CENTRE FOR CHILD LAW AND OTHERS v MEC FOR EDUCATION, GAUTENG, AND OTHERS 2008 (1) SA 223 (T)

Citation	2008 (1) SA 223 (T)
Case No	19559/06
Court	Transvaal Provincial Division
Judge	Murphy J
Heard	June 28, 2006
Judgment	June 30, 2006
Counsel	S Budlender for the applicants Adv Ngwane for the respondents
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Constitutional law - Human rights - Rights of children - Nature of - Unqualified and immediate - Not subject to availability of resources and legislative measures - Justiciability of not to be compromised by budgetary considerations. C
School and school board - School - School of industry - Purpose of is care and rehabilitation of children - School to provide higher standard of care than child's parents - Nature of school requiring security and controlled access.
Constitutional practice - Remedies - Granted even though others in same position may claim similar remedy at considerable D cost to State - Especially so when right to dignity infringed and costs are foreseeable and containable.

Headnote : Kopnota

The first applicant was concerned that the conditions at a certain school of industry infringed the schoolchildren's constitutional rights. It sought orders directing the respondents to provide each E child in the school with a sleeping bag and to put in place proper access control and psychological support structures, and to make immediate arrangements for the school to be subject to a developmental quality-assurance process.

Held , that the duty to provide care and social services to children removed from the family environment rested upon the State. (At 228G.) F

Held , further, that schools of industry should provide a higher standard of care than that which the child's parents were able to provide. The regulations to the Child Care Act 74 of 1983 specifically provided for the maintenance of appropriate standards to ensure the wellbeing of the children in such institutions. (At 226B - C.)

Held, further, that children were sent to schools of industry for the purpose of care and rehabilitation, and the intention G of the system was to develop children to best advantage by means of skilled interventions. Psychological and social

support was a critical ingredient of State care, absent parental support. (At 229C.)

Held, further, that the very nature of the institution of a school of industry meant that it must be secure, with access carefully monitored and controlled. (At 228H.) H

Held, further, that s 28 of the Constitution contained no internal limitation subjecting children's rights to the availability of resources and legislative measures for their progressive realisation, unlike other socioeconomic rights. Children's rights remained subject to reasonable and proportional limitation, but the absence of any internal limitation entrenched the rights as unqualified I and immediate. The justiciability of children's rights ought not to be compromised by budgetary considerations. (At 227I - 228B.)

Held , further, that it could never be a defence to a violation of constitutional rights to argue without qualification that a remedy should not be granted lest others similarly denied their rights should seek the same remedy at considerable cost to the State. In cases where the fundamental right to dignity was central, and the costs where foreseeable, manageable and containable, 'levelling up' was the appropriate and desirable remedy. (At 228C - E.)

Held , further, on the facts, that the children at the school (who had been removed from their parents and made wards of the State) were living in conditions which might be poorer than the conditions from which they had been removed. (At 227B - C.)

Held, further, on the facts, that the minimal-costs or budgetary-allocation problems were far outweighed by the urgent need to advance the children's interests in accordance with constitutional values. (At 228B - C.)

Held, further, on the facts, that the provincial department had functional responsibility, so no order needed to be made against the national department. (At 230B - C.)

Held, further, on the facts, that the court should retain a supervisory role to ensure progress. (At 229I.)

Held, accordingly, that the first applicant was entitled to the orders sought. (At 230D.)

Cases Considered

Annotations

Reported cases

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) (2001 (1) BCLR 39): dictum in para [77] applied.

Statutes Considered

Statutes

The Child Care Act 74 of 1983, s 15: see *Juta's Statutes of South Africa 2006/7* vol 5 at 2-95 E

The Constitution of the Republic of South Africa, 1996, s 28: see *Juta's Statutes of South Africa 2006/7* vol 5 at 1-25.

Case Information

Application for declaratory and other relief consequent upon the infringement of the rights of children resident in the hostels at a F school of industry. The facts appear from the reasons for judgment.

S Budlender for the applicants.

Adv *Ngwane* for the respondents.

Cur adv vult. G

Postea (June 30).

Judgment

Murphy J:

On 28 June 2006 I made an order directing the first respondent to supply the pupils and residents at the JW Luckoff High School with sleeping bags, and reserved my reasons for making the order as well as judgment in respect of the other relief sought by the applicants. I am today in a position to hand down my reasons for judgment.

Normally I would have preferred to prepare a typed judgment, but as I have just indicated, unfortunately the restraints of time and I resources compel me while working under the pressure of the urgent court, to deliver judgment in open court relying rather on my notes.

This matter is one of importance and urgency, and hence judgment should be handed down sooner rather than later.

The first applicant is the Centre for Child Law at the University of Pretoria, an advocacy and public-interest body that works to promote A the best interests of children in the South African community. The second and further applicants are pupils at JW Luckhoff High School, a school of industry in Gauteng, the second respondent in these proceedings. The first respondent is the MEC for Education in Gauteng. B

The cause of action in this matter relates to alleged infringements of rights in the Bill of Rights. The first applicant has locus standi to act on behalf of the pupils of the school of industry in terms of s 38 *(d)* of the Constitution, by virtue of it acting in the public interest.

The second and third applicants, and all the other children of the school represented by the first applicant, have been placed at the school by way of an order in terms of s 15(1) *(d)* of the Child Care Act of 1983.

* This action arises from the first applicant's concern about the physical conditions at the hostels where the children are housed, the lack of access control and the absence of proper psychological support and therapeutic services at the school. The first applicant contends D that the conditions infringe the children's rights guaranteed by s 28 of the Bill of Rights, as well as the right to human dignity in s 10 and the right not to be subjected to cruel, inhuman or degrading treatment in s 12.

In order to address the problems effectively, the first applicant seeks E orders compelling the authorities to provide each child with a sleeping bag, and to put in place proper access control and psychological support structures. It also wants the MEC for Education, the first respondent, to be directed to make immediate arrangements for the school to be subjected to a developmental quality-assurance process, which is a recognised means of assessment aimed at the production and F implementation of an organisational development plan.

The first respondent has filed an answering affidavit. Its attitude to the problems is somewhat ambiguous. On the one hand, it concedes the existence of the problems and indicates a willingness to take remedial action. It has put up defences that if sustained could G delay the process, while it effects the necessary reforms at its own preferred pace.

While I am minded to commend the first respondent for the concessions about the poor state of affairs, I express the concern, I am sure shared by many, about the bureaucratic prevarication intrinsic to the department's litigation strategy. H

Section 195(1) of the Constitution requires the public administration to respond to public needs quickly and effectively. Increasingly one is a witness to public statements made by politicians and community activists about the slow pace of the delivery of social services to the vulnerable and marginalised sectors of our society. I There is a growing sense arising in the general public that the bureaucrats are failing us. I therefore venture the tentative suggestion that in many cases government departments J

defend litigation against them unnecessarily, and in doing that use resources that might be better applied elsewhere. A

Schools of industry have a long history in South Africa. Currently children are sent to them in terms of s 15 of the Child Care Act of 1983.
* A children's court may send a child to one if satisfied that the B child is in need of care, after holding an enquiry in terms of s 13. The idea obviously is that the school will provide a higher standard of care than that which the child's parents, for one reason or other, are able to provide. Regulations to the Act specifically provide for the maintenance of appropriate standards to ensure the wellbeing of the children in such institutions. Regulation 31A(1) *(b)* confers upon such children the right to a plan and programme of care and C development, which includes a plan for reunification, security and lifelong relationships.

Regulation 31A(1) *(d)* gives them the right to expect that the plan and programme are based on an appropriate and competent assessment of their developmental needs and spreads. Regulation 31A(1) *(f)* grants them the right to be fed, clothed and D nurtured according to community standards and to be given the same quality of care as other children in similar institutions. Regulation 31A(1) *(s)* gives them the right to respect and protection from exploitation and neglect.

Various other provisions of the regulations establish mechanisms for the enforcement, supervision and monitoring of the rights bestowed E upon children in these institutions. As I see it, the rights conferred by the regulations give effect to, and are a concrete embodiment of, the rights in s 28 of the Constitution, of every child , to appropriate alternative care when removed from the family, and to be protected from maltreatment, neglect, abuse or degradation. F

A few weeks ago employees of the first applicant visited the school and conducted

an inspection of the prevailing conditions. Their findings and observations are recorded in a founding affidavit. They are, to say the least, troubling. The respondents do not dispute the accuracy of the first applicant's account. All three hostels are G in a varying degree of physical deterioration. Most dormitories have no windows. The floors are in poor condition and there are no cubicles to provide privacy in the showers, and in some instances no doors to the toilets. There are broken windows and broken ceiling boards in the dormitories, meaning essentially that children are exposed to inclement H weather in their sleeping quarters.

At this time of the year, and especially at the present moment, Gauteng experiences a windy season and a particularly cold snap, with temperatures dropping after sunset to zero degrees and less. There appears to be no heating in the dormitories at all, and in some I instances there is no electricity. The children's beds consist of old, dirty foam mattresses on old bedstands. Some of the beds examined had sheets and one blanket, others had two blankets. The blankets are thin and grey, such as those J used in the prisons. The bedding looks old and dirty. During the hearing the applicants handed up photographs confirming their A observations. Some children do not have proper clothing, because they sell their clothes to outsiders to obtain money for drugs. This latter practice, I might add, reveals worrying deficiencies in access control and monitoring in a facility that is supposed to be secure. B

It would seem, therefore, that the first applicant is correct in its submission that these children , removed from their parents and made wards of the State, are now living in conditions which may be poorer than the conditions they were removed from. The scheme and object of the protective legislation is defeated by the failure to furnish the means and measures needed to give effect to the constitutional and C statutory obligations.

Both the second and third applicants confirm that the blankets provided to them are insufficient and that they are bitterly cold at night, and understandably miserable. Any adult or parent cannot but be moved by their plight. The applicants' proposed solution is the D immediate provision of sleeping bags.

The respondents have not denied that the children are suffering the effects of the inclement weather as a result of the poor quality of the building, lack of clothing and the poor condition of the dormitories. They propose other solutions. Firstly, they make the point E that it would be expensive to furnish sleeping bags, and that budgets are stretched. They provide no estimate of the costs and give no insight into the state of the province's education budget, or the existence or otherwise of any contingency fund. For all we know, as seems fairly common in certain government departments, there may even F be an underspend.

They go on to propose a temporary solution. Of the 111 pupils housed at the school at present, only 20 are in attendance because of the school holidays. They suggest therefore that the existing 150 blankets be distributed among the 20 pupils. Besides the cost, the respondents fear that the provision of sleeping bags at the school G would amount to inequality, by favouring those children above others at similar institutions. I was informed from the bar that there is only one other school of industry in Gauteng, Emmasdaal School, which houses 38 pupils. At worst, therefore, the respondents will have to provide about 150 sleeping bags at a cost, in my estimate, of H between R30 000 and R70 000, possibly less than the amount spent by the respondents in defending this litigation.

The solution proposed by the respondents in relation to bedding simply does not pass constitutional muster. What is notable about the children's rights in comparison to other socioeconomic rights, is that s 28 contains no internal

limitation subjecting them I to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation, but the absence of any internal limitation entrenches the rights as unqualified and immediate J

Insofar as polycentric issues may arise from the courts becoming A involved in budgetary or distribution matters, our Constitution recognises, particularly in relation to children's rights and the right to a fair trial, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. B The minimal-costs or budgetary-allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values.

The equality argument equally holds no water. It can never be a defence to a violation of constitutional rights to argue without C qualification that the remedy should not be granted, lest others, similarly denied their rights, should seek the same remedy, at significant cost to the State. While levelling-down may have its place when considering remedies for infringements of rights with pecuniary consequences, in cases such as the present, where the fundamental right D to dignity is central, and where the costs are foreseeable, manageable and containable, levelling-up is the appropriate and desirable remedy. To hold otherwise will lead to what Ackermann J in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (2001 (1) E BCLR 39) in para 77 [at 42B (SA) - Eds] described as 'equality with a vengeance', leading to equal graveyards. The fact is, on the respondents' own admission, the standard is below the constitutional standard, and cannot be allowed to continue.

As a society we wish to be judged by the humane and caring manner in which we treat our children. Our Constitution imposes a duty upon us F to aim for the highest standard, and not to shirk from our responsibility. By that token, the respondents' further proposal, that efforts will be undertaken to raise funds from the Red Cross and the non-governmental sector, is way off the mark and reflects its fundamental misunderstanding of its constitutional duty. The duty to provide care and social services to children removed from the family G environment rests upon the State. The government must provide appropriate facilities and meet the children's basic needs. The duty cannot be restricted to pleading, on behalf of children , with private interests to furnish it with resources.

Similarly, the problem of access control and the need for perimeter fencing is not denied by the respondents. By the very H nature of the institution, a school of industry must be secure, and access to and exit from it carefully monitored and controlled. The school occupies a large expanse of ground. There is no perimeter control at all. Children can therefore walk off the school grounds, as they often do, and any person can walk into the school grounds. There I is no security.

Correspondence and other documentary evidence reveals that attempts by the principal of the school to address this problem have been met mainly with bureaucratic silence and inertia. The failure to come up with an adequate response over a period of six years beggars belief. The applicants therefore seek an order directing the first respondent to devise plans to establish perimeter and access A control at the school and to provide information to the court regarding such plans by 31 July 2006. The first respondent, to its credit, has wisely conceded that such an order would be appropriate. Hopefully the impetus of a court order will move matters along. B

As for the lack of psychological and therapeutic services, it deserves to be kept in mind that an underlying premise of the system is that children are sent to schools of industry for the purpose of care and rehabilitation, and from the regulations it appears that the intention is to develop the children to best advantage by means of skilled interventions. Psychological and social support is a critical C ingredient of State care, absent parental support. It is common cause that there is no such resource in place at the school. There is no psychologist. There is no social worker.

I have to pause here, perhaps in a moment of exasperation, to ask: what message do we send to the children when we tell them that they are to be removed from their parents because they deserve better care, and D then neglect wholly to provide that care? We betray them, and we teach them that neither the law nor State institutions can be trusted to protect them. In the process we are in danger of relegating them to a class of outcasts, and in the final analysis we hypocritically renege on the constitutional promise of protection. E

Once again, there is correspondence on record dating back to August 2002 from the staff at the school to the first respondent, pleading for assistance, expressing distress and concern about the psychological health of the children . There is also uncontested evidence of instances where children have become disturbed, depressed, F and even suicidal. Yet they are denied access to therapy, family support and basic health care.

The prayer for relief made by the applicants in this regard is eminently reasonable. The respondents again are concerned about expense and apparently, in typical bureaucratic fashion, would rather dawdle than act. In effect, all the applicants ask for is the G deployment of the existing resources of the psychological-services unit of the Department of Education to attend to the urgent needs of the school. The expense will be minimal and far outweighed by the potential benefits.

The need for a developmental quality-assurance process is patently obvious. Matters appear to have come adrift at the school. They need to H be remedied immediately. The process is a useful, investigative, diagnostic and remedial tool which will identify organisational weaknesses and a way forward. Given the dilatory and lackadaisical approach taken so far, it is a good idea that this court retain a supervisory role to ensure progress. Violations of constitutional I rights invite innovative remedies and the present case calls for such.

The respondents have raised the question of non-joinder of the Department of Social Services and Development. I have left it to last, because I consider it to be without any merit. In their answering affidavit the respondents raised the point as being fatal to the application. Frankly, the point smacks of an attempt to pass the buck. A However, in argument Mr *Ngwane* , who appeared for the respondents, made the valid submission that joinder might assist in rendering any order regarding the developmental quality-assurance process more effective.

Mr *Budlender* , who appeared for the applicants, compellingly argued with reference to the legislative scheme that the B provincial education authority is indeed the appropriate department with functional responsibility and that no order needs to be made against the Department of Social Services and Development. Without burdening this judgment unduly, I am persuaded, with reference to the Child Care Act and the Education Affairs Act, that such submission is indeed correct. Moreover, while there may be a role for the

Department of Social Services and Development, I see no cause to make any order joining it.

In the premises I am satisfied that the applicants are entitled to the order they seek.

On 28 June, two days ago, I made an order directing the respondents to supply the sleeping bags. That order will be incorporated in the order that follows. The order to be granted is that sought in the notice of motion, including the minor amendments suggested by Mr *Budlender* during argument. To avoid any uncertainty, and in the interests of the completeness of this judgment, I will recite the order in full. The following order is accordingly issued:

1. It is declared that the practices and conditions of the JW Luckhoff High School, school of industry, violate s 28(1) paras *(b)* to *(c)* , s 28(2), s 10, s 12(1) para *(c)* and s 12(1) para *(e)* of the Constitution. F
2. The first respondent is directed immediately to supply each pupil at JW Luckhoff High School, school of industry, with a sleeping bag with a temperature rating of at least five degrees Celsius. The sleeping bags are to be handed to the children every evening at lock-down and the children must hand them back to the hostel staff in the morning before the hostel is opened.
3. The first respondent is directed immediately to devise plans for perimeter and access control at JW Luckhoff High School and must provide written information regarding such plans by 31 July 2006 to this court and the applicants.
4. The respondent is directed to make immediate arrangements for the following:

(i) That JW Luckhoff High School be subjected to a developmental quality-assurance process in accordance with the recognised policy and standards for developmental quality assurance for residential care and treatment.

(ii) The team that carries out this process must be multidisciplinary, comprising experts from both the government and A non-government sector, with expertise in child and youth care and children's rights.

(iii) The team must provide a report on their findings and recommendations, to be placed before this court on 31 July 2006.

5. The first respondent is directed to present this court and the applicants by 7 August 2006 on oath with the department's plan to implement the recommendations of the team performing the B developmental quality-assurance process, also indicating the time periods within which the recommendations will be implemented.
6. The applicants may respond on oath by 14 August 2006 to the report presented by the team carrying out the developmental C quality-assurance process referred to above, as well as the first respondent's plan. The applicants may subsequently, if they deem it necessary, set this matter down before me for a further hearing by me to consider the reports set out above and to seek any further D necessary relief.
7. In the interim, the first respondent is directed to, on an urgent basis, put in place the following support structures in order to provide properly for the psychological and therapeutic needs of the children at JW Luckhoff:

(i) An advisor to support the management team at JW Luckhoff. This individual must be an expert in child and youth care.

(ii) A process to assess each of the children in JW Luckhoff according to developmental assessment practice to determine the specific individual developmental and therapeutic needs of each child , which must be fully documented and overseen by the advisor referred to F above. And

(iii) Psychological and therapeutic support for the children in accordance with the identified means.

8. The costs of this application are to be paid by the first respondent.

Applicants' counsel instructed by *Centre for Child Law* , University of Pretoria.

Respondents' Attorneys: *State Attorney* , Pretoria. G

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