# STUDENT PREGNANCY

***Head of Department, Department of Education, Free State Province v. Welkom High School & Another; Head of Department, Department of Education, Free State Province v. Harmony High School & Another***
**CCT 103/12 [2013] ZACC 25**
**South Africa, Constitutional Court**

## COURT HOLDING

The Head of Department ("HOD" or "applicant") did not have the power to formulate policies for a particular school and, consequently, could not instruct school principals not to follow school policies, even if the HOD was of the view that the policies were unconstitutional.

The pregnancy policies *prima facie* violated constitutional principles. However, the Court would not make a declaration on the constitutionality of the pregnancy policies since it was not properly brought before the Court, and also because the Court respected the scheme of powers under the School Act.

### Summary of Facts

This was an application before the Constitutional Court of South Africa by the Head of Department of the Department of Education of the Free State Province for leave to appeal against a judgment of the Supreme Court of Appeal. The matter concerned two high schools, Welkom High School and Harmony High School in the Free State (collectively, "respondents"), and their respective school governing bodies ("SGBs"). Both schools had adopted policies that provided for automatic exclusion of any student from school if it is found that she is pregnant. When in two separate instances the schools applied the policies to pregnant students, the applicant intervened in the decisions of the SGBs and ordered the schools and their governing bodies to ignore the pregnancy policy and reinstate the students. The respondents took the matter to the High Court which ruled that the HOD had no authority to tell the principals to go against an adopted policy of the SGBs, nor could the HOD interfere in the decisions of the schools implementing these policies. The Supreme Court upheld this decision.

### Issues:

1. Whether the HOD had the power to instruct principals of public schools to ignore policies adopted by the SGBs.

2. Whether and to what extent the Court could determine the constitutionality of the policies on student pregnancy.

### Court's Analysis

The majority judgment, written by Justice Sisi Khampepe, reviewed the School Act (the " Act"), which is the primary legislation governing the relationships between the Minister of Education,

Members of Provincial Executive Councils responsible for education ("MECs"), HODs, principals and SGBs. According to Justice Khampepe, the Act gave the SGB powers akin to a legislative authority within the school to formulate policies, while the principal was responsible for implementation of these policies through the supervisory authority of the HOD. The Act does not grant the HOD any powers of policy making, so the HOD was not empowered to formulate binding pregnancy policies for a particular school.

Justice Khampepe held that an SGB may not adopt and enforce a policy that undermines the fundamental rights of pregnant learners, including the rights to education and freedom from unfair discrimination. However, the rule of law obliges an organ of state to use the correct legal process, which in turn requires the HOD to use clear internal remedies where available, rather than resort to self-help. Therefore, the HOD was obligated to ensure that constitutional rights were upheld, but the HOD could not interfere in an arbitrary manner and had to follow the mechanisms provided for by the Act.

Additionally, Justice Khampepe discussed whether the Court should delve into the issue of constitutionality of the pregnancy policies even if this was not properly before the Court. The Court was of the opinion that the pregnancy policies *prima facie* violated constitutional rights. Under section 172(1)(b) of the Constitution, the Court has the power to order any just and equitable remedy "that would place substance above mere form by identifying the actual underlying dispute between the parties" even if the claims were not raised by the parties. The Court invoked these discretionary powers in order to make a just and equitable determination of the matter. The Court therefore elaborated on its opinion about the constitutionality of the pregnancy policies.

The Court held that, first, the policies unjustifiably discriminated on the basis of pregnancy and sex. Second, the policies limited the right to education by requiring that the student repeat an entire year. Third, the policies *prima facie* violated students' rights to human dignity, privacy, and bodily and psychological integrity by requiring them to report their own pregnancy or that of others. Finally, the policies violated the best interests of the child because they failed to take into account the health and other needs of the pregnant student.

The majority judgment concluded that the Court would not make a declaration on the constitutional validity of the pregnancy policies since this was not put properly before the Court, and also because the Court respected the scheme of powers in the School Act. Instead, the Court ordered the SGBs to review their pregnancy policies.

The minority and dissenting judgment written by Justice Raymond Zondo opined that if the pregnancy policies were *prima facie* inconsistent with the Constitution, "then it logically follows that the principal was obliged not to implement that policy and the HOD was not only entitled but obliged to give the instruction that he did to ensure that the principal did not act unlawfully and unconstitutionally."[28] According to the minority judgment, the principle of legality obliged the HOD to ensure that the principal was not implementing policies that were unconstitutional. Further, the Court ought not to have avoided determining the matter of constitutional validity of the pregnancy principles, since this matter had been raised in both lower courts by the HOD.

## Conclusion

Leave to appeal was granted. The appeal against the order of the Supreme Court of Appeal was dismissed. The SGBs were ordered to review their pregnancy policies in the light of the judgment, and to do so in collaboration with the HOD.

## Significance

This decision follows several others such as *Student Representative Council of Molepolole College of Education v. Attorney General* [1995] (3) LRC 447), where the Botswana Court of Appeal held that a regulation that required a student to report pregnancy to the authorities, and would be obliged to leave the College or be expelled if this was a second occurrence, was unconstitutional as it was discriminatory on the basis of sex. Similarly, in *Mfolo and Others v. Minister of Education, Bophuthatswana* (South Africa, Supreme Court, Bophuthatswana and General Division), [1992] (3) LRC 181, and in *Lloyd Chaduka and Morgenster College v. Enita Mandizvidza* (Zimbabwe, Supreme Court), Judgment No. SC 114/2001; Civil Appeal No. 298/2000, the two Courts held that regulations that required pregnant students to withdraw from college were unconstitutional.

Pregnancy in colleges and schools has been perceived as the problem of the pregnant student, that she has mistimed it, or in the case of unmarried girls and women, that it was morally wrong to be pregnant before marriage. As a result, policies on student pregnancy have been designed to "discourage" others from becoming pregnant and have been rather punitive on pregnant students and young mothers. This also perpetuates the stigma against pregnant and young mothers. This case and the ones referred to above encourage states to change the attitude of duty-bearers and align policies with fundamental rights and freedoms.

An important consideration that the Court brought up is that the pregnancy policies failed to take into account the best interests of the child (the pregnant student or young mother below the age of 18), including her health, arrangements she has made to take care of the newborn, and her wishes generally. This line of thought has far reaching implications. For instance, what would it mean to have policies that would support arrangements about taking care of a learner's new born or baby, including breastfeeding? What wishes of the pregnant student or young mother should be taken into account? This may involve measures that require allocation or reallocation of resources beyond simply allowing pregnant students and young mothers to remain in the school system, and addressing the pattern of bias and discrimination that has operated against pregnant students and young mothers in schools.