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**CASE: CCT46/95**

**THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**DISPUTE OVER THE CONSTITUTIONALITY OF THE NATIONAL EDUCATION  
POLICY BILL OF 1995**

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**SUBMISSIONS ON BEHALF OF THE DEMOCRATIC PARTY**

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*Ram Jawaya Kapur v State of Punjab* AIR 1955 SC at 550 ..... 3

## **Introduction**

- 1 The Democratic Party confines its attack to those provisions of the bill which seem to oblige provincial governments to implement and assist in the implementation of the national education policy of the minister of education. They are clauses 3(3), 8(6) and (7), 9(1)(c) and 10(1)(c). We will refer to them as “the disputed provisions”.
- 2 It is not clear that the disputed provisions oblige provincial governments to implement and assist in the implementation of the minister’s national education policy. We will submit that they do. If this court should however hold that they do not and that provincial governments are at liberty to ignore the minister’s national education policy, then the Democratic Party’s constitutional objections would fall away.
- 3 The basis of the objections to the disputed provisions, on the assumption that they oblige provincial governments to implement and assist in the implementation of the minister’s national education policy, is that they violate the legislative and executive autonomy of provincial governments.

## **The purpose of the bill**

- 4 The purpose of the bill is obscure. It is said in clause 2 that its objectives are to provide for the determination and implementation of a national education policy. But, in his

capacity as the member of cabinet responsible for the portfolio of education, the minister is entitled and obliged under the executive authority vested in him in terms of the constitution,<sup>1</sup> to determine and implement a national education policy. His executive authority “comprises both the determination of policy as well as carrying it into execution.”<sup>2</sup>

5 Clauses 3,4 and 5 of the bill prescribe the principles and scope of the national education policy and the manner in which it is to be determined. Their effect may in other words be, not to endow the minister with powers he did not have before, but to restrict his executive authority by circumscribing his power to determine and implement a national education policy.

6 One of the purposes of the bill seems to be to enforce provincial compliance with the minister’s national education policy. The disputed provisions seem to oblige provincial governments to implement and assist in the implementation of his policy as follows:

6.1 Clause 3(3) provides that, whenever the minister “wishes a particular national policy to prevail over the whole or a part of any provincial law on education”, he shall make his wish known by informing the provincial political heads of education and incorporating a declaration to that effect in his policy instrument.

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<sup>1</sup> sections 75, 82(3) and 92

<sup>2</sup> Ram Jawaya Kapur v State of Punjab AIR 1955 SC at 550

- 6.2 Clauses 8(6) and (7) provide that, when a departmental report indicates that the standards of education provision, delivery and performance in a province, do not comply with such a policy which the minister wishes to prevail over provincial law, the minister shall inform the responsible provincial political head of education and “require the submission within 90 days, of a plan to remedy the situation.” Such a plan then has to be prepared by the responsible provincial education department in consultation with the national department. The minister thereafter tables the plan together with his comments in parliament.
- 6.3 Although they do not say so, we submit that the disputed clauses imply firstly that the “plan to remedy the situation” has to be one, or may have to be one, which provides for changes in provincial legislation and executive policy to ensure compliance with the minister’s national education policy and secondly, that the provincial government is then obliged to implement the plan. These clauses in other words create a mechanism by which the minister can enforce provincial legislative and executive compliance with his national education policy.
- 6.4 Clause 9 creates a Council of Education Ministers comprising the minister, his deputy and all the provincial political heads of education. It obliges the council to “promote a national education policy which takes full account of the policies of the government”.<sup>3</sup> The provinces are accordingly also in this way, through

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<sup>3</sup>

clause 9(4)(a)

their political heads of education, compelled to participate in the promotion of the minister's national education policy.

6.5 Clause 10 creates a Heads of Education Departments Committee comprising the national Director-General of Education and his deputies and all the heads of the provincial education departments. This committee is also obliged to "facilitate the development of a national education system in accordance with the objectives and principles provided for in this Act".<sup>4</sup> In this way provincial governments through their heads of department, are also required to facilitate the development of education in accordance with the objectives and principles laid down by the national parliament.

6.6 Under these provisions, provincial governments may be compelled in other words to implement and assist in the implementation of the minister's national education policy. We submit that the compulsion to do so violates the legislative and executive autonomy they enjoy under the constitution.

### **Provincial legislative autonomy**

7 Section 125(3) of the constitution vests every provincial legislature with "the power to make laws for the province in accordance with this constitution".

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<sup>4</sup> clause 10(2)(a)

8 In terms of section 126(1) and (2A), both parliament and the provincial legislatures enjoy legislative competence in respect of all matters within the functional areas specified in schedule 6, including “education at all levels, excluding university and technicon education”. Parliament and the provincial legislatures in other words enjoy concurrent legislative competence in respect of education. They are coordinate in the sense that neither is subordinate to the other. The provinces derive their legislative competence from the constitution, and not from parliament. The latter cannot take away, alter or control their legislative authority.

9 If there is an inconsistency between an act of parliament and a provincial law within the area of their shared legislative competence, the conflict is resolved by section 126(3). It provides that the provincial law prevails unless one or more of the specified grounds of justification for national legislation are present. This provision has the following implications:

- 9.1 The provincial law will prevail where there is no conflicting act of parliament.
- 9.2 The provincial law will prevail over a conflicting act of parliament if none of the specified grounds of justification for national legislation is present.
- 9.3 If there is a conflict and one or more of those grounds are present, a provincial law may be overridden by an act of parliament. It is a far cry however from the notion in the bill, that mere executive policy could prevail over conflicting

provincial legislation.

9.4 The section does not empower the national government, whether through its legislative or executive branches, to direct or control the exercise of provincial legislative authority.

10 In other words, the national government may exercise its legislative and executive powers as it thinks fit but may not exercise legislative or executive control over the way in which the provincial governments exercise their legislative powers. The provinces enjoy legislative autonomy within their sphere of legislative competence. The national government may not direct or control the manner in which the provinces exercise their legislative authority. Provincial laws may be overridden only by act of parliament and then only if justified by one or more of the circumstances described in section 126(3). They are not also subject to the whims of national executive policy.

#### **Provincial executive autonomy**

11 In terms of section 144(2) of the constitution, every province has executive authority over,

- matters in respect of which it has exercised legislative competence;
- matters assigned to it by or under section 235 or any law, and

- matters delegated to it by or under any law.

A province may accordingly enjoy executive authority over all matters in respect of education.

- 12 In terms of section 144(1), the executive authority of a province vests in its premier who exercises and performs his powers and functions subject to and in accordance with the constitution. Section 147(2) requires him generally to exercise and perform all his powers and functions in consultation with the executive council of the province.
- 13 Section 153 makes it clear that the executive council is accountable only to the premier and the legislature of the province. Every MEC "shall be accountable individually both to the premier and the provincial legislature of the province for the administration of the portfolio allocated to him or her"<sup>5</sup> and is obliged to "administer his or her portfolio in accordance with the policy determined by the executive council".<sup>6</sup> In other words, any legislation or executive decree which renders an MEC accountable to the minister and the national government or requires of him or her to administer his or her portfolio in accordance with national legislation or executive policy rather than provincial executive council policy, would be unconstitutional.
- 14 The provinces accordingly also enjoy executive autonomy. The national government

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<sup>5</sup> section 153(1)

<sup>6</sup> section 153(2), (3) and (4)

may not by legislation or executive decree direct or control the exercise of provincial executive authority.

### **The importance of provincial autonomy**

15 Provincial autonomy within their spheres of legislative and executive competence is an important principle of our constitution. This is apparent, not only from the explicit provisions referred to above, but also from the constitutional principles enshrined in schedule 4 and more particularly those in paragraph XVI to XXII. The latter principle is particularly significant. It provides:

“The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.”

### **The bill violates provincial autonomy**

16 **Clauses 3(3) and 8(6) and (7)**

The mechanism created by these provisions, is designed to ensure provincial compliance with the minister's national education policy, if needs be by forcing changes to provincial legislation and executive policy. It violates provincial legislative and executive autonomy by permitting the minister to force them to exercise their legislative and executive functions in compliance with his policy.

It postulates a deviation of provincial standards of education provision, delivery or performance, from that required under the minister's policy. If the deviation is one required by a law of the province concerned, then the "plan to remedy the situation" that the minister is entitled to demand, can only be one for the amendment of the offending law. If on the other hand, the deviation is not one required by law but the product of a policy difference, the "plan to remedy the situation" will be one demanding a change of provincial policy to conform with national policy. In either event, the province would be compelled to exercise its legislative or executive authority, not in the way that it thinks best, but in the way that the minister's policy demands. That clearly constitutes a violation of their legislative and executive autonomy.

17 **Clause 9(1)(c)**

This provision read with clauses 9(1) and (4) in effect requires of every provincial political head of education to participate in the promotion of "a national education policy which takes full account of the policies of the government", whether or not it accords with provincial policy. This clause accordingly also violates the executive autonomy of the provinces under the constitution.

18 **Clause 10(1)(c)**

This provision read with clauses 10(1) and (a) in effect compels the heads of provincial education departments to participate in facilitating "the development of a national

education system in accordance with the objectives and principles provided for in this act", whether or not it is the policy of the provincial government concerned to do so. It accordingly also violates the executive autonomy of the provinces.

### Conclusion

19 The Democratic Party asks for an order,

19.1 declaring that clauses 3(3), 8(6) and (7), 9(1)(c) and 10(1)(c) of the bill are inconsistent with the constitution and

19.2 directing the minister of education to pay its cost including the costs consequent upon the employment of three counsel.

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Wim Trengove SC

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Dennis Davis

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David Unterhalter

Chambers, Johannesburg  
24 January 1996

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