

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

CASE NO: 22507/2012

In the matter between:

BEAUVALLON SECONDARY SCHOOL

And Others

And

THE MINISTER OF EDUCATION FOR THE W/CAPE

And Others

JUDGMENT: 31 JULY 2013

LE GRANGE, J

[1] I had the benefit of reading the judgement of Bozalek J, (the main judgment). I am indebted to him for his comprehensive elucidation of the background, contentions of the parties, and the four main issues that presented itself during argument. I am in agreement with the finding that the MEC's decision to close the schools in this instance constituted administrative action, and is subject to review in terms of the full range of grounds as set out in PAJA. I am also in agreement, for the reasons as articulated by Bozalek J, that the Applicants challenge against the constitutionality of s 33 falls to be dismissed.

[2] The two issues relating to whether the process prescribed by s 33(2) of the SA Schools Act 84 of 1996 and followed by the MEC was administratively unfair, arbitrary or irrational and whether the process was procedurally fair remain for consideration. Unlike Bozalek J, who is satisfied that review grounds have been established pertaining to Beauvallon Secondary School only, the conclusion I have reached leads me to an outcome that diverges from his decision.

[3] The MEC, in order to streamline the educational system and give effect to the Constitutional ideal of Quality Education for all, is lawfully entitled to close a school despite the concomitant huge inconvenience to the affected parties. This matter, and my judgment herein, do not take issue with that, but rather concerns the process to be followed before such a decision should take place.

[4] According to the MEC, his decision to close the relevant schools has been largely motivated by the desire to improve the educational opportunities of all children in the province. In addition the objective and aim of his decision is to further enhance the quality of education at some schools, and to have learners attend schools equipped with better facilities to provide quality education. To this end, he further states that *'A decision to close a public school entails the consideration of a range of factors against the background of a carefully designed educational policy in the province, as well as the limited resources available to the WCED.'* It was pointed out by the MEC that neither he nor his department has predetermined standards or tests against which they measured the performance of any particular school, and that the ultimate decision as to which schools should be closed, involved a 'balancing of many factors'. The MEC

ultimately decided to close 20 of the schools originally earmarked for closure. Of the 20 schools closed, 4 were urban Cape Town schools and the balance all rural or farm schools. Most of these rural schools have a long history. Some dating back between 40-70 years and the majority of them, if not all, are located in economically deprived communities. At the public meetings, the record clearly speaks of widespread objections from the affected parties and strong emotions and deep unhappiness underpinning the said objections.

[5] The history of education in this Country, as alluded to by the full bench in the interdictory relief, has been one of tragic consequences affecting the lives of millions of children. Presently our educational system still faces enormous challenges. Bold efforts are required to enhance proper and quality education to all learners in order to achieve the promises and objectives enshrined in our Constitution.

[6] The importance of education and in particular basic education has repeatedly been asserted by our Higher Courts. The importance of access to schools as a significant component of the right to basic education has also been emphasised. Moreover, the right to basic education imposes a positive obligation on all those who make decisions concerning a child, in this instance the MEC and WCED, to ensure that the best interests of the child enjoy paramount importance in their decisions. In this regard see Governing Body of the Juma Musjid Primary School v Essay NO 2011(8) BCLR 761 (CC) para [43] – [44] and [67].

[7] The present dispute between the parties must therefore be viewed within this context and constitutional framework.

[8] The Applicants' case is principally anchored in s 33 (2) of the Schools Act and they raise two categories of grounds of review. The first are general and the second are school specific grounds. In respect of the first category, three grounds of review were raised. The first is the failure to provide adequate reasons, the second is the failure to grant SADTU a hearing and lastly, the arbitrariness and irrationality of the decision. Regarding the failure to grant SADTU a hearing, I am in agreement with the reasoning of Bozalek J, that this ground of review falls to be dismissed.

[9] In terms of the general grounds, I now turn to consider the first review ground. At the heart of the Applicants' complaint is that the MEC has given them insufficient reasons for closure. As a result, no meaningful engagement has taken place between the parties that can be construed as amounting to real or genuine consultation.

[10] It is perhaps convenient at this stage to refer to the process and approximate time line the WCED and the MEC adopted before coming to a final decision and the reasons provided by them to the Applicants for the intended closure of each school.

[11] The approximate chronology of the time – line in 2012, can be summarised as follows:-

23 April Education District recommends closure. An application form setting out inter alia the reasons for the suggested closure is completed by

- the IMG Adviser, the Circuit Team Manager and the District Director.
- 10 May WCED prepares a report, with a recommendation that the Minister approve the closure in principle, subject to any representations received from the SGB and any member of the public at, or prior to, the public hearing.
- 12-18 May The report is considered and the recommendation agreed to by:-
- Director: Infrastructure Planning and Management
 - Chief Director: Physical Resources
 - Chief Director: Districts
 - Deputy Director-General: Education Planning
 - Deputy Director-General: Institution Development and Co-ordination
 - Head: Education
- 25 May Minister approves the recommendation and signs letter to the SGB.
- 28 May School signs acknowledgement of receipt.
- 5 June Meeting between WCED officials and SGB. Written representations from SGB handed to WCED.
- 21 June WCED prepares a further report, with a recommendation that the Minister approve the continuation of the process to close the school.
- 21 June The report is considered and the recommendation agreed to by:
- Chief Director: Physical Resources

- Deputy Director-General: Institution Development and Co-ordination
 - Head: Education
- 3 July Minister approves the recommendation and signs letter to SGB.
- 18,19 July Notices of public hearing published.
- 7 August WCED publishes media release and proposed learner placement plan, including names and advantages of receiving schools and map.
- 25 August Public hearing. Oral representations received. Written representations received (as well as previously and subsequently).
- 31 August Reports on public hearing prepared by presiding officer and by Circuit Team Manager and District Director, with recommendations.
- 27 September Data on school considered for closure and receiving schools downloaded from CEMIS.
- 28 September WCED prepares final report, incorporating two aforesaid reports as well as record and minutes of public hearing and CEMIS data, and makes recommendations.
- 28-29 September The report is considered and the recommendation agreed to by:
- Director: Physical Resources
 - Chief Director: Physical Resources
 - Chief Director: Districts
 - Deputy Director-General: Education Planning
 - Deputy Director-General: Institution Development and Co-ordination
 - Head: Education

15-16 October Minister makes decision, and addresses letters to
SGB, principal and parents and guardians.

[12] The initial reasons advanced for the closing of the effected schools were the following:-

Beauvallon: *"Consistent underperformance in the NSC examinations as well as Grade 8 to 11", and "High dropout rate".*

Bergrivier: *"Continuous decline in learner numbers over the past 2 years, from 57 to 35 in grades 1-6", and "eradication of multi-grade teaching".*

Brackenhill: *"Dwindling learner numbers" and "learners do not benefit maximally by multi-grade teaching".*

Denneprag: *"Dwindling learner numbers" and "learners do not benefit maximally by multi-grade teaching".*

Klipheuwel: *"There is no feeder community", and "dwindling learner numbers".*

Krombeksrivier: *"The learner numbers have been dwindling and the learner growth will not increase sufficiently in the near future", and "the multi-grade teaching compromises the delivery of quality education".*

- LK Zeeman: *"The school building is under-utilised", "gradual decrease in learner numbers causing educators to be in excess", and "nearby schools have accommodation".*
- Lavisrylaan: *"The learner numbers have been dwindling and there is also a preparatory school within 500m offering the same curriculum", "enough provisioning at neighbouring schools", and "there is no principal at present and the post has been vacant for 3 years".*
- Protea: *"Diminishing learner numbers (Gr 1 to 7 = 211 learners)."*
- Redlands: *"Dwindling learner numbers"; "multi-grade teaching compromises quality education delivery" and "poor LITNUM results of the school".*
- Rietfontein: *"Learner numbers have been dwindling:", "Learners can be accommodated at neighbouring schools", and "multi-grade teaching compromises quality education delivery".*
- Rondevelei: *"the quality of the education suffers as a result of the multi-grade teaching", "learners are transported from George to the school" and "the learner numbers are dwindling".*
- Urionskraal: *"The learner numbers have been dwindling", and "there is no feeder community".*

- Valpark: *"The learner numbers have been dwindling and there is enough provisioning at neighbouring schools for all the learners", "there are other schools in the area that can accommodate the learners", and "the school is no longer viable".*
- Wansbek: *"The learner enrolment is lower than 25".*
- Warmbad-Spa: *"Dwindling learner numbers", and "multi-grade teaching is compromising quality education".*
- Welbedacht: *"Dwindling learner numbers", "unsuitable accommodation", and "multi-grade teaching that compromises quality education."*

[13] At Bosplaas, one of the schools the MEC decided not to close, the reasons advanced for closing were the following: 'Continuous decline in learner numbers over the past 2 years, from 57 to 35 in Grades 1-7 and eradication of multi-grade classes'. It was suggested that the current learners can be accommodated at two nearby primary schools and that a transport scheme be implemented. As for the educators, the recommendation was that the two permanent members should be transferred to one of the nearby primary schools and the third educator's contract not be renewed at the end of December 2012. (I will return to the decision by the MEC relating to Bosplaas when considering the question of irrationality)

[14] It is evident from the time-line stated above that the whole process contemplated in s 33 of the School's Act was completed for all the affected schools simultaneously in a period of approximately five months.

[15] I am acutely aware that in determining what constitutes procedural fairness in a given case, a Court must be slow to impose obligations upon Government which will inhibit its ability to make and implement policy effectively. However, what constitutes a fair process will ultimately depend upon the circumstances of each case. See Premier Mpumalanga v Executive Committee, Association of State Aided- Schools Eastern Transvaal 1999 (2) SA 91 (CC) at para [41].

[16] In the present instance s 33 of the Schools Act provides that the MEC must inform the SGB of his/her intention to close a school and his reasons therefor. It also provides a mechanism for the SGB and the local communities to make representations to the MEC in this regard. Common sense dictates that it cannot conceivably be expected from an MEC to advance his/her final reasons at this stage for closure of the schools since the entire process has not yet been finalised. However, the intention to permanently close a school has significant consequences not only for the affected learners and their educators, but for the local communities as well. It not only leads to the permanent closure of a particular school's doors and the transfer of its assets, but also the permanent deletion of its entire history and achievements, if any, within the local community.

[17] In my view substantive fairness justifiably dictates that, in these circumstances, the SGB and the community are entitled to adequate and proper reasons why the MEC

harbours an intention to close a school. Given the MEC's statement that neither he nor his department has predetermined standards or tests against which they measured any performance of any particular school, and that the ultimate decision as to which schools should be closed involved a 'balancing of many factors', the reasoning and motivation to close should be made clear. The failure to advance adequate and proper reasons for an intended closure of a school can certainly compromise any meaningful representation by the SGB and affected communities, thereby rendering such process inherently flawed and unfair.

[18] The issue for consideration now is whether the initial reasons advanced by the MEC in this instance were inadequate to the extent that no meaningful representation by Applicants and the communities could take place rendering the process irredeemably flawed. Put differently, did the procedure followed by the MEC fall short of what is reasonably expected in a public consultation process?

[19] The MEC has repeatedly stated that the WCED has limited resources. He also indicated that it is his responsibility to ensure that these resources are distributed and utilised in a responsible manner to provide 'an education of progressively high quality for all learners'. The MEC's vision in this regard is highly commendable, but on the papers it is evident that 'the limited resources' was one of the key drivers for initiating the s 33 of the School's Act process. Moreover, if one has regard to the process as revealed in the Rule 53 record, a more detailed departmental policy on the closure of small and non-viable schools becomes apparent. The decision to close the schools was therefore mainly premised on budgetary constraints.

[20] The initial reasons advanced for closure of schools are in my view extraordinarily brief, taking into account the complex decision the MEC needed to take. The complaint that the reasons advanced such as, *'unsuitable infrastructure; learner numbers have been dwindling; learners do not benefit maximally by multi-grade teaching'*, were too brief for any meaningful engagement with the WCED and the MEC, is in my view not without merit. The meeting with the SGB's and public clearly demonstrates that the reasons advanced for the possible closure were largely inadequate. The manner in which these proceedings were conducted further strengthened the Applicants' case. The officials of the WCED who chaired the public meetings simply allowed the affected parties at the meeting to say what they wished without making any attempt whatsoever to engage, raise and discuss the reasons for the proposed closure of the respective schools. In the interdictory relief judgment the following remarks were made by Desai J:-

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

[21] I agree with these views and regrettably cannot accept that the paucity of reasons in this instance 'did not operate as a stumbling block to the making of meaningful representations'. Procedural fairness in the present instance requires more because as it stands, the procedure followed renders the consultation process an artificial formality. The evidence of the majority of principals of the affected schools clearly demonstrated that the paucity of the initial reasons affected them prejudicially. The evidence of the principal of Bergrivier NGK Primary is a prime example regarding the difficulty they faced in making proper representation to the MEC:-

"10. Bergrivier has in 2013 a total of 74 learners, of which 23 are in Grade R. Hence between Grades 1 to 6 we have 51 learners. This is an improvement on last year, when we had 47 (excluding Grade R).

11. The Minister, in his reasons, claimed that the school had only 35 learners. This is untrue. The school has never had so few learners. I do not know where the Minister got this information. We did inform the Minister's representatives at the public hearing that the school had considerably more than 35 learners.

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15. I have been advised that in his affidavit, the Minister claims that if Bergrivier is closed and our learners shifted to Soentendal, there will be "better literacy and numeracy results, opportunities to participate in team sports, better service delivery and use of resources, and no multi-grade classes.

16. Other than the reference to multi-grade teaching, none of these reasons were ever put to myself or any other representative of the school whether verbally or in writing. I am not even sure what is meant by

"better service delivery and use of resources". I can confirm that Bergrivier has exactly the same services (including, for example, running water, closed toilets, electrical systems, feeding schemes and so on) as Soetendal. The only difference is that Soetendal has team sports, where at Bergrivier we teach sports like athletics. I contend that this is not a valid reason to close a school.

- 17. I further contend that multi-grade teaching is not by itself a reason to close a school. Many of our learners have benefitted and best perform, in the safe environment of Bergrivier. Just for example, our pass rate for Grade 6 learners from 2009 to 2011 is 100%. This is because Bergrivier – with the assistance of the Centre for Multi Grade Education associated with the Cape Peninsula University of Technology – is familiar with the techniques of multi-grade teaching and can implement them effectively.*
- 18. There are, in any event, many other multi-grade schools in the Western Cape. Why was our school chosen out of all of these schools to be closed? We have no idea. If the Minister had told us why he had chosen us, out of all of these schools, we could have made proper representations that responded to his reasons. He did not, and this has left us totally in the dark."*

[22] In the present instance the MEC had evidently more information at his disposal when he initially furnished his brief reasons for closure. A short background to the departmental policy regarding the closure of schools and other relevant policies could easily have been made available to the affected parties. This, in my view, would have enhanced and made the process more meaningful. The brief reasons provided for closure and the mechanical manner in which the process was followed manifestly impeded effective and proper representations by the Applicants and the public. In my

view, it falls short of the requirement in s 33(2) of the School's Act and is a material factor that justifies interference by this Court.

[23] In respect of the third ground of review in this category, the Applicants' complaint is that in the absence of any clearly-defined criteria that are consistently applied, the MEC's decision to close the schools was taken arbitrarily and capriciously. The crux of the complaint is that several of the schools the MEC decided to close are markedly similar to the schools he decided not to close. This resulted in a lack of rational basis for the closure decision. In these respects Mr Arendse highlighted the following in his heads of argument.

[24] Some schools were given the opportunity to put "ad hoc" measures in place in response to the WCED's concerns, while others were not. In situations in which the problem of weak leadership was raised as a concern, in respect of certain schools the option of simply replacing the principle was deemed a valid alternative response to closing the school, while not in respect of others. Although concerns were raised by many schools relating to the safety of pupils travelling to placement schools, these were dismissed by the MEC as "statistically insignificant". Additionally, it was pointed to one instance in which a school's good results and its importance to the community were enough to persuade the MEC to keep it open, while such considerations were ignored for the other schools. The MEC's citation of multi-grade teaching as a reason for closure was particularly problematic. Certain schools were kept open on the basis that the method had been successfully implemented at the school, while others were closed based on the risk of quality of education declining, despite evidence of the method's

success. Furthermore, in certain cases schools were closed despite the placement schools also using multi-grade teaching. Finally, it was pointed out that in some instances, even though it had been shown that the primary reason given for a certain school closure was false, the MEC went ahead with the decision to close.

[25] In the papers filed, the MEC gave an overview of the nature of the decision he was called upon to take. He reiterated the complexity of his decision and the many balancing factors considered before taking a final decision. He also referred to the guidelines in this regard and the possible reasons for closing a school which include *inter alia* low levels of learner enrolment, inadequate curriculum provisioning, limited school access, unsuitable schooling infrastructure, poor retention of learners, inability to attract and retain educators, and difficulties related to the location of schools on private property. He also stated that many schools are too small to provide an optimal education, according to international and local research. The MEC also stated that, in order to find the necessary resources to build new high schools, small rural schools would have to be closed down to make valuable resources available that can be utilised better elsewhere.

[26] Counsel for the MEC, Mr. Fagan, submitted that the decision that was taken was essentially a polycentric one. Moreover, the MEC's decision was rationally related to the purpose for which the power to close schools was given and that his actions bear a rational connection to the facts and information available to him. Furthermore, it was argued that it serves no point comparing one or two aspects of an applicant school with one or two aspects of a school that is remaining open as the MEC and the WCED did

not have preconceived standards or tests against which they measured the performance of any particular school. Instead, the argument continued, the MEC considered all the information pertaining to each of the 27 schools on its own terms, in light of the national and provincial policy and available resources, and made his decision on that basis and there is therefore no validity in this review ground.

[27] I have no difficulty with the submission that the decision taken by the MEC was based on policy considerations. My difficulty is whether the MEC's closure decision was rational having regard to the paucity of his initial reasons for closure, the flawed process in obtaining representation during the meetings with the affected parties and whether all the relevant facts and information was available to him. Rationality in essence means that a decision must be supported by the evidence and information before the administrator, as well as the reasons given for the decision. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. In this regard See Hoexter, Administrative Law in South Africa at 307; and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 CC at 513 para [45] where the court held the following:-

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals

and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

[28] I readily accept that the ultimate decision to close a school will always be contentious and in all likelihood will not please all the affected parties. However, the decision to close a school has significant consequences, not only for the affected learners and their educators, but for the local communities as well. Moreover, if parents are unable to send their children to the new school, they face the prospect of incarceration in terms of s 3(6) of the School's Act.

[29] In considering whether the MEC's closure decision was rational, the fear may arise that this Court will be drawn into the merits of the MEC's decision, thereby breaking down the crucial distinction between appeal and review. I am alive to the fact that action in review proceedings must not be tested against the reasonableness of the merits of the decision in the same way as in an appeal. In the circumstances of this case, however, the decision of closure will by its very nature have a drastic impact on the learners' right to education, access to school and the best interest of the child. It is therefore almost impossible to determine rationality without at the same time considering the merits of the decision taken by the MEC.

[30] In my view the approach adopted in Carephone (Pty) Ltd v Marcus NO 1999(3) SA 304 (LAC) para 36, is apposite in the present instance.

"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgements will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

[31] In this instance, taking into account the complexity and balancing factors that needed to be considered by the MEC, the entire process contemplated in s 33 of the Schools Act was completed simultaneously in respect of all the affected schools in a very short period of time. The Applicants have demonstrated in the papers filed that the schools the MEC decided to close have remarkable similarities to those he decided to keep open. One of the schools the decision favoured was Bosplaas NGK Primary School. This school, like many of the affected rural schools the MEC decided to close, currently accommodates about 40 learners with different learning capacities, including learners with foetal alcohol syndrome. In the Bosplaas matter two councillors from the local Drakenstein Municipality, Doctors ND Adams and H. von Schlicht, compiled reports voicing their opposition to the closing of the school. Dr Adams at the time was from the office of the Portfolio Holder for Social Services, Health and Community Development. The views in these reports demonstrate the benefits of multi-grade teaching and the remedial needs that can be addressed in a smaller environment where learners come from a socially, emotionally, financially poor and deprived environment.

[32] The issue of multi-grade teaching and the benefits of smaller schools are clearly issues of policy, which fall in the exclusive domain of the MEC and his department.

However, where multi-grade teaching was cited as the primary reason to close certain schools, in circumstances in which schools where the method is implemented and with an equally successful rate are given a reprieve to continue, then the complaint of arbitrariness is not without merit and cannot be ignored on the basis of policy consideration.

[33] I am not persuaded, in the present circumstances, that the Applicants' attempt to ascribe arbitrariness or capriciousness to the closure decision on the basis of certain similarities between some schools is misplaced. The difference between the MEC's initial and final reasons for closure at certain schools, and in particular Beauvallon Secondary School, in my view gives further credence to the Applicants' complaint of irrationality. I am satisfied that the Applicants have established a ground for review in this regard. In view of these findings it will be unnecessary to deal with the specific grounds of review raised by the Applicants and the discrepancies between the reasons initially given for the proposed closure by the MEC and the final reasons.

[34] I am satisfied that the relief sought by the Applicants in respect of the closure of the schools should be granted and the decision of the MEC to close the affected schools be reviewed and set aside with an appropriate costs order as alluded to by Bozalek J.

[35] In the result, I would make the following order:-

1. The First Respondent's decision made on or about 15-16 October 2012, to close the affected schools with effect from 31 December 2012 is reviewed and set aside;
2. The application for declaratory relief in relation to s 33(2) of the South African Schools Act, 81 of 1996 is dismissed;
3. The First and Second Respondents are ordered to pay the Applicants' costs (except the costs of the 35th Applicant, SADTU), jointly and severally, the one paying the other to be absolved and such costs to include the costs of two counsel.
4. In respect of the 35th Applicant, SADTU, each party to pay its own costs.

LE GRANGE, J

I agree.

DOLAMO, J