



### KONSTITUSIONELE HOFUITSPRAAK: FEDSAS V MEC, GAUTENG op 20 MEI 2016 CONSTITUTIONAL COURT JUDGEMENT: FEDSAS VS MEC, GAUTENG on 20 MAY 2016

Die Konstitusionele Hof het op 20 Mei 2016 finaal beslis oor sekere aspekte van die *Regulasies ten opsigte van Die Toelating Van Leerders Tot Openbare Skole* in **Gauteng**, wat oorspronklik in 2001 gepubliseer is en in 2012 gewysig is.

FEDSAS het teen sommige wysigings beswaar gemaak. Die proses is deur drie vlakke houe – FEDSAS se aansoek was suksesvol in die Hoë Hof. Die LUR se appèl teen die uitspraak na die Hoogste Hof van Appèl was suksesvol. FEDSAS het daaropvolgend aansoek gedoen by die Konstitusionele Hof om teen die HHA se uitspraak te appelleer.

Uitgesluit een sub-regulasie het die Konstitusionele Hof bevind dat al die wysigings wat die LUR wou invoeg wel grondwetlik en volhoubaar is.

#### Die Konstitusionele Hof het bepaal dat:

- i. Provinsiale Wetgewing in die meeste gevalle Nasionale Wetgewing troef (veral waar die Provinsie die bevoegdheid het om self wette te maak) asook in die geval waar die Regulasiewysigings op die oog af teenstrydig met die nasionale wetgewing is. Die Konstitusionele Hof het bevind dat die wysigings nie onbestaanbaar met artikel 5 van die Suid-Afrikaanse Skolewet is nie;
- ii. Die verbod op die aanvraag van vertroulike inligting van 'n leerder vanaf sy vorige skool voordat die leerder toegelaat is tot die huidige skool is geldig. Die belang van sodanige leerder weeg swaarder as die vermeende motief om ander leerders se sekuriteit te beskerm deur die inligting vooraf te verkry;
- iii. Die doel van bostaande verbod is om te verhoed dat die leerder 'vooraf' uitgesluit kan word. Die Konstitusionele Hof was van oordeel skole moet gelyk deel in die verpligting om ook met 'probleem' leerders te deel. Daar is egter geen beletsel om die inligting na die toelating van die leerder aan te vra nie;

The Constitutional Court made their final judgement on 20 May 2016 about certain aspects of the Regulations Relating to the Admission of Learners to Public Schools in Gauteng which was originally published in 2001 and amended in 2012.

FEDSAS objected to some of the amendments. This process has been through three levels of court – FEDSAS' application was successful in the High Court. The MEC's appeal against the judgement was successful in the High Court of Appeal. FEDSAS subsequently applied to appeal the HCA's judgement in the Constitutional Court.

Excluding one sub-regulation, the Constitutional Court found that the amendments that the MEC wanted to introduce are in fact constitutional and sustainable.

#### The Constitutional Court determined that:

- i. Provincial Legislation trumps National Legislation in most cases (especially where the Province is competent to make laws) as well as when the Regulation amendments are, on face value, contradictory to the national legislation. The Constitutional Court found that the amendments are not inconsistent with article 5 of the South African School's Act;
- ii. The bar on the request for confidential learner information from a previous school before a learner is permitted into a new school, is valid. The interests of such learner outweighs the supposed motive to ensure other learners' safety by acquiring the information beforehand;
- iii. The objective of the bar on the above-mentioned is to prevent pre-determined learner exclusion. The Constitutional Court is of the opinion that all schools must share in the responsibility towards 'problem' learners. There is, however, no bar on requesting the information after the learner has been accepted into the school;

- iv. Die KH het die LUR beveel om die konsultasieproses binne 12 maande van die uitspraak te onderneem wat betref die daarstel van toevoersones, die sogenaamde “feeder zones”;
- v. Alhoewel skole geregtig is om hul enge belange te dien het hul ook ‘n samelopende verpligting om universele en nie-diskriminerende toegang tot onderwys te bevorder. ‘n Skool se toelatingsbeleid moet dus nie teenstrydig met hierdie universele oogmerke wees nie;
- vi. Die LUR moet verseker dat daar voldoende plek in skole is sodat elke kind wat in die provinsie woonagtig is, kan skoolgaan. Die Hoof van die Onderwysdepartement het die reg om die getalvermoë van die skool te bepaal en gevolglik is die Regulasies ten opsigte hiervan regtens bestaanbaar.

**Die Konstitusionele Hof het herhaal dat :**

- i. Die verhouding tussen skoolbeheerliggame en die Staat een is van samewerking, konsultasie en respek, soos bevestig deur die Konstitusionele Hof in die Welkom-uitspraak;
- ii. Die voormelde verhouding deur ‘legaliteit’ onderskryf word.

**Wat is die implikasies van hierdie uitspraak?**

- i. Eerstens moet daarop gelet word dat dit slegs op **Gauteng** van toepassing is, maar dat die onderliggende konstitusionele beginsels wel deur ander provinsies van kennis geneem sal word.
- ii. Die toelatingprosedure in alle ander provinsies moet steeds geskied volgens die bestaande regulasies in die bepaalde provinsies.
- iii. Die SAOU is van mening dat ander provinsiale onderwysdepartemente waarskynlik sal poog om toelating tot openbare skole ingevolge hierdie uitspraak toe te pas. Skoolhoofde moet daarop bedag wees en hulself vergewis van die inhoud van die toepaslike regulasies in die betrokke provinsie.
- iv. Die verwagting is dat ander provinsies hul bestaande regulasies dienooreenkomstig sal wysig.
- v. Daar word voorsien dat daar moontlik onbehoorlike druk deur oningeligte amptenare van die onderwysdepartement op skoolhoofde uitgeoefen sal ten tye van die finalisering van skoolbeleid, en veral insake die toelating van leerders.
- vi. Die SAOU beveel aan dat skoolhoofde hulself moet vergewis met die inhoud en implikasies van die Konstitusionele Hof-uitspraak en hul skoolbeheerliggame dienooreenkomstig inlig en adviseer.
- vii. Skoolhoofde word versoek om die bestuur van die aangeleentheid fyn dop te hou en indien daar enige onduidelikheid is of onbehoorlike druk op hulle geplaas word, moet die provinsiale SAOU kantoor onmiddellik in kennis gestel word.
- viii. Laastens word aanbeveel dat skoolhoofde ‘n prosedure vir kommunikasie met die skoolbeheerliggaam, in samewerking met die beheerliggaamorganisasie waaraan die skool behoort, daarstel indien daar ‘n situasie by die skool ontstaan wat dadelik hanteer moet word.

- iv. The CC ordered the MEC to initiate the consultation process within 12 months of the judgement, concerning the creation of the so-called “feeder zones”;
- v. Although schools have the right to serve their own narrower interests, they also have a concurrent responsibility to promote universal and non-discriminatory access to education. A school’s admissions policy must, therefore, not be contradictory to these universal aims;
- vi. The MEC must ensure that there is sufficient space in schools so that each child residing in the province can attend school. The Head of the Education Department has the right to determine the capacity of a school and accordingly, the Regulations related to this are legally congruent.

**The Constitutional Court reiterated that:**

- i. The relationship between school governing bodies and the State is one of co-operation, consultation and respect, as confirmed by the Constitutional Court in the Welkom judgement;
- ii. The aforementioned relationship is endorsed by ‘legality’.

**What are the implications of this judgement?**

- i. Firstly, it must be noted that it only applies to **Gauteng**, but that the underlying constitutional principles will be noted by other provinces.
- ii. The admission’s process in all other provinces must still be done according to the existing regulations in the given province.
- iii. The SAOU believes that other provincial education departments will also try to grant admission of learners to public schools in terms of the judgement handed down for Gauteng. Principals should be aware of this and must personally ascertain the content of the regulations applicable in their province.
- iv. The expectation is that other provinces will amend their regulations accordingly.
- v. It is foreseen that uninformed officials from the education department will possibly apply improper pressure on principals, when finalising the school’s policy, especially with regards to learner admissions.
- vi. The SAOU recommends that principals familiarise themselves with the content and implications of the Constitutional Court judgement and inform and advise their school governing bodies accordingly.
- vii. Principals are requested to monitor the management of the matter carefully and if there are any obscurities or improper pressure is placed upon them, they must contact their provincial SAOU office immediately.
- viii. Lastly, principals are advised to maintain clear communication with the school governing body, in conjunction with the governing body organisation to which they belong, in case a matter arises that requires immediate attention.