



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Head of Department: Department of Education, Free State Province v Welkom High School & Another

Today the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant and upheld an order of the Free State High Court, Bloemfontein.

The main issue on appeal was whether the provincial head of the Department of Education had the authority to instruct the principal of a public school to act in a manner contrary to a policy adopted by the school governing body.

The appellant is the Head of Department of Education in the Free State (HOD) and the first and second respondents are the public schools and their governing bodies respectively. The governing bodies of both the public schools adopted policies on the management of learner pregnancies.

In the Welkom Case, a 15 year old, grade 9 female learner fell pregnant in 2010. The learner was subsequently advised that pursuant to the terms of the pregnancy policy, she

would have to take a leave of absence and would only be able to return to school in the second term of the following year. A complaint was then laid by the learner's family, contesting her absence from school, to the Minister of Basic Education, the MEC for Education in the Free State and the Human Rights Commission of South Africa.

The second matter concerned the exclusion of a 17 year old, grade 11 learner at Harmony High School. In terms of the school's policy a learner could not be re-admitted to school in the same year that they had left, due to pregnancy.

In both the above matters, the school principals received a written directive, instructing them to rescind their decisions and to re-admit the learners. The HOD contended that these policies were unconstitutional and that his decision was based on what was best for the learners concerned.

The conduct of the HOD, in this regard, gave rise to the dispute and the respondents in consequence thereof instituted urgent proceedings, against the decision of the HOD, in the high court. The high court found in favour of the respondents and made the following order; it:: (a) declared that the HOD does not have authority to instruct or compel the school principal to act in a manner contrary to a policy adopted by the school governing body; (b) declared that decisions taken by the governing body of the schools relating to the exclusion of the two learners from the high schools, pursuant to the implementation of their pregnancy policies, were valid in law and (c) interdicted the HOD from taking steps intended to undermine the decisions taken by the schools and their respective governing bodies pursuant to the pregnancy policies.

On appeal, the SCA held that it was clear from the South African Schools Act 84 of 1996 that the governance of a Public school is the responsibility of the governing body of the school. The SCA found that the decision to adopt a pregnancy policy is an administrative decision and stated that even if the pregnancy policies are unconstitutional as contended by the HOD, it does not entitle the HOD to instruct the principals to disregard such policies.

The SCA confirmed further that the HOD exercises executive control over public schools through principals. However the HOD is constrained by the principle of legality which

fundamentally entails that public power is only legitimate where lawful. The SCA in this regard, found that the HOD had failed to adhere to the principle of legality.

The HOD alleged that he was, in these proceedings, protecting the constitutional right of learners not to be excluded from school. A collateral challenge of this nature to the validity of the decisions of the governing body is not a defence in the hands of the HOD. The HOD says the pregnancy policies are unlawful, and in a nutshell, the basis of his defence is that the HOD has the power to instruct principals, as their employer, not to obey an unlawful policy or act in an unlawful manner, especially if to do so would be unconstitutional. That is a direct challenge and he has to approach a court to set aside the decisions that are, in his opinion, invalid. The SCA rejected the argument that the HOD had brought a collateral challenge.

The SCA amended the terms of the order granted by the high court so as to limit the terms of the order.