

## IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Premier, Province of Mpumalanga and another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal Case CCT 10/98**

**Decided on 2 December 1998**

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#### **Media Summary**

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*The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

During August 1995, the Member of the Executive Council responsible for education in the province of Mpumalanga (the MEC) decided to discontinue paying all bursaries to 'Model C' schools in the province of Mpumalanga with effect from July 1995. The decision was approved by the provincial executive council. The Association of Governing Bodies of State-aided Schools: Eastern Transvaal (the Association), challenged this decision in the TPD. De Klerk J set aside the MEC's decision, finding that it was inconsistent with the Association's right to procedurally fair administrative action.

In the appeal before the Constitutional Court, both parties agreed that the bursaries, which were paid to schools which mainly educated white pupils, were one of the unfair legacies of the past dispensation that needed to be eradicated. The only dispute between the parties concerned the manner in which the bursaries were terminated.

The Constitutional Court dismissed the appeal. The Court found that the governing bodies of the schools had a legitimate expectation that the government bursaries would continue to be paid during the 1995 school year subject to reasonable notice by the government of its intention to bring them to an end. Therefore, in terms of their constitutional right to fair administrative action, this meant that the government had either to give reasonable notice prior to the termination of the bursaries or else, to act in a procedurally fair manner if it wished to bring the bursaries to an end before December 1995. It is evident that the government did not give reasonable prior notice. Thus, this court had to decide what the requirements of procedural fairness required in this case.

The Court emphasised that the content of procedural fairness will depend on the circumstances of a case, and does not require that a hearing be given in all cases. In determining what constitutes procedural fairness, a court should be slow to impose obligations upon the government which will inhibit its ability to make and implement policy effectively. On the other hand, the Court held that to permit the implementation of retroactive decisions without affording parties an effective opportunity to make representations would flout the important principle of procedural fairness.

The Court found that the bursaries were discontinued retrospectively, without reasonable notice and without affording the Association and its members an opportunity to be heard or to restructure their contractual obligations in the light of the diminished income. This

was a breach of their constitutional right to procedural fairness. The MEC's decision was therefore constitutionally invalid.

In considering the consequences of an order of constitutional invalidity on the payment of bursaries, the court determined that as the bursaries were payable only until the end of 1995, and that time period had long passed, this was not an appropriate case to refer the matter back to the MEC in order for him to act in a manner which would cure the unconstitutional action. In the result the Constitutional Court simply dismissed the appeal. The effect of this is that the bursaries are to be paid until the end of 1995.

The Court noted that the matter concerned the interaction between two constitutional principles grounded in fairness: the first is the need to eradicate discrimination and to address the effects of such discrimination and the second is the constitutional duty placed on government to act in a procedurally fair manner. It emphasised that during the period of transition both these constitutional principles need to be honoured.

The judgment of the Court was delivered by O'Regan J and was concurred in by the other members of the Court.