THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 298/08

In the matter between:

THE MEC FOR EDUCATION:
NORTHERN CAPE PROVINCE 1st APPELLANT

THE HEAD: DEPARTMENT OF
EDUCATION: NORTHERN CAPE
PROVINCE 2nd APPELLANT

and

BATELEUR BOOKS (PTY) LTD & OTHERS RESPONDENTS

Neutral Citation: *MEC for Education, Northern Cape v Bateleur Books (Pty)Ltd* (298/08) [2009] ZASCA 33 (31 March 2009)

Coram: CAMERON, MTHIYANE, JAFTA, MAYA JJA, AND BORUCHOWITZ AJA
Heard: 12 NOVEMBER 2008
Delivered: 31 MARCH 2009
Summary: Legitimate expectation – provincial government department closely involving private business entities in its procurement processes – after two years, abruptly changing practice without notice – unfair and unlawful – decision set aside – two years not too short for practice to come into being – fact that alternative source of funds used irrelevant –budgetary decisions and procurement processes not to be conflated for purpose of determining duty of fair decision-making

ORDER

On appeal from: The Kimberley High Court (Molantwa AJ and Kgomo JP – sitting as a court of first instance).

'The appeal is dismissed with costs, including the costs of two counsel.'

JUDGMENTS

CAMERON JA (MTHIYANE, MAYA JJA, AND BORUCHOWITZ AJA concurring, with JAFTA JA dissenting.)

[1] The question this case raises is whether a government department can make private entities a close part of its procurement processes, putting them to trouble and expense in their permissible pursuit of income, and then without warning summarily exclude them from it, leaving them to foot the bill. In my view the answer must be No. It is the legal doctrine of legitimate expectation the publishers cry in aid here; but it is elementary fairness that demands their protection.

[2] I have had the benefit of reading the judgment of my colleague Jafta JA in which he concludes that the appeal should succeed. Though I agree with him that the failure by the appellants ('the department') to file the record on time should despite the respondents' strong objections be

condoned, and that the appeal is not moot, I cannot agree with his conclusion that the respondents ('the publishers') should be non-suited. The high court judgment in my view rightly assessed the facts (which appear from the judgment of Jafta JA) as well as the equities of the situation, and soundly applied the law to them. I would therefore dismiss the appeal, though in doing so I should make it clear that I do not find it necessary to go as far as the high court did in finding a violation of s 217(1) of the Constitution,[1] and holding that those provisions require 'competitiveness … determined and driven by […] market forces and not by the Department on undisclosed criteria'.

[3] The nub is this. For some years before 2006, the Northern Cape education department involved publishers closely in public schools' book procurement. Those schools ordered learner teacher support materials (LTSMs) off a departmental catalogue the publishers at their own expense prepared for this purpose. The schools placed orders with bookshops in the province, which then ordered the books from the publishers.

[4] But in June 2006, the department decided to shortcut the process by cutting past the schools and the bookshops. For 2007, it decided on

[1] Constitution s 217:
Procurement
(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

'central provisioning' for grades 8, 9 and 11 – instead of the schools and bookshops procuring LSTM, it would do so itself. Its objectives were good – mainly efficiency and cost savings. But the effect on the publishers was harsh. Not only did they stand to lose their profits, but their considerable 2006 investment, in producing the catalogue, paying a participation deposit, producing and distributing promotional materials, and undertaking expensive marketing and publicity 'roadshows', would go to waste.

[5] Worse was that the department made this decision without consulting them. It did not even inform them. They learnt of the proposed change, months after it was circulated, by accident rather than the department's design. This triggered an emergency meeting with the department, and when this failed to provide a remedy, a successful interdict application (in which the publishers acted in concert, even though in the short term some stood to benefit from the change).

[6] In the face of these facts, the judgment of Jafta JA non-suits the publishers on three bases:

(a) He says the publishers have shown no benefit to themselves from the previous system;

(b) In any event, he says, that system did not constitute a settled practice and therefore could not give rise to any expectation; and

(c) Finally, that system imposed no duty on the department to consult the publishers.

[7] In reaching this conclusion, Jafta JA accepts, it appears, that the department's decision was administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (though the department contested this in the court below), as well as the principles now settled in our law relating to the doctrine of legitimate expectation, which PAJA itself recognizes.[2]

[8] I agree these principles are applicable. They should in my view lead to the failure of the appeal. I therefore deal in turn with the three impediments the judgment of Jafta JA discerns.

(a) No benefit, or interests not affected

[9] First, Jafta JA says, it is not clear what benefit or privilege or advantage the publishers claimed to derive from the previous ordering process, since it was the schools that placed orders with the bookshops,

[2] Promotion of Administrative Justice Act 3 of 2000, s 3(1):
'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'

and the bookshops that on-ordered from the publishers. Hence, he says (para 43), the publishers' interests were not affected since the only change was that the department placed the orders directly with the publishers, and not the schools through the bookshops.

[10] This point does not seem to me persuasive. There are two answers to it, though before giving them, I should say that it is not clear that an applicant in a legitimate expectation case need have relied on the undertaking to his or her detriment (see Lord Hoffmann in *R (on the application of Bancoult) v Secretary of State* [2008] UKHL 61; [2008] 3 WLR 955 para 60); but given what I say below it is not necessary to decide that now.

[11] The first answer is that benefit to the publishers from the past practice, and detriment from its abrupt cancellation, has never been disputed. It was set out in the publishers' founding affidavit and not denied in the department's answer. All parties seem to have taken it as obvious. Indeed, the publishers' interest was the counterpart of the savings the department aimed to achieve through central provisioning: by buying from fewer publishers, in bigger orders, gain sizeable discounts would accrue. The necessary corollary was fewer orders, at lesser cost. So the publishers as a group undoubtedly benefited from the existing,

more costly, practice. Discounts and efficient ordering were laudable departmental objectives: but, given the department's past practice, and the publishers' reliance on them, they had to be pursued fairly.

[12] The second answer springs from the publishers' explanation of why they acted in concert in these proceedings even though some stood to benefit from the change. It is that central provisioning concentrated orders on some, while it excluded others. Schools-based ordering, by contrast, not only decentralized the process; it diversified the choices the schools made, thus spreading the available funds more randomly – and more evenly – between all the publishers. Some for all, instead of more for some.

[13] That was a sizeable benefit, to each publisher who on the previous process would have received orders and on the new system would not. Each of these publishers has in my view an individual cause of complaint arising from a forfeited benefit or advantage. No one has sought to non-suit any of the publishers who have joined in the litigation on the ground that, individually, they stood to gain and not lose: hence nothing more need be said about this.

(b) No expectation because no settled practice

[14] Second, Jafta JA says, the publishers failed to show a regular practice that they reasonably expected to continue (para 44). This was because the province's education head (the second respondent, or HOD) used additional funds for LSTM procurement in the grades concerned. This point was put up against the publishers' case in the court below, which rejected it, and the publishers' written argument in my view correctly points out that it conflates two different issues – budgetary decisions and procurement processes.

[15] The fact that different funds were used cannot change the duty of fairness that applied to the official disbursing them. As Molwantwa AJ (with whom Kgomo JP concurred) pointed out in the high court, 'the funds had already been appropriated for purposes of being disbursed by the department … The HOD was simply determining how it should be spent'.

[16] Just as the focus of the inquiry in determining whether a particular act is administrative action is not the identity of the actor, but the nature of the power exercised,[3] so too the focus is not on the nature or source of the funds but the nature of the power invoked in disbursing them. The duty springs from the department's prior practice, which involved the

[3] *President of the Republic of South Africa v South African Rugby Football Union* 2001 (1) SA 1 (CC) para 141.

publishers intricately in the book-ordering process. It required the department to tell them it was going to change that process before doing so. The department head could no more exempt himself from that duty by using different funds than he could by taking the decision in an adjoining office.

[17] Also on the nature of the practice the publishers invoke, Jafta JA observes that 'the procedure on which [they] rely as proof of a regular practice was implemented for only two years', concluding that it was therefore not regular enough to sustain an expectation from which a duty of fairness could spring.

[18] This approach seems to me to err on the side of formalism. The law does not predetermine the time that must elapse before a departmental or official practice can give rise to a duty of fairness. It depends on whether what happened was an isolated event or a procedure designed to lay a basis for planning future conduct and arrangements.

[19] Here, a decentralized and diversified system was in place for at least two years, in which the schools placed orders through the bookshops, which relayed them to the publishers. That system was designed and intended to continue. Indeed, the department informed the

schools by circular in February 2006 that it would. As in the two preceding years, it allowed the publishers to draw up their catalogues, to train and deploy their 'roadshow' staff, to pay the participation deposit, and to produce and distribute promotional materials.

[20] All this points to the conclusion that, until revoked, the decentralized schools procurement system was a fairly settled way of doing things. It meant that the publishers could rely on it in running up expenses and in planning for the next year. It also meant that the department could not change it without notice to them. It would in my view be quite unfair to non-suit them because the system had been in existence for only two years.

[21] I might add that the High Court relied, in my view justifiably, on a minute the publishers recorded of the emergency meeting with the department in October 2006, after the department’s intention to change the system came to their notice. That minute shows that the department itself regarded the practice as the 'normal' procedure, and indeed that it told the publishers that centralized procurement for 2007 was a 'once-off', and that 'things will return to normal next year'.

[22] Though the department's answering affidavit quibbled with the status of the minute, denying that it was an 'official record', it grudgingly acknowledged that 'it purports to be a record of what occurred at the meeting, albeit a record compiled on behalf of the [publishers]'. But, significantly, it did not dispute one iota of its accuracy. The record persuaded Molwantwa AJ 'that the Department has hereby, directly or by implication, acknowledged the existence of an established normal procedure'. That inference was in my view correct.

(c) No legitimate expectation in law

[23] Jafta JA concludes (para 48) that no legal duty arose that required the department to warn the publishers that it proposed to change the system. Procedural fairness, he says, did not require the department to give the publishers an opportunity to make representations before implementing centralized procurement. I cannot agree with this. The settled practice and the reliance the publishers placed on it in making their plans were quite enough to trigger a legal duty.

[24] In reaching his conclusion, Jafta JA relies again on the suggestion (para 48) that 'the only complaint the [publishers] could raise is that some of them would have no orders'. But that, surely, was quite enough. The point is not that the department owed the publishers a living, nor any

obligation to contribute to their profits. It simply owed them a duty to give them reasonable notice that it was planning to change the procurement processes in which it had intimately involved them. That would enable them to adjust their business plans, and if necessary their markets, to absorb the blow. To change the existing system without notice, and after they had incurred expenses in reliance on it, was in my view intolerably unfair.

[25] As Kgomo JP pointed out in refusing the department leave to appeal, the system was not immutable, and the finding in favour of the publishers did not mean that procurement 'can never be centralized by the Department'. It required only observing elementary fairness in process, in good time, before doing so.

[26] In my view, this case is on all fours with *Premier Mpumalanga v Association of State-aided Schools* 1999 (2) SA 91 (CC), from which Jafta JA tries to distinguish it. In both cases, a past practice involving the disbursement of public funds is interrupted mid-year, without notice, after preparations have begun for, and reliance placed upon, its continuance. In both cases, fairness will intervene.

[27] In my view, the interdict was rightly granted. The appeal is dismissed with costs, including the costs of two counsel.

E CAMERON
JUDGE OF APPEAL

JAFTA JA

Introduction

[28] This is an appeal against the judgment of the Kimberly High Court (Molwantwa AJ, Kgomo JP concurring) in terms of which that court reviewed and set aside the second appellant's decision and ordered the appellants to withdraw orders made for delivery of books for learners in public schools in the Northern Cape province. The main issue raised in this appeal is whether the respondents – the publishers – had a legitimate expectation to be heard before the second appellant took the impugned decision.

[29] The second appellant is the administrative head of the Department of Education (the department) in the Northern Cape province. The first appellant is the member of the executive council under whose responsibility the department falls. The respondents are publishers of

books and members of the Publishers Association of South Africa, a voluntary association representing publishers in this country.

[30] The respondents instituted these proceedings for an interdict and review of the decision taken by the second appellant. This decision was published in a circular addressed to the first appellant and other functionaries in the department, including public schools in the province. As already mentioned, the court below set it aside and directed the appellants to perform certain acts concerning procurement of books for learners at public schools. The appeal is with leave of this court.

Statutory setting

[31] Section 29 of the Constitution imposes an obligation on the state to provide education for everyone while at the same time redressing past imbalances caused by racially discriminatory laws and practices of the apartheid era.[4] The national and provincial governments enjoy concurrent competence over education, excluding tertiary education.[5] In order to promote the right to education and regulate the manner in which the state

[4] Section 29 provides: '(1) Everyone has the right – (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible. (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account – (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.'

[5] See Part A of Schedule 4 of the Constitution.

would discharge the obligation to provide education, Parliament passed the South African Schools Act 84 of 1996.

[32] Section 12 of the Act obliges the member of the executive council responsible for education to provide public schools for education of learners, out of funds allocated for that purpose by the provincial legislature.[6] The governance and management of public schools is vested in the governing bodies whose functions and responsibilities are listed extensively in the Act.[7] The Act also mentions powers to be exercised by the head of department such as the second appellant. Some of these powers can be delegated to governing bodies upon request. Section 21 of the Act provides:

'(1) Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions:

(a) to maintain and improve school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;

(b) to determine the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;

(c) to purchase text books, educational materials or equipment for the school;

(d) to pay for services to the school;

(dA) to provide an adult basic education and training class or centre subject to any

[6] Section 12 provides: '(1) The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. (2) The provision of public schools referred to in subsection (1) may include the provision of hostels for the residential accommodation of learners.'

[7] See sections 16 and 17 of the Act.

applicable law; or

(e) other functions consistent with this Act and any applicable provincial law.'

[33] The functions allocated to a governing body in terms of s 21 can be withdrawn by the head of department. Except in the case of an emergency, the head of department is obliged to give a governing body notice of his or her intention to withdraw a function; furnish it with reasons therefor and grant it an opportunity to make representations. All of this must occur before the decision is taken. In the case of an emergency the head of department must furnish the governing body with reasons for his or her decision after it had been taken and give it a chance to make representations.[8]

[34] Of the functions mentioned in s 21, the purchase of books and educational material is relevant for present purposes. The second appellant had allocated it to governing bodies at the time the impugned decision was taken. A governing body of a public school must prepare an

[8] Section 22 provides: '(1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body. (2) The Head of Department may not take action under subsection (1) unless he or she has- (a) informed the governing body of his or her intention so to act and the reasons therefore; (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intension; and (c) given due consideration to any such representations received. (3) In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter – (a) furnishes the governing body with reasons for his or her actions; (b) gives the governing body a reasonable opportunity to make representation relating to such actions; and (c) duly considers any such representations received. (4) The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3). (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.'

annual budget according to prescripts determined by the member of the executive council and such prescripts must be published in a Provincial Gazette. The budget must be presented to a general meeting of parents for approval before being adopted by the governing body.[9] A governing body must establish a school fund and administer such fund in accordance with directions issued by the head of department. Money received by a school, including school fees, must be paid into this fund.[10] A governing body also has the responsibility of supplementing resources supplied by the state so as to improve the quality of education to all learners at its school.[11] The norms and standards for funding schools are determined by the Minister of Education after consultation with the Council of Education Ministers and the Minister of Finance. These norms and standards set out the criteria for the distribution of funding to all schools in a fair and equitable manner. They also provide for a system in terms of which learners are placed into quintiles according to financial means. This is used to determine the level of funding.

[35] Public schools are funded from the public revenue and the state must effect the funding on ‘an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of

[9] See s 38 of the Act.
[10] See s 37 of the Act.
[11] See s 38 of the Act.

past inequalities in education provision'. The state must annually provide information to public schools regarding such funding, to enable them to prepare budget estimates for the next financial year.[12]

[36] Therefore, for the supply of resources to public schools to succeed there must be co-operation between the governing bodies and the departmental officials in the provinces. Public schools located in affluent areas have better resources because they can supplement whatever funding they receive from the state. Of the 421 schools in the Northern Cape province, 409 schools were allocated the power to procure their own Learner Teacher Support Material (LTSM).

Factual background

[37] The decision which was set aside by the court below concerned procurement of LTSM for grades 8, 9 and 11 in 2007. Before referring to that decision and considering the basis on which it was challenged, it is necessary to set out the procedure followed in the procurement of LTSM in the Northern Cape province. Usually in October of each year the department received from publishers such as the respondents books published by them and which they wished to be included in the provincial

[12] See s 35 of the Act.

catalogue. This catalogue was compiled by the department and listed books from which orders could be made for various schools in the province.

[38] Before being placed in the catalogue, books were evaluated by officials in the department. By the end of January each year, a catalogue comprising books accepted by the evaluation team was compiled. Once the catalogue was finalised it was submitted to the procurement unit in the department. This unit prepared requisition forms for schools; printed and distributed the catalogue to schools and arranged for exhibitions by publishers whose books were listed in the catalogue.

[39] By May the schools submitted their completed requisition forms, which constituted orders, to bookshops. Some schools submitted these orders to the departmental procurement unit. From the bookshops or the procurement unit the orders were normally sent to publishers.

[40] In 1997 the national government adopted the policy of Outcome Based Education which necessitated a fundamental change in the curriculum. This policy was later implemented in terms of a framework called Curriculum 2005 which later became the New Curriculum Statement (the NCS). The NCS was introduced incrementally as from

2004. In that year the new curriculum for grades R to 3 was implemented. In 2005 the implementation was extended to grades 4 to 6 and in 2006 it was the turn of grades 7 and 10. The NCS in respect of grades 8, 9 and 11 was scheduled to be implemented in 2007.

[41] The implementation of the NCS meant that the course content and LTSM for each grade had to change. This necessitated procurement of new textbooks as the old ones could no longer be used. Each learner had to be supplied with seven to eight new textbooks. This placed a heavy financial burden on the schools, especially the less resourced ones. Due to budgetary constraints it is not possible for the state to provide each learner with all the necessary textbooks, educator manuals and stationery. Wealthier schools are able to raise additional funds to cover the shortfall while learners in poor schools have to be content with the material supplied by the state.

[42] When the NCS was first implemented in 2004, schools did not receive additional funding to cover the costs occasioned by the procurement of the new LTSM. They had to acquire such material from their ordinary budget allocations. The same thing happened in 2005. During 2006 there was uncertainty regarding who was going to bear the costs for the new LTSM for grades 7 and 10. The uncertainty arose from

statements made by some departmental officials. As a result the schools used most of their funds to acquire other material they needed. At the time the department cleared the misunderstanding, there were no funds in the schools' budgets for procurement of the new LTSM. In order to address the problem the department was able to raise additional funding in the amount of R5 million.

[43] The additional amount was made available for the purpose of acquiring LTSM for grade 10 only. Schools were allowed to place orders through the department which forwarded them directly to publishers. The bookshops were left out of the process. In this way the department was able to negotiate a discount of 30% from the retail price of LTSM. In so far as LTSM for other grades was concerned, schools were required to pay for orders from their own budgets.

[44] Initially the authorities had scheduled the implementation of the NCS in respect of grades 8 and 11 only. But later the Council of Ministers decided that implementation in respect of grade 9 should be effected simultaneously with those two grades. The latter grade was added after school budgets had been finalised. As a result procurement of LTSM in respect of that grade was not budgeted for. The department addressed the additional financial burden on schools by allocating a special fund to

cover costs for LTSM for the three grades. Having secured the funds the second appellant was of the view that in order to achieve an equitable distribution of resources the department – and not the schools - should make the selection of books to be ordered for grades 8, 9 and 11. The selection was to be made from the catalogue referred to above. Since the department had previously obtained a 30% discount when it placed orders directly with publishers, he decided to again leave the bookshops out of the procurement process. In his view making orders directly to publishers had proved to be more efficient and cost-effective. Having considered a recommendation submitted to him by officials in the department, the second appellant issued, as he had authority to do so, circular 67/2006 on 20 July 2006, setting out his decision.

[45] As the circular contains the impugned decision it is necessary to quote it in full. It reads:

'CIRCULAR NO 67/2006

LEARNING AND TEACHING SUPPORT MATERIAL (LTSM) FOR SECTION 21 AND NON-SECTION 21 SCHOOLS FOR THE YEAR 2006/2007.

1. The Department will be provisioning LTSM for Grades (8,9,&11) implementing NCS (National Curriculum Statement) in 2007 centrally.

2. Section 21 schools however, will be responsible for procuring their own Text and Reading books for all other top-up Grades, as well as the textbooks not supplied by the Department for Grades 8,9 & 11 and other areas of LTSM (Paper, Writing books & Stationery) from the allocations they will be receiving.

3. Non-section 21 schools will place their orders from approved suppliers

appointed through the bidding process via the District Offices.

4. The approved book catalogues for all Grades except Grade 9 with copies of the Management Plan and Circular NO 22 will be forwarded via the District Offices to all schools.

5. District Offices are kindly requested to ensure that all schools adhere to these dates in the management plan.

6. The Supply Chain Management Unit will be procuring the Grades 8, 9 and 11 titles on behalf of the schools as follows:
   Grade 8 - 7 Text Books per learner (Excluding Languages)
   Grade 9 - 7 Text Books per learner (Excluding Languages)
   Grade 11 - 5 Text Books per learner (Excluding Languages)

7. The Publishers will deliver the policy directly to Head Office who will in turn be responsible for the receipt and packaging of these books to the schools via the District Offices.

8. Schools will in turn be responsible, as in the past, for providing regular progress reports on the ordering and delivery of all LTSM to their respective District Office who will, in turn, have to provide Head Office with these progress reports.

Your co-operation in this regard will be appreciated.

_____
DEPUTY DIRECTOR GENERAL
01-09-06'

[46] Although the circular stipulates that the department would procure a specified number of text books for each learner in the affected grades, it expressly states that schools, if they wished to acquire books not selected by the department, were free to order them in the normal way and pay for them from their own budgets. In addition schools were still responsible for procurement of LTSM for other grades (para 2 of the circular). The decision to centralise procurement did not affect 12 schools which were described as 'non-section 21 schools'. These schools could order their

material from suppliers who had been awarded tenders to supply material (para 3 of the circular).

[47] The circular was sent to schools in the province. None of them complained about the decision that the department was to select books for them and that the bookshops were left out of the procurement process. It was common cause that this decision was taken without giving the governing bodies an opportunity to make representations. But the governing bodies did not challenge it. In fact the schools were happy with the decision. The bookshops which had been left out of the supply chain also did not challenge the decision. It was only the respondents who attacked it, even though some of them were to benefit from the decision as orders had already been made to them. The respondents' role in the chain was to supply the bookshops with books ordered from the latter by schools.

[48] Although the respondents had challenged the decision on various grounds they pursued two grounds only, both in the court below and this court. The first was that the decision did not comply with the provisions of s 217 of the Constitution.[13] Secondly, they contended that the decision

[13] Section 217(1) provides: 'When an organ of the state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-

amounted to procedurally unfair administrative action which was taken in contravention of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In support of this ground they argued that they had a legitimate expectation to be heard before the concerned decision was taken. Section 3(1) of PAJA provides:

'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'

Section 3(2) proclaims that a person whose legitimate expectations are affected must be given a 'reasonable opportunity to make representations' before the decision is taken.

Preliminary issues

[49] Before I address matters raised in this appeal, it is necessary to consider two preliminary issues. The first is that the appellants failed to lodge the record timeously and as a result they were obliged to apply for condonation. The second is whether this appeal is moot or not. When refusing leave to appeal the court below pointed out that the matter had become academic as its order had already been carried out and the NCS for the relevant grades had been implemented. I address these issues in

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effective.'

turn.

Condonation

[50] In a case such as the present where leave was granted by this court, the appellant was supposed to lodge its notice of appeal with both the registrar of this court and the registrar of the court *a quo* within one month from the date on which leave was granted.[14] The date on which the notice of appeal was lodged is used as a reference point from which the period for lodging the record is calculated. Once the notice of appeal is lodged, the appellant must file or lodge within three months six copies of the record of proceedings in the court below and deliver to respondents copies of the same record. The parties may, however, agree to extend the period or the registrar may do so upon written request provided that notice has been given to other parties. But the registrar may not extend the period for more than two months.[15]

[51] In this matter the appellants lodged their notice of appeal on 3 October 2007. They ought to have lodged the record by no later than 4 February 2008. They failed to do so. The record together with the

[14] Rule 7(1) provides: '(1) An appellant in a civil case shall lodge a notice of appeal with the registrar and the registrar of the court a quo within one month after the date of - (a) …. (b) the granting of leave where leave to appeal is required ….'

[15] See Rule 8 of the Supreme Court Rules.

application for condonation were lodged on 13 June 2008. It was four months late. The applicants' attorney gave the following explanation for the delay. He said the record was delivered to the respondents' attorneys on 9 January 2008. The copies which were meant to be lodged with the registrar were delivered to the appellants' Bloemfontein attorneys.

[52] On 14 January 2008 the Bloemfontein attorneys informed him that the record was defective in that it was not compiled by a 'professional transcription service'. It was therefore not lodged with the registrar. The appellants' attorney contacted various transcribing companies and all of them indicated that they could not complete the work in time for lodging before 4 February 2008. While on sick leave, he instructed a secretary in his office to send a letter requesting extension of time to the respondents' attorneys. But this letter was erroneously sent to counsel. On returning to work he sent the letter to respondents' attorneys on 7 February. In a letter dated 25 February the respondents' attorneys declined to grant the appellants an extension. He received the record from transcribers on 26 March. He immediately forwarded a copy to counsel with instructions that an application for condonation and heads of argument be prepared. He received both the application and heads of argument from counsel on 10 June. As mentioned, it was lodged on 13 June.

[53] The respondents opposed the application for condonation. They contended that since the granting of the order on 21 November 2006, they have conducted their affairs in accordance therewith and if the appellants' were granted condonation and should they succeed, the new order will be 'disruptive and prejudicial' to the respondents. They argued that they have spent amounts of money in promoting publications which were included in catalogues for 2007 and 2008. These promotions were done on the understanding that the procedure followed by schools in ordering books, before the circular was issued, would continue to apply. If they had known that the procedure would be stopped, they could not have spent money on promotions. They contended that they were entitled to finality of the matter.

[54] The correct approach to applications for condonation was laid down in *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie*.[16] In that case Holmes JA said:

'In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.'

[16] 1969 (3) SA 360 (A) at 362G-H.

[55] Applications for condonation in this court are now regulated by Rule 12 which requires the applicant to furnish a detailed and accurate explanation for the delay to enable the court to decide whether to grant or refuse condonation.[17] Although the explanation given by the appellants' attorney is not entirely satisfactory, as soon as the defect in the record was pointed out, he took remedial steps and further causes of the delay were not occasioned by him. He had submitted the record to the transcribing company before the deadline for lodging the record lapsed. Upon receiving it from the transcribers, he immediately instructed counsel to prepare heads of argument and the application for condonation. The appellants themselves were in no way to blame for the entire delay. It also appears to me that there are prospects of success on the merits.

[56] The respondents' objection is primarily based on their interest in the finality of the case. But they were aware that the appellants were desirous of appealing against the judgment because they were served with the notice of appeal and the defective record. Their consent to an extension was sought but withheld. When all this happened the respondents had already spent money on promoting their publications. After the lodging of the notice to appeal the respondents did not take any

[17] Rule 12(4) provides: '(4) Every application, answer or reply shall - (a) be clear and succinct and to the point; (b) furnish fairly all such information as may be necessary to enable the court to decide the application; and (c) deal with the merits of the case only in so far as is necessary for the purpose of explaining and supporting the particular grounds upon which the application is sought or opposed.'

action which they could not have taken had they have known that the appellants were still pursuing the appeal. In compliance with the order of the court below, schools had selected and requisitioned books as if the circular was not issued. The appellants' success on appeal, if any, will not reverse the orders already made. In these circumstances I am satisfied that condonation must be granted.

Mootness

[57] Counsel for the respondents argued that the appeal was moot because judgment by this court will have no practical effect. The NCS for the relevant grades was implemented in 2007 and in requisitioning LTSM, schools acted as if the impugned decision did not exist. While it is true that a judgment which effectively revives that decision would not have any effect on the implementation of the NCS for grades 8, 9 and 11, I disagree that such judgment will have no practical effect. The effect of the order granted by the court below is that whenever the department contemplates taking a similar decision, it must afford the respondents an opportunity to make representations. A judgment which sets aside the order of the court below will release the department from that obligation. In this context therefore such judgment will have a practical effect. In

Natal Rugby Union v Gould[18] this court said:

'Had there been no appeal the judgment of the Court below would in all probability have continued to influence the procedure adopted in respect of office bearer elections at future union meetings…. In the circumstances I consider that determination of the appeal will, quite apart from the issue of costs in the Court below, have a 'practical effect or result' within the meaning of s 21A of the Supreme Court Act.'

Failure to comply with s 217 of the Constitution

[58] Having found that the impugned decision amounted to administrative action the court below based its judgment on two grounds. It said:

'34 In the circumstances of this case, I find that the Applicants [Respondents] have established that there are grounds of review for the following reasons:

34.1 There is clear evidence that there was a legitimate expectation which arose from the existence of a regular practice which the Publishers reasonably expected to continue.

34.2 The decision of the HOD to cancel the right of the schools to select and procure LTS – Material in respect of grades 8, 9 and 11 without giving prior notice to the Publishers was an administrative action which is subject to review.

34.3 The HOD failed to adopt a procedurally fair and justifiable process in terms of section 217 of the Constitution read with section 3(2) of PAJA.'

[18] 1999 (1) SA 432 SCA at 444J-H445B.

[59] Section 217 does not require the process followed by the state in procuring goods to be justifiable. What is required is that such process must be fair, equitable, transparent, competitive and cost-effective. The court below found that the process followed in the present case failed to meet the criteria in s 217. It held that for the process to be competitive orders ought to have been made to all publishers whose books were in the catalogue. Proceeding from the premise that the respondents should have been notified of the impugned decision, the court below held that the process lacked transparency. It reasoned thus:

'It is not clear how equity will be achieved by a process which by its very nature has excluded some publishers without any sound basis whatsoever. There is no reason advanced why centralization was kept under a cloak of secrecy until such a late stage (02/10/2006). There was, without doubt, no transparency at all. The process had not been shown to have been cost effective or to promote competitiveness…. Competitiveness in this context can only be healthy when it is allowed to be determined and driven by the market forces and not by the Department on undisclosed criteria. This process can only be achieved when all publishers are given an equal opportunity to market their products to the schools and then be supported and chosen on the quality of their products.'[19]

[60] To the extent that the court below implies that the publishers were not given equal opportunity to market their books, it erred. All

[19] The judgment of the court below at para 31.

respondents were allowed and did submit their books for inclusion in the catalogue. The selection of books ordered by the department was made from that catalogue. No publisher was excluded from submitting its books for consideration and listing in the catalogue. That process was as transparent, competitive, fair and equitable as contemplated in s 217. Having followed such process the section did not oblige the state to procure books from every publisher whose books appear in the catalogue. It was for the state (either through the department or schools themselves) to choose from the catalogue books needed for learners at schools. The selection of books, per se, could not make the process to be inconsistent with s 217 of the Constitution. I also fail to appreciate how the selection that led to orders being made to some publishers rendered the process less cost-effective. The record does not show any pricing by any of the publishers.

[61] Before addressing the issue of legitimate expectation, I must point out that the finding by the court below to the effect that the second appellant cancelled the schools' right to select material is incorrect. There was simply no evidence supporting it. Instead overwhelming evidence and the decision itself show that the schools retained their right to select and order material for grades 8, 9 and 11. In this regard the circular states:

'Section 21 schools however, will be responsible for procuring their own Text and

Reading books for all other top-up Grades, as well as the textbooks not supplied by the Department for Grades 8,9 & 11 and other areas of LTSM (Paper, Writing books & Stationery) from the allocations they will be receiving.'

[62] Clearly, if the schools wanted to make a selection of books other than those selected by the department, they were free to do so. They were also allowed to procure LTSM for other grades. The impugned decision did not at all interfere with schools' budgets. It was confined to the additional fund only. The error by the court below influenced the manner in which the case was presented in this court. Counsel for the respondents argued that the second appellant had, without giving the schools and publishers a hearing, withdrawn the schools' power to select books. The submission is not borne out by the facts as demonstrated above.

[63] Although I have reservations I am willing to assume in the respondent's favour that they have established *locus standi* in respect of the subject matter of these proceedings. I am also willing to assume in their favour that the impugned decision constitutes administrative action envisaged in PAJA. The question that arises is whether the decision affected the respondents' legitimate expectation. They did not claim that it affected their rights nor could they do so on the present facts. I address the issue of legitimate expectations below.

Legitimate expectation

[64] Counsel for the respondents argued that the impugned decision affected their legitimate expectation and as a result they should have been given the opportunity to make representations before it was taken. Since it is common cause that the respondents were denied that opportunity, he submitted that the decision contravened s 3 of PAJA. Accordingly, he argued, the decision was procedurally unfair and consequently invalid.

[65] In addressing this issue the starting point is to determine whether a legitimate expectation existed or not. In *Administrator, Transvaal and Others v Traub and Others*[20] – a leading authority on the topic – Corbett CJ described a legitimate expectation as a –

'substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing'.[21]

[66] The doctrine of legitimate expectation finds application where a person enjoys a privilege, advantage or benefit which it would be unfair

[20] 1989 (4) SA 731 (A).
[21] Ibid at 758D-E.

to deny such person without giving him or her a hearing.[22] The legitimate expectation contemplated in s 3 of PAJA can arise either from a promise made by the decision-maker or from a regular practice which is reasonably expected to continue. The purpose of legitimate expectation is to provide procedural fairness in decision-making in circumstances where the decision does not affect the rights of the party in need of protection against unfairness. In *Traub* Corbett CJ, however, warned against the danger of freely invoking the doctrine. The learned Chief Justice said:

'[W]hereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it can become an unruly horse. And in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.'[23]

[67] The application of the doctrine of legitimate expectation is determined on a case-by-case basis. The test for establishing whether a legitimate expectation exists is twofold. A party claiming that its expectation has been adversely affected by administrative action must

[22] See *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) at para 35.
[23] Above n 17 at 761D-G.

prove, by means of accepted facts, either that the decision-maker had made a promise or that it followed a regular practice which the claimant reasonably expected to continue and be extended to it. Once this is established, then the court must determine whether, in the circumstances of the particular case, the facts introduce a legal duty which obliges the decision-maker to afford the claimant a pre-decision hearing.[24] This entails a value judgment to be made by the court while bearing in mind the need to strike the balance referred to in *Traub*.

[68] Returning to the present facts, in determining whether the respondents have established a legitimate expectation it is necessary to examine their case as set out in the papers. In their founding affidavit the respondents stated:

'25. In the past schools in the Northern Cape have ordered publications off a catalogue produced by the Department. *These orders were placed with various bookshops in the province ('suppliers'), which suppliers in turn ordered the publications selected by the schools from the relevant publishers.*(my emphasis)

26. This year the Department has, in most subjects/learning areas, excluded the schools and the suppliers from the process, selected the books themselves and placed orders directly with certain of the publishers.'

[24] Above n 19 at para 38.

[69] The above procedure was confirmed by the appellants with one qualification. That is that schools submitted orders either to bookshops or the department. Because these are motion proceedings, where the appellants' version differs with that of the respondents, it must prevail.[25] However, it is quite clear that parties on both sides agree that previously the selection of books was done by schools, irrespective of whether subsequently the orders were submitted to bookshops or the department.

[70] On the respondents case it is not clear what benefit, privilege or advantage they derived from the process whereby the schools sent orders to bookshops who, in turn, acquired stock from the respondents. It appears to me that if there was any advantage flowing from that process, it accrued to the bookshops which, it seems, were suppliers to whom tenders were awarded. There was no direct link between the schools and the publishers. The bookshops were the common link. In my view the respondents' interests were not affected even in the case where the schools submitted orders to the department, following a selection of books by the schools themselves. The department forwarded such orders to the respondents. The fact that orders did not come from the bookshops made no difference. The only thing new brought about by the impugned decision is that the department selected books for schools. That selection

[25] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

was, of course, confined to orders relating to the special fund and such orders were placed directly with the respondents.

[71] The power to select books suitable for learners in public schools in the Northern Cape province vests in the second appellant. He controls the budget allocated to the department. It was him who made additional funds available for procurement of LTSM for the relevant grades. He is the functionary who allocated the power to procure books to the schools' governing bodies. The impugned decision did not withdraw that power but it meant that orders made in relation to the additional fund the department would select the books. The schools were happy with the decision. He had done the same in the previous year in respect of additional funds which were made available for ordering LTSM for grade 10. In these circumstances I am unable to appreciate how the respondents could entertain an expectation that they would be heard before the decision was taken. It seems to me that they could not have anticipated that additional funds were going to be made available. Nor could they have reasonably expected to be heard if the department were to decide to make the selection itself. If anything, they should have expected the opposite when additional funds were made available because that was the position in the previous year.

[72] Moreover, the procedure on which the respondents rely as proof of a regular practice was implemented for only two years before. In the third year of implementing the NCS the department departed from that procedure in respect of grade 10. Can it be said – in these circumstances – that there was a regular practice which the respondents expected to continue? I think not. Bearing in mind that the schools were still free to select and order books for grades 8, 9 and 11, there was no right or interest of the respondents which was adversely affected by the impugned decision.

[73] But on the assumption that the first requirement is fulfilled the question that needs to be considered is whether in these circumstances the respondents should have been given the opportunity to make representations before the decision was taken. In doing so, Corbett CJ's caution in *Traub* must be borne in mind. That warning is consistent with the principle of judicial deference referred to in the following statement by Professor Hoexter, cited with approval by this court and the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*:[26]

'[A] judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in

[26] 2004 (4) SA 490 (CC); 2003 (6) SA 407 (SCA) and *Logbro Properties CC v Baldderson NO and Others* 2003 (2) SA 460 (SCA).

policy-laden or polycentric issues, to accord their interpretation on fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention… Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'[27]

[74] Even if the respondents had established facts giving rise to a legitimate expectation, it could not follow as a matter of law that they were entitled to a hearing. The question whether an expectation is legitimate to the extent of giving rise to the right to be heard depends on the circumstances of each case. The fact that a decision is prejudicial to a particular party, by itself, is not sufficient for invoking the doctrine of legitimate expectation. The issue is whether the facts of the case, viewed as a whole, cry out for a pre-decision hearing. The claimant's subjective hope or expectation is not relevant to the enquiry. In *SARFU*[28] the Constitutional Court said:

'The requirement of procedural fairness, which is an incident of natural justice,

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[27] Hoexter 'The future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 501-2.

[28] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC).

though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. *Du Preez's* case is no authority for such a proposition, nor is it authority for the proposition that, whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case. For instance, in *Du Preez*'s case, the calling of evidence was likely to cause severe prejudice to the persons implicated thereby. Yet, it could hardly have been suggested that the commission would not have been entitled to take the decision to call the witnesses without first hearing such persons.'[29]

[75] I am of the view that the present case falls into the category referred to in SARFU. Procedural fairness did not require the second appellant to give the respondents an opportunity to make representations before he decided that the department would make the selection of books and place orders with some of the respondents. Since the selection was made from the catalogue and the orders made to some of the respondents, the only complaint the respondents could raise is that some of them would have no orders. By selecting one book for each learner throughout the province, the second appellant reduced the number of publishers to whom orders could be made. In essence this was the complaint by the respondents. The impact of the selection on the respondents must be viewed in the light of the fact that it applied to orders made in relation to

[29] Ibid para 219.

the special fund only. The schools were still free to select other books for the same grades and LTSM for other grades. On these facts the duty to act fairly, in my view, did not require a pre-decision hearing.

[76] For the conclusion that the respondents had a legitimate expectation to be heard, the court below relied on *Premier, Mpumalanga and Another v Executive Committee, Association of State-aided Schools, Eastern Transvaal*.[30] In that case the Constitutional Court held that in the particular circumstances of that case the affected schools had a legitimate expectation to be heard before the decision withdrawing subsidies was taken. The court emphasised the fact that it was procedurally unfair to cancel the subsidies in the middle of the year, without notice, after the MEC for education had allocated funds for such subsidies for the entire financial year. Moreover, the decision to cancel subsidies was made to have a retrospective effect.

[77] The facts in *Premier Mpumalanga* were briefly that the department of education had been paying subsidies to schools for the needy white learners over a period of years. The payment was effected in terms of a policy of the past apartheid government. The current democratic government wanted to terminate the policy as it was based on and

[30] 1999 (2) SA 91 (CC).

perpetuated the inequalities of our past. At the end of the 1994 school year, the provincial government issued notice that payment of subsidies would continue until the end of 1995 or until the government decided otherwise. Subsidies were indeed paid for the first and second terms in 1995. In May 1995 the MEC for education allocated funds from his budget for the payment of the subsidies until the end of the financial year. As a result the schools arranged their affairs on the footing that they would receive the subsidies until the end of the financial year or until payment is terminated by notice to schools. However, the MEC informed the schools on 5 August 1995 that he had decided to terminate the subsidies with effect from July 1995. The facts of this case are distinguishable from the present matter and reliance on it was misplaced.

[78] For these reasons I would allow the appeal.

C N JAFTA
JUDGE OF APPEAL

Appearances:

For 1st & 2nd Appellant:	I Jamie SC D Borgström Instructed by State Attorney Bloemfontein
For Respondent:	R G L Stelzner Instructed by Fairbridges Attorneys Cape Town Duncan & Rothman Kimberley McIntyre & van der Post Bloemfontein