CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 13/98

CHRISTIAN EDUCATION SOUTH AFRICA Applicant

versus

THE MINISTER OF EDUCATION OF THE GOVERNMENT
OF THE REPUBLIC OF SOUTH AFRICA Respondent

Decided on : 14 October 1998

JUDGMENT

LANGA DP:

[1] This is an application for direct access to this Court in terms of rule 17 of the Constitutional Court Rules.[1] The applicant seeks an order in the following terms:

(i) that section 10 of the South African Schools Act, 1996 (Act 84 of 1996) is hereby declared to be unconstitutional and invalid to the extent that it is applicable to independent schools as defined in section 1 of the said Act; alternatively,

(ii) that section 10 of the South African Schools Act, 1996 (Act 84 of 1996) is hereby declared to be unconstitutional and invalid to the extent that it is

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[1] Constitutional Court Rules, 1998, as promulgated in Regulation Gazette No. 6199 of 29 May 1998.

applicable to learners at those independent schools as defined in section 1 of the said Act, whose parents or guardian have given consent in writing to such corporal punishment being administered.

[2] The applicant is a voluntary association to which 209 schools, which subscribe to its constitution, are affiliated in all the nine provinces of the Republic of South Africa. These are all "independent schools"[2] in terms of the South African Schools Act (the Act). The applicant and its constituent member schools subscribe to the belief that corporal punishment in their schools, as in the home, forms part of a system of discipline based upon the Christian faith and scriptures. Applicant contended that corporal punishment, which it referred to as "corporal correction", was part of the common culture of such schools and that such culture is protected by sections 15(1),[3] 29(3)[4] and 31(1)[5] of the

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2 Section 1 of the Act defines an "independent school" as a school registered or deemed to be registered in terms of section 46 of the Act. These were formerly known as private schools. See also section 53 of the Act.

3 Section 15(1) provides:
"Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

4 Section 29(3) provides:
"Everyone has the right to establish and maintain, at their own expense, independent educational institutions that -
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions."

5 Section 31(1) provides:
"Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -
(a) to enjoy their culture, practise their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

Constitution.[6] It was claimed that corporal correction, as it was administered at schools affiliated to the applicant, was not in conflict with the common law as it constituted moderate chastisement not amounting to an assault, and was imposed by a teacher with the consent of the learner's parent or guardian. Applicant drew a distinction between this and juvenile corporal punishment in a judicial sentence,[7] or in public schools.[8] In this respect, applicant pointed out that moderate corporal correction has been declared not to be contrary to either the United States Constitution[9] or to the European Convention on Human Rights.[10]

[3] Rule 17(2), which was adopted pursuant to the provisions of section 167(6)(a) of the Constitution,[11] requires an applicant for direct access to set out, among other things -

> ". . . the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted".

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6 Constitution of the Republic of South Africa, 1996.

7 See *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC).

8 See *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS) and *S v A Juvenile* 1990 (4) SA 151 (ZS) at 162D-G.

9 See *Ingraham et al v Wright et al* 430 US 651 (1977).

10 See *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112.

11 Section 167(6)(a) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
> (a) to bring a matter directly to the Constitutional Court".

[4] This Court has, in a number of decisions, emphasised that direct access is an extraordinary procedure and that it should be granted only in exceptional circumstances.[12] Accordingly, in directions by the President of the Court, the applicant was referred to the decision in *Bruce and Another v Fleecytex Johannesburg CC and Others*[13] and invited to lodge written argument dealing with the issue "whether this is a proper matter for the granting of direct access."

[5] In response, the applicant contended that although the Constitution recognises that there should not ordinarily be an unqualified right to approach this Court directly,[14] subject to certain specific exceptions,[15] it was in the interests of justice for this matter to be heard directly by this Court. Applicant submitted that since rule 17 is silent as to the factors to be considered by the Court in determining such interests of justice, it would be "instructive" to seek guidance from rule 18, which provides for the procedure to be

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12 *S v Zuma and Others* 1995 (2) SA 642 (CC)*;* 1995 (4) BCLR 401 (CC) at para 11; *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paras 15-17*; Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 10*; S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 29; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 at para 15; *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC) at para 6; *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 16; *Hekpoort Environmental Preservation Society and Another v Minister of Land Affairs and Others* 1998 (1) SA 349 (CC); 1997 (11) BCLR 1537 (CC) at para 6.

13 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

14 Id at para 5.

15 These are matters involving, among others, the constitutionality of bills before the national Parliament or a provincial legislature, the constitutionality of certain national or provincial legislation, the certification of the national or provincial constitutions and disputes between national or provincial organs of state (see sections 79, 80, 121, 122 and 167(4) of the 1996 Constitution).

followed in an application for leave to appeal directly to the Court from a decision of the High Court.

[6] Thus, according to the applicant, the interests of justice will ordinarily have been satisfied where a matter is one of substance and one in respect of which there are reasonable prospects of success, and where there are no factual disputes requiring further evidence.[16] It was submitted that these factors have been satisfied in the present case and that, in addition to there being good prospects of success, the issue is one of importance which has exercised the attention of other jurisdictions, in particular, the United States[17] and the European Community.[18] It was further contended that this is a matter upon which strong views are often held and which involves a large number of learners in all nine provinces, and that it concerns an important question of social policy, that is, the disciplining of children. Applicant further attached significance to the fact that the respondent does not object to the granting of direct access.

[7] There are considerable difficulties with the approach suggested by the applicant. It conflates the requirements of two rules which deal with different circumstances. Rule 17 is concerned with applications for direct access, and rule 18 with appeals directly to

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16 See rule 18(6)(a)(i)-(iii).

17 *Wright* above n 9.

18 *Campbell and Cosans* and *Costello-Roberts* above n 10.

this Court from courts other than the Supreme Court of Appeal. Although some of the requirements of the respective rules may overlap, for instance the factor concerning prospects of success, others will not necessarily coincide.

[8] The relevant considerations in an application for direct access were authoritatively stated in *Fleecytex*.[19] They are, in my view, fully applicable to this case and bear repeating. Speaking for a unanimous Court, Chaskalson P stated:

> "[7] Whilst the prospects of success are clearly relevant to applications for direct access to this Court, there are other considerations which are at least of equal importance. This Court is the highest Court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. These factors have been referred to in decisions given by this Court on applications for direct access under the interim Constitution, and are clearly relevant to the granting of direct access under the 1996 Constitution.
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> [8] It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.

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19 *Fleecytex* above n 13 at paras 7-9.

> [9] Under the 1996 Constitution, High Courts as well as the Supreme Court of Appeal have constitutional jurisdiction including the jurisdiction to make an order concerning the validity of the provisions of an Act of Parliament. Although an order made by such Courts declaring an Act of Parliament to be invalid has no force unless confirmed by this Court, the court making the order may grant a temporary interdict or other temporary relief pending the decision of this Court. The procedure contemplated by the 1996 Constitution is that such orders of constitutional invalidity will be referred to this Court for confirmation . . . . Bearing in mind the jurisdiction of the High Courts and the Supreme Court of Appeal, and the matters referred to in paragraphs [7] and [8] of this judgment, compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access and sit as a Court of first instance." [Footnotes omitted]

[9] Applicant submitted that the issue in the present matter involves a value judgment, rendering legal precedent less significant, and that the fact that the Court would "sit as a court of first and last instance without there being any possibility of appealing against the decision given",[20] therefore assumed less importance for the interests of justice. There is no merit in the submission. As stated in *Mistry v Interim National Medical and Dental Council of South Africa and Others*:[21]

> "Whilst it may not be easy 'to avoid the influence of one's personal intellectual and moral preconceptions', this Court has from its very inception stressed the fact that 'the Constitution does not mean whatever we might wish it to mean.' Cases fall to be decided on a principled basis. Each case that is decided adds to the body of South African constitutional law, and establishes principles relevant to the decision of cases which may

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20 Id at para 8.

21 1998 (7) BCLR 880 (CC).

arise in the future."[22] [Footnotes omitted]

Whilst the procedure might accelerate the finalisation of a particular matter, the exclusion of the other courts from the exercise of a jurisdiction given to them by the Constitution would clearly not be in the general interests of justice and the development of our jurisprudence.

[10] Applicant contended that the matter is one of urgency by reason of the uncertainty regarding the constitutionality of section 10 in two respects, and that it was desirable in the public interest that legal certainty should be achieved quickly. Firstly, the uncertainty relates to teachers who would be exposed to the risk of conducting themselves on the assumption that section 10 is unconstitutional and therefore invalid. Secondly, it was contended in the founding affidavit lodged on behalf of the applicant that if the matter were to be brought before a High Court, the decision of such court would only be binding in its area of jurisdiction, and not nationally, and that this would result in uncertainty about the true legal position amongst the applicant's constituent members elsewhere in the Republic.

[11] In my view, the position is no different to that which this Court dealt with in *Fleecytex*,[23] which was an application for direct access in a matter involving the

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22 Id at para 49.

23 *Fleecytex* above n 13.

constitutionality of section 150(3) of the Insolvency Act,[24] where the following was said:

> "It was pointed out in *Transvaal Agricultural Union* that the mere fact that the validity of a provision of an Act of Parliament is in issue does not in itself justify an application for direct access. There must in addition be sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government, to justify such a procedure."[25] [Footnotes omitted].

The remarks are apposite in this case. The importance of establishing the constitutional validity of section 10 is no greater than that which ordinarily exists with regard to provisions of other Acts of Parliament. I do not agree that there is any greater urgency arising from the fact that some teachers may ignore the prohibition imposed by section 10 and thus expose themselves to prosecution. If they choose to take the risk, knowing full well that the provision's constitutionality is under challenge, then there should be no complaint if appropriate consequences follow their deliberate conduct. It is moreover clear that the prohibition in section 10 is concerned only with corporal punishment which is imposed within a school context. It has not been contended, and indeed it could not have been, that the provision makes such severe inroads into the disciplining of children as to render the matter so urgent that ordinary procedures would not suffice. The Act has been in force since 1 January 1997, a full eighteen months before these proceedings were launched. It was not suggested that discipline at schools has crumbled in the meantime or was threatening to do so. I am satisfied that no case for urgency has been established.

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24 Act 24 of 1936.

25 *Fleecytex* above n 13 at para 19.

[12] If direct access were to be given in this matter, this Court would be sitting as a court of first and final instance, without there being the possibility of an appeal from its decision. It would not have had the benefit of the views of the High Court which has jurisdiction.[26] The additional costs that would be incurred and the delay that would result if normal procedures are followed, are no doubt relevant considerations. I am however not persuaded that, taken by themselves, or cumulatively with the other factors mentioned by the applicant, they weigh sufficiently in this case to justify a departure from the normal procedures.

[13] The relief claimed by the applicant is within the jurisdiction of the High Court and no good ground has been advanced to justify an extraordinary procedure.[27] I am satisfied that it has not been established that this is a proper case for the granting of direct access.

The Order:

[14] The application for direct access is refused.

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26 Section 169 of the Constitution.

27 *Fleecytex* above n 13 at para 19.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Langa DP.

For the Applicant: Mr FG Richings SC and Mr DM Achtzehn instructed by Bentley Warne Attorneys.