IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

CASE NO: 22507/2012

In the matter between:

BEAUVALLON SECONDARY SCHOOL AND 36 OTHERS	Applicants
And	
MINISTER OF EDUCATION FOR THE WESTERN CAPE	First Respondent
WESTERN CAPE EDUCATION DEPARTMENT	Second Respondent
MINISTER OF BASIC EDUCATION	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent

---

CORAM		**S DESAI J et D M DAVIS J et ED BAARTMAN J**
JUDGMENT BY	:	**S DESAI J et ED BAARTMAN J**
FOR THE APPLICANTS	:	**ADV N ARENDSE (SC), ADV D SIMONZ ADV S FERGUS**
INSTRUCTED BY		**BOTHA PRETORIUS & ANDREWS INC.**
FOR THE RESPONDENTS		**ADV E FAGAN (SC) & ADV E VAN HUYSTEEN**
INSTRUCTED BY	:	**STATE ATTORNEY**
DATE OF HEARINGS	:	**18 & 19 DECEMBER 2012**
DATE OF JUDGMENT	:	**20 MARCH 2013**

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Before the Honourable Justices Desai, Davis and Baartman

Case number: 22507/12

In the matter between:

BEAUVALLON SECONDARY SCHOOL	First Applicant
SCHOOL GOVERNING BODY OF BEAUVALLON SECONDARY SCHOOL	Second Applicant
BERGRIVIER NGK PRIMARY SCHOOL	Third Applicant
SCHOOL GOVERNING BODY OF BERGRIVIER NGK PRIMARY SCHOOL	Fourth Applicant
BRACKENHILL EK PRIMARY SCHOOL	Fifth Applicant
SCHOOL GOVERNING BODY OF BRACKENHILL EK PRIMARY SCHOOL	Sixth Applicant
DENNEPRAG PRIMARY SCHOOL	Seventh Applicant
SCHOOL GOVERNING BODY OF DENNEPRAG PRIMARY SCHOOL	Eighth Applicant
KLIPHEUWEL PRIMARY SCHOOL	Ninth Applicant
SCHOOL GOVERNING BODY OF KLIPHEUWEL PRIMARY SCHOOL	Tenth Applicant
KROMBEKSRIVIER NGK PRIMARY SCHOOL	Eleventh Applicant
SCHOOL GOVERNING BODY OF KROMBEKSRIVIER NGK PRIMARY SCHOOL	Twelfth Applicant

LK ZEEMAN PRIMARY SCHOOL	Thirteenth Applicant
SCHOOL GOVERNING BODY OF	
LK ZEEMAN PRIMARY SCHOOL	Fourteenth Applicant
LAVISRYLAAN PRIMARY SCHOOL	Fifteenth Applicant
SCHOOL GOVERNING BODY OF	
LAVISRYLAAN PRIMARY SCHOOL	Sixteenth Applicant
PROTEA PRIMARY SCHOOL	Seventeenth Applicant
SCHOOL GOVERNING BODY OF	
PROTEA PRIMARY SCHOOL	Eighteenth Applicant
REDLANDS PRIMARY SCHOOL	Nineteenth Applicant
SCHOOL GOVERNING BODY OF	
REDLANDS PRIMARY SCHOOL	Twentieth Applicant
RIETFONTEIN NGK PRIMARY SCHOOL	Twenty-First Applicant
SCHOOL GOVERNING BODY OF	
RIETFONTEIN NGK PRIMARY SCHOOL	Twenty-Second Applicant
RONDEVLEI EK PRIMARY SCHOOL	Twenty-Third Applicant
SCHOOL GOVERNING BODY OF	
RONDEVLEI EK PRIMARY SCHOOL	Twenty-Fourth Applicant
TONKO BOSMAN PRIMARY SCHOOL	Twenty-Fifth Applicant
SCHOOL GOVERNING BODY OF	
TONKO BOSMAN PRIMARY SCHOOL	Twenty-Sixth Applicant
URIONSKRAAL NGK PRIMARY SCHOOL	Twenty-Seventh Applicant
SCHOOL GOVERNING BODY OF	
URIONSKRAAL NGK PRIMARY SCHOOL	Twenty-Eighth Applicant
VALPARK PRIMARY SCHOOL	Twenty-Ninth Applicant
SCHOOL GOVERNING BODY OF	

VALPARK PRIMARY SCHOOL	Thirtieth Applicant
WANSBEK VGK PRIMARY SCHOOL	Thirty-First Applicant
SCHOOL GOVERNING BODY OF WANSBEK VGK PRIMARY SCHOOL	Thirty-Second Applicant
WARMBAD-SPA PRIMARY SCHOOL	Thirty-Third Applicant
SCHOOL GOVERNING BODY OF WARMBAD-SPA PRIMARY SCHOOL	Thirty-Fourth Applicant
WELBEDACHT UCC PRIMARY SCHOOL	Thirty-Fifth Applicant
SCHOOL GOVERNING BODY OF WELBEDACHT UCC PRIMARY SCHOOL	Thirty-Sixth Applicant
THE SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	Thirty-Seventh Applicant

and

THE MINISTER OF EDUCATION FOR THE WESTERN CAPE	First Respondent
THE WESTERN CAPE EDUCATION DEPARTMENT	Second Respondent
THE MINISTER OF BASIC EDUCATION	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent

---

JUDGMENT: TUESDAY, 19 MARCH 2013

DESAI, J:

[1] The imminent closure of eighteen schools in the Western Cape resulted in this application which was heard on an urgent basis by a full court of this division. The matter was heard on 20 and 21 December 2012 as the closure of the schools sought by the Minister of Education for the Western Cape (the MEC) was to come into effect on 31 December 2012.

[2] The relief sought by the applicants was, in effect, a stay of the closure of the schools and ancillary relief, pending a review of the MEC's decisions in this regard. Albeit with some amendments, I granted the relief which the applicants were seeking. Baartman, J agreed with me while Davis, J dissented. These are the reasons for my decision.

[3] Despite widespread objections from the affected parties, and the deep emotions which underpin the said objections, it seems that the decisions by the MEC to close the schools are final. That is his position as well as that of the second respondent. Whatever the legal position with regard to the review, the fact that there is no room for further discussion on the matter is regrettable. A court is simply not the appropriate forum to deal with the issues which arise herein.

[4] The said issues are clouded, if not exacerbated, by the unfortunate history of education for the many millions who were disadvantaged by the system prevailing in this country prior to the advent of democracy. The schools in this instance are for

those who come from that sector of society which was previously disadvantaged and which remains marginalised in the current period.

[5] The schools, the learners, the parents, the educators and the school governing bodies were, it seems, somewhat poorly treated by the MEC and second respondent. I say this for the following reasons.

[6] The whole process contemplated in Section 33 of the South African Schools Act 84 of 1996 (the Act) was simultaneously completed for all the affected schools in a period of about five months. The process would have gained more credibility, and overcome some obstacles, if it had been conducted in an inclusive manner and at a more measured pace. There is no explanation for the undue haste other than to infer that it was designed to prevent the objections gathering greater momentum.

[7] All the schools were informed by letter dated 15 October 2012 that they were to be closed two months later. It may be, as it is alleged, that the pupils were promised free uniforms and transport for their new schools. However, the two month period was clearly insufficient for the necessary adjustments to be made in the daily lives of the learners and their parents. That is, *inter alia*, for them to assess the suitability of the proposed new schools, the practicability of the suggested transport, the distances involved, and, most importantly the safety of the affected pupils. All these problems are compounded by the fact that most of these schools, if not all, are located in economically deprived communities.

[8] The educators were only told much later whether and where they were to be redeployed. They are not seeking any relief in these proceedings but the indifference to their plight warrants noting. I raised this aspect with Mr E Fagan SC, who appeared with Ms E Van Huyssteen on behalf of the first and second respondents, during the course of oral argument. He was unable to furnish any coherent reason why the educators were given such short notice of the pending changes in their employment.

[9] Similarly, the MEC refused to consult with the South African Democratic Teachers Union (SADTU) prior to making the decisions to close the schools. It appears that his immediate predecessors involved the union prior to making such decisions. The MEC maintains that consultation with SADTU was unnecessary. He met with them afterwards for the purposes of the Labour Relations Act 66 of 1995. The co-operation and advice of the teachers' union would have added greater acceptance of his decisions to close the schools. The failure to consult with SADTU does not, however, render the closure decisions unlawful and invalid as the applicants contend. There is no legal basis for that conclusion.

[10] MR HENRY CLAUDE HOCKEY, the acting principal of the first applicant, suggests that the clockwork-like manner in which the process contemplated in Section 33 of the Act was carried out, in most instances to the day in respect of each school, leads to the inescapable conclusion that the decisions to close the schools had already been made by the MEC and that the process of consulting with the governing bodies and holding public hearings was merely an attempt to comply with the letter of the law. A perusal of the transcripts of the meetings held in respect of

each school in fact confirms to some extent what Mr Hockey says. It is quite clear that the MEC, or his representatives, and the affected parties did not speak to each other meaningfully in order to achieve some understanding of the issues, and resolve them. This was so, as the MEC's representatives, that is the chairpersons of the meetings, saw themselves merely as mute transcribers of what was being said by the objectors. They were not there to encourage two-way communication and reach some accord with the affected community with regard to the further education of their children. I shall revert in greater detail to this aspect in due course.

[11] Most of the schools which the MEC seeks to close are rural schools. Their location, the limited number of pupils in each school and the multi-grade teaching in some instances, are a product of their unique history. These schools, which were built over decades, were intended to make very basic education accessible to the children of the rural poor, including both permanently employed and seasonal farmworkers. The communities from which the children come are scattered over the more remote parts of the Western Cape interior. The proposed new schools inevitably involve travel over greater distances. The regularity or otherwise of the transport, the time spent on the roads and other related problems, may result in the ill-considered closure of such schools, placing in jeopardy the children's right to access to basic education.

[12] Using figures and percentages to determine the efficacy of the schools is deceptive in that the schools are very different to well-resourced urban schools and the social circumstances of their respective student bodies are vastly different. Deciding upon the closures simply on the basis of numbers and poor results is a

simplistic response to an enormous social problem. The hurried closure of such schools may result in some of the children not receiving any further education.

[13] In any event the closure of poorly functioning schools is hardly a salutary response from those entrusted with the task of managing the education of our young. If learners are not performing optimally at a particular school, one would expect the MEC to adopt measures to remedy the situation. More teachers, extra classes, better facilities, remedial teaching and a host of other tools are universally used to create a more effective learning environment.

[14] According to the MEC the decisions taken by him, and the implementation of the said decisions, relate fundamentally to the use and distribution of resources. He says, in express terms, that a decision to close certain schools is taken after deciding upon the best way to use and distribute the limited resources available to the Western Cape Education Department (the WCED). These resources, he says, include funding and subsidies, but also physical resources like infrastructure and its maintenance, movable property, teaching and learning materials, transport and educators. All of these, the MEC contends, have significant budgetary implications.

[15] The authorities are quite clearly confronted with enormous budgetary constraints in regard to education as well as other social expenditure. However, prioritising education is a constitutional requirement – I shall revert to this shortly – and taking the necessary steps to address the educational imbalances of the past, graphically illustrated by the conditions in the so-called farm schools, is a moral, if

not legal, imperative. The fact that the schools sought to be closed in this instance belong to the historically disadvantaged sector of society, compounds the problem.

[16] Although I may differ from the MEC and, I suppose, his advisors, with regard to the closures of the schools, I am not at liberty to interdict him from implementing policy simply based upon my preference. Specific powers and functions have been entrusted to the various branches of government in terms of either legislation or the constitution. The courts may not usurp those powers as it "..would frustrate the balance of power implied in the principle of separation of powers". (See: International Trade Administration Commission v Scaw South Africa (Pty) Ltd 2012 (4) SA 618 (CC) at para 95).

[17] I am acutely aware of the doctrine which relates to the separation of powers. In effect, I may not ordinarily make an order which infringes upon the powers and functions of another arm of government. The required caution in this regard was recently set out by the Constitutional Court in National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC), (the OUTA judgment) as follows:

> "Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in present case, a state functionary is restrained from exercising statutory or constitutionally authorised power. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrant otherwise."

(See the OUTA judgment at para 7)

[18] Simply stated, it means that certain administrative actions are placed by the law in the hands of the executive and the judiciary may only intervene in very limited circumstances or, as it is put in the OUTA judgment, in the clearest of cases.

[19] According to Fagan SC the "policy-laden and polycentric" decisions in this instance involve a consideration of the best use and distribution of resources in a particular setting. They relate to how best public resources are to be applied and are pre-eminently part of the duty and responsibility of the Executive. I have no quarrel with that submission, save to add that the expenditure must comply with the relevant legislation governing its use.

[20] Everyone has the right to a basic education. Section 29 (1) of the Constitution guarantees that right. It is immediately realisable and not subject to the availability of resources (see: Governing Body of the Juma Masjid Primary School and Others v Ahmed Essay N.O. and Others CCT 29/10 [2011] ZACC 13 at para 37). In terms of the Act, school attendance is compulsory for learners from the age of 7 years until the age of 15 years or until the learner reaches the ninth grade. Furthermore, in terms of Section 3 (3) of the Act, the MEC has to ensure that there are sufficient places for every child who lives in his or her province to attend school. Nkabinde J points out in the Juma Masjid case *supra* at para 38 that "these statutory provisions which make school attendance compulsory for learners from ages 7 to 15, read together with the entrenched right to basic education in the Constitution signify the importance of the right to basic education for the transformation of our society."

[21] The MEC is obliged to provide public schools for the education of learners and the provincial legislature appropriates funds for this purpose (see Section 12 of the Act). I suppose in providing schools and funding them the MEC cannot ignore the lasting effects of educational segregation, or apartheid, which, as Nkabinde J points out, are still "discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners" (see Juma Masjid *supra* at para 42). In this instance an awareness of the plight of learners in the Western Cape is not readily apparent from the decisions to close the schools nor in the reasons furnished for the decisions. The decisions to close the schools are principally premised upon budgetary constraints.

[22] In any event the MEC has a positive obligation to protect and promote the rights in the Bill of Rights (Section 7 (2) of the Constitution) and, in particular, the learners' right to a basic education. That right is compromised by the decisions to close the schools.

[23] Ultimately this case turns on the exercise by the MEC of his powers under Section 33 of the Act. The said section provides:

> "(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 ..."

[24] Mr NM Arendse SC, who together with Mr D Simonsz and Mr S Fergus appeared on behalf of the respondents, initially challenged the constitutionality of Section 33, *inter alia* contending that the section was overbroad and vague, rendering it inconsistent with the constitution. However, this aspect was not pursued in oral argument and, it seems, abandoned.

[25] The second argument raised by Arendse SC was equally untenable. He contended that Section 33(2)(c) of the Act prohibits a MEC from closing a school unless he has "conducted a public hearing on reasonable notice, to enable the community to make representations to him or her in relation to such action". It is common cause that the MEC did not personally conduct any public hearing. This was done by other officials of the WCED who reported on the outcome of the proceedings to the MEC. Save for one or two exceptions, Section 62 (1) expressly authorises the MEC to delegate any of his powers to his officials. That appears to be a complete answer to the complaint raised in this regard.

[26] The arguments raised by Arendse SC in respect of the MEC's failure to consult meaningfully with the threatened schools are more compelling. He contended that Sections 33(2)(b) and (c) require the MEC to grant the school governing bodies and the communities of the threatened schools a reasonable opportunity to make submissions to him concerning the closure of the schools. If he does not do so, it amounts, according to Arendse SC, to a material irregularity which

vitiates the closure decisions. The public hearings were conducted in a somewhat peculiar manner. There were no two-way debates or any consultation processes. They were merely platforms for the WCED to passively listen to the community and then report back to the MEC. It was argued on behalf of the applicants that this could not be regarded as a genuine consultation process which granted the affected party a meaningful opportunity to change the mind of the decision-maker.

[27] Arendse SC is probably correct in his submission that the procedure followed by the MEC falls short of what is expected in a public consultation process. Does it, however, follow that the process was inconsistent with the provisions of the Act? Fagan SC argued the contrary. According to him all the Act requires is that a public meeting be held for the sole purpose of receiving representations from the affected parties. Section 33(2)(c) says as much and no more.

[28] The public hearings in respect of all the schools were run along similar lines. I refer briefly to the hearings at two of the schools in order to illustrate how the said hearings were conducted.

[29.1] The notice advertising the intended closure of the Beauvallon Secondary School furnishes two reasons for the decision by the MEC to close the school. It states somewhat cryptically:

> "2.1 Consistent under-performance in the National Senior Certificate examinations as well as grades 8 to 11.
> 2.2 High drop-out rate."

It seems that the school is located in an area where gangsterism and drug abuse are rife. Furthermore, the earlier representations by the school to the MEC indicates that

the drop-out rate is deceptive and shows only the total grade 12 learners and fails to take into account the great number of learners repeating grade 10 and 11.

[29.2] The public hearing was held on 25 August 2012 and the proceedings were recorded. A transcript of the hearing forms part of the court papers.

[29.3] The meeting was chaired by a Danny Volschenk. He introduced himself and indicated that the meeting was being held in terms of the Act and its purpose was to provide an opportunity to comment on or to provide inputs and representations on the proposal to close the school. He dealt with the formalities and stated

> "The important point ladies and gentlemen, I've referred to this as a hearing; this is a hearing and not a debate. In other words you are to listen to me and to report what your purpose ... or put on the table in terms of your (indistinct) or your representations".

[29.4] Mr Volschenk then permitted about twenty-five people to speak. He had a list of speakers and did little else but keep the meeting in order and call upon the next speaker. He did not comment on what was being said nor did he prevent anyone from having his or her say.

[29.5] The notice convening the meeting was not read out and at no stage did Mr Volschenk indicate to the people present why the WCED propose closing the school. The reasons for the closure were accordingly neither debated nor discussed in a meaningful way or at all.

[30.1] The notice convening the public meeting in respect of the Protea Primary School furnishes as the reason for the proposed closure of the school "declining

learner numbers". That is the sole reason given and the school itself has furnished an extensive response to that allegation.

[30.2] The public hearing was held on 22 August and was chaired by one Archie Lewis. Again the notice convening the meeting was not read out nor was the public told precisely why the WCED intended closing the school. There was to be no debate or discussion on the matter. Mr Lewis put it bluntly:

> "Ladies and gentlemen this is a hearing and not a meeting, hence we are not here to debate the issues that you might raise at this meeting or hearing ...".

[30.3] Mr Lewis also made no comments and permitted the people on his list of speakers to say what they wished. There was no real debate or discussion on the only reason furnished for the proposed closure of the school.

[31] The hearings were patently farcical. The chairpersons permitted the affected parties and members of the public to say what they wished without making any attempt whatsoever to raise and discuss the reasons for the proposed closure of the respective schools. In fact, it seems, the chairpersons came to the hearings simply to allow the public to say what they wished and thereby, hopefully, complying with the relevant statutory enactment.

[32] As was pointed out in Moutse Demarcation Forum and Others v President of RSA and Others 2011 (11) BCCR 1158 (CC) for a public hearing to be adequate certain criteria must be met to ensure that meaningful participation is allowed. Without being alerted to the thinking of the MEC and the WCED in respect of the closures of the schools, real and effective participation at the hearing was unlikely. It

would not be an opportunity capable of influencing the decision to be taken. Before being given an opportunity to answer the concerns of the decision-maker, you need to know those concerns.

[33] A public hearing of necessity involves public participation in the political process or in the conduct of public affairs. It implies, at the very least, a public dialogue, if not debate, with the elected representatives or as in this instance with the officials to whom this task was delegated (see in this regard: Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCCR 1399 (CC)). As is also pointed out in this case public hearings are a key form of political participation for the citizenry.

[34] The right to a public hearing assumes a greater importance in this matter for several reasons. Firstly, it is expressly prescribed by the relevant statute. The right to a basic education, as already stated elsewhere in this judgment, is accorded due importance in the Constitution. It states unequivocally that everyone has a right to a basic education. Moreover, the affected schools have an unfortunate legacy which has to be prioritised if the imbalances of the past are to be redressed. Finally, the MEC is proposing the closure of eighteen schools – a significant number – simultaneously and each school is located in a marginalised community. Viewed cumulatively, these factors warrant a proper dialogue with the affected communities to enable them to make an informed decision with regard to the future schooling of their children.

[35] The practicability of the proposed new schooling arrangements are of vital importance to the parents for another fundamental reason. If they are unable to send their children to the new schools, they face the prospect of incarceration in terms of Section 3(6)(b) of the Act.

[36] It follows that the processes contemplated in the Act for the closure of the schools must be approached with a great deal of circumspection. The public dialogue must be a genuine attempt to reach an arrangement which best suits the interests of all and enhances the values enshrined in the constitution. The public hearings conducted by the officials of the WCED in respect of the affected schools, simply do not meet this criteria.

[37] As will be apparent from the preceding paragraphs, the conduct of the MEC with regard to the closure of the schools falls below the standard required by the constitution and the relevant statutory provisions.

[38] This is one of those "clearest of cases" contemplated in the OUTA judgment which permits the court to come to the assistance of the applicants. They quite clearly have a *prima facie* right to defend their constitutional interests and there is no alternative remedy save for the court to grant the relief sought.

[39] In the result, I made the following Order:

1. The First and Second Respondents are:

1.1. interdicted from closing any of the schools represented by the First to Thirty-Sixth Applicants, save for the Twenty-Sixth applicant and any other of the applicants where the learners and educators voluntarily choose not to re-open the affected school;

1.2. interdicted from transferring or compelling to move any of the registered learners and educators from any of the remaining seventeen schools, save in those cases where the learners and educators voluntarily choose to do so;

1.3. interdicted from moving any movable property belonging to any of the seventeen schools, and insofar as the Second Respondent has already done so, that such property be returned forthwith;

1.4. directed to continue providing the seventeen schools with their full subsidies and support entitlements, including the payment of the salaries and benefits of all educators the First and Second Respondents employed at the said seventeen schools; and

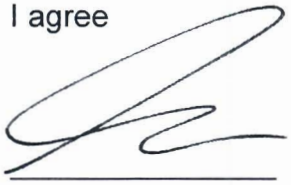
1.5. directed to take all reasonable steps, including but not limited to the employment of temporary teachers and the renewal or reinstatement of leases, to ensure that all necessary services are provided to the said seventeen schools;

2. Directing that the interdict set out in paragraph 1 above is to remain in force and effect until the final resolution, inclusive of all appeals, of the application for the judicial review set out in Part B of this notice of motion;

3. Directing the First and Second Respondents to pay the Applicants' costs, jointly and severally the one paying the other to be absolved, including the costs of two counsel.

DESAI J

I agree



BAARTMAN J