with SADTU, or any other trade union that might represent the interests of educators or other members staff of a school, is not a requirement specified in s 33 as a prerequisite for closure of the school. Even though it was alleged in the supplementary founding papers that the Minister's failure to consult was 'without precedent', it appears that at best the views of the leadership of SADTU had been obtained previously only at an informal level before a decision to close a school was taken. Members of SADTU were, of course, perfectly entitled to make representations on the proposed closing of the schools, either in their capacities as members of the relevant SGBs or as members of the public, and some of them did. But there was no obligation on the part of the Minister to consult with SADTU, and the fact that he did not is no reason to impugn his decision.

[37] The respondents also alleged the decision to close each of the schools was arbitrary and irrational. In particular, in this regard, it was argued that as the

circumstances of the seven schools the Minister had decided not to close were comparable to certain of the schools that he did close, this demonstrated 'an inconsistency and vacillation in standards and policies that is entirely irrational'. In this regard attention was focussed on the Minister having replaced the school principal of certain schools to avoid closure but not in other schools that he closed where leadership was cited as a concern. The respondents also emphasised that although multi-grade teaching was cited as a reason for the closure of all of the rural schools, some schools in which there was multi-grade teaching were kept open.

[38] It is neither necessary nor desirable to attempt to closely analyse the respects in which it is alleged the decision relating to each school had been irrational, particularly as I did not understand counsel for the respondents, at the end of the day, to place undue emphasis on this aspect of the case. Indeed the attack upon the Minister's decision on the basis of its alleged irrationality can be swiftly dealt with. Courts must be wary of trespassing into the domain of public officials by interfering with decisions entrusted by the Constitution or legislation to them. As long as there is a rational connection between the facts and information available to a public official and the achievement of the purpose falling within the power being exercised, a court cannot interfere merely because it considers a decision to be wrong or that a different outcome would have been preferable.[15] As was emphasized by Ngcobo CJ in *Albutt*:[16]

'Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not

[15] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 45.
[16] *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) para 51.

whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.'

Thus the requirement of rationality is not aimed at testing the reasonableness, fairness or appropriateness of a decision nor whether an alternative or better means could have been employed to achieve the desired end. It is restricted to the 'threshold question' whether the decision taken 'is properly related to the public good it seeks to realise'.[17]

[39] The majority in the court a quo held that the decision to close the affected schools was irrational, particularly as even though multi-grade teaching and the benefits of smaller schools were clearly issues of policy falling within the domain of the Minister and the department, 'where multi-grade teaching was cited as the primary reason to close certain schools, in circumstances in which schools where the method is implemented and with an equally successful rate are given a reprieve to continue, then the complaint of arbitrariness is not without merit and cannot be ignored on the basis of policy consideration'.

[40] With respect, this conclusion was clearly incorrect The Minister had the power under s 33(1) to close the affected schools. Hard choices had to be made, and the fact that in the exercise of his function he closed a school whose circumstances may have been similar to another school that was not closed does not, in itself, establish irrationality. The truth is that no two schools can ever be regarded as identical and the Minister, as functionary, was called upon to make what may be colloquially described as being a 'judgment-call' on which of the 27 schools under consideration should be closed to achieve the desired end of improving education in the province. Thus, for example, multi-grade teaching can obviously not be phased out overnight, whatever national policy might be,

---

[17] Per Moseneke DCJ the *Law Society of South Africa & others v Minister for Transport & another* 2011 (1) SA 400 (CC) para 35.

and the fact that a school offering multi-grade teaching was not closed does not mean that the closure of a school at which there is such instruction is irrational.

[41] As appears from the evaluation process that I have already described in some detail, the Minister made his decision in the light of the facts made available to him, and after considering the recommendations, representations and debates that had taken place during a lengthy and careful evaluation process. There is no suggestion that he was not bona fide in taking his decision. Indeed, the converse is glaringly apparent. The closure of each of the schools was in line with national policies relating to similar schools and there is thus no room for a finding that his decision was vitiated for being irrational or arbitrary. Consequently, the conclusion of the minority in the court a quo that the closure of the schools had not been shown to have been irrational, was correct.

[42] In the light of all the afore-going, save for the instance of Beauvallon, the court a quo's decision to review and set aside the Minister's decision to close the remaining schools cannot stand and the appeal must succeed.

[43] That brings me to the respondent's cross-appeal in which it was sought to impugn the provisions of s 33(2) of the Act as unconstitutional. This challenge was conditional upon the assertion that if the section is to be interpreted in such a way as to permit the Minister to close a school without giving substantive reasons for proposing to do so, it would offend the right to just administrative action enshrined in s 33 of the Constitution. However, it was not suggested by any of the parties that s 33(2) of the Act was to be so interpreted and, that being so, the debate on the validity of the section fell away. The National Minister, who was represented solely in order to support the constitutional validity of s 33(2), did not seek to recover costs for appearing. In these circumstances, it is appropriate to make no order in the respect of the conditional cross-appeal.

[44] In regard to the costs of the appeal itself, although the appellants must succeed in setting aside the order of the court a quo in respect of all of the affected schools, save for Beauvallon, they did not seek a costs order against any of the schools or their SGB's as would inevitably have to be discharged from the public purse. In addition, whilst the appellants, in their heads of argument, had indicated that they would seek a costs order against SADTU should the appeal succeed, their counsel did not persist in seeking such relief and, most properly, conceded that the appellants would in any event have been before this court had SADTU not been a party. In these circumstances, save for the first and second respondents (Beauvallon and its SGB, the first and second applicants in the court below) being entitled to their costs in successfully resisting the court a quo's judgment in their favour, no further order need be made in respect of the costs of appeal.

[45] Of course the first and second respondents in the appeal were also entitled to their costs in the court below; as was indeed reflected in the order of the minority. It was also not suggested that the order in the majority judgment below relating to the issue of costs between the appellants (as respondents below) and SADTU should change. In the result, only the first and third paragraphs of that order need be altered.

[46] For these reasons it is ordered as follows:

(a) The appeal succeeds to the extent that paras 1 and 3 of the order of the court a quo are set aside and substituted with the following:

'1 (a) The first respondent's decision to close Beauvallon Secondary School (the first applicant) with effect from 31 December 2012 is reviewed and set aside;

(b) The review application in respect of the first respondent's decision to close another 16 schools with effect from 31 December 2012 is dismissed;

. . .

3 The first and second respondents are ordered to pay the costs of the first and second applicants jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.'

(b) (i) The first and second appellants are to pay the first and second respondents' costs of appeal, jointly and severally, the one paying the other to be absolute.

(ii) Save to the extent in (b) (i) above, there will be no further order as to costs of the appeal.

(c) No order is made on the cross-appeal.

L E Leach

Judge of Appeal

Willis JA:

[47] Having read the fine and comprehensive judgment of Leach JA, I agree with his proposed order that each of the individual decisions to close 16 of the affected schools, is not one with which a court may interfere. Indeed, I should have gone one step further. In the case of the Beauvallon Secondary School , I consider the difference given in the final reasons as to why the school was to be closed was neither so materially different from those originally put before the meetings with the school governing bodies (SGBs) nor so strikingly unfair in the overall process as to be 'fatally flawed'. I therefore disagree that there was, accordingly, a justification for judicial interference with the decision to close that school. Relevant is the totality of the history of the process. Having as its wellspring the best interests of those who teach and those who learn, the decision to close the school was, in each instance, taken after careful consideration and extensive consultation over a protracted period of time. In this regard, my conclusions mirror those of Davis J who delivered a dissenting judgment when the application for an interim interdict in this matter was considered. In my opinion, this court should, therefore, also have sanctioned the closure of Beauvallon Secondary School.

[48] Additionally, there are a few other aspects in the reasoning of Leach JA where I respectfully find myself not to be in unqualified agreement with him. Here below I shall attempt to set out briefly the features of the case which, in my deliberations of the matter, warrant a separate consideration.

[49] I agree with Leach JA that, in general, administrative action is characterised by the requirement of procedural fairness whereas executive action is not. This is made clear in *Masetlha v President of the Republic of*

South Africa & another.[18] It is important, however, not to lose sight of the fact that the requirement of procedural fairness is a consequence of a decision being administrative rather than the reason why it is so.

[50] In my opinion, it follows from *President of the Republic of South Africa & others v South African Rugby Football Union & others*,[19] *Premier, Mpumalanga & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*[20] and *Masetlha*[21] that the development, formulation and implementation of policy are executive decisions. It is in regard to the use of the word 'implementation'[22] that confusion may arise. Mr Fagan, who appeared for the appellants, argued that all that they had done was to implement policy and, therefore, the application was not amenable to review.

[51] The implementation of policy will almost always require some degree of individuation. The implementation of a policy to build more clinics, for example, would require that specific contracts be entered into for the building of particular units in different places. The former is not amenable to review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), but the individuated tenders awarded as a result thereof would be.

[52] 'Policy' has a 'general' character.[23] It is in the nature of things that the implementation of policy entails a process of moving from the general to the particular. Ordinarily, once a process of decision-making has been particularised to the extent that an individuated decision has been made, having concrete, measurable and finite results and which are not of general application,

---

[18] *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 78.
[19] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 143.
[20] 1999 (2) SA 91 (CC) para 41.
[21] Para 77.
[22] See *Premier, Mpumalanga* para 41, approved in *Masetlha* para 77.
[23] See for example *The Oxford English Dictionary*, 2006.

there is a change of character: executive decision-making becomes administrative action. In a certain sense, as the colloquial expression has it: 'The devil is in the detail'. Policy has an abstract quality: it is separated from particularity.[24] The fingerprint of administration, on the other hand, is precisely the particularity of its consequences in the hand of the State. Administrative action, in a manner different from executive decision-making, affects human beings in the singularity of their lives, their hopes, their futures. Therein reposes the wisdom of the constitutional requirement[25] that there should be a statute such as PAJA.

[53] Not every individuated decision made the executive authority or an organ of State is, however, amenable to review. Certain decisions, such as those historically derived from the royal prerogative and that are unrestrained by the Constitution would, by way of illustration, be beyond review in terms of PAJA. The closure of schools is not such a prerogative decision.

[54] By reason of my minority judgment in *Minister of Home Affairs & others v Scalabrini Centre & others*[26] to which Leach JA has referred with approval, I should record, as an aside, that I agree that *Scalabrini* makes it clear that the decision to close particular or individual schools is an administrative one. *Scalabrini* dealt with the closure of a Refugee Reception Office in Cape Town. In that case it was held that the decision to close the office was an administrative one. In principle, there is no difference, in regard to the question of its amenability for review, between the decision to close a Refugee Reception Centre and a school. Although I wrote a minority judgment in *Scalabrini*, all the judges hearing the matter agreed that the decision to close the office was reviewable in terms of PAJA.

---

[24] Ibid.
[25] See s 33 of the Constitution, 1996.
[26] *Minister of Home Affairs & others v Scalabrini Centre & others* 2013 (6) SA 421 (SCA).

[55] I am considerably more phlegmatic than Leach JA about the shortcomings of PAJA, such as they are. In my opinion, it has served us well since its coming into operation. Certainly, it has been a huge improvement on the situation that previously prevailed. The consideration of PAJA has come before the Constitutional Court in cases to innumerable to mention. As far as I am aware, the Constitutional Court has not found it necessary to criticise the crafting of the Act. In this regard, I take my cue from them. Indeed, in what was effectively the unanimous decision of the Constitutional Court in *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs & others*,[27] PAJA seems to have received a sterling endorsement.[28]

[56] I otherwise agree with the judgment and order proposed by Leach JA, including his reasons therefor.

N P WILLIS
JUDGE OF APPEAL

[27] *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC).
[28] See esp paras 25 and 26.

Appearances:

For the Appellant:	E W Fagan (with him E F van Huyssteen) Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein
For the Respondents:	N Arendse SC (with him D Simonsz and S Fergus) Instructed by: Botha, Pretorius and Andrews Inc, Cape Town Honey Attorneys, Bloemfontein
For the Respondent in the Cross-Appeal:	Kemp J Kemp SC (with him T Masuku) Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein