

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CIVIL CASE NO. 2168/09**

**IN THE MATTER BETWEEN:**

**SWAZILAND NATIONAL EX-MINERS  
Workers Association**

**APPLICANT**

**VS**

**THE MINISTER OF EDUCATION  
RESPONDENT**

**1<sup>ST</sup>**

**The Prime Minister**

**2<sup>nd</sup>**

**Respondent**

**Swaziland Government**

**3<sup>rd</sup>**

**Respondent**

**The Attorney General**

**4<sup>th</sup>**

**Respondent**

**CORAM**

**MBC MAPHALALA, J**

**For Applicant**

**Mr. T.R. Maseko**

**For 1<sup>st</sup> Respondent**

**Mr. M. Dlamini**

**JUDGMENT  
19 January 2010**

[1] In January 2009, Applicant instituted an urgent application before this Court under case No. 355/09 calling upon the Respondents to show cause on a date to be fixed by this Court, why:

(a) They should not be ordered to make Free Primary Education in public schools for every Swazi child in terms of Section 29 (6) as read with Section 60 (8) of the Constitution of Swaziland Act No. 001 of 2005.

(b) They should not be ordered to make available their Education Policy relating to the implementation of their Constitutional obligation in terms of Section 29 (6) as read with Section 60 (8) of the Constitution No. 001 of 2005 in order to ascertain compliance therewith.

[2] The orders that were being sought were mandatory in nature. However, on the 16<sup>th</sup> March 2009, the Court issued the following declaratory Orders:

2.1. That every Swazi child of whatever grade attending Primary School is entitled to education free of charge, at no costs 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.

2.2. That the Government of Swaziland has the Constitutional obligation to provide education free of charge<sup>^</sup> at no cost to every child so entitled.

[3] The Court declined to order the Swaziland Government to produce its Policy on education for scrutiny.

[4] IT IS WORTH MENTIONING AT THE ONSET THAT THE DECLARATORY ORDERS ISSUED BY THE COURT MERELY DECLARED THE RIGHT TO FREE PRIMARY EDUCATION FOR ALL SWAZI CHILDREN OF WHATEVER GRADE ATTENDING PUBLIC SCHOOL; IT FURTHER DECLARED THAT THE GOVERNMENT OF SWAZILAND HAS A CONSTITUTIONAL OBLIGATION TO PROVIDE EDUCATION FREE OF CHARGE AT NO COST TO EVERY SWAZI CHILD SO ENTITLED.

[5] However, it is trite law that declaratory orders merely pronounce upon the existence or non-existence of a legal state of affairs. It is not executory and does not compel anybody to do anything. In the present case, these orders did not compel Respondents to implement

the Free Primary Education. No time frame was fixed when the Respondents would implement the "declared right"; it was left to the Respondents to decide when implementation would commence.

[6] IN JUNE 2009, THE APPLICANT INSTITUTED THE PRESENT PROCEEDINGS SEEKING A MANDATORY ORDER AS THE APPROPRIATE RELIEF FOR THE ALLEGED VIOLATION OF SECTION 29 (6) AS READ WITH SECTION 60 (8) OF THE CONSTITUTION OF SWAZILAND ACT No. 001 OF 2005.

[7] The relevant prayer which was pursued during the hearing was prayer 2 which provides that:

"DIRECTING AND COMPELLING THE RESPONDENTS TO MAKE FREE PRIMARY EDUCATION AVAILABLE THIS YEAR TO EVERY SWAZI CHILD IN TERMS OF THE CONSTITUTIONAL OBLIGATION PLACED ON THEM BY SECTION 29 (6) AS READ WITH SECTION 60 (8) AND SECTION 2 OF THE CONSTITUTION AND IN TERMS OF THE JUDGMENT OF THIS COURT DELIVERED ON 16<sup>TH</sup> MARCH 2009.

[8] The Respondents are opposing the application. In their Opposing Affidavit, the Respondents have raised two Points in *Limine*. First, that the matter is "*res judicata*" having been adjudicated by this court on 16<sup>th</sup> March 2009 as between the parties, for the same thing and on the same ground. Second, that the present application in so far as it purports to enforce the order

made under Civil Case No. 335/09 is misconceived on the basis that a Court Order of this nature is enforced by Contempt Proceedings and not by an application against the same party, seeking the same relief on the same ground.

[9] However, during the hearing of this matter, the learned Counsel for the Respondents told the Court that they were no longer pursuing the "Points In *Limine*" but the merits of the case.

[10] I agree with the learned Counsel for the applicant and it is Common Cause that this Court has jurisdiction to hear and adjudicate over this matter in terms of Section 14 (2) as read together with Section 151 (2) of the Constitution of Swaziland Act No. 001 of 2005.

[11] SECTION 14 (2) PROVIDES THAT:

"The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and the judiciary and other organs or agencies of government and, where applicable to them, by all national and legal persons in Swaziland, and shall be enforceable by the courts as provided for by this Constitution."

[12] SECTION 151 (2) PROVIDES THAT:

"Without derogating from the generality of subsection (1) the High Court has the jurisdiction:

- (a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and,
- (b) To hear and determine any matter of a Constitutional nature.

[13] SECTION 2 OF THE CONSTITUTION PROVIDES THAT "THE KING AND INGWENYAMA AND ALL THE CITIZENS OF SWAZILAND HAVE THE RIGHT AND DUTY AT ALL TIMES TO UPHOLD AND DEFEND THIS CONSTITUTION."

[14] The issue before Court is whether a Mandatory order could be issued compelling the Respondents to provide Free Primary Education NOW to all Swazi children attending Primary school in all grades at no costs to the children. In deciding this matter, the nature of "the right" under scrutiny is decisive.

[15] THIS RIGHT IS IN SECTION 29 (6) OF THE CONSTITUTION, AND IT PROVIDES AS FOLLOWS:

"Every Swazi Child shall within three years of the commencement of this Constitution have the right to Free

Education in public schools at least up to the end of primary school beginning with the first grade."

[16] Applicant prays that this Section be read together with Section 60 (8) of the Constitution. The latter Section provides:

"WITHOUT COMPROMISING QUALITY THE STATE SHALL PROMOTE FREE AND COMPULSORY BASIC EDUCATION FOR ALL...."

[17] Section 60 (8) is not justiciable since it is part of the Directive Principles of State Policy. Section 56 (1) of the Constitution provides that:

"THE DIRECTIVE PRINCIPLES OF STATE POLICY CONTAINED IN THIS CHAPTER SHALL GUIDE ALL ORGANS AND AGENCIES OF THE STATE, CITIZENS, ORGANIZATIONS AND OTHER BODIES AND PERSONS IN APPLYING OR INTERPRETING THIS CONSTITUTION OR ANY OTHER LAW AND IN TAKING AND IMPLEMENTING ANY POLICY DECISIONS, FOR THE ESTABLISHMENT OF A JUST, FREE, AND DEMOCRATIC SOCIETY."

[18] Section 56 (2) provides that:

"The Prime Minister shall report to Parliament at least once a year all the steps taken to ensure the realization of the directive principles contained in this Chapter."

[19] And Section 56 (3) provides that:

"The Provisions of Sections 57 to 63 are not enforceable in any court or tribunal."

[20] IN THE CIRCUMSTANCES, THE FOCUS SHOULD BE ON SECTION 29 (6) WHICH IS JUSTICIABLE AS WELL AS THE JUDGMENT ISSUED BY THIS COURT ON THE 16<sup>TH</sup> MARCH 2009.

[21] It is applicant's contention that Free Primary Education should be provided now because the three year period has come and gone, and that a failure to do so amounts to a violation of the Constitution.

[22] APPLICANT FURTHER CONTENDS THAT THE LACK OF RESOURCES AND INFRASTRUCTURE IS NOT A LEGALLY JUSTIFIED REASON FOR NOT IMPLEMENTING THE RIGHT ENSHRINED IN SECTION 29 (6) OF THE CONSTITUTION, THE REASON BEING THAT THE "RIGHT" IS ABSOLUTE.

[23] HOWEVER, APPLICANT CONCEDES THAT THE RESPONDENTS FAILED TO MAKE A BUDGETARY ALLOCATION TOWARDS FREE PRIMARY EDUCATION BECAUSE THEY MISCONSTRUED THEIR CONSTITUTIONAL OBLIGATION; AND ACCORDING TO HIM THIS CANNOT BE A GOOD EXCUSE.

[24] Applicant quotes with approval a portion on the 16<sup>th</sup> March 2009 judgment at page 26 where it is stated:

"That it is the responsibility not to be abdicated by the Third Respondent for whatever reason or excuse including lack of funds, shortage of teachers et al; it is clear from the use of the word "shall" which in the context in which it has been used in Section 29 (6) as an accruing right, appears to be imperative,



compelling compliance, and not merely a directly or permissive expression."

[25] IN HIS REPLYING AFFIDAVIT, THE APPLICANT CONCEDES AT PARAGRAPH 12 THAT THE RIGHT TO FREE PRIMARY EDUCATION IS NOT SELF-EXECUTING AND THAT IT IS POSITIVE IN NATURE REQUIRING GOVERNMENT ACTION; HOWEVER APPLICANT DENIES THAT THE RIGHT IS SUBJECT TO THE AVAILABILITY OF RESOURCES AS DID THE COURT ON THE 16<sup>TH</sup> MARCH 2009.

[26] However, in his Replying Affidavit at paragraph 25, applicant states:

"IT IS NOT FOR THE APPLICANT TO POINT OUT WHERE THE MONEY SHOULD COME FROM, THAT IS A CONSTITUTIONAL DUTY PLACED ON THE RESPONDENTS. AS CUSTODIANS OF PUBLIC FUNDS AND RESOURCES, IT IS INCUMBENT UPON THE RESPONDENTS TO SET ASIDE MONEY FOR FREE EDUCATION."

26.1. (1) The above statements, in my view, does recognize the importance of resources in realizing the right.

[27] ACCORDING TO THE APPLICANT, THE COURT SHOULD ENFORCE THE RIGHT AS REQUIRED BY SECTIONS 14 (2) AS READ WITH SECTION 151 (2) OF THE CONSTITUTION WHETHER OR NOT

RESOURCES ARE AVAILABLE TO IMPLEMENT FREE PRIMARY EDUCATION.

[28] Furthermore, it is not denied by the applicant as did this Court in its judgment on the 16<sup>th</sup> March 2009 that Free Primary Education encompasses not only school fees but a host of other ancillary costs including the Construction of more schools, additional classrooms, provision of books and stationery, employment of additional teachers and construction of teachers' houses, provision of furniture, teaching aids and equipment.

[29] ACCORDING TO THE APPLICANT AND THE 16<sup>TH</sup> MARCH COURT ORDER, A FAILURE BY THE RESPONDENTS TO IMPLEMENT FREE PRIMARY EDUCATION IN ALL GRADES AT THE SAME TIME WOULD AMOUNT TO AN ABDICATION OF THEIR CONSTITUTIONAL OBLIGATION.

[30] At paragraph 23 of his Replying Affidavit, the applicant concedes that the Respondents are ill-prepared to implement Free Primary Education and attributes this to "their casual approach to and implementing and misconstruction of Section 29 (6) as well as a lack of Political will".

[31] THE ISSUE OF "PREPAREDNESS OF THE RESPONDENTS TO IMPLEMENT FREE PRIMARY EDUCATION AS WELL AS THE AVAILABILITY OF RESOURCES CANNOT BE IGNORED BY THIS COURT SINCE THESE FACTORS HAVE A BEARING ON THE ENFORCEMENT OF THE RIGHT TO FREE PRIMARY EDUCATION.

[32] As previously stated, on the 16<sup>th</sup> March 2009, this Court merely made a declaratory order which was not executory and which did not compel the Respondents to implement the right to Free Primary Education. The order was not mandatory.

[33] The Respondents produced a draft Hand Book for Free Primary Education in November 2008 which sets out how the Respondents intended to comply with their Constitutional Obligations in terms of Section 29 (6). The draft is annexed as "RHA1" to the Respondents' Supplementary Heads of Argument.

[34] THIS DRAFT HANDBOOK WAS REVISED IN JULY 2009 AND RE-ISSUED AS THE FREE PRIMARY EDUCATION IMPLEMENTATION PLAN

AND PROGRESS REPORT BEING ANNEXURE "RHA2".

[35] Both reports advocated a staggered approach to Free Primary Education beginning with grades 1 and 2 in 2010. The productions of the Reports indicate a concerted effort on the part of the Respondents to comply with the declaratory nature of the judgment of the court issued on the 16<sup>th</sup> March 2009. That judgment left to the discretion of the Respondents to produce a programme on how they intended to comply with their constitutional obligation in terms of Section 29 (6) of the Constitution.

[36] BEING DECLARATORY IN NATURE, THE JUDGMENT COULD NOT THEN DICTATE THE FORMAT OF THE PROGRAMME OR THE MANNER OF IMPLEMENTATION; THAT WAS LEFT TO THE DISCRETION OF THE RESPONDENTS.

[37] It is true that the Court rejected the staggered implementation of the right; however such a rejection is contrary and contradictory to the judgment being declaratory and not mandatory. In the final analysis, the judgment being declaratory in nature cannot prescribe the manner of implementation of Free Primary Education.

[38] IT SHOULD BE BORNE IN MIND HEREIN THAT THE RESPONDENTS DID COMPLY WITH THE JUDGMENT BY FORMULATING THE PROGRAMME OF IMPLEMENTATION AFTER THE COURT HAD DECLARED THAT THEY HAD THE CONSTITUTIONAL OBLIGATION TO PROVIDE FREE PRIMARY EDUCATION. AFTER THE JUDGMENT, THEY DID NOT FOLD THEIR ARMS BUT TOOK POSITIVE STEPS TO COMPLY WITH THEIR OBLIGATION EVEN THOUGH THE JUDGMENT HAD NOT ORDERED AND/OR EVEN DIRECTED OR COMPELLED THEM TO DO ANYTHING SAVE FOR THE DECLARATION.

[39] If the judgment had been mandatory, which it was not, then it would be open for the court to prescribe the programme and manner of implementation.

[40] I HAVE BEEN REFERRED TO THE SOUTH AFRICAN CASE OF **MINISTER OF HEALTH V. TREATMENT ACTION CAMPAIGN** 2002 (5) S.A. 721 AT 755 WHERE IN A CASE TO FORCE THE GOVERNMENT TO COMPLY WITH THE RIGHT TO HEALTH ENSHRINED IN THE CONSTITUTION THE COURT RULED THAT "THE FUNDS MUST BE PRODUCED OR PROCURED BY THE RESPONDENTS WHERE-SO-EVER AND HOW-SO-EVER TO FULFILL THEIR CONSTITUTIONAL OBLIGATION.

[41] SUCH AN ORDER CAN ONLY BE MADE WHERE THE COURT IS SATISFIED AND IT HAS BEEN PROVED ON A BALANCE OF PROBABILITIES THAT THE FUNDS DO EXIST. IN COUNTRIES WHERE THE ECONOMY IS GOOD AND NOT SHAKY LIKE OURS, IT IS UNDERSTANDABLE TO ISSUE SUCH AN ORDER.

[42] In the case of **Mansell v. Mansell 1953 (3) S.A. 716** at **720-1**, it was held that the court will not make orders which cannot legally and practically be enforced since they do not have any practical efficacy.

[43] I associate myself fully with that judgment. In deciding the present application, I have to be convinced that the orders made can legally and practically be enforceable. An order which does not pass this test can only lead to anarchy, chaos and confusion; such a state of affairs cannot be allowed to happen.

[44] IT IS COMMON CAUSE THAT THE RIGHT TO FREE PRIMARY EDUCATION AS ENSHRINED IN THE CONSTITUTION AND DECLARED BY THIS COURT MEANS MORE THAN REMOVING PAYMENT OF SCHOOL FEES BY SWAZI CHILDREN. IN ADDITION, THERE HAS TO BE IN PLACE ON THE GROUND ENOUGH SCHOOLS AND CLASSROOMS, SUFFICIENT TEACHERS AND TEACHERS' HOUSES, ENOUGH BOOKS AND STATIONARY FOR EVERY CHILD AS WELL AS PROVISION OF

FURNITURE, EQUIPMENT AND TEACHING MATERIALS.

[45] As applicant has correctly conceded that the right to Free Primary Education is not self-executory and that it is positive in nature requiring government action in order to realize the right. The only way in which government could make the right realizable or effectual is by putting in place a programme of action with a budget allocation; all government programmes are dependent on the availability of resources for their successful implementation.

[46] THE AVAILABILITY OF THE RIGHT IN THE CONSTITUTION IS ONE THING AND ITS IMPLEMENTATION IS ANOTHER THING. FOR A COURT TO DECLARE THAT THE RIGHT EXIST IS ONE THING, THE ENFORCEMENT OF THE RIGHT IS ANOTHER THING WHICH DEPENDS ULTIMATELY ON THE AVAILABILITY OF RESOURCES; HENCE, THE COURT HAS TO BE CAREFUL NOT TO BE POPULIST AND PLAY TO THE GALLERY AND IGNORE CLOSING THE GAP BETWEEN THEORY AND PRACTICE.

[47] Whether the right in issue is absolute or qualified is irrelevant; what is decisive is the availability of resources, the preparedness of the State to enforce the right with the requisite structures in place as well as the availability of a programme of action put in place by the

state to realize the right; It is my considered view that the Respondents have shown a political will to comply with the constitutional provisions.

[48] TO HOLD THE GOVERNMENT ACCOUNTABLE FOR RENEGING AND ABDICATING ITS CONSTITUTIONAL OBLIGATION TO PROVIDE FREE PRIMARY EDUCATION, APPLICANT HAS TO PROVE ON A BALANCE OF PROBABILITIES THAT THE RESOURCES FOR DOING SO ARE AVAILABLE AT THE DISPOSAL OF THE GOVERNMENT BUT THE GOVERNMENT DOES NOT WANT TO UTILIZE THEM. APPLICANT HAS NOT PROVED THAT RESOURCES ARE INDEED AVAILABLE.

[49] The statement attributed to the judgment of the 16<sup>th</sup> March 2009 that "the responsibility to provide Free Primary Education is not to be abdicated by the Respondents for whatever reason or excuse including lack of funds and shortage of teachers et al "was taken out of context on the ground that the Right to Free Primary Education is Socio-economic in nature. It can only be realized when resources are available at the disposal of the government.

[50] IT IS EVIDENT TO ME THAT THE RESPONDENTS ARE NOT READY TO IMPLEMENT FREE PRIMARY EDUCATION IN ALL GRADES NOW BECAUSE OF THE FOLLOWING FACTORS:



First, it has not been proved that after the advent of the constitution in 2005, new schools and Additional Classrooms have been built to accommodate the influx of Swazi children intending to benefit from the right to Free Primary Education;

SECOND, NO EVIDENCE HAS BEEN ADVANCED TO PROVE THAT ADDITIONAL NEW TEACHERS HAVE BEEN EMPLOYED AS WELL AS TEACHERS' HOUSES BUILT TO ACCOMMODATE THEM;

Third, no evidence has been adduced to prove that the Respondents have in their possession and custody sufficient books, stationery, furniture, equipment and other teaching material to cater for all the children;

FOURTH, NO EVIDENCE HAS BEEN ADDUCED TO PROVE THAT THE RESPONDENTS HAVE BUDGED FOR THIS PROGRAMME.

[51] It is clear to me that the implementation of the Right to Free Primary Education cannot be finalized overnight. A lot of funds are needed to make this right realizable. The political will to implement the Right on its own without the availability of resources is not enough.

[52] THE RESPONDENTS HAVE PUT IN PLACE THE IMPLEMENTATION PLAN OF 2009 WHICH IS A DETAILED PROGRAMME OF HOW THEY INTEND TO COMPLY WITH THEIR CONSTITUTIONAL OBLIGATION IN TERMS OF SECTION 26 (9) OF THE CONSTITUTION; ACCORDING TO THAT PROGRAMME, THE IMPLEMENTATION OF FREE PRIMARY EDUCATION WILL BE STAGGERED IN ACCORDANCE WITH THE DECLARATORY NATURE OF THIS COURT'S JUDGMENT OF THE 16<sup>TH</sup> MARCH 2009. THE STEPS TAKEN BY THE RESPONDENTS ARE IN THE CIRCUMSTANCES REASONABLE AND SATISFACTORY IN VIEW OF THE LIMITED RESOURCES AT THE DISPOSAL OF THE RESPONDENTS.

[53] In the circumstances, I make the following order:

52.1 THE APPLICATION IS HEREBY DISMISSED.

52.2 Each party to bear his own costs.

**M.B.C. MAPHALALA**  
**JUDGE OF THE HIGH COURT OF SWAZILAND**

