



## **JUDGEMENT**

### **DR. S. TWUM J.A.**

[1] This is an appeal from the judgment of M.B.C. Maphalala J given on 19<sup>th</sup> January 2010. The suit which came before him was a sequel to an earlier one mounted by the appellant herein and one Cebisamadoda Nxumalo against the same respondents in this appeal. That was Suit No. 335/09. It was heard by Agyemang J. These two High Court actions dealt with apparently the same issue; i.e. on its true and proper interpretation, what was the meaning of section 29 (6) of the Constitution. Different conclusions were arrived at by these two courts. I will discuss these anon! No appeal was filed against the judgment delivered by Agyemang J on 16<sup>th</sup> March 2009.

[2] After the appellant filed its appeal it filed a Notice of Motion in this Court praying for an order that the appeal be heard on an urgent basis. That application was heard by Ramodibedi, CJ who gave a ruling thereon on 17<sup>th</sup> March 2010. He dismissed it primarily on the ground that the appellant had not established any case of real urgency for this Court to be convened to deal with it before the commencement of this session of the Court.

[3] Even though this appeal is against the judgment of M.B.C. Maphalala J, reverberations from the judgment of Agyemang, J loom large in the background. The reason is that that judgment was a declaratory one. In it the learned Judge held that “every Swazi child of whatever grade attending primary school is entitled to education free of charge, at no cost and not requiring any contribution from any such child regarding tuition, supply of textbooks, and all inputs that ensure access to education and that the said right accrued

during the course of the period of three years following the coming into force of the Constitution.” She further held “that the third respondent being the Government of Swaziland has the constitutional obligation to provide education free of charge, at no cost, to every child.”

[4] Unfortunately being a declaratory judgment the appellant found that it had in effect, won only a pyrrhic victory. The judgment could not be enforced by one of the methods of execution particularised either in Rule 45 or Rule 46 of the High Court Rules.

[5] The appellant’s woes were exacerbated by a statement attributed to the first respondent soon after the judgment by Agyemang J, to the effect “that primary education will only be made available starting this year 2010 and only for the first and second grades.”

[6] These matters goaded the appellant to file the second High Court suit which was heard by M.B.C. Maphalala J. This was to “enforce the Agyemang J’s judgment and to force compliance with the Constitution.”

[7] A careful reading of the judgment by Agyemang J shows clearly that in course of time certain glosses have been put on it which make the actual declarations she made seemingly overboard. That judgment was strictly based on the interpretation of section 29 (6) of the Constitution, informed by decided cases and the writings of learned authors and academics.

[8] It was in the suit before M.B.C. Maphalala J that the appellant described the Swazi child’s right to free primary education as a “positive right”. It was also then argued by the appellant that when it says that right is absolute, it means that it is not subject to the availability or otherwise, of resources. It further contended that in

terms of the Constitution, the respondents were enjoined to make free primary education immediately available. This was because the Constitution provides the time-frame and the respondents have no right and are not entitled to ignore or suspend the constitutional requirements as they choose. Indeed the appellant submitted that the respondents' attitude constituted a breach of the Constitution. It was also submitted that the claim by the respondents that it lacked resources and infrastructure was not a good reason not to obey the Constitution. The appellant supported this stand by saying that the resources were available and that what was lacking was "political will, and mismanagement of public funds." Finally, the appellant took the respondents to task because the respondents claimed that they misunderstood the constitutional provision because "they were ignorant of the meaning and content of free primary education."

[9] In reply the respondents stated that they had "no doubt whatsoever that without sufficient funds, teachers, classrooms learning materials, etc, free education to every Swazi child so entitled is but a pie in the sky." They said the right of every child to free primary education was not self-executing. They conceded that besides the challenges of mobilising the necessary financial infrastructure and human resources they had "apparently apprehended their responsibility as covering one school grade per year until all the primary school grades are covered in a progressive and incremental approach." They admitted that Agyemang J's judgment of 16<sup>th</sup> March 2009 had since pointed out to them that they were wrong in their understanding of section 29 (6). However, they said the mistake had been made and reversing the planning thus far achieved in order to correct the error could not be done that easily.

[10] The respondents referred the court to summaries of the education policy of Imbokodvo and attached extracts as "R1". They

also referred to an Executive Summary in a World Bank Report – entitled: “Swaziland, Education, Training Skills and Development for Shared Growth and Competitiveness (May 2009)” and suggested that from the said World Bank Report, “just how much funds to be allocated to free primary education was a nightmare. It was pointed out that the Report itself noted that “Swaziland will require substantial external and national resources to finance reforms proposed in this report.” Finally, it said that the Government Estimates for the Financial Year 2008-2009 showed that “Education and Training has the biggest subsectoral budgetary allocation at 20.8%, above all other budgeted items”. Respondents estimated the cost of implementing the free primary education programme for grades 1 and 2 next year at about E175 million. At least, they claimed, that E650 million is allocated to primary education and that the cost of rolling out the programme for all seven primary school grades at once could be around E600 million. This amount, the respondents claimed they did not have and could not guarantee that they would be in a position to raise it over the short period between then and the beginning of next year.

[11] After a very careful review of the relevant evidence provided by either side in their affidavits and the authorities cited, the learned judge came to the conclusion that he was not satisfied that the orders being sought by the appellant could be legally and practically enforced. He held that the appellant has not established that the respondents had the resources and they were refusing to use them to implement the provisions of section 29 (6) as read with section 60 (8) of the Constitution. The judge pointed out though that section 60 (8) was not justiciable. Consequently he held that the focus should be on section 29 (6) of the Constitution as well as the judgment delivered by Agyemang, J. I entirely agree with the learned judge when he said that in this Kingdom, the application of the ratio in the South African case of **Minister of Health v.**

**Treatment Action Campaign** 2002 (5) S.A. 721 (CC) at 755, when by the Government was ordered to comply with the right to health, enshrined in that country's Constitution, and that "the funds must be produced or procured by the Respondents where-so-ever and how-so-ever to fulfil their constitutional obligation", would be a recipe for chaos and anarchy.

[12] The learned Judge was of the opinion that the Respondents' implementation programme of how they intended to implement the Free Primary Education was the right approach. He endorsed the implementation programme which was to be "staggered in accordance with this court's judgment of 16<sup>th</sup> March 2009". He said the steps taken by the respondents were in the circumstances reasonable and satisfactory in view of the limited resources at the disposal of the respondents. In the circumstance, he dismissed the application and ordered that each party should bear its won costs.

[13] The appellant was aggrieved by the said judgment and appealed against it. The following grounds were noted:

(1) The court *a quo* erred in law and in fact in holding

that the enforcement of the right to free primary education and its implementation in public schools, is subject to the availability of resources and that it should be implemented through a staggered approach in as much as this is inconsistent with the provisions of section 29 (6) of the Constitution.

1. The Court *a quo* erred in law and in fact in holding that the onus rests on the appellant to prove that resources are available to implement free primary education in public schools, and that the appellant failed to discharge the onus in as much as the breach of the Constitution cannot be justified.

2. The Court *a quo* erred in fact and in law in holding that the right to free education is socio-economic in nature and therefore enforceable subject to the availability of resources in as much as the wording of section 29 (6) is devoid of any ambiguity.
3. The Court *a quo* erred in law and in fact in holding that the respondents do not have sufficient resources at their disposal to comply with the constitutional requirement to make education in public schools available within three years of the commencement and coming into effect of the Constitution in terms of section 29 (6) of the Constitution in as much as the implementation of the right is mandatory.
4. The Court *a quo* erred in law and in fact in holding that since the advent of the Constitution no new schools and additional classrooms have been constructed and that no new teachers have been trained in as much as new structures and additional teachers are required for children already in the school system.

The parties' respective Heads of Argument rehearsed and refined the arguments each had advanced in the court *a quo*. The appellant was unyielding in its view that the provisions of section 29 (6) of the Constitution were clear. There was no ambiguity whatsoever and consequently the respondents had no excuse not to comply with the section. The respondents would not be outdone and were equally insistent that without staggering the programme the Government would have no resources to implement the fee free primary school education.

[14] During the hearing of the appeal Advocate A.F. Kades SC, for the appellant suggested that here was an interim order made by the court *a quo* to the effect that pending the hearing of the applicant's motion the respondents were forbidden to expel primary school children from school. Subsequently, he produced a draft order which he handed over to the court and submitted that it would be in the circumstances an appropriate order. His general submission was

that pupils now attending primary school should not be expelled therefrom. He submitted that that position was supported by the Constitution as well as by the judgment of Agyemang J. He said that according to the Government's own programme of staggering the implementation of the fee free primary school system, only grades 1 and 2 would be covered by 2010. Consequently, on that assessment, all grades would not be covered until the year 2015. Herein lies his basis for the submission that until then, all primary school children actually in school but whose parents could not pay their school fees should not be sent home.

[15] In his reply, the Attorney disagreed that there was any need for that order. He said, currently about 100, 000 pupils were covered by the scheme. He said there was no evidence that all the pupils in the primary school had indigent parents. He ended his response by saying that the programme already covered orphans and vulnerable children.

[16] It was part of the respondents' case that the provision in section 29 (6) of the Constitution savours more of a socio - economic right than a classical fundamental right. This distinction was regarded by the respondents as critical. There is some merit in that and needs a brief resume.

[17] The earliest fundamental rights and freedoms were innate rights. They existed at birth. Examples are the right to speak, think, move about, associate with others worship or not worship as he/she pleases. These were provided by nature as necessary conditions for human existence. These could easily be made enforceable.

[18] As society became more egalitarian other rights were recognised. These were not directly enforceable but nonetheless sufficiently fundamental to the governance of a country. These are today known as Directive Principles of State Policy. The state was



directed to bring about a social order where justice, social, political and economic considerations shall inform all the institutions of national life. It was recognised that fundamental rights and freedoms were for the most part, rights against government interference in man's activities. These could be secured by the passing of simple legislation to forbid such interference. It was also generally accepted that economic and social rights can be achieved only progressively according to the available resources of the state and the policies adopted by the government. Obviously then, an economic basis should be created before economic and social rights can be made positive and enforceable rights. For example, the right to work depends on employment potential or opportunities created or facilitated, at the very least, by the creation of an enabling environment. Another such right is the right to health which depends upon the establishment of health facilities, training of medical and para-medical staff and health education. These require resources and good planning.

[19] I wholeheartedly endorse this distinction. Nonetheless, my general approach to this case, in part, derives from a different provenance. There is a well established science principle known as the principle of conservation of matter which overshadows all human activity; i.e. nobody can create anything out of nothing. At its basic, we all eat food to create energy for our sustenance. We burn petrol in our cars to release the energy in hydro-carbons necessary to make our car move. We burn coal to generate heat in our homes, cook and even for the creation of steam for locomotive trains. Dr. Albert Einstein and his teams of scientists eventually discovered how to split atoms, release the energy harnessed in them to create an atom bomb. Now we have nuclear bombs.

[20] When this principle is applied to nations the principle is the same but the effect is different. Nations may harness water energy

by building dams to create hydro-electric power, (electricity). Richer nations build nuclear power stations because they can afford the immense financial outlay needed. Even solar energy is not cheap to install. There is indeed a popular saying abroad that there is no such thing as a free lunch. It is a veritable manifestation of the principle of conservation of matter.

[21] In my considered opinion, the problem posed in this appeal comes down to the availability of resources, not a fastidious insistence on the true and proper interpretation of, section 29(6) of the Swazi Constitution. I hasten to add, I am not saying that the interpretation is irrelevant. What I am saying is that after the interpretation and the evaluation of two High Court judgments, if the problem still persists, some other solution must be adopted. This is because, the appellant's position is supported by the interpretation of section 29 (6) stated in the judgment of Agyemang J as well as by a host of decided cases, mostly South African. The respondents are equally supported by a substantial number of respected well-researched academic papers, reports of multinational bodies, such as the World Bank and decided authorities. It is this impasse that leads me inexorably to the conclusion that this is one dispute which cannot be resolved solely by further resort to legal syllogism and the persuasiveness of judgments and academic writing.

[22] It may well be that the characterization of the rights of the Swazi child to fee free primary education as a fundamental right was over-ambitious. Be that as it may, in my view, the answer does not necessarily lie in an amendment to the Constitution. Rather, the Government may have to rehash its programmes, policies and priorities so that the hopes and aspirations of the people of Swaziland as captured in the Constitution may be realised.

[23] It must be noted, however, that a very fruitful lesson must be learnt by all the people of this Kingdom. Nations can fail or become bankrupt. The situation in Greece, a member of the European Union, is a clear example. The law governing their pension scheme was seriously flawed leading to insufficiency of pension funds when people started to retire at age 50. Now, they require what has been euphemistically called “a bail out” (a loan) of some Euros 600 billion. The other lesson is that many developing countries depend to some extent on foreign donations to support their projects. Many such countries, including Ghana, for some years cannot balance their budgets unless they receive some sort of subvention from the “Paris Club” of nations.

[24] In conclusion, I remind myself that society is organic in the sense that it grows gradually changing according to circumstances. My view is that the judgment of Agyemang J was an eye opener to all government or state institutions and government functionaries that the Constitution will forever remain the beacon that will throw the searchlight on their official actions. It is also my view that the judgment of M.B.C. Maphalala J was pragmatic and appropriate which will eventually secure the enforcement of section 29(6). Those two judgments in their respective ways, helped to chart a new path towards constitutional adjudication in this country.

[25] In the event, I will dismiss the appeal. There will be no order as to costs.

Delivered in open court on 28<sup>th</sup> May 2010.

**DR. SETH TWUM**

**JUSTICE OF APPEAL**

**I agree: M.M. RAMODIBEDI**

**CHIEF JUSTICE**

**I agree: S.A. MOORE**

**JUSTICE OF APPEAL**