IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 12126/99

DATE: 21-9-2000

In the matter between:

BEL PORTO SCHOOL GOVERNING BODY	First Applicant
VERA SCHOOL GOVERNING BODY	Second Applicant
DOMINICAN-GRIMLEY SCHOOL GOVERNING BODY	Third Applicant
JAN KRIEL SCHOOL GOVERNING BODY	Fourth Applicant
ALTA DU TOIT SCHOOL GOVERNING BODY	Fifth Applicant
TAFELBERG SCHOOL GOVERNING BODY	Sixth Applicant
PIONEER SCHOOL GOVERNING BODY	Seventh Applicant
ELJADA SCHOOL GOVERNING BODY	Eighth Applicant
GLENDALE SCHOOL GOVERNING BODY	Ninth Applicant
PAARL SCHOOL GOVERNING BODY	Tenth Applicant
DE LA BAT SCHOOL GOVERNING BODY	Eleventh Applicant
and	
THE PREMIER OF THE PROVINCE, WESTERN CAPE	First Respondent
THE MINISTER OF EDUCATION OF THE PROVINCE OF THE WESTERN CAPE	Second Respondent

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J U D G M E N T

BRAND, J: This is an application for review. The 11 applicants are governing bodies of schools within the Province of the Western Cape. All of them are schools for learners with special education needs referred to by the acronym "Elsen Schools". The learners involved all suffer from learning disorders or from physical and/or mental disabilities such as autism, epilepsy, cerebral palsy, blindness and deafness.

First and second respondents are respectively The Premier and the Minister of Education for the Province of the Western Cape.

Initially applicants sought an order under section 32 of the Constitution, No. 108 of 1996 ("the Constitution") that respondents be compelled to provide them with certain reports and information concerning the appointment of so-called "general assistants" at applicants' schools. By general assistants is meant non-teaching members of the applicants' staff, such as drivers, class aids, clerks, labourers etcetera.

After respondents filed their answering affidavits, applicants amended their notice of motion. The import of the amendment is that the applicants no longer seek any reports or information. The relief they now seek appears from prayers 1 and 2 of the amended notice of motion. The relevant part of these prayers reads as follows:

> "1. Declaring the respondents' failure to employ the general assistants presently employed by the applicants to be in conflict with the fundamental rights entrenched in Chapter 2 of the Constitution.
>
> 2. Directing the respondents to employ the general assistants presently employed by the applicants."

Applicants also seek an order that respondents be directed to pay the cost of the proceedings, including the costs pertaining to the relief sought in the notice of motion, as originally formulated.

Background

The exact nature of the issues between the parties and

the factual background against which these issues are to be decided appear from what follows. The Western Cape Education Department ("WCED") has a Directorate dealing specially with Elsen Schools. At present there are 78 such schools involving approximately 12 400 learners who fall under the auspices of this special Directorate. Learners in Elsen Schools have special needs. What is pertinent for the purposes of this case, they need assistance - depending to a certain extent on the nature of their disability - with things such as dressing, bathing, travelling and assistance to teachers in classes. These functions are all performed by so-called general assistants.

During September 1995 the WCED took over responsibility for all schools and educational institutions in the Western Cape. Prior thereto these schools and institutions had been administered by four separate departments based on the previously existing Tricameral system, namely the Department of Education and Training and the three departments of education of the House of Assembly, the House of Delegates and the House of Representatives respectively. Each of these four separate education departments had a sub-department dealing with Elsen Schools. The 11 applicant schools all provided for white children only and they were thus attached to the Department of Education of the House of Assembly. At present these schools are attended by learners from all races.

Prior to the merger of the different departments of education in September 1995, the Department of the House of Assembly had an arrangement with Elsen Schools regarding the employment of general assistants, which was different to the system employed by the three other departments. Whereas

the three other departments employed and paid the general assistants at their Elsen Schools directly, the general assistants at the House of Assembly schools were employed and paid by the governing bodies of the schools. The Department provided the schools with a subsidy to reimburse them in part for the expenses incurred in paying the salaries of the general assistants.

After the merger in September 1995, the differences regarding the employment of general assistants persisted. At the 12 former House of Assembly Elsen Schools, including the 11 applicants, the general assistants were still employed and paid by the governing bodies while at the other 66 Elsen Schools these workers were paid by the WCED. The former House of Assembly schools were disadvantaged by the system in that the subsidy they received for salaries did not cover the salaries of the general assistants in full. This, in substance, was the factual position when the application was launched.

The applicants felt that they were unfairly discriminated against. They therefore sought information from respondents which would, so they hoped, serve as a basis for a further application by them to compel the WCED to treat applicants on the same footing as all other Elsen Schools, by employing their general assistants directly, or as it was succinctly stated on behalf of first applicant:

> "Although the applicants only seek information at this stage of the application, the applicants in the final instance merely wish to be treated on the same footing as all other Elsen Schools in the Western Cape."

In their answering affidavits, respondents agreed with

applicants that they were entitled to the same treatment as other Elsen Schools. In fact, so respondents state, one of the very first objectives of the WCED, after the merger of the schools from different departments, was to create a system of parity between all schools.

The main answering affidavit on behalf of respondents was deposed to by the Superintendent-General of the WCED, Mr Brian O'Connell. When the WCED took over the functioning of the four erstwhile departments, O'Connell explains, it was confronted with many wide-ranging disparities between the schools administered by them. Consequently, the WCED was confronted with the formidable task of pooling resources, staff and finances in order to ensure that education in the Western Cape will be conducted on a fair and proper basis. This rationalisation programme, he states, has been ongoing for over four years and has not yet been finalised.

What also appears from O'Connell's affidavit is that, as with all other government departments, the WCED also has to operate within the budgetary constraints imposed on it by Government. As with most, if not all other provincial government departments, the WCED simply does not have sufficient funding. It has to utilise the amount allocated to it to the best of its ability. It is also obliged to give effect to the constitutional imperatives of promoting equity within the educational context for previously disadvantaged communities. In practical terms the WCED was and is thus confronted, inter alia, with a shortage of classrooms, books and other educational resources. The consequent problems were exacerbated in that the WCED had to comply with national policies and agreements which involved

the Department in an unprecedented staff rationalisation exercise and payment in excess of R416 million in respect of voluntary severance benefits.

The employment and restructuring of staff within the budgetary constraints of the Department, O'Connell says, was an aspect of great complexity and sensitivity which necessitated the careful balancing of the needs of various schools and other institutions. O'Connell then proceeds to deal at length with the extended process of consultation and deliberation which has gone into determining the staffing levels at the various education institutions operated by the WCED. Inter alia, task teams were appointed to investigate the position of all non-teaching staff at these institutions and to make recommendations as to the norms that should be applied in the so-called "provisioning of posts".

It appeared that the task team interviewed many people and considered and discussed numerous documents. Eventually they brought out their report containing suggested guidelines for personnel provisioning scales. These guidelines formed the basis of further discussions with various interested parties, including school principals. Consequent upon these discussions, the guidelines for personnel provisioning were revised and amended in subsequent drafts. These subsequent drafts then formed the subject of further discussions with trade unions attached to the Provincial Bargaining Commission. Thereafter, personnel provisioning scales were prepared for approval by the various officials and functionaries within the Provincial Government and eventually by the Cabinet of the Western Cape itself. The Cabinet's final approval of these scales was only conveyed to the WCED on 2 November

1999 i.e. shortly before the present application was launched.

The personnel provisioning scales or measures, as finally approved by the Cabinet, is annexed to O'Connell's affidavit as Annexure BC22. For the sake of convenience I will refer to this important document simply as "BC22". The general plan embodied in BC22, so O'Connell stated in his affidavit deposed to on 14 February 2000, now stands to be implemented. BC22 has certain Annexures. Three of these Annexures are relevant for present purposes, namely Annexure A3, A4 and A5.

As an introduction to A3 and A4 it is stated that:

> "Owing to the fact that schools for special education have additional needs to those or ordinary schools, weighting factors have to be taken into consideration when allocating posts to these schools. These factors are essentially to make provision for the performing of functions such as giving assistance with bathing, dressing and feeding of learners with special needs."

It appears that these weighting factors had been determined in consultation with the sub-department within the WCED responsible for Elsen Schools. Annexure A3 contains a list of all Elsen Schools together with a weighting factor attributed to every particular school. So, for example, second applicant (which is a school for autistic learners) has a weighting factor of 9. The same weighting factor is also attributed to other schools for autistic learners, formerly governed by other departments.

The consequence of applying this weighting factor, for example, is that second applicant, with its enrolment of 77

learners, will be entitled to the same number of non-teaching staff as a mainstream school with an enrolment of 693 learners. To give another example, the weighting factor allocated to first applicant that provides education for learners with cerebral palsy and/or learners who are severely mentally handicapped is 4, while the weighting factor for 7th applicant, a school for the blind, is 5.

Annexure A4 provides the norms for determining the number of staff for hostels attached to Elsen Schools. It also employs the principle of weighting factors, although the weighting factors differ from those set out in Annexure 3. Thus, for example, the weighting factor for second applicant in Annexure 4 is 4.5 as opposed to the 9 in Annexure 3 and for 7th applicant, 2.5 as opposed to 5 in Annexure 3.

Apart from the benefits derived from the system of weighting factors, further benefits for Elsen Schools are provided for in Annexure A5 to be BC22. The introduction to this Annexure reads as follow:

> "Besides the abovementioned post allocation, a need exists for drivers and class aids at schools for special education. The need for such posts differ from institution to institution as well as from year to year, subject to the enrolment of needy pupils who require their services. It has been accepted that an allowance be paid to these schools so that these services can be purchased."

Annexure 5 contains, in table form, the different amounts pertaining to learners with different needs. By way of example, I give the first three entries in these tables:

"Type of school:

Mentally handicapped

Class aid: R700 per learner.

Driver: R700 per learner.

Autistic

Class aid: R2 100 per learner.

Driver: R1 700 per learner.

Sight/hearing impaired

Class aid: R500 per learner.

Driver: R700 per learner."

Finally, O'Connell responded to applicants' complaint that they i.e. applicants themselves are compelled to raise funds in order to pay the salaries of their general workers. O'Connell's answer to this is a reference to:

> "The sad fact that the State simply does not have sufficient funds to meet all of the needs of all of the educational institutions and pupils in the country."

As a consequence, he states, all education institutions in the Western Cape have to participate in various fund-raising activities in order to meet their requirements.

The answering affidavits were filed on 15 February 2000. Applicants filed their replying affidavits on 26 April 2000. On 8 August 2000, applicants effected the fundamental amendment to their notice of motion that I have already alluded to. The consequence of the amendment was, in substance, that applicants are no longer seeking information but that they are seeking an order compelling the WCED to employ the general workers who are at present employed by applicants. In support of the relief sought in their amended notice of motion, supplementary affidavits were filed by applicants on 1 September 2000. The

supplementary affidavits are primarily based on the contents of Annexure BC22 to O'Connell's answering affidavit. The first complaint by some of the applicants on the basis of this document is that upon implementation of the personnel provisioning measures contained in BC22, the WCED will provide them with a lesser number of general assistants than the number currently employed by applicants themselves. This complaint is not shared by all the applicants because it appears from applicants' own calculations that some of them will have more general assistants than currently employed by them when BC22 comes into operation.

Applicants' second complaint pertains to all of them. It is formulated as follows in the supplementary founding affidavit on behalf of first applicant and echoed almost verbatim on behalf of the other applicants:

> "The implementation of this formula (i.e. BC22) at other Elsen Schools where all general assistants are in the employ of WCED would mean that many general assistants would have to be redeployed or otherwise retrenched. If the WCED redeploys these workers at the applicant schools, loyal workers with many years' service would have to be retrenched by the applicant schools, which would be most unfair and would probably lead to a serious drop in morale amongst the remaining workers."

Furthermore, applicants alleged:

> "It is important to bear in mind that general assistants at applicant schools assist learners with most intimate tasks (like personal hygiene) and that the personal relationship that exists

between assistants and learners is important for the effective functioning of these schools."

In response to applicants' supplementary affidavits, respondents filed supplementary answering affidavits deposed to by the Director:Personnel Management of the WCED, Mr Gerald Elliott. As to the objections by some of the applicants that the WCED will provide them with a lesser number of general assistants than those at present employed by applicants themselves, the answer by Elliott on behalf of respondents is two-fold. Firstly, that the formulae reflected in BC22 are the result of an exhaustive process of investigation, consultation and input by experts; that these formulae apply to all schools in the Western Cape and that the WCED is not at liberty to negotiate exceptions thereto on an ad hoc basis with individual schools. Such ad hoc exceptions, Elliott states, will give rise to great satisfaction among various interest groups that the WCED had to consider. Secondly, with reference to the objection that applicants will have to lose general assistants when BC22 becomes operative, Elliott again points out, as O'Connell did in the original answering affidavit, that applicants are not only at liberty, but indeed under an obligation, to make an attempt to generate their own funds so as to supplement the personnel complement provided by the WCED, where necessary.

As to the applicants' apprehension that the implementation of the personnel provisioning measures provided for by BC22 may result in the retrenchment of the general assistants currently employed by applicants, Elliott concedes that this apprehension is well-founded. More

particularly, he concedes that the implementation of the BC22 measures will have the effect of reducing posts at schools where general assistants are currently employed by the WCED; that that in turn will result in certain general assistants who are WCED employees being declared "in excess of staff requirements" and attempts will have to be made to have these access staff members redeployed at other schools, including applicants' schools. Such redeployment or transfers to other schools, Elliott states, will however be effected in consultation with the governing body of the recipient schools. The governing body concerned will be entitled to decline to accept a particular transfer, provided that the governing body will be required to motivate its objection to the candidate concerned.

Elliott's further answer to the applicants' objection that they will be compelled to employ general assistants from other schools is that this objections is both exaggerated and unreasonable. The objection is unreasonable, Elliott says, essentially because it requires the WCED to renege on an agreement and to retrench its own employees so as to accommodate the applicants' present employees. It is exaggerated for two reasons; first, the staff who are to be redeployed will be perfectly capable of performing their duties at applicants' schools. Those staff, after all, will be performing exactly the same functions as at the school to which they were previously attached. Secondly, the probabilities are that applicants will continue to employ some of their present general assistants who cannot be employed by the WCED from their own resources.

At the hearing of the matter, applicants were represented by Mr Van Rooyen, who appeared with Mr Van der

Berg while Mr Oosthuizen appeared on behalf of the respondents.

Administrative justice

The first basis for applicants' case relied upon by Mr Van Rooyen was applicants' fundamental right enshrined by section 33 read with section 22 of Schedule 6 of the Constitution i.e "the right to administrative action that is lawful, reasonable and procedurally fair". With reference to these constitutional provisions, Mr Van Rooyen contended that the finalisation of the present policy in respect of the appointment of general assistants by the WCED was both unreasonable on the merits as well as procedurally unfair. In support of his contention that the WCED acted procedurally unfairly, Mr Van Rooyen's submission was that the WCED had failed to give the applicants a proper opportunity to make recommendations with regard to its policy in respect of the appointment of general assistants prior to the finalisation of this policy.

I will first deal with the contention that the policy is unreasonable on the merits. In this regard it must be borne in mind that the Courts have traditionally been reluctant to interfere with administrative decisions regarding affairs of budgetary policy. I can see at least two reasons for this reluctance. Firstly, such decisions usually amount to what has aptly been described, with reference to spiders' webs as "polycentric" by Professor Lon Fuller in the (1978) 92 Harvard Law Review 353 when he explained the effect of interference with these polycentric decisions as follows:

> "A pull on one strand will distribute tensions after a complicated pattern throughout the web as

a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions, but will rather create a different complicated pattern of tensions. This would certainly occur for example if the double pull caused one or more of the weaker strands to snap. This is a polycentric situation because it is many-centred. Each crossing of the strands is a distinct centre for distributing tensions."

The second reason for the mentioned reluctance on the part of the Courts to interfere with budgetary decisions is that administrative authorities are notoriously under-budgeted in the sense that they cannot meet all their financial needs and consequently have to make difficult determinations of priority and consequent sacrifices. These sentiments appear from the following statement by Sir Thomas Bingham, Master of the Rolls in R v Cambridge Health Authorities 1995(2) All ER 129 (CA) 137d-f:

"I have no doubt that in a perfect world any treatment which a patient or patient's family sought would be provided if doctors were willing to give it, no matter how much it costs, particularly when a life was potentially at stake. It would, however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like. They cannot provide all the treatments they would like. They cannot

purchase /...

purchase all the extremely expensive medical equipment they would like. They cannot carry out all the research they would like. They cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the Court can make. In my judgment it is not something that a health authority such as this authority can be fairly criticised for not advancing before the Court."

It is clear, in my view, that both these fundamental truisms find application in this case. Having regard thereto I find myself unpersuaded that I can interfere with the decisions of the WCED which are embodied in Annexure BC22. In fact, Mr Van Rooyen made it clear in argument that applicants are not asking for BC22 to be set aside. To the contrary, applicants specifically want BC22 to be implemented with the exception that they want all the general assistants currently employed by them to be employed by the WCED. The first problem I have with this approach is that insofar as some applicants are employing more general assistants than they will be entitled to in terms of BC22, the effect of the order sought by the applicants will be to prefer these applicants to other Elsen Schools in the same position.

My second problem is that it will compel the WCED to renege on their agreement with trade unions and their present employees individually. I am simply not persuaded that such order will be competent.

As to the applicants' reliance on procedural unfairness, Mr Oosthuizen's argument was that if it is to be accepted that applicants were entitled to be heard and to be consulted prior to the finalisation of the policy embodied in BC22, their remedy would be to have the whole scheme embodied in BC22 to be set aside. That, however, Mr Oosthuizen pointed out is the very order that applicants do not seek. They want BC22, but as amended in their favour. Such an order, Mr Oosthuizen submitted, cannot be granted. I agree with this submission. As I understand the audi alteram partem rule, the infringement thereof justifies the setting aside of a particular administrative decision. The administrative authority must then reconsider the matter and take a new decision after the provisions of the audi rule have been complied with. An infringement of the audi rule does not justify an amendment to the decision in favour of the aggrieved party, particularly not when such amendment will result in another breach of the audi rule, vis-á-vis those who are also affected by the polycentric decision.

Infringement of other constitutional rights

As a further basis for the relief sought by applicants, Mr Van Rooyen contended that refusal by the WCED to employ the general assistants currently employed by applicants constitutes an infringement of the constitutional rights of the learners in applicants' schools. In amplification of this contention, Mr Van Rooyen submitted that the respondents' conduct amounted to an infringement of the following fundamental rights of learners:

(a) The fundamental rights of children, section 28 of the Constitution.

(b) The right to dignity, section 10.

(c) The right to life, section 11.

(d) The right to freedom and security of the person, section 12.

(e) The right to housing, section 26.

(f) The right to health care, section 27.

(g) The right to equality, section 9.

In the view that I hold of the matter I find it unnecessary to fully record Mr Van Rooyen's argument as to why and how each of these fundamental rights of the learners have been infringed. I believe that the answer to Mr Van Rooyen's submissions are to be found on a different level.

The conduct of the WCED complained of by the applicants is the Department's failure to appoint the general assistants currently employed at applicants' schools. According to applicants' supplementary papers they will be prejudiced in two ways as a result of this conduct. Firstly, they will not have enough general assistants. Secondly, they will have different general assistants of a lesser quality. As to the first complaint regarding the number of assistants, Mr Van Rooyen conceded that in order for applicants to obtain more assistants than they will be entitled to in terms of the BC22 formula, one of two things will have to happen; namely, the whole of BC22 will have to be set aside, or they will have to be preferred to other Elsen Schools who will be subject to the BC22 formula. Mr Van Rooyen also conceded that an order of this Court that would have any one of these two results would not be acceptable.

The consequence of these two concessions is, however, that it is no longer open for applicants to contend that they will not have enough general assistants if BC22 is

implemented. As a further consequence, it is no longer open to applicants to rely on constitutional infringements which are dependent on the supposition that applicants will have an insufficient number of general assistants.

Applicants' second complaint alluded to in argument is that as a result of the scheme adopted by the WCED they will have assistants of a lesser quality. I believe that on the papers before me there is more than one answer to this complaint. First, according to the uncontroverted testimony on behalf of respondents, the WCED employees who are to be redeployed are currently performing the very same functions that they will be performing at applicants' schools. Secondly, if an applicant school can properly motivate its view that a particular candidate for redeployment is not of the required standard, he or she will not be appointed at that school. Thirdly, applicants have not made out a case that they will not be financially able to appoint any of their present general assistants from their own resources. In this regard it should be pointed out that on the original founding papers, applicants' case was that they cannot afford to pay <u>all</u> their general assistants. On respondents' answering papers it is clear, however, that applicants will not be required to pay all their general assistants when BC22 is implemented. From applicants' supplementary papers it appears that although the position of the different applicants are not the same in this regard, the WCED will, at worst, pay the majority of the general assistants currently employed by every applicant. That is why I say that on the papers as a whole, applicants have not made out a case that they cannot afford to pay at least some of these present general

assistants from their own funds.

The result of all this is that applicants have failed to make out a case that upon implementation of Annexure BC22 the standard of their full staff complement of general assistants will be so low that the life, health, dignity or interest of the children for whom they are responsible, will be endangered or compromised.

There is another reason why, in my view, applicants' reliance on an alleged infringement of constitutional rights cannot succeed. It relates to the general approach by the Courts to the constitutional protection of socio-economic or so-called "second generation" rights. In this regard it appears that our Courts will show the same deference to administration when it comes to budgetary policy as it has shown under the common law. Thus, it is stated by Chaskalson, P in Soobramoney v The Minister of Health, Kwa-Zulu Natal 1998(1) SA 765 CC in paragraph 11 at 771H:

> "What is apparent from these provisions is that the obligations imposed on the State by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed."

In paragraph 29 at page 776C:

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"The Provincial Administration which is responsible for health services in Kwa-Zulu Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding upon the priorities to be met. A Court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."

It is also significant, in my view, that in paragraph 30 of the judgment in the Soobramoney case, Chaskalson, P refers with approval to the dictum by the Master of the Rolls in the Cambridge Health Authority case that I have quoted above. This, in my view, is a clear indication that the constitutional approach is not much different from the common law approach to these difficult matters where the administrative authority is compelled to make a choice between unsatisfactory options.

On the facts before me, respondents have made out a case that they do not have sufficient resources to satisfy everybody's needs, but that they have over a period of some four years of consultation and deliberation, worked out a scheme of general application that will be equally fair (or unfair) to everybody concerned and that they have the genuine intention to implement that scheme as soon as practically possible. In these circumstances, and although I have great sympathy with the applicants and the

unfortunate children for whom they care with obvious dedication, I cannot interfere with respondents scheme of general application in a manner that may throw the whole scheme out of kilter.

For these reasons the application for the relief sought in paragraphs 1 and 2 of the notice of motion cannot succeed.

The information application

This brings me to the question of costs, more particularly the costs of the application for information which was abandoned after respondents filed their answering papers. Mr Van Rooyen's argument in this regard was, in substance, that applicants were entitled to the information sought in their original notice of motion and that if such information had not been provided in respondent's answering papers, applicants would have been entitled to proceed with their original application. Consequently, Mr Van Rooyen contended, even if applicants were to be unsuccessful in the outcome of the proceedings as a whole, they are entitled to costs until the filing of the answering affidavits. In motivating these submissions, Mr Van Roover went into a detailed analysis of the correspondence between the parties, stretching over a period of some four years. I find it unnecessary to perform the same exercise. I confine myself to the general remarks that follow.

The application for information was based on section 32 read with Item 23(2)(a) of Schedule 6 of the Constitution. As was pointed out by Davis, J in Inkatha Freedom Party & Another v The Truth and Reconciliation Commission 2000(5) BCLR 534 (C) 550, the right to information guaranteed by these provisions of the Constitution is not a right that

exists in the abstract or, as it is formulated by Davis, J: 40

> "In short, the context of the right must be examined within the context within which it is claimed. The very wording of section 32 which contains the phrase 'required for the exercise of rights' points in the direction of such an enquiry, for what is required is dependent on the facts."

Prayer 1 of the notice of motion, in its original form, reads like a notice for further and better discovery in terms of Rule 35(3). In the context of that request it is clear that the information sought was required for purposes of further litigation. For the sake of the present enquiry I will assume that applicants were entitled to such detailed information for the purposes of further litigation, since that information was in any event provided to applicants' apparent satisfaction in respondents' answering affidavits. For purposes of deciding the costs issue the question is, however, whether the same detailed information was sought by the applicants for the same purpose before they launched their application, i.e. in the preceding correspondence between the parties. Upon my reading of such correspondence it was not. The tenor of the applicants' letters to the WCED, in general terms, are complaints that applicants are discriminated against in that their general assistants are not paid by the WCED and enquiries as to what the WCED intended doing to rectify this. These complaints and enquiries were answered in the same general terms on behalf of the WCED. An example of such response appears from a letter to third applicant (i.e. the Dominican Grimley School) dated 30 September 1997. The relevant portion of

the letter reads as follows: 41

> "As stated in our letter of 30 May 1997, the South African Schools Act made it possible for all general assistants to become civil servants irrespective of their former status as employees of governing bodies of State subsidised schools. This rule will also be applicable to the general assistants at the Dominican Grimley School. However, due to a number of factors this issue could not be finalised yet. The various trade unions and other stakeholders must still be consulted. A cut-back of 12% of all non-educator posts must be implemented and the financial implications must be taken into consideration before a final decision could be taken on this complicated issue. The Western Cape Education Department will, however, try to accommodate as many general assistants as possible but no guarantee of the number can be given."

Another example appears from a letter written on 27 October 1998 by the then Minister of Education for the Western Cape to the first applicant. The relevant part of this letter reads:

> "I wish to reiterate that the Western Cape Education Department policy with regard to the funding of schools is based on the principle of equity. In the light of this policy the WCED had identified disparities existing between schools belonging to different departments of the previous education dispensation as a matter for urgent attention. Whilst I concur that inequities in

the provision of staff at schools exist, it is important that you locate your argument concerning the issue within the broader historical context. Schools in the ex House of Assembly and the ex House of Representatives were funded differently. In the case of Bel Porto and all ex House of Assembly Education Department Schools for Learners with Special Education needs, subsidies were paid for both their running costs and also for the salaries of general assistants appointed by the governing bodies of the schools.

In the light of the new dispensation and the creation of a single education department, the WCED is committed to working towards uniform policy practices pertaining to all schools.

In the case of non-teaching staff, my hands and that of the WCED are in fact tied, as the scales used to determine these allocations have to be negotiated in the Provincial Chamber as the WCED is bound by legislation and various collective agreements. You also should note that the Western Cape is in the process of down-sizing and therefore the creation of posts at Bel Porto can only take place upon the abolition of posts elsewhere. There is also the question of redeploying employees who may be in excess, into vacancies thus created. At this stage any vacancy that arises is immediately frozen and only essential posts are filled."

As we have learnt with hindsight, the ultimate approval of the general scheme introduced in BC22 was only

communicated to the WCED on 2 November 1999 i.e. shortly before the application was launched. It might be that applicants were quite justified to become frustrated by what one of them described as "the languid pace at which urgent matters are addressed" by the WCED. That, however, is not the point. The point is that I am not persuaded that respondents failed to provide applicants with the information which they sought and to which they were entitled.

For these reasons the application should, in my view, be dismissed with costs.

BRAND, J