

**LAERSKOOL MIDDELBURG EN 'N ANDER v DEPARTEMENTSHOOF,  
MPUMALANGA DEPARTEMENT VAN ONDERWYS, EN ANDERE 2003 (4)  
SA 160 (T)**

**Headnote : Kopnota**

In November 2001 the first applicant, at that stage the only public school in a certain area of Middelburg in the Mpumalanga Province with Afrikaans as the exclusive teaching medium, was instructed by a representative of the second respondent, the Education MEC for the province, to enroll 20 learners who wished to attend the school from 2002 and to be taught in English. The applicant refused to comply with this instruction and informed the learners' parents that their applications had been refused as the school's instruction medium was Afrikaans. It was common cause that the school's language policy and admission policy had been drawn up in accordance with the provisions of the South African Schools Act 84 of 1996 (the Schools Act). In January 2002 the school's power to admit learners was withdrawn by the first respondent. The next day a number of learners, to be taught in English, were enrolled at the school. This led to the present application for the setting aside of the decision of the first respondent and his functionaries to declare the school a dual-medium one.

In terms of s 6(1) of the Schools Act, the Minister of Education (the third respondent) could publish norms and standards regarding the language policy of schools. Such a publication was published in the Government Gazette 18546 of 19 December 1997. These regulations were the only authorising provisions for the creation of a new language course in the province. The parties *in casu*, however, disagreed about the interpretation of the regulation. According to the applicants, a single-medium school could only be expected to open a second course when all the other schools in the district which offered the relevant language, were full (a primary school being regarded as full when the relationship of 40 learners to one teacher was reached in a given grade in a given class). The respondents, on the other hand, argued that the correct interpretation of the regulation was that an Afrikaans medium school could be expected to open an English course even before the other schools in the area offering instruction in English were full. The Court was concerned about the interests of the learners (specifically about the effect that the change of the school's status would have on the learners with special learning requirements and on the Afrikaans learners, and about the fact that it appeared that the respondents had not paid any attention to the interests of the learners who were to receive their instruction in English), and for these reasons decided to appoint a *curatrix ad litem* for the learners. From the *curatrix's* report it appeared that the new learners could easily have been accommodated in other schools, that the learners had adapted reasonably well at the applicant school, that the applicant school was probably the best primary school in the area, that it was the nearest school to their homes, that the learners' parents wanted them to attend the applicant school, that a forced turning away of the learners would have a negative influence on them, that the learners might feel rejected, and that it would be in the learners best

interest to stay at the first applicant school, despite the administrative defects of the process.

*Held*, that the respondents' interpretation of the regulations was not in accordance with the express provisions thereof. The regulations clearly stated that the schools which offered the tuition in the desired language had to be at full capacity before the status of a single-medium school could be changed. The provisions of the regulations had thus been disregarded. The respondents' administrative conduct was prima facie unfair. Neither the Schools Act nor the regulations authorised the respondents to instruct a school to change its single-medium status. (At 171A/B - B/C, G, 171J - 172A/B and 176F.)

*Held*, further, that the respondents' argument that the applicant school's admission policy discriminated unfairly against English learners was not acceptable in the light of the departmental policy regarding changing of status of single-medium schools to dual-medium schools, and it was in violation of the provisions of s 29(2) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), which provided that everyone had the right to receive education in the official language of their choice in public educational institutions where that education was reasonably practicable. (At 173G and 175B - B/C.)

*Held*, further, that it was difficult to determine the content of the right to a single-medium school as opposed to the right to be educated in the official language of one's choice. It was clear that the latter right entailed the core right to mother tongue education, or education in the language of choice. The claim to an institution where the language of choice was used exclusively, necessarily had to be seen against the background of the protection of the right to use a language of own choice and to live a cultural life of own choice. While it was clear that independent educational institutions could be set up by cultural societies with the object of single-medium education, the claim to single-medium education in a public school was necessarily linked to the practicability thereof. It was an open question whether the exercise of own language and culture was better furthered where provision was made in a school for the exclusion of other cultural societies or not. A claim to a single-medium institution was probably best defined as a claim to emotional, cultural, religious and social-psychological security. As long as a dual-medium school was properly run, it could hardly be argued that the conversion of a single-medium public institution to a dual-medium school per se detracted from the claim of each cultural society to education in its own official language or language of its choice. The right to a single-medium public educational institution was clearly subordinate to the right which every South African had to education in a similar institution and had to make way where there was a clearly proven need to share education facilities with other cultural societies. (At 173A/B - F/G.)

*Held*, further, that that did not mean, however, that an existing single-medium institution could be attacked unprovokedly and without compliance with the existing requirements. As appeared from the preamble to the Schools Act,

diverse cultures had to be protected and promoted. It was for that reason that provision had been made for regulations according to which any change in a school's status had to be effected. (At 173G and 175B - B/C.)

*Held*, further, that the Courts had repeatedly emphasised that practical content was to be given to the fundamental right entrenched in s 28(2) of the Constitution, viz that a child's best interests were of paramount importance in every matter concerning the child. It was self-evident that the provisions of s 28(2) of the Constitution were directly applicable to education and every situation in which a learner might find himself. (At 176F/G - I/J.)

*Held*, further, all things considered, that it was clear that the interests of the relevant learners would best be served by allowing an English course to be created at the applicant school. (At 177F/G - G.)

*Held*, further, that the respondents had undertaken not to close the class for the learners with special educational requirements. The learners in the Afrikaans course at the school would lose the exclusivity of an Afrikaans school if the respondents' decision were not set aside, and their classes would probably become somewhat fuller. There was no indication, however, that their exercise of the Afrikaans language and culture, or their academic or sport achievements would be prejudiced by the step, as long as the relationship of 40 to one was not exceeded. (At 177G - J.)

*Held*, further, that, in the light of the foregoing, the Court had to balance the interests of the first applicant school, and specifically its right to fair administrative action which had undeniably been violated by the respondents, against the interests of the learners who were dragged into this unpleasant dispute by the conduct of the respondents. Although the applicants argued that s 28(2) created no fundamental right, but only afforded priority/precedence to a child in the weighing-up of conflicting interests, s 28(2) indeed established that the fundamental right of every child had to take first place in the balancing of conflicting rights of fighting parties (and thus also the fighting parties' claim to fundamental rights and the maintaining of such rights). The applicants' interests had to yield to those of the minors. (At 177J - 178D.)

*Held*, further, that it had to be emphasised that the applicants had waited very long (almost nine months) before the present matter was placed before the Court. Even though the applicants had bona fide explanations for the delay, it could not be denied that the learners in the mean time developed an indisputable interest to remain at the applicant in the future. If the application had been brought before the Court on the day that the respondents' decision was taken, the Court would not have hesitated to set the decision aside. That route could not be followed now, however, without prejudice to the learners. A further consideration in favour of not allowing the application, was the concession by the respondents that they would most probably resume their attempt if the present application succeeded. It was in no one's interest to expose the applicant and the learners to a repetition of the process. (At 178D - H.)

*Held*, further, that no matter how unsatisfactory the result might be from the viewpoint of the applicant, administrative law and single-medium schools in general, the application had to be dismissed. (At 178H/I.) H

*Held*, further, as to costs, that the respondents had ignored the existing administrative prescriptions which were created, *inter alia*, to protect language and cultural interests which were very precious to people. They had fought the present application even though they should have known *ab initio* that their administrative conduct was wrong. The attitude which the respondents took not only lacked acknowledgment of the applicants' rights, but also showed no respect for the applicants' opinions, for the applicants' attachment to their language and culture, and it also ignored the interests of the individual learners who were involved in the process by the respondents. The mere fact that the Court found it necessary to appoint a *curatrix ad litem* was sharp criticism for the respondents' conduct, although the applicants, to a lesser degree, also tended to pay more attention to their administrative rights than to the learners' interests. In the light of the foregoing there was more than enough reason to make a punitive costs order against the respondents. (At 178I - 179C.)