IN THE SOUTH GAUTENG HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 29847/2014

In the matter between:

ORGANISASIE VIR GODSDIENSTE-ONDERRIG EN DEMOKRASIE	Applicant
and	
LAERSKOOL RANDHART	First Respondent
LAERSKOOL BAANBREKER	Second Respondent
LAERSKOOL GARSFONTEIN	Third Respondent
HOËRSKOOL LINDEN	Fourth Respondent
HOËRSKOOL OUDTSHOORN	Fifth Respondent
LANGENHOVEN GIMNASIUM	Sixth Respondent
MINISTER OF BASIC EDUCATION	Seventh Respondent/Third Party
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Eighth Respondent

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FIRST TO SIXTH RESPONDENTS'

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INTRODUCTION

1. The Constitution recognises the importance of religion and its centrality in the lives of South Africans.

2. It not only guarantees the right to freedom of religion, belief, conscience, thought and opinion,[1] but also expressly makes provision for the collective and public conducting of religious observances in state and state-aided institutions.[2]

3. The Constitution is therefore unlike the constitution of the United States of America that demands a separation of church and state.

4. It is also unlike the Canadian Charter of Rights and Freedoms or the European Convention on Human Rights, the other two human rights instruments whose interpretative jurisprudence is referred to and relied upon by the applicant in its heads of argument.

5. Following the approach taken in decisions in the United States, Canada and Europe, the applicant encourages the court to adopt an interpretation of section 15(1) and section 15(2) of the Constitution that effectively empties these provisions of meaningful content within the public school context.

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[1] Section 15(1) of the Constitution.

[2] Section 15(2) of the Constitution, mirrored in section 7 of the South African Schools Act, 84 of 1996 (as amended) (the Schools Act). Public schools are state-aided institutions.

6. The respondent schools contend that section 15(1) and 15(2) should be given effect to in a manner consistent with the jurisprudence of the Constitutional Court on the subjects of diversity, religious identity and freedom of religion in South African society.

7. The Constitution demands of schools as organs of state,[3] learners, educators, parents and school governing bodies ("SGBs") to take up the challenge of not only respecting the right to religious freedom, but protecting, promoting and fulfilling the right to religious freedom in public schools.

8. At the centre of the application are South Africa's children.

9. School attendance is compulsory for all children in South Africa up to the age of 15.[4]

10. Only a minute portion of learners in schools in South Africa can afford to attend private schools.

11. The vast majority attend one of the 24 060 public schools in South Africa.[5]

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[3] See *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA) para 18-21 and 25

[4] Section 3(1) of the Schools Act

[5] AA para 8 Vol 1 p 156

12. The declaratory relief sought in the notice of motion, framed in the broadest and most comprehensive terms possible, is aimed at all public schools.

13. Even if the relief sought were somehow tailored in order that the order sounded against the six respondent schools only, (something which the applicant makes no attempt to do), the interpretation of the Constitution together with the doctrine of *stare decisis* will cause any judgment given to have an impact on all public schools.

14. The application will potentially decide the fate of the right to freedom of religion not only for learners in the respondent schools but in all schools.

15. The undisputed evidence before the court is that the majority of learners in South African public schools come from broken homes and rely on religious coping as the only effective form of coping available to them.[6]

16. The stakes could not be higher.

17. The applicant is a radical atheist organisation whose leader (its main deponent) deliberately offends individuals who hold religious beliefs. The applicant denigrates and mocks religion and those who are religious on its Facebook page.[7]

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[6] AA para 424-430 Vol 5 p 281-283

[7] AA para 864-866 Vol 4 p 395-397, para 871-889 Vol 4 p 396 – Vol 5 p 404

18. The focus of the applicant's case is the minority non-religious learner who the applicant claims, without any proper evidence, to suffer unfair discrimination and coercion - in conflict with the requirement contained in section 15(2) of the Constitution that religious observances be free and voluntary - where the religious activities and observances conducted by the schools are those of the majority.

19. In the name of the right to freedom of religion, the applicant seeks to remove all religion and religious observances from all public schools.

20. The relief sought is designed to sterilise South African public schools of religion and create an environment that suits only learners who are atheist or religiously indifferent.

21. The applicant also tries to create the impression that the focus of the respondent schools is exclusively the religious majority, heedless of the effect on the religiously different or non-religious minority.[8]

22. It is not.

23. The SGBs of the respondent schools have considered the right to religious freedom of all learners at such schools, including both the religious majority and the religiously different or non-religious minority.

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[8] AA para 53 Vol 1 p 172

24. The respondent schools' SGBs have exercised their rule-making power granted to them in terms of section 7 South African Schools Act 84 of 1996 ("the Schools Act") to practically and meaningfully give effect to sections 15(1) and 15(2) of the Constitution. The SGBs did so within the particular context of the school and wider school community in light of the religious demographic of the school, in each instance expressly prohibiting discrimination on religious grounds and providing for means by which learners and members of staff can do so freely and voluntarily.[9]

25. The Constitution and the best interests of South Africa's children demand a dispensation where the fundamentally important religious needs of learners are met in a system where care and concern is shown to all.

26. The respondent schools and the nine other which had made affidavits[10] contend that theirs is such a system, crafted in each instance to suit each school's particular needs and circumstances.

27. The respondent schools recognise that, notwithstanding the identity of the applicant and what its agenda might be, the application raises important questions concerning the scope and meaning of section 15(1) and 15(2) of the Constitution in the context of public schools.

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[9] This is, insofar as the Gauteng schools are concerned, consonant with section 22(3)(a) of the Gauteng School Education Act 6 of 1995, and for the Western Cape see section 44 of the Western Cape Provincial School Education Act 12 of 1997

[10] Referred to in AA para19 Vol 3 p158

28. It is in the best interests of South Africa's children that the application be decided and certainty given.

29. Before proceeding, we clarify that:

29.1 the right contained in section 15 of the Constitution will hereafter be referred to as the right to freedom of religion; and

29.2 the right to freedom of religion, as used in these heads of argument, refers to both religious and non-religious belief, thought and opinion.

THE RELIEF SOUGHT

30. The applicant seeks two forms of far-reaching relief.

31. First, the applicant seeks declaratory relief that it is unconstitutional for "*any* *public school*"[11] to:

31.1 promote adherence to only one or predominantly one religion during its religious school activities;

31.2 hold out that it promotes the interests of any religion;

31.3 align or associate itself with any religion;

[11] NM para 1 Vol 1 p 2

31.4 require any learner, either directly or indirectly, to disclose their religious or non-religious belief;

31.5 maintain any record of the religious or non-religious beliefs of learners;

31.6 segregate or permit the segregation of learners on the basis of religious adherence; or

31.7 "*commit or permit any*" of the religious observances and related conduct sought to be interdicted (in a non-existent prayer 2)[12] in the case of the respondent schools.[13]

32. Second, the applicant seeks interdictory relief prohibiting the respondent schools from being in any way associated with religion, conducting religious observances, providing religious instruction, and having voluntary religious learner associations, in addition to a long list of related conduct.[14]

33. The declaratory relief aimed at "*any public school*" incorporates every iteration of conduct sought to be prohibited at the respondent schools by interdict. This

[12] We shall assume, unless otherwise advised by the aplicant, that the reference should be to prayer 1.3

[13] NM para 1-1.2.7 Vol 1 p 2-3

[14] NM para 1.3-1.3.6.5.2 Vol 1 p 3-14

casts the relief sought in the notice of motion in the broadest and most comprehensive terms possible.[15]

34. The far-reaching nature of the relief sought is apparent from the analysis that follows.

THE IMPUGNED CONDUCT

Collective religious observances

35. The applicant seeks a ban on all collective religious observances at a school in assembly, the gathering of a school in the quad and any other formal school functions.

36. In this regard, the applicant seeks to interdict and declare unlawful:

36.1 the "*structuring of assemblies"* at public schools *"with <u>any religious part</u> thereto*";[16]

36.2 the opening of assemblies with prayer and the reading of sacred texts;[17]

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[15] NM para 1.2.7 Vol 1 p 3. See also FA para 13-13.2 Vol 1 p 24-25: "*The purpose of this aplication is to obtain declaratory relief that the aspects of religious observance and religious instruction forming the subject matter of this affidavit are in breach of [the] national policy on religion and education ... and unconstitutional*".

[16] NM para 1.3.2.10 Vol 1 p 5 (emphasis added)

[17] NM para 1.3.2.6 Vol 1 p 5 and NM para 1.3.5.5.1 Vol 1 p 12

36.3 the reading of sacred texts, prayer and praise and worship in the quad or assembly;[18] and

36.4 the conducting of religious observances such as a prayer and reading from a sacred text at formal school functions such as an awards evening.[19]

Prayer

37. The applicant seeks to remove all collective forms of school prayer from public schools. It even seeks to limit or discourage individual prayer.

38. In this regard, the applicant seeks to prohibit:

38.1 the opening of the school day with reading of scripture and prayer;[20]

38.2 the opening of the school day with scripture and prayer in register or other school class;[21]

38.3 prayer in class at the end of the school day;[22]

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[18] NM para 1.3.4.3.2, para 1.3.4.3.1 and para 1.3.6.4.1 Vol 1 p 9-10 and 13

[19] NM para 1.3.5.5.4 Vol 1 p 12 and para 1.3.6.4.4 Vol 1 p 13

[20] NM para 1.3.2.9 Vol 1 p 5, para 1.3.4.3.1 Vol 1 p 9

[21] NM para 1.3.3.13 Vol 1 p 8, para 1.3.5.5.2 Vol 1 p 12, and para 1.3.6.4.2 Vol 1 p 13

[22] NM para 1.3.4.3.3 Vol 1 p 10

38.4 prayer prior to exams;[23]

38.5 prayer by sports teams prior to or after sports matches;[24] and

38.6 designating a room solely for the purpose of praying.[25]

Hymns and religious singing

39. In addition to the removal of prayer, the applicant also seeks to prohibit the singing of hymns or other religious songs at public schools.[26]

40. The applicant at the same time seeks an order prohibiting and declaring unconstitutional for a public school to refer to "*any deity*" in its school song.[27]

Religious instruction

41. The applicant also seeks a ban on religious instruction in public schools, notwithstanding that this may be provided by the school on a non-promotional and voluntary basis.[28]

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23 NM para 1.3.4.12 Vol 1 p 11

24 NM para 1.3.2.8 Vol 1 p 5, para 1.3.5.4.1 Vol 1 p 11, para 1.3.5.5.5 Vol 1 p 12, and para 1.3.6.4.5 Vol 1 p 14

25 NM para 1.3.4.6 Vol 1 p 10

26 NM para 1.3.2.11 Vol 1 p 5 and para 1.3.2.3 Vol 1 p 4

27 NM para 1.3.3.2 Vol 1 p 6

28 NM para 1.3.1.6 Vol 1 p 4, para 1.3.2.15 Vol 1 p 6 and para 1.3.3.6 Vol 1 p 7

Religious symbolism and decorations

42. The applicant seeks that all religious symbolism, decorations and sacred texts be removed from the walls of schools.[29]

43. The applicant also seeks orders prohibiting and declaring unlawful any Christian symbolism contained in a school badge or coat of arms.[30]

Religious values

44. According to the applicant, a public school can also not have a vision, mission or character that is religious or linked to a religion.

45. The applicant seeks to prohibit and declare unconstitutional:

45.1 that a public school have a vision, mission or purpose associated with the Christian philosophy;[31]

45.2 that a public school align or associate itself with any religion;[32]

45.3 that a public school publicise or advertise that the Christian faith forms part of the vision, mission and ethos of the school;[33] and

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29 NM para 1.3.4.11 Vol 1 p 11, para 1.3.6.5 Vol 1 p 14

30 NM para 1.3.1.4-1.3.1.5 Vol 1 p 3-4 and para 1.3.3.1 Vol 1 p 6

31 NM para 1.3.1.1 Vol 12 p 3, para 1.3.2.1 Vol 1 p 4, para 1.3.2.8 Vol 1 p 5, para 1.3.3.1 Vol 1 p 6, para 1.3.3.4 Vol 1 p 6-7, para 1.3.4.1 Vol 1 p 9 and para 1.3.6.1.1 Vol 1 p 12

32 NM para 1.2.3 Vol 1 p 2

45.4 that a public school endorses the school as one that has a Christian character.[34]

Voluntary religious associations

46. The applicant applies for orders prohibiting and declaring unconstitutional the formation of voluntary religious learner associations, such as the Afrikaans VCSV.[35]

47. In the eyes of the applicant, the following is unlawful:

47.1 having a VCSV focussed on the Christian religion as part of the weekly routine;[36]

47.2 having VCSV as a cultural activity;[37]

47.3 having assemblies of VCSV groups during break time at school;[38] and

47.4 advertising or creating interest in VCSV groups at the school.[39]

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33 NM para 1.3.1.2 Vol 1 p 3, para 1.3.2.8 Vol 1 p 5, para 1.3.4.10 Vol 1 p 10-11, para 1.3.5.1 Vol 1 p 11 and para 1.3.6.1.2 Vol 1 p 13

34 NM para 1.3.1.3 Vol 1 p 3 and para 1.3.4.2 Vol 1 p 9

35 United Christian Students Association

36 NM para 1.3.2.2 Vol 1 p 4

37 NM para 1.3.5.2 Vol 1 p 11

38 NM para 1.3.2.14 Vol 1 p 6

39 NM para 1.3.4.4-1.3.4.5 Vol 1 p 10 and para 1.3.6.2 Vol 1 p 13

48. The applicant goes so far here as to even indicate a wish to stifle the sharing of Christian religious beliefs between learners.[40]

Alleged coercive practices and other abuses

49. The applicant also applies for orders prohibiting and declaring unconstitutional certain perceived coercive practices and other abuses. These include:

49.1 teaching learners that they should not be friends with other learners who do not subscribe to the same religion;[41]

49.2 teaching that non-believers will go to hell;[42]

49.3 requiring (i.e. forcing) learners to sing religious hymns or to pray;[43]

49.4 allowing learners to wear Christian accessories but no others;[44] and

49.5 indoctrinating learners.[45]

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[40] NM para 1.3.3.7 and para 1.3.3.11 Vol 1 p 7

[41] NM para 1.3.2.17 Vol 1 p 6

[42] NM para 1.3.3.15 Vol 1 p 8

[43] NM para 1.3.3.20 Vol 1 p 8, para 1.3.3.21 Vol 1 p 9, para 1.3.4.12 Vol 1 p 11 and para 1.3.5.4.1 Vol 1 p 11

[44] NM para 1.3.3.22 Vol 1 p 9

[45] NM para 1.3.5.5.3 Vol 1 p 12, para 1.3.6.4.3 Vol 1 p 13 and para 1.3.3.12 Vol 1 p 8

50. The applicant, however, fails to establish in evidence that such conduct occurs at the respondent schools. The flimsy factual basis provided by the applicant in this regard is disputed by the respondent schools whose version must be preferred in accordance with the rule in *Plascon-Evans*.[46]

51. The respondent schools, in any event, agree that such conduct (which is denied) is unlawful and unconstitutional. Each of the respondent schools views such conduct as totally unacceptable. It is certainly not sanctioned by any school's religion policy.

52. There is therefore no issue in the above regard that the court is called upon to determine.

Consequences of the granting of the relief sought for religion in public schools

53. The relief sought by the applicant is drastic, to say the least.

54. Should the relief summarised above be granted, it would have the effect of eliminating religious observances from not only the respondent schools, but all public schools within South Africa in totality.

55. There is no doubt that this is the aim of the applicant.

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[46] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

56. The attempt by the applicant to avoid embarrassment by clawing back to some extent on the extreme position adopted in its founding papers in the course of the replying affidavit is inconsistent and insincere:

56.1 the suggestion that religious observances could be conducted in assembly by means of a period of silence for praying or daydreaming[47] is contradicted by the applicant's notice of motion which seeks to prohibit and declare unconstitutional the structuring of an assembly with any religious component thereto;[48]

56.2 the suggestion that VCSV groups would be permissible but only in schools where a majority religion is not recognised and catered for is insensible.[49] Any community, including school communities, inevitably has a majority religious or non-religious grouping;

56.3 the suggestion that a voluntary religious service could be conducted at the school during break times or after hours, but not by the school itself, is impractical and inconsistent with the very text of the Constitution that specifically makes provision for religious observances to be conducted at state and state aided institutions.[50]

[47] FA para 86.1 Vol 1 p 86

[48] NM para 1.3.2.10 Vol 1 p 5

[49] Aplicant's HOA para 116 fn 126

[50] Aplicant's HOA para 183. Section 7 of the Schools Act leaves of no doubt: the observances are those that learners and members of staff attend voluntarily. It does not limit observances to break times or after hours or for the public only

57. The applicant in any event persists, and does not seek to qualify, any of the relief sought in its notice of motion.

THE FACTS UPON WHICH THE APPLICATION IS TO BE DETERMINED

58. But the applicant fails to make out a proper case either in fact or in law for the granting of the drastic relief it seeks.

59. The applicant seeks final relief.

60. The application must therefore be determined on the facts contained in the affidavits of the respondent schools together with the facts contained in the applicant's founding affidavit which the respondent schools admit.[51]

61. We analyse and set out the facts upon which the application is to be determined accordingly.

General

62. There are six respondent schools.

63. Three of the schools are primary schools[52] and three of the schools are high schools.[53]

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[51] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

[52] Laerskool Randhart, Laerskool Baanbreker and Laerskool Garsfontein

[53] Hoërskool Linden, Hoërskool Oudtshoorn and Langenhoven Gimnasium

64. Five of the schools are single medium Afrikaans schools.[54] The sixth school, Hoërskool Oudtshoorn, is a dual medium English-Afrikaans school.[55]

65. All of the respondent schools are multi-racial.[56]

Facts peculiar to each of the respondent schools

Laerskool Randhart

66. Laerskool Randhart is a primary school located south of Johannesburg.[57]

67. In 2015, 1 024 learners attended the school.[58]

68. The local community in Randhart and the surrounding suburbs that constitute the feeder areas for the school are strongly Christian.[59]

69. The religious demographic of learners at the school is a reflection of the local community. Of the 1 024 learners at the school, there were no learners that professed belonging to a different religious group or to be non-religious.[60]

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[54] Laerskool Randhart, Laerskool Baanbreker, Laerskool Garsontein, Hoërskool Linden and Langenhoven Gimnasium

[55] Oudtshoorn Affidavit para 13-14 Vol 8 p 664

[56] Randhart Affidavit para 18 Vol 5 p 443; Baanbreker Affidavit para 30 Vol 5 p 489; Garsfontein Affidavit para 18 Vol 5 p 550; Linden Affidavit para 23 Vol 7 p 605; Oudsthoorn Affidavit para 16 Vol 7 p 665 and Langenhoven Affidavit para 24 Vol 8 p 708

[57] Randhart affidavit para 15 Vol 5 p 442

[58] Randhart affidavit para 16 Vol 5 p 443

[59] Randhart affidavit para 19 Vol 5 p 443

[60] Randhart affidavit para 22 Vol 5 p 444 and para 25 Vol 5 p 445

70. Taking into account the religious profile of learners at the school, the SGB adopted a religion policy according to which the school would have a Christian ethos, promote Christian values and the religious observances at the school would be Christian.[61]

71. This policy was subject to the express provision that no learner be indoctrinated in any particular faith, that every learner would have the right not to attend religious instruction or activities[62], and that no learner would be discriminated against on the basis of his or her religious or non-religious belief.[63]

72. Laerskool Randhart has not in 22 years, not on any single occasion, received any objection or complaint from any parent or learner concerning the Christian character of the public school education provided at the school, religion or the religious observances and Bible study classes.

73. Religiously different learners have in the past been welcomed and had many friends. Labelling, ostracisation, discrimination and proselytising or indoctrination do not occur at the school and are in fact specifically prohibited.[64]

74. In the evidence placed by it before the court, the applicant adduces no evidence originating from a present learner at Laerskool Randhart.

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[61] See “AA3.2” and “AA3.3” Vol 5 p 470-471

[62] This correlates with the provisions of section 22 of the Gauteng Act.

[63] Randhart affidavit para 26-31 Vol 5 p 445-447

[64] Randhart affidavit para 50-56 Vol 5 p 451-452

75. The applicant only refers in its replying affidavit to an unidentified "*Laerskool Randhart member [that] is no longer affiliated to the school*"[65] who makes certain allegations regarding the conduct of prefects in the past. This hearsay evidence can immediately be dismissed as having no probative value. The allegations are in any event plainly without foundation and are denied.[66]

76. There is accordingly no individual learner presently at Laerskool Randhart that the applicant can point to, that has suffered or continues to suffer harm from any alleged unlawful conduct.

77. There is no learner before the court at Laerskool Randhart that makes any claim that the religious observances, religious instruction, provision of public school education based on Christian values, coat of arms or motto at the school are coercive or infringe his or her right to freedom of religion.

Laerskool Baanbreker

78. Laerskool Baanbreker is a primary school located in the East Rand.[67]

79. The community in which the school is located is predominantly Christian. In the area there are many churches of various denominations but hitherto absent are mosques, temples, synagogues and the places of worship of other religions.[68]

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[65] RA para 128 Vol 24 p 2217-2218

[66] SAA para 113-116 Vol 26 p 2434-2435

[67] Baanbreker affidavit para 22 Vol 6 p 487.

80. In 2015, there were 824 learners at the school.[69] The learners at Laerskool Baanbreker were all Christian save one Muslim and one Hindu. Sixteen other learners' admission forms provide no indication of religious affiliation.[70]

81. In light of this religious demographic, the SGB adopted a religion policy for the school that is based on a single faith. The religious observances at the school are Christian. Christian religious instruction is provided on a voluntary, non-promotional basis.[71] Christian values are promoted at the school.

82. The above is subject to respect for the religious belief and conscience of all learners. Those not wishing to participate or be present at the school's religious activities are accommodated[72] in the computer centre or by being allowed to be a few minutes late for registration classes in the mornings.[73]

83. Until 2014, there had not been a single complaint from learners or educators or parents of learners regarding Laerskool Baanbreker's approach to religion in 30 years.[74]

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68 Baanbreker affidavit para 24-26 Vol 6 p 487-488

69 Baanbreker affidavit para 28 Vol 6 p 488

70 Baanbreker affidavit para 29 Vol 6 p 488

71 Baanbreker affidavit para 34-38 Vol 6 p 489-492

72 As they are entitled to do in any event under section 22 of the Gauteng Act

73 Baanbreker affidavit para 38-56 Vol 6 p 491-495

74 Baanbreker affidavit para 60 Vol 6 p 496

84. There are apparently two learners, children of two members of the applicant, currently at Laerskool Baanbreker.[75] The parents did not make affidavits in support of the application. The allegations pertaining to these children are hearsay.

85. The applicant alleges that the two learners have expressed the fear that, once it is discovered that they are not Christians, their friends would sever friendship ties and they would not be picked for sport teams.[76]

86. In addition, one of the children who allegedly overheard teachers discussing the complaint laid with the Department concerning religion at Laerskool Baanbreker by that child's parents, feared "*that he would be identified as the complainant's child and be ostracised*".[77]

87. Even if there might be a basis for allowing this evidence, these subjective fears are unfounded. Openness and respect for religious diversity is fostered at the school, spurred on by the compulsory study of religion education by all learners.[78] Other learners who are not Christian and have disclosed their non-religious or different religious beliefs at Laerskool Baanbreker have not been discriminated against.[79]

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75 FA para 45 Vol 1 p 61

76 FA para 48 Vol 1 p 62

77 FA para 45 Vol 1 p 61

78 Baanbreker affidavit para 186-189.2 Vol 6 p 521-522

79 Baanbreker affidavit para 142-148 Vol 6 p 513-514

88. The allegation that a student teacher stated to learners in the oldest sibling's class that learners should not be friends with children who do not believe in Jesus, is denied by the student teacher concerned.[80] It is therefore not a fact on which the applicant can rely.

89. The subjective and ungrounded fears allegedly expressed by the two learners referred to above is the high watermark for the applicant in the case of Laerskool Baanbreker.

90. There is no evidence that the religious observances and other activities at Laerskool Baanbreker are coercive or otherwise infringe the right to freedom of religion. Accordingly, it is submitted that no relief can be granted against Laerskool Baanbreker.

Laerskool Garsfontein

91. Laerskool Garsfontein is a primary school located in the eastern suburbs of Pretoria.[81]

92. The school embraces the new constitutional dispensation and values enshrined in the Constitution. It also symbolically hoists the new South African flag daily and sings the national anthem during assembly.[82]

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80 FA para 46 Vol 1 p 61; AA para 133-137 Vol 6 p 512-513 and SAA para 128 Vol 26 p 2437

81 Garsfontein affidavit para 15 Vol 6 p 549-550

82 Garsfontein affidavit para 15.5 Vol 6 p 550

93. In 2015, there were approximately 1682 learners at Laerskool Garsfontein in Grades R to Grade 7.[83]

94. The school is located in an area that is predominantly Christian and served by a number of churches of various denominations. There is at this stage no mosque, synagogue or Hindu or other temple near the school.[84]

95. The religious demographic at the school in 2015 was 100% Christian.[85]

96. In the light of its religious demographic, the SGB adopted a religion policy according to which religious observances and instruction at the school would be based on a single religion, the Christian religion. Participation in such religious activities and observances is voluntary and the religion policy makes provision for and directs that alternative arrangements are to be made in order to accommodate learners who do not wish to attend.[86] The religion policy also provides that Laerskool Garsfontein will promote and enhance understanding of and respect for religious diversity.[87]

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[83] Garsfontein affidavit para 17 Vol 6 p 550

[84] Garsfontein affidavit para 23-24 Vol 6 p 551

[85] Garsfontein affidavit para 19-20 Vol 6 p 550-551

[86] Garsfontein affidavit para 30-30.4 Vol 6 p 552-553. Once again, it is consonant with section 22 Gauteng Act

[87] Garsfontein affidavit para 30.6 Vol 6 p 553

97. There are no learners identified by the applicant that currently attend Laerskool Garsfontein who has suffered, or continues to suffer, any alleged unlawful conduct.

98. The source of the factual allegations in the applicant's founding affidavit is an atheist member of the applicant, Dr K, whose daughters were no longer at the school in 2014 when the application was launched. We submit that it serves no purpose to revisit that history: no interdict can be granted on the basis of historical facts without a well-founded allegation of an apprehension that such conduct will be repeated.

99. The deponent alleges that learners at Laerskool Garsfontein who do not wish to participate in the religious instruction and observances at the school "*run ... the real risk of being ... ostracised, labelled as non-Christians, Satanists, amoral or evil, treated differently from other [learners] who hold themselves out to be Christians*".[88] There is no objective basis for these fears, as would be required for the granting of an interdict. In any event the school denies that such conduct, strictly prohibited at Laerskool Garsfontein, takes place there.

100. There is no evidence that the religious observances and other activities at Laerskool Garsfontein are coercive or otherwise infringe the right to freedom of religion. It is submitted that the court cannot grant relief in the abstract.

[88] FA para 69-70 Vol 1 p 72-73

Hoërskool Linden

101. Hoërskool Linden is a secondary school located in Linden, Johannesburg.[89]

102. In 2015, there were 765 learners at Hoërskool Linden, well over 700 of whom were Christian.[90]

103. There was one known Muslim at the school and about 30 learners who were atheist or agnostic by their own declaration.[91]

104. At Hoërskool Linden the value of tolerance is promoted in all contexts where learners are confronted with difference. The school has a strong culture of "*live and let live*".[92]

105. The religion policy adopted at the school in light of its religious demographic provides that the school's ethos and religious observances will be Christian. The same religion policy makes it an objective of the education process of Linden to promote a national culture of tolerance towards various cultures and religions and guarantees "*every learner's right to participate of their own free will in any religious activities at the school*".[93]

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89 Linden affidavit para 17-20 Vol 7 p 604-605

90 Linden affidavit para 23-24 Vol 7 p 605

91 Linden affidavit para 25-26 Vol 7 p 605-606

92 Linden affidavit para 38-39 Vol 7 p 609

93 Linden affidavit para 28-28.4 Vol 7 p 606-607

106. There are again no present learners at Hoërskool Linden who are represented by the applicant.

107. The applicant relies on the evidence of a previous learner who matriculated in 2013, Ann Stegman, and mentions also Ms Stegman's sister who had likewise left the school in 2013.[94] Again, it is not worth examining because it is history: with nobody currently claiming any infringement of fundamental rights with concomitant prejudice, no interdictory relief can follow.

108. Significantly, Hoërskool Linden includes the testimony of educators Adri Le Grange and Deputy Principal Ronelle Nel who interacted with Ms Stegman concerning her beliefs when she was at the school and say she was unperturbed by religious observances at the school, was aware that she would be accommodated if she did not wish to attend religious observances, and chose herself to remain present during such religious observances.[95]

109. The balance of the allegations in the applicant's founding and replying papers concerning Hoërskool Linden are provided without any direct evidence that the religious activities and related conduct at the school are in any way coercive or that there is discrimination on grounds of religious belief at the school.

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94 Linden affidavit para 144-145 Vol 7 p 630

95 Linden affidavit para 116-127.5 Vol 7 p 625

Hoërskool Oudtshoorn

110. Hoërskool Oudtshoorn is a high school located in Oudtshoorn, Western Cape.[96]

111. In 2015, there were approximately 621 learners at the school.[97]

112. On account of the historic accommodation between Afrikaans farmers and Jewish businessmen within the Oudtshoorn community, Hoërskool Oudtshoorn has an ingrained culture of respect for religious and non-religious difference.[98] The transition to democracy and the success of religion education has served to re-affirm this culture.[99] The educator who supervises the classroom to which learners who do not wish to participate in the school's religious observances go to during assembly, William Klopper, says that the learners who regularly engage in conversations concerning religion in that class have never expressed feelings of being marginalised or excluded in his experience of 20 years.[100] Another educator, Marie Meyers, who has been at the school for 31 years, has never witnessed or heard of a single incident of discrimination or victimisation at the school on the basis of religious belief.[101]

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[96] Oudtshoorn affidavit para 13-17 Vol 7 p 664-445

[97] Oudtshoorn affidavit para 16 Vol 7 p 665

[98] Oudtshoorn affidavit para 20-28 Vol 7 p 666-667

[99] Oudtshoorn affidavit para 128 Vol 6 p 685

[100] Oudtshoorn affidavit para 92-101 Vol 7 p 679-680

[101] Oudtshoorn affidavit para 127-129 Vol 7 p 685

113. The religious demographic of learners at the school in 2014 (the last anonymous census) revealed that out of 557 learners from Grades 8 to 11, 510 were Christian with the balance being a mixture of Jewish, Zionist, Muslim, Buddhist, atheist and other religious or non-religious minorities.[102]

114. In accordance with the needs of learners and the school community as a whole, the SGB determined that Hoërskool Oudtshoorn would have a Christian ethos and that religious observances at Hoërskool Oudtshoorn would be Christian. At the same time, the religion policy affirms that the constitutional rights of all learners will be respected and attendance at any religious observances at the school is strictly voluntary.[103]

115. The founding affidavit contained no allegations emanating from learners at Hoërskool Oudtshoorn complaining of religion and religious observances at Hoërskool Oudtshoorn.

116. Only after the shoe began to pinch in the light of the respondent schools' answering affidavit, the applicant procured the son and daughter of a member of the applicant to provide the following evidence in reply:

116.1 the daughter expresses that she feels it unfair that "*Geestesweerbaarheid*" classes are taught only from a Christian

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102 Oudtshoorn affidavit para 18-18.8 Vol 7 p 665

103 Oudtshoorn affidavit para 50-51 Vol 7 p 671

perspective, expresses that she does not want to be excused as she does not want to feel excluded or made to feel different, and denies that she is entirely at ease in the class when learners sing Karaoke gospel songs;[104]

116.2 she states that an educator, Mrs Visser, once told students that it was a Christian school and learners should therefore follow Christians;[105]

116.3 the son alleges that he was once told by a group of boys that he "*should not ... bring his atheistic tendencies*" to the school.[106]

117. Hoërskool Oudtshoorn records that it is unable to respond to the last-mentioned because of the vagueness of the allegation, but regards such intolerance as totally unacceptable and would immediately deal it should it occur.[107] This occurred outside the ambit of the school's religion policy.

118. The educator, Ms Visser, denies that she said anything to the effect that learners should follow Christians or Christianity. She is not even a churchgoer herself and does not discuss religion except for academic reasons in the context of the analysis of literary texts.[108]

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[104] RA para 183.1-183.3 Vol 24 p 2242 and para 189 Vol 24 p 2244

[105] RA para 198.2 Vol 24 p 2247

[106] RA para 199.2 Vol 24 p 2247

[107] Further Oudtshoorn affidavit para 16-18 Vol 27 p 2567

[108] Further Oudtshoorn affidavit para 13-15 Vol 27 p 2566

119. In explaining the religious practices at the school, the first-mentioned allegation is dealt with already in the answering affidavit of Hoërskool Oudtshoorn: the teacher of *Geestesweerbaarheid* goes out of her way to ensure that learners of different religious beliefs are comfortable in class and also, so the learner concerned admits, introduces herself as someone who regards herself as no better than others and values the input of learners holding all religious and non-religious views.[109]

120. Again, there is no proper evidence of coercion or of a threatened or ongoing infringement of the right to freedom of religion. Insofar as the evidence belatedly provided attempts to do so, it was met by the school's evidence which must be the version on which the court must come to a finding on the facts. It is submitted that on those facts, the applicant's claim for relief must fail.

Langenhoven Gimnasium

121. Langenhoven Gimnasium is a high school also located in Oudtshoorn.[110]

122. All of the learners at Langenhoven Gimnasium are Christian or have indicated that they are Christian on their admission forms.[111]

[109] Oudtshoorn affidavit para 29-55 Vol 7 p 667-672; RA para 184 p 2243

[110] Langenhoven affidavit para 23 Vol 8 p 707

[111] Langenhoven affidavit para 26 Vol 8 p 708

123. The school is located in a community in Oudtshoorn where people express their religious beliefs openly.[112] The three main feeder schools of Langenhoven Gimnasium are also Christian, and strongly so. These include *inter alia* a dual medium school with majority black and coloured learners, Laerskool Noord.[113]

124. The religion policy, drafted with due regard to the religious composition of the school, provides for education based on a Christian value system with Christian religious observances. The same religion policy requires that the voluntary nature of the religious activities at the school be regularly mentioned and expects of educators that they be sensitive to learners not wishing to participate in religious observances.[114]

125. Langenhoven Gimnasium has not received any complaints from within the school, including learners or parents.

126. There is no learner at Langenhoven Gimnasium within the applicant's fold.[115]

127. There is no evidence that attendance of religious observances at the school are not free and voluntary and hence an infringement of the right to freedom of

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[112] Langenhoven affidavit para 29 Vol 8 p 708

[113] Langenhoven affidavit para 31-32 Vol 8 p 709

[114] Langenhoven affidavit para 36-36.9 Vol 8 p 710-714

[115] The attack on Langenhoven Gimnasium stems from the member of the aplicant, one Mr Van den Heever, who is personally incensed at the Christian character of the school and regards it as the greater of two "*evils*", Hoërskool Oudtshoorn being the "*lesser evil*": FA para 81 Vol 1 p 81

religion. There is no evidence of any individual scholar suffering as a result of any alleged unlawful conduct.

Facts common to all the schools

128. Apart from the particular allegations pertaining to each of the schools dealt with above, the founding affidavit reads like an overly long laundry list of alleged religious observances and other activities at the respondent schools.

129. Many of the alleged religious observances and other activities are admitted. Other allegations are corrected, clarified and explained.

130. The facts set out immediately below incorporate the respondent schools' version and a number of admitted facts.

131. The applicant contends that these facts, the common cause facts, constitute sufficient basis for the relief sought in the notice of motion. The applicant's case is that:

131.1 the religious observances, instruction and other related activities identified in the notice of motion and admitted by the respondent schools are *per se* unconstitutional;

131.2 the religious observances, instruction and other related activities identified in the notice of motion and admitted by the respondent schools necessarily or automatically are directly or indirectly coercive;

131.3 the religious observances, instruction and other related activities identified in the notice of motion and admitted by the respondent schools necessarily give rise to “labelling”, “ostracising”, “religious bullying”, “discrimination” and other unconstitutional conduct.

132. We set out the common cause facts and thereafter examine the basis upon which the applicant makes such claims.

133. The conduct described below will thereafter, for the sake of convenience, be referred to herein as “the common cause conduct”.

Christian religious observances

134. Christian religious observances are conducted as part of the formal religious observances at each of the respondent schools.

135. In the three primary schools, the main occasion for religious observances includes formal hall assemblies once[116] or twice[117] a week.

[116] Laerskool Garsfontein and Laerskool Randhart

[117] Laerskool Baanbreker

136. The religious observances conducted usually include a scripture reading, reflection, prayer and a hymn.[118]

137. Scripture reading and prayer also take place in the beginning of each day in register classes in the three primary schools on days of the week where there is no assembly.[119]

138. Religious observances in formal hall assemblies are between 5 and 15 minutes in duration, while observances in register classes are between 1 and 3 minutes in duration.[120] In the case of Laerskool Garsfontein, Bible reading and related activities such as picture colouring-in in Grade R, may last as long as 15 minutes in the beginning of the day.[121]

139. The above religious observances are led either by an educator or a learner, save once a quarter when a member of the clergy is invited to lead the religious observances in formal hall assemblies at each of the schools.[122]

140. At Laerskool Baanbreker, there is in addition a short prayer at the end of the school day between announcements over the intercom and the school bell.[123]

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118 Randhart affidavit para 63.1-63.2 Vol 5 p 454, Baanbreker affidavit para 38 Vol 6 p 491-492 and Garsfontein affidavit para 34-35 Vol 6 p 554

119 Randhart affidavit para 63.1 Vol 5 p 454, Baanbreker affidavit para 38.2 Vol 6 p 492 and Garsfontein affidavit para 38 Vol 6 p 555

120 Randhart affidavit para 63.1 Vol 5 p 454, Baanbreker affidavit para 38.2 Vol 6 p 492 and Garsfontein affidavit para 42-43 Vol 6 p 555

121 Garsfontein affidavit para 44 Vol 6 p 556

122 Randhart affidavit para 63.2.3 and 63.3 Vol 5 p 455, Baanbreker affidavit para 38.1 Vol 6 p 492, para 83 Vol 6 p 500-1, and Garsfontein affidavit para 36, 37 and 39 Vol 6 p 554-555

141. In the three high schools, formal religious observances take place either in school assembly or in the quad.[124]

142. Formal hall assemblies take place on one day of the week, and school gathering in the quad on each of the four other days.[125]

143. As with the primary schools, religious observances are usually led by an educator or a learner, with a member of the clergy invited in once per quarter save in the case of Hoërskool Linden where a member of the clergy leads religious observances in weekly assembly.[126]

144. The religious observances are, with minor differences in the case of each of the schools, the same as in the primary schools.[127]

145. The duration of the religious observances are usually less than 15 minutes.[128]

146. At Hoërskool Linden, there is also prayer in class at the end of the school day between the announcements over the intercom and the ringing of the school

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[123] Baanbreker affidavit para 38.3 Vol 6 p 492

[124] Linden affidavit para 62.1-62.2 Vol 7 p 614, Oudtshoorn affidavit para 92 Vol 7 p 679, para 104 Vol 7 p 681, and Langenhoven affidavit para 49.1-49.2 Vol 8 p 716-717

[125] Linden affidavit para 29.1-29.2 Vol 7 p 607, Oudtshoorn affidavit para 92.1-92.2 Vol 7 p 679, and Langenhoven affidavit para 49.1-49.2 Vol 8 p 716-717

[126] Linden affidavit para 29.1 Vol 7 p 607, para 62.1 Vol 7 p 614, Oudtshoorn affidavit para 92.1-92.2 Vol 7 p 679, and Langenhoven affidavit para 49.1-49.2 Vol 8 p 716-717

[127] Linden affidavit para 29 Vol 7 607, Oudtshoorn affidavit para 92 Vol 7 p 679 and Langenhoven affidavit para 49 Vol 8 p 717

[128] Linden affidavit para 29.3 Vol 7 p 607, and Langenhoven affidavit para 49.1 Vol 8 p 716

bell. It is not prescribed by the school and participation therein is entirely voluntary. Only about 13 out of 50 educators in the school persist with this observance.[129]

147. At all six respondent schools, there are, in addition, religious observances in the form of scripture reading and prayer at formal school functions such as annual prize givings.[130]

148. There are also informal religious observances at the schools, such as non-regulated spontaneous prayers by sports teams prior to or after sports matches and prayers by learners before school exams.[131]

149. Participation in the above religious observances is in all instances voluntary.[132]

150. In the case of assemblies, gatherings in the quad and register classes, the respondent schools endeavour to accommodate learners not wishing to participate in or attend at religious observances by accommodating such learners in supervised classes or allowing late arrival.[133]

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[129] Linden affidavit para 29.3 Vol 7 p 607 and para 63 p 615

[130] Linden affidavit para 29.4 Vol 7 607, Oudtshoorn affidavit para 111 Vol 7 p 682 and Langenhoven affidavit para 110-111 Vol 8 p 727

[131] See, for example, Oudtshoorn affidavit para 82-83 Vol 7 p 677, para 112 Vol 7 p 682 and Lagenhoven affidavit para 114-118 Vol 8 p 728

[132] Linden affidavit para 29.2 Vol 7 607, para 30-37 Vol 7 p 608-609, Oudtshoorn affidavit para 51 Vol 7 p 671, para 93 Vol 7 p 679 and Langenhoven affidavit para 52 Vol 8 p 717-718

[133] Linden affidavit para 31 Vol 7 608, para 127.2 Vol 7 p 627, Oudtshoorn affidavit para 46 Vol 7 p 670, para 93-95 Vol 7 p 679-680 and Langenhoven affidavit para 30-46 52 Vol 8 p 714-715. This accords with the provisions of section 22(3) Gauteng Act as far as the Gauteng schools are concerned.

Religious Instruction

151. There is no religious instruction at the high schools.

152. In the primary schools, religious instruction in the form of non-denominational Bible classes is provided to learners once or twice a week.[134]

153. In the case of all three schools, Bible classes are conducted on a voluntary and non-promotional basis with accommodation of learners not wishing to participate in the computer centres supervised by an educator.[135]

Voluntary Christian Associations

154. All six of the respondent schools allow Christian associations in the form of VCSV/UCSA or Jesus is King ('JIK') to make use of the schools' facilities.

155. Participation is voluntary.[136]

156. Meetings are held either during break time or after school.

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[134] Randhart affidavit para 65-67 Vol 5 p 456 and Baanbreker affidavit para 49 Vol 6 p 494, para 52-53 Vol 6 p 495; In the foundation phase at Garsfontein learners are informed only generally of the content of the Bible with emphasis on values – Garsfontein affidavit para 111 Vol 6 p 566.

[135] Randhart affidavit para 67-72 Vol 5 p 456-457 and Baanbreker affidavit para 54-55 Vol 6 p 495

[136] Baanbreker affidavit para 72-74 Vol 6 p 499, Garsfontein affidavit para 47-50 Vol 6 p 556, Linden affidavit para 35-37 Vol 7 609, para 64 Vol 7 p 615, Oudtshoorn affidavit para 69-72 Vol 7 p 675-676 and Langenhoven affidavit para 51-52 Vol 8 p 717-718, para 63 Vol 8 p 720

157. In all instances, these groups enjoy no more exposure or advertisement within the school than other cultural clubs.[137]

Christian values

158. Hoërskools Linden and Oudtshoorn have expressly adopted a Christian ethos.[138]

159. Langenhoven Gimnasium states that it provides Christian "based" education.[139]

160. Several of the primary schools have vision and mission statements that are explicitly Christian in character and purpose.[140] According to the respondent schools, and under section 5(3)(b) of the Schools Act, there is no obligation placed on any educator or learner to subscribe to such vision and mission statements.[141]

161. However described, the substance of the aforesaid is that in each of the respondent schools, human interaction in the education process is conducted

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[137] Baanbreker affidavit para 73-74 Vol 6 p 499, Garsfontein affidavit para 89-90 Vol 6 p 563, Linden affidavit para 65 Vol 7 615, and Oudtshoorn affidavit para 78-80 Vol 7 p 676-677

[138] Linden affidavit para 28.1 Vol 7 p 606, "AA6.4" para 2.1 Vol 7 p 639, Oudtshoorn affidavit para 50 Vol 7 p 671, "AA7.3" Vol 8 p 694

[139] Langenhoven affidavit para 36.7 Vol 8 p 713; "AA8.5" Vol 8 p 749

[140] Randhart affidavit para 41 Vol 5 p 449, "AA3.6" para B Vol 5 p 476, Baanbreker affidavit para 185 Vol 6 p 521, "AA4.5" Vol 6 p 537, and Garsfontein affidavit para 15.4 Vol 6 p 550, "AA5.3" para 3 Vol 7 p 585

[141] See, for example, Randhart affidavit para 77 Vol 5 p 458, and Garsfontein affidavit para 98 Vol 6 p 564

on the basis of Christian values[142] and Christian values are imparted to learners.

162. The respondent schools are ordinary public schools. They are not denominational schools, confessional schools or Sunday schools.

Religious symbolism and decoration

163. Two of the primary schools have school badges or coats of arms that have a historic overtly Christian meaning.[143] Neither school requires its present learners to attribute such Christian meaning to the school coat of arms.[144]

164. Langenhoven Gimnasium has its inner school walls and certain loose-standing walls on the premises decorated with religious symbolism and Bible verses or Bible references - not on instruction from the school, but as a result of the voluntarily initiatives of leaners. The decorations and symbolism are balanced with non-religious decorations, texts and symbols.[145]

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142 Here "values" do not include "religious truths", such as belief in God or in the divinity of Jesus Christ

143 Randhart affidavit para 92-96 Vol 5 p 460-461, and Garsfontein affidavit para 81-83 Vol 6 561-562

144 Randhart affidavit para 92-96 Vol 5 p 460-461, and Garsfontein affidavit para 81-83 Vol 6 561-562

145 Langenhoven affidavit para 126 and 128 Vol 8 p 730

165. A teacher at Hoërskool Linden has decorated her walls with religious symbols and texts. These are likewise balanced or interspersed with non-religious decorations.[146]

THE APPLICANT'S CASE ON THE FACTS

166. The case for the applicant is that the common cause conduct should be declared unlawful and prohibited because it allegedly:

166.1 breaches the National Policy on Religion and Education, published as Government Notice No. 1307 in *Government Gazette* No. 25459 of 12 September 2003 ("the National Religion Policy");[147] and

166.2 is unconstitutional.[148]

167. The National Religion Policy is not binding on the respondent schools.[149] The applicant therefore has no cause of action on the basis of the National Religion Policy. We deal with this and further reasons why no relief should be granted on the basis of the National Religion Policy herein below.

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146 Linden affidavit para 101-102 Vol 7 p 622, "AA6.8" Vol 7 p 645

147 NM para 1.1 Vol 1 p 1

148 NM para 1.2 Vol 1 p 2

149 *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7; See also *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 10. In addition, the National Education Policy Act cannot justify rules pertaining to religious observances: *Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* [2017] (1) All SA 331 (SCA) para 64 ("*Insolvency Practitioners*")

168. For the present, we focus on the case made by the applicant on the basis of the Constitution.

169. In this regard, the applicant alleges in its founding affidavit that the common cause conduct infringes sections 9 (equality), 10 (dignity), 12 (freedom and security of the person), 14 (privacy), 15 (freedom of religion) and 18 (freedom of association) of the Constitution.[150]

170. The case of the applicant as it emerges in its replying affidavit and in the applicant's heads of argument, however, is made on the basis of the right to freedom of religion contained in section 15 of the Constitution. The applicant also alleges that the right to privacy of learners who may not want to disclose their religious or non-religious beliefs but are required to in order to be excused from religious observances or instruction, are infringed.

171. It is submitted that the right asserted is not contained in section 14, but rather in section 15 as an aspect of the right to freedom of religion. In this regard, the respondent schools respectfully refer to Prof Kommers[151] who summarises the jurisprudence of the German Federal Constitutional Court on the point as follows:

> "*In its church-state jurisprudence generally, the court has recognized both the negative and positive characters of religious freedom. Negative*

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[150] FA para 13.2 Vol 1 p 25-27

[151] Donald P Kommers (2001) *The Constitutional Jurisprudence of the Federal Republic of Germany* 2nd Ed.

freedom includes the freedom of unbelief as well as the freedom not to disclose one's belief in public. Positive freedom includes the right to express one's belief in public. The idea of negative and positive freedoms is analogous to the concept of subjective and objective rights in the general sphere of fundamental rights and liberties. Freedom of religion in the negative sense means that the state must respect those inner convictions which belong to the domain of self. Freedom of religion in the positive sense implies an obligation on the part of the state to create a social order in which it is possible for the religious personality to develop and flourish conveniently and easily."[152] (emphasis added)

172. The respondent schools accordingly submit that the privacy right asserted by the applicant is a freedom subsumed into the right to freedom or religion.

173. The respondent schools reserve the right to deal with argument on the basis of the right to privacy in oral argument.[153]

174. As the applicant makes out no self-standing substantive challenge on the basis of the other constitutional rights referred to in its founding affidavit, these will likewise not be dealt with herein.[154]

Evidential basis for the applicant's challenge

175. Insofar as the applicant's case on the basis of section 15 of the Constitution is concerned, as we have noted above, it is clear from what is stated in the founding and replying affidavits and in the applicant's heads of argument, that the common cause conduct is unconstitutional:

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152 Kommers p 461

153 Or if needs be, supplementary written argument

154 The respondent schools' right to deal with same in oral or suplementary written argument is reserved

175.1 either because it is unlawful *per se* in that the Constitution on the applicant's interpretation requires a strict separation of church and state; or

175.2 because the common cause conduct - so the applicant alleges on its say-so only - is automatically or necessarily coercive in that learners who are non-religious or of a different religious belief are implicitly coerced into attending or participating in the religious observances of the majority in order to hide their religious or non-religious identity to avoid being discriminated against, labelled, bullied or ostracised; or

175.3 because the common cause conduct - again so the applicant alleges without supporting evidence - results necessarily in discrimination, labelling, bullying or ostracising of learners who are part of the minority.

176. The contention of the applicant contained in paragraph 175.1 above is a contention of law based on an interpretation of the Constitution which we deal with below in the section that follows on the law.

The applicant has no case on the evidence

177. The related contentions of the applicant in paragraphs 175.2 and 175.3 are contentions of fact.

178. The onus is on the applicant to establish the facts on which its claims of constitutional infringement are based.[155]

179. The applicant must do so in its founding affidavit and, in the discretion of the court, its replying affidavit, which constitute and must contain both the applicant's pleadings and evidence.[156]

180. The applicant must do so not only in satisfaction of the general rule that the party who alleges, must prove, but also because the Constitutional Court has held in the context of the right to freedom of religion that the onus is on the party alleging that observances are not free and voluntary to establish it on the facts.

181. In *Solberg*,[157] the Constitutional Court interpreting the right to freedom of religion in the interim Constitution, held that:

> *"coercion may be direct or indirect, but it must be established to give rise to an infringement of the freedom of religion. It is for the person who alleges that s 14 has been infringed to show that there has been such coercion or constraint."* (emphasis added)

182. As we demonstrate in our analysis of the particular allegations directed at each of the respondent schools above, however, the applicant's affidavits are devoid of evidence that attendance at religious observances is not free and voluntary.

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155 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 104 ("*Solberg*")

156 *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) 368H–369B

157 *Solberg* para 104

183. There is no evidence in the founding (or replying) affidavit of a learner who was, or is currently, in fact being coerced, whether overtly or implicitly, as a result of the common cause conduct at the respondent schools.

184. There is, in addition, no evidence in the founding (or replying) affidavit that learners at the respondent schools are suffering labelling, religious bullying, unfair discrimination or ostracism as a result of the common cause conduct at the respondent schools.

185. Rather, in the founding papers, in the place of evidence, the reader finds only a series of bald and cynical assertions of the deponent leader of the applicant to such effect.

186. Over and above the lack of factual evidence, the aforesaid assertions of the applicant's deponent are not supported in the founding papers by expert opinion.

187. The respondent schools considered it unsafe to leave matters there. They were convinced that the theoretical exposition of the applicant entirely ignored the interests of the children involved.

188. The respondent schools therefore responded to the application for drastic and far-reaching relief by inviting the court into their life and daily activities; by seeking to paint a broader picture in schools all over the country which do not

have the same demographic composition as the respondent schools; by introducing the evidence of some nine principals not affiliated with the respondent schools who, in their own right, are educationists; and by offering comprehensive expert evidence speaking directly to the interests of all learners not only at the respondent schools, but in general. The respondent schools also provided the children directly affected an opportunity to speak, ultimately via an independent expert.

189. The applicant then sought to remedy the fatal deficiencies in its founding papers in the replying affidavit:

189.1 by belatedly adducing the expert evidence of Prof Roux whose view - albeit not properly motivated - is that any single faith approach is "*exclusive*" and therefore coercive; and

189.2 by pointing to the content of the expert reports of Dr Anja Botha and Dr Tanya Robinson and claiming, on the basis of an incorrect reading of such reports, that these supported the applicant's case.

190. Although this was arguably not permissible,[158] these efforts do not avail the applicant.

[158] It is incumbent on an aplicant to make out its case in its founding affidavit, and not in its replying affidavit. See in this regard, *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* 1978 (1) SA 173 (W) 177G-178A

191. In the section that follows, we respectfully demonstrate why.

THE EVIDENCE OF THE EXPERTS

The role of experts and the evaluation of their evidence in court proceedings

192. The precise role that experts play in court proceedings requires emphasis.

193. In *Jacobs*[159] the SCA stated:

> "*It is well established that an expert is required to assist the Court [and] not the party for whom he or she testifies. Objectivity is the essential prerequisite for his or her opinions. In assessing and expert's credibility an appellate court can test his or her underlying reasoning and is in no worse a position than a trial court in that respect. Diemont JA puts it thus in Stock v Stock:*
>
> > '*An expert must be made to understand that he is there to assist the Court. If he is to be helpful, he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and constantly asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the Trial Court was.*'" (footnotes omitted)

194. The principles applicable to the admissibility and evaluation of expert opinion evidence are well established. These principles are *inter alia*:[160]

194.1 expert evidence presented to the court should be, and should be seem to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;

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[159] *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA) para 15

[160] *National Justice Compania Naviera S.A v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] (2) Lloyd's Rep 68, 81 to 82 per Cresswell J, cited with aproval in *Schneider NO v AA and Another* 2010 (5) SA 203 (WCC) 211E- 214B

194.2 an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his/her expertise;

194.3 an expert witness should state the facts or assumptions upon which his/her opinion is based. He/she should not omit to consider material facts which could detract from his/her concluded opinion;

194.4 an expert witness should make it clear when a particular question or issue falls outside his/her expertise;

194.5 if an expert's opinion is not properly researched because he/she considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one;

194.6 if the expert cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report;

194.7 the court must determine whether and to what extent expert evidence is supported by logical reasoning;[161]

[161] *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) para 36.

194.8 where there are conflicting views on either side, both capable of logical support, it would be wrong to decide a case by simple preference. Only where expert opinion cannot be logically supported at all will it fail to provide *"the benchmark by reference to which the Defendant's conduct falls to be assessed*";[162] and

194.9 the proper approach to the evaluation of expert evidence is to assess the evidence of expert witnesses in the light of such witnesses credibility and reliability and the probabilities. A court must identify the extent to which expert opinions are founded on logical reasoning and to compare competing sets of evidence in the light of the probabilities.[163]

195. It is submitted that the contributions of those holding themselves out as experts in this application should be evaluated on the basis of the above principles.

The applicant's expert: Prof Cornelia Roux

196. The applicant's expert is Prof Cornelia Roux. As appears from her CV, Prof Roux is an educationist or educational theorist who is a prodigious academic, having published extensively on religion and education, and specifically the teaching of religion studies.[164]

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162 *Michael v Linksfield* para 39.

163 *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) para 27. See also Evan Bell **"**Judicial Assessment of Expert Evidence" (2010) 2 *Judicial Studies Institute Journal* 55

164 "RA1" Vol 24 p 2249-2272

197. What is also clear from her CV, however, is that Prof Roux has extremely little experience in teaching children. In fact, it is clear that Prof Roux only taught children of high school age for three years from 1983 to 1985,[165] in the era of Christian National Education.

198. Perhaps more fundamentally, Prof Roux is not a psychologist by qualification, training or experience.[166] She has no experience or qualifications in child psychology, still less developmental psychology or forensic psychiatric work with children.[167]

199. Prof Roux's report is attached to the replying affidavit and is in the form of a "*feedback report*", which was provided in response to two questions put to her by Advocate H P van Nieuwenhuizen, the junior advocate representing the applicant.[168]

The Roux report

200. Prof Roux's opinion, concisely stated, may be expressed as follows: Exclusion in education (Prof Roux regards a single faith approach to be an exclusive or exclusivist approach) is necessarily discriminatory, coercive, contrary to pedagogical principles, and detrimental to the well-being of learners.

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165 "RA1" Vol 24 p 2249

166 **Botha reply** para 14-16 Vol 26 p 2442; see also **Robinson reply** para 12-14 Vol 26 p 2460

167 **Botha reply** para 14-16 Vol 26 p 2442; see also **Robinson reply** para 12-14 Vol 26 p 2460

168 **Roux report** Vol 24 p 2281-2298

201. The key statements in Prof Roux's report, which express the above, are as follows:

> *"The impact of exclusion on learners' religious, social and emotional well-being and being a minority can create conflict for the individual and as a group."*[169]

> *"Subliminal discrimination begins the moment when the learner needs to leave, or be excused from the classroom or school hall for specific reasons. The notion of being different is created because she/he acts differently or is pressured to act different [sic]. Conflict and questions raised within the home environment can lead to conflicting emotions between family and school, peers and educators. Being labelled can lead to undermine the well-being of the child/learner (Durkin et al., 2012). There are concerns that a learner's exclusion and isolation can ultimately undermine critical thinking."*[170]

> *"Religious observance could be part of the 'hidden curriculum': (the values driving the curriculum, and in South Africa embedded in the Constitutional values [1996] or subliminal values of a particular school [ethos]) or part of the 'null curriculum'. The null curriculum is the assumption of what should be regarded as worthwhile knowledge to be included in teaching learning [sic] (Becker & Du Preez, 2014: 61). According to Bekker and Du Preez (2014: 61), the null curriculum protects privilege empowered by broad educational exclusions with respect to social class, race and gender."*[171]

> *"Exclusion inherently discriminates against the core values of the hidden (in SA the Constitutional values) and the technical curriculum (the content of subjects outlined in the NCS and CAPS documents)."*[172]

202. At the end of the report, Prof Roux gives her response to the two questions posed by the advocate acting for the applicant.[173]

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169 **Roux report** Vol 24 p 2287

170 **Roux report** Vol 24 p 2287

171 **Roux report** Vol 24 p 2288

172 **Roux report** Vol 24 p 2288

173 **Roux report** Vol 24 p 2295-2296

203. In response to the statement put to her that "*those children, who do not adhere to the majority religious conviction (faith) in a particular school, will not be impaired by religious adherences or faith religious instruction and that they will benefit as the process will rather build character*", Prof Roux responds as follows:

> *"I am convinced that an exclusive approach to religion education, religious observances and world views might hamper all learners (especially the very young, Grade R-4), including adolescents, if the observance supports a different world view than those of the family.*
>
> *…*
>
> *My short answer is yes ... conflict with family values and excluding children from being part of the pedagogical and social environment (like a school) can and should, according to the UNICEF documents, be defined as 'social exclusion' and as being 'different' (UNICEF document on children, 2006). Exclusion can lead to stigmatizing and victimhood."*[174]

204. In response to the statement "*that no indirect force is applied to the minority to adhere to religious observances (faith practices) or to excuse themselves from these practices*", Prof Roux responds by saying:

> *"Any exclusion or 'exemption' in education is supporting that a minority is 'different'. Exemption is only possible when permission is given. Voluntary exemption requires permission from a school authority. ... Exemption reflects the very essence of exclusion."*[175]

205. For the reasons set out below, however, it is submitted that:

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[174] **Roux report** Vol 24 p 2295-2296

[175] **Roux report** Vol 24 p 2296

205.1 the criticisms by Prof Roux of the reports of the respondent schools' experts are unjust, without merit and mostly outside her field of expertise;[176]

205.2 the opinion of Prof Roux is not reliable; and

205.3 applying the established principles on expert evidence set out above, the opinions of the respondent schools' experts should be preferred.

Terse statement of opinion

206. According to the principles stated at the outset, an expert opinion should not be a series of statements of conclusion. Rather, an expert should set out the expert's reasoning with sufficient detail in order to enable a court to examine and test the logic and reasoning underlying the opinion given.

207. It is submitted that it respectfully follows that where references are made to studies or the works of other experts on which the expert relies, these should be done in a manner that is transparent and may readily be tested by the reader of the expert opinion.

208. A reader of the Roux report, however, is immediately confronted with the fact that the report is not only concise. It is terse.

[176] SAA para 12 Vol 27 p 2410; see generally **Botha reply** Vol 26 p 2439-2456, **Robinson reply** Vol 26 p 2457-2485 and **De Klerk-Luttig reply** Vol 27 p 2515-2524

209. In most instances, Prof Roux provides opinion with no real explanation for the opinion given.

210. Her opinions that a single faith approach that is "*exclusive*" is necessarily discriminatory or detrimental to well-being and critical thinking is essentially unexplained.[177]

211. The terse explanation of the operation of the so-called "*hidden curriculum*" and the "*null curriculum*" likewise assumes a depth of knowledge of not only the concepts involved, but also the socio-psychological dynamics according to which these two phenomena operate.[178] Without this, it is impenetrable and it cannot be properly evaluated by the court.

Questionable references

212. The statement of opinion by Prof Roux is not only superficial and unexplained, it also refers to and relies upon a number of questionable authorities.

213. Dr Botha draws the court's attention to the fact that the study by Durkin *et al* repeatedly relied upon by Prof Roux[179] is inappropriate because that study dealt with peer aggression in school goers between the ages of 8 and 12 in

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[177] **Roux report** Vol 24 p 2287

[178] **Roux report** Vol 24 p 2288

[179] **Roux report** Vol 24 p 2287

Britain, whereas the subject matter of Dr Botha's report and of the application is implicit coercion in South Africa in the context of religion in schools.

214. Dr Botha points out further that Prof Roux's references to South African studies allegedly available on coercion in religion are also not studies on that subject at all.[180]

215. The first reference to an article by Du Preez & Roux,[181] 2010 does not deal with coercion but with facilitating school discipline within a human rights framework,[182] and the "isrev" internet reference is merely a reference to a platform for scholars to share information in the field of religion education.[183]

216. The UNICEF document relied on by Prof Roux in her misguided criticism of the manner in which Dr Robinson interviewed learners at the respondent schools is also not only inapplicable but entirely irrelevant in the South African context.[184] The UNICEF guidelines provide principles on the interviewing of, and reporting on, children by the media. It does not purport to prescribe ethical standards and guidelines for the interviewing of children in the context of social science

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[180] **Botha reply** para 46-50 Vol 26 p 2449-2451

[181] This Roux is the expert under consideration

[182] **Botha reply** para 47 Vol 26 p 2450

[183] **Botha reply** para 48-50 Vol 26 p 2451

[184] **Robinson reply** para 33-47.5 Vol 26 p 2464-2468

research.[185] Dr Robinson attaches to her reply the ethical codes applicable to social science researchers in South Africa, with which she complied.[186]

217. Another example, crucial in the context of Prof Roux's opinion, is the reference cited for the statement that "*exclusion [is] a main cause of discrimination*", namely "*REDCO projects, 2006-2009*".[187]

218. The report on the REDCO projects is not in support of Prof Roux but decidedly against her. The research, conducted in eight European countries on learners between ages 14 and 16, showed young people:

218.1 by a vast majority, to be optimistic about sharing society with people belonging to different religions; and

218.2 also by a vast majority, in favour of religion education as a means to learning about religion (especially the religions of others) and as a means to peace and harmony between persons of different religions.[188]

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185 **Robinson reply** para 37 Vol 26 p 2465

186 **Robinson reply** para 39-40 Vol 26 p 2466, and "TMR2" Vol 26 p 2489-2512

187 **Roux report** Vol 24 p 2289

188 SAA para 56-57 Vol 26 p 2418-2419, and "SA4" Vol 26 p 2525-2540

219. Although the focus of the study was religion education, and being a European study not necessarily translatable in the South African context, the conclusions in the study are telling for the present case:

> *"On the basis of our research findings, we can come to the following conclusions on young people's view of religious heterogeneity:*
>
> 1. *Religious pluralism is not only accepted, but widely welcomed. The majority believe that people of different religions can live together in harmony.*
> 2. *The responding pupils are critical of truth claims that exclude people of different beliefs or faith.*
> 3. *Although pupils are clearly aware of the conflict potential of religion and religious plurality, the majority of young people share a vision of peaceful coexistence in a religiously plural Europe. Realisation of this vision is often presented as contingent on the existence of attitudes of tolerance, open-mindedness and respect, and on the exercise of key dialogue skills, learning about each other's beliefs, listening to each other, getting to know a variety of views.*
>
> *The beliefs and thoughts of the young people we questioned in our survey are really quite remarkable. They indicate a great willingness and openness to engage with religious and societal plurality in Europe without excluding its problems. Furthermore, they clearly demonstrate that young Europeans today are aware of the key role that dialogue skills play in realizing a peaceful coexistence in European societies."*[189]

220. Of particular significance, in the context of the opinion by Prof Roux and the cynical assertions by the deponent for the applicant concerning discrimination where there is a religious majority, is what a Muslim learner in Moscow had to say about her experience of being a minority in the classroom:

> *"Yes, of course, I'm a Muslim. But all my classmates of another faith treat me very well."*[190]

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[189] SAA para 58 Vol 26 p 2419-2420

[190] SAA para 59 Vol 26 p 2420

221. The legal representatives of the respondent schools also sought to follow up on Prof Roux's internet reference provided for the alleged empirical research supporting Prof Roux's views, only to find it to be a home page of a website hosted by North West University wherein the alleged empirical research referred to could not be found.[191]

222. In sum, the references relied upon and the reasoning employed calls squarely into question the integrity and reliability of the Roux report.

Opinion outside Prof Roux's field of expertise

223. Another reason why the opinion of Prof Roux should be rejected as being unreliable, or at least that the opinions of the respondent schools' experts should be preferred, is that her opinions on the alleged detriment to the well-being of children and of coercion are outside her field of expertise.

224. Prof Roux is an educationist or, more specifically, an academic educational theorist.

225. As stated above, she has no qualifications, training or expertise in the field of psychology, let alone child psychology or developmental psychology.[192]

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[191] SAA para 55 Vol 26 p 2418

[192] **Botha reply** para 14-16 Vol 26 p 2442

226. She likewise has no experience in forensic psychiatric social work and the interviewing of children,[193] and has little or no understanding of young children and how they experience reality.[194]

227. Prof Roux's hyper-theoretical views on exclusion which lead her to draw conclusions concerning the well-being of children are no more than the assertions of an academic who is well outside her field of expertise.

228. They pale into redundancy in the face of the opinion of Dr Botha, a lecturer in developmental psychology as well as a child psychologist with a clinical practice, who states as follows:

> *"Prof Roux's comment to the effect that being identified as 'different' on the basis of religious or non-religious belief adversely impacts upon the well-being of children is not correct. A child's well-being and healthy development depends on multiple factors including neurological, biological, psychological, social and ecosystemic factors – and more specifically, the reciprocal interactions between these. A claim that a single factor (such as being identified as 'different') will adversely impact on well-being or impede healthy development represents a reductionist (and pessimistic) view on human functioning.*
>
> *As set out in my report, it is not advisable for children to avoid engaging in moderately challenging diversity issues as these are vital for the development of mastery, resilience, a positive identity and social skills, all of which contribute to their future competence to function effectively in society. Negotiating issues surrounding conformity and autonomy (including how I am similar and different to others) is an essential developmental task, and vital for healthy identity development. The practice of religion in schools following the recommendations set out in my report, inclusive of reasonable accommodation, will not have a detrimental impact on children's well-being and development."*[195]

[193] **Robinson reply** para 12-14 Vol 26 p 2460

[194] **Robinson reply** para 73-75 Vol 26 p 2476

[195] **Botha reply** para 53-54 Vol 26 p 2452

229. Prof Roux's opinion to the effect that a single faith approach in schools will have a detrimental impact on critical thinking[196] is likewise an academic assertion well outside her field of expertise.

230. Dr Botha responds as follows:

> *"Prof Roux's comment that exclusion and isolation may impact on the development of critical thinking is neither a fair nor accurate response to my report. In my report, I do not promote or endorse 'exclusion' or 'exclusivist' approaches, but rather the provision of appropriate and workable practical solutions mindful of the South African context and the developmental stages of the children concerned.*
>
> *It is a very pessimistic perspective on diversity to assume that acknowledging and promoting diversity practices will lead to isolation and exclusion. That will not be the case where the adult community handles these issues in the manner envisaged in my report. Following this approach, the practice of religion in schools certainly can be done in a manner that is respectful and protects the dignity and identity of even the smallest minority groups.*
>
> *In addition, experiences of diversity, including acknowledging and embracing diversity, is one (of multiple) contributors to critical thinking skills. Hence, the emphasis in my report on the manner in which these issues are dealt with. Should the practice of religion in the respondent schools be carried out, following the recommendations in my report, there should be no risk to the development of critical thinking."*[197]

231. Prof Roux's figurative and literal distance from learners in public schools, in general, and learners in the respondent schools, in particular, is highlighted by the contrast between Prof Roux's views and those of Dr Robinson.[198]

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[196] **Roux report** Vol 24 p 2287-2288

[197] **Botha reply** para 55-57 Vol 26 p 2452-2453

[198] SAA para 29-33 Vol 26 p 2413-2414; **Robinson reply** para 19-26 Vol 26 p 2461-2463

232. Following her hyper-theoretical approach, Prof Roux says that she is "*convinced that an exclusive approach to religion education, religious observances and world views might hamper all learners (especially the very young, Grade R-4)*"[199] and that exclusion leads to "*stigmatising and victimhood*".[200]

233. This, of course, is what the deponent for the applicant repeatedly asserts, also without any proper motivation.

234. But these opinions do not accord with reality, and specifically the reality at the respondent schools.

235. It is submitted that the following extract from the reply of Dr Robinson decisively illustrates the quality and reliability of her report and the clear lack of quality and reliability of the report of Prof Roux:

> *"Prof Roux is, literally and figuratively, far away from the children at the respondent schools that I interviewed, observed and studied, and from their reality. Her opinions on "exclusivism", "subjectivism" and "discrimination" do not accord with the experience of the children at the respondent schools or the reality of their situation.*
>
> *<u>Had I found evidence that the children at the respondent schools suffered discrimination on grounds of belief or opinion, were subject to coercion, or were in any other way being detrimentally or adversely affected by the approach of the respondent schools to religious observances, instruction or ethos, I would have clearly recorded those findings in my report, and given them prominence in my conclusions and recommendations</u> (both of which would have been altered in light of such findings).*
>
> *<u>But I did not find such evidence</u>.*

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199 **Roux report** Vol 24 p 2295

200 **Roux report** Vol 24 p 2296

What I did find - as is more fully set out in the report - is that the children at the schools, both the majority and the minority, were coping well within the current system, and that the current system (while it may be improved) is not coercive.

This does not mean that there were not individuals (both religious or non-religious) who were not happy with several aspects of the current system or who expressed that the current system should be changed. There were. Nor does it mean that there were no traces or ordinary social or peer influence. Again, there were. The instances of possible social and peer influence are identified in my report.

But the aforesaid does not imply that the current systems are coercive, nor does it imply that learners at the respondent schools are suffering the kind of discrimination or the adverse effects of discrimination that the applicant claims they do. I did not find this.

What I also found is that the vast majority of the children in the respondent schools deeply valued the religious component of school life and that many exhibited genuine alarm at the possibility of its removal. I also found that the religious activities at the respondent schools were conducted in an open and non-divisive manner, had a positive and up-building effect on the children at the respondent schools, and that the removal of religion would have a seriously detrimental impact on children at the respondent schools.

I did not necessarily anticipate or expect many of the above findings. What I reported on is what I learnt and heard from the children (through the quantitative and qualitative studies and observations), and about the children from parents and teachers. My report is true to all of the information gathered during the course of the empirical research carried out at the respondent schools."[201] (emphasis added)

236. Another illustration of the contrast between academic theory and the reality with which the court is dealing is provided by the contrasting views on religious symbolism of Prof Roux and Dr Robinson respectively.[202]

237. Prof Roux's climactic assertions that to the effect that religious symbols are coercive or discriminatory because "*symbols are ultimate power and have*

[201] **Robinson reply** para 19-26 Vol 26 p 2461-2463

[202] **Roux report** Vol 24 p 2292-2293; compare with **Robinson reply** para 92-95 Vol 26 p 2480

power in itself [sic]",[203] are contrasted with Dr Robinson's matter of fact findings of the real situation on the ground:

> *"During the study, I enquired into the subject of religious symbols at each of the respondent schools in the focus group interviews with learners and teachers ... Religious symbols were not raised as a source of concern – still less of coercion – by either the learners or the teachers at the respondent schools."*[204]

Patently unfounded criticisms

238. Finally, the criticisms levelled by Prof Roux's at the respondent experts' reports are virtually all fundamentally unfounded and only reveal her superficial reading (or in some instances apparent lack of reading) of such reports:

238.1 Prof Roux's criticism of the ethical integrity of Dr Robinson's report is misguided and wholly without foundation;[205]

238.2 there would have been no material difference to the findings of Dr Robinson's report had she used crystallisation as a research method instead of triangulation;[206]

238.3 Prof Roux's criticisms of the sampling of interviewees and subject participants in the quantitative and qualitative studies conducted by Dr Robinson to the effect that parents' views were accorded too

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203 **Roux report** Vol 24 p 2293

204 **Robinson reply** para 94-95 Vol 26 p 2480

205 Compare **Roux report** Vol 24 p 2291 with **Robinson reply** para 33-47.5 Vol 26 p 2464-2468

206 Compare **Roux report** Vol 24 p 2290 with **Robinson reply** para 48-57 Vol 26 p 2468-2470

much weight only reveals that she did not read Dr Robinson's report at all, in which event she would have learned that the quantitative study on parents was secondary and only for the purpose of enriching the study on learners and confirming trends therein;[207]

238.4 Prof Roux's superficial criticisms of the data collection tools used by Dr Robinson only reveal that she only superficially read the Robinson report (in which the pilot study is referred to) and Prof Roux's distance from and lack of understanding of children, as we have mentioned above.[208] The questionnaires or data collection tools used by Dr Robinson were proven effective (and improved upon) in a pilot study and approved by senior researchers in social sciences at the North West University;[209]

238.5 Dr Botha did not conflate the meanings of spirituality versus religion at all.[210] Dr Botha clearly understands the meaning of both terms and deliberately used them in different places in her report;[211] and

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207 Compare **Roux report** Vol 24 p 2289-2290 with **Robinson reply** para 50-63 Vol 26 p 2471-2472

208 **Roux report** Vol 24 p 2290-2291

209 **Robinson reply** para 64-82 Vol 26 p 2472-2478

210 **Botha reply** para 32-38 Vol 26 p 2446-2448

211 **Botha reply** para 32-38 Vol 26 p 2446-2448

238.6 Prof Roux's criticisms of the views of Dr De Klerk-Luttig are also wholly without merit.[212]

The reliability, by contrast, of Dr Robinson, Dr Botha and Dr De Klerk-Luttig

239. The flaws in the Roux report and the patent lack of reliability of her opinions is contrasted sharply by the opinions and reports of the school's experts.

240. Most relevant in the present context, are the reports of Dr Robinson, Dr Botha and Dr De Klerk-Luttig.

Dr Robinson

241. Dr Robinson possesses of impeccable relevant qualifications. She is a Psychiatric Forensic Social Worker,[213] an industry leader in the field of mental health and a well-known specialist in children's assessments and the facilitating and presenting of the voice of the child.[214]

242. Dr Robinson was engaged by the respondent schools in this application because of the demand to hear the voice of the child in all matters pertaining to the child. Article 12 of the Convention of the Rights of the Child states - [215]

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[212] Compare **Roux report** Vol 24 p 2293-2294 with **De Klerk Luttig reply** para 9.1-13.2 Vol 27 p 2517-2523

[213] **Robinson report** Vol 10 p 932. See for an explanation of the nature of this profession Dr Robinson's CV at Vol 11 p 979

[214] **Robinson report** Vol 11 p 980

[215] And compare sections 8-10 of the Children's Act 38 of 2005; the applicant's own constitution – AA para 853 Vol 4 p393

"Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

243. The only reasonable way the schools could facilitate evidence on the voice of the child without compromising the identity of very young children to make statements on oath (considering some six thousand learners at the respondent schools), was to engage appropriate experts to speak for them, or in the words of the Constitutional Court in *Christian Education*, "*in their name*". [216]

244. Dr Robinson is uniquely capable of professionally ascertaining and thereafter portraying the voice of the child: she has many years' experience of interviewing and assessing children, performing psycho-social behavioural assessments on them, listening to and establishing through professional methods the challenges which they might face, and of professionally advising in respect of these challenges.[217]

245. Dr Robinson is in full time practice.[218] She has further received advanced academic training at a tertiary level in research methodology, quantitative and

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[216] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 53

[217] **Robinson affidavit** para 6 Vol 10 p 932

[218] **Robinson report** Vol 11 p 978

qualitative research methods, the development of strategies on how to collect, analyse and present data and to conduct fieldwork to gather data effectively and ethically.

246. Dr Robinson has undertaken four academic studies[219] (culminating in the award of two doctoral degrees with one awaiting completion at the time)[220] which stands as a testament to, and evidence of, her excellence in research in her fields of expertise.[221] Accordingly, Dr Robinson could approach her given task with the necessary theoretical knowledge and then marry practice and theory to arrive at her conclusions in her report.[222]

247. Having been asked to advise on the best interests of a multitude of children, absent any empirical studies in that field, a theoretical treatise was insufficient.[223] Accordingly, Dr Robinson planned her study in the most meticulous way[224] to preserve its integrity and to ensure the best interests of the child in that process.[225] The applicable ethical considerations were thoroughly engaged with and applied to the study.[226]

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[219] **Robinson report** Vol 10 p978

[220] **Robinson report** Vol 10 p977

[221] **Robinson report** Vol 11 p 978

[222] **Robinson affidavit** para 7 Vol 10 p 933

[223] **Robinson affidavit** para 8 Vol 10 p 933

[224] The research method is explained in full in chapter 6 of the **Robinson report** Vol 13 p 1163-1182

[225] **Robinson affidavit** para 10 p 933; the section 'Method' in the **Robinson report** Vol 11 p 955-969.

[226] **Robinson report** Vol 11 p 960

248. Dr Robinson was personally in charge and control of the entire process of data collection at each respondent school.[227] She ensured the integrity of the data gathering and interpretation.[228]

249. Having interfaced with hundreds of learners at the respondent schools, and having conducted interviews with focus groups in each of them, Dr Robinson is by far in the best position to convey to the court the voice of the child.

250. Her understanding and interpretation of the quantitative data obtained from the schools (by way of questionnaires filled in by 758 primary school learners and 527 high school learners) and the qualitative data gathered during focus group interviews (ten representative learners in each school),[229] was arrived at transparently and professionally, considering and applying her experience, knowledge and expertise.[230]

251. To this there is no real answer by the applicant.

Dr Botha

252. Dr Botha is a lecturer in Development Psychology at the University of the Free State, and has since 2005 been registered with the Health Professions Council

[227] **Robinson affidavit** para 11 Vol 10 p 933

[228] **Robinson affidavit** para 12 Vol 10 p 934; and para 21 Vol 10 p 937

[229] **Robinson report** Tables 1 and 2 Vol 10 p 957

[230] **Robinson affidavit** para 22 Vol 10 p 937

of South Africa as a counselling psychologist.[231] She maintains a part-time clinical practice alongside her academic obligations at the university.

253. Her career abounds with experience, studies in and writing about "*resilience*" and the life satisfaction of adolescents.[232]

254. From 2010 to 2012 she was part of a research team that surveyed 1 000 adolescents in South Africa to obtain data on risk and resilience. This project involved liaising with different schools and principals, administering the questionnaires, capturing the data and being involved in its analysis.[233]

255. She is the recipient of the Donald J. Cohen Fellowship from the International Association for Child and Adolescent Psychiatry and Allied Professions, in recognition of her work as an emerging international scholar in the field of child and adolescent mental health.[234]

256. Dr Botha was requested to advise on the role that coercion, explicit or implicit, may play in affecting the freedom and voluntariness of learners to participate in religious observances at South African public schools. In doing so she based her advice on the allegations made by the applicant.[235]

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[231] **Botha affidavit** para 1 Vol 10 p 906

[232] **Botha affidavit** para 6 Vol 10 p 906-907; see the theme of her doctoral thesis in her CV, "AA18.2" Vol 10 p 923.

[233] "AA18.2" Vol 10 p 926

[234] "AA18.2" Vol 10 p 929

[235] **Botha affidavit** para 10 Vol 10 p 908

257. Dr Botha approached her report from the perspective of developmental psychology.[236] Within this field, questions of religious affiliation and practice are questions of diversity.[237]

Dr de Klerk-Luttig

258. Dr de Klerk-Luttig is currently a researcher on Morality in the Office for Moral Leadership at the University of Stellenbosch. Commencing in 1982, and for the next twenty-six years as a member of the Education Faculty at Stellenbosch University, she lectured primary and high school educators in the subjects of Educational Psychology and the Philosophy of Education.[238]

259. Her area of expertise lies in the field of value education and character building in South African schools.[239] Importantly, she speaks not from a theoretical base only, but also from a practical one, having presented many workshops on the topic of values in schools countrywide.[240] She is internationally recognised for her work in this field.[241]

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[236] **Botha report** Vol 10 p 910

[237] **Botha report** para 2 Vol 10 p 911

[238] **de Klerk-Luttig** para 4 Vol 19 p 1743; para 5 Vol 19 p 1743

[239] **de Klerk-Luttig** para 7 Vol 19 p 1744, para 15 Vol 19 p 1746, and para 16.1 Vol 19 p 1748.

[240] **de Klerk-Luttig** para 11 Vol 19 p 1746

[241] **de Klerk-Luttig** para 15 Vol 19 p 1746

The experts' main findings and principles

260. The respondent schools submit that this court may accept the following main findings and principles made by the respective expert witnesses.

Coercion: is attendance at religious observances free and voluntary?

261. As Dr Botha explains, there are currently no South African psychological studies which provide a "*conceptualisation of implicit coercion*" and certainly not in the context of religion and religious observances in public schools.[242]

262. Relying on the most recent international research, Dr Botha defines "*implicit coercion*" as "*situations where people take advantage of social, psychological or peer pressure to induce conformity*".[243]

263. Implicit coercion can also occur when there is a power differential which is abused by the person in power.[244]

264. In the context of religion in schools, Dr Botha reports that implicit coercion is preventable, if the time and effort to structure religious observances and policies, and to train staff accordingly is taken seriously by schools. She states that especially younger children would need the guidance and support of

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[242] **Botha report** Vol 10 p 911

[243] **Botha report** Vol 10 p 912, AA para 362.5 Vol 3 p 261

[244] **Botha report** Vol 10 p 912, AA para 362.5 Vol 3 p 261

teachers, parents, and their own religious communities successfully to navigate difficulties surrounding religious communities and diversity.[245]

265. Dr Botha states that should an instance of implicit coercion occur, for as with all diversity issues this may happen in certain instances, these can be dealt with on an individual basis in a way that promotes learning, understanding and resilience.[246]

266. Dr Robinson makes the importance point that it cannot be assumed that exposure of learners holding non-religious worldviews to a religious (Christian) ethos or observances is *per se* coercive. It is wrong, in her expert opinion, to adopt the "*automatic equation of Christian ethos + non-Christian learner child = possible coercive environment*", which is apparently the applicant's point of departure. Social realities are complex realities in which various factors have a bearing, all of which must be thoroughly investigated.[247]

267. While learners are exposed directly or indirectly to a specific faith that they might not be able to relate to, caution should be taken not to suggest that exposure implies coercion "*as this is not correct*".[248]

[245] **Botha report** Vol 10 p 920, AA para 362.15 Vol 3 p 262

[246] **Botha report** Vol 10 p 919, AA para 362.18 Vol 3 p 263

[247] **Robinson report** Vol 16 p 1548

[248] **Robinson report** Vol 16 p 1550

268. Regarding the socialisation of the child, questions of peer pressure and conformity, in Dr Botha's expert opinion:

268.1 it is not advisable for children to avoid engaging in challenging issues, such as religious diversity;[249]

268.2 moderately challenging situations are vital for the development and mastery of, resilience, a positive identity, and social skills, all of which contribute to the child's future competence to function effectively in a democratic, diverse society;[250]

268.3 the ability of children to resist peer pressure varies depending on the age and stage of development of the child. Middle childhood (7-12 years) and early adolescence (12-14) are considered sensitive stages for social conformity and peer pressure;[251]

268.4 children younger than 15 may be more vulnerable to succumb to peer pressure, and special care should be taken to prevent such coercion in primary schools.[252] The ability to resist peer pressure increases significantly from age 14 onwards;[253]

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[249] **Botha report** Vol 10 p 911, AA para 362.2 Vol 3 p 260

[250] **Botha report** Vol 10 p 911, **Botha reply** para 20.3 Vol 26 p 2444, para 54 Vol 23 p 2452, AA para 362.3 Vol 3 p 260

[251] **Botha report** Vol 10 p 912 first para under 2.1, AA para 362.8 Vol 3 p 261

[252] **Botha report** Vol 10 p 914 second para, AA para 362.9 Vol 3 p 261

[253] **Botha report** Vol 10 p 912 second para

268.5 children are susceptible to influence of peers in matters of taste, appearance and behaviour. By contrast, in the case of long term social and moral issues, parents remain the most influential;[254] and

268.6 although peer pressure may increase risky behaviour for a short period in early adolescence, it is a small number of children that succumb to excessive, dysfunctional conformity.[255]

The role of the school, educators and parents

269. As Dr Botha notes, the role of adults is important in minimising the chances for coercion to occur. In her opinion, the roles of parents and teachers are equally important, as both constitute the school community. If adults model and teach attitudes of tolerance and respect, if they are knowledgeable on different world views and sensitive to children's experiences, if they create an environment of acceptance, are aware of power differentials, approach religious observances creatively, and if they help children develop empathy, parents and educators can greatly contribute to a positive experience of religious diversity in schools.[256] Dr Botha concludes that an environment can be created where children are taught from a young age to engage successfully in a democratic,

[254] **Botha report** Vol 10 p 912 third para

[255] **Botha report** Vol 10 p 912 third para

[256] **Botha report** Vol 10 p 911, 914-915 and 920

diverse society,[257] and that it would be to the benefit of South African learners to negotiate the challenges posed by issues pertaining to religious diversity, freedom of religion, and religious observances in schools.[258]

270. In Dr de Klerk-Luttig's expert opinion, the establishment of core values in schools and households is of paramount importance, with educators having the moral duty to the individual learner and to society to instil core values by word and conduct, to model and teach core values, resourced in the religious beliefs of learners.[259]

271. Contrary to the applicant's desired dreary, bleached school environment, the processes of education and of instilling values are inseparable.[260]

272. As Dr de Klerk-Luttig notes:

> *Strong values are deeply anchored and do not disappear when problems arise or difficult moral decisions have to be taken. Rather, they grow to become part of a person's identity, his/her character. They become so ingrained in the personal character that moral decision making in line with core values occurs with ever greater ease.*"[261]

273. Accordingly, the values promoted at a school should be rooted in the cultural and religious affiliation of the learners at the school.[262]

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[257] **Botha report** Vol 10 p 917 third para

[258] **Botha report** Vol 10 p 916-917

[259] **De Klerk-Luttig** para 24-26 Vol 19 p 1750

[260] **De Klerk-Luttig** para 27-29 Vol 19 p 1751

[261] **De Klerk-Luttig** para 48 Vol 19 p 1756

[262] **De Klerk-Luttig** para 53 Vol 19 p 1758

274. Importantly, the report of Dr de Klerk-Luttig emphasises, like Dr Botha's, that in striving for a successful constitutional democracy, learners and educators should be permitted to interact on a religious and spiritual level because it enhances pluralism and is not inimical to it.[263]

275. In particular, the creation of a truly pluralistic community in South Africa requires that all people have the choice to demonstrate their religious convictions in their daily life in all spheres, also in the public sphere, as opposed to a stifling of those convictions by preventing or forbidding it to occur in public spaces such as schools.[264]

"The voice of the child": the empirical data

276. Dr Robinson found *inter alia* that the vast <u>majority</u> of learners:

276.1 thrive in a school with a Christian ethos and feel empowered and uplifted with the religious practices at the school;[265]

276.2 feel a definite need for a Christian value system in their school as this serves them and they are aware that they should be accommodating to other religions and faiths;[266]

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[263] **De Klerk-Luttig** para 66-72 Vol 19 p 1761-1763

[264] **De Klerk-Luttig** para 72 Vol 19 p 1763, and para 83 Vol 19 p 1767

[265] **Robinson report** Vol 16 p 1547

[266] **Robinson report** Vol 16 p 1547

276.3 want to adhere to a Christian ethos as this is an innate psychological need that is the basis for the learner's self-motivation and to foster positive processes;[267]

276.4 are passionate about the religious observances at their schools and experience their schools to be non-judgmental, non-discriminatory and inclusive;[268]

276.5 feel empowered by the religious messages given during assembly and feel that there is no coercion or measure of force used for them to participate and that all activities, including religious observances, are voluntary;[269]

276.6 perceive that the Christian ethos and value system guide them as learners to develop their outlook on life, and to consistently improve their social consciousness so as to lay a solid foundation for them as learners to become a rising generation with lofty ideas, moral integrity, knowledge and culture, and observing discipline;[270]

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[267] **Robinson report** Vol 17 p 1551

[268] **Robinson report** Vol 16 p 1547

[269] **Robinson report** Vol 11 p 963

[270] **Robinson report** Vol 16 p 1546

276.7 are happy and content with the Christian ethos; the children will be negatively impacted if the Christian ethos of the school is eliminated;[271] and

276.8 feel passionate and emotional about the value system of the schools and do not perceive the school environment as intimidating, coercing, forcing or indoctrinating on learners, but as a friendly, inclusive, non-discriminatory environment which tries to serve the best interests of the learner children.[272]

277. Interpreting the qualitative data obtained from the focus groups with the high school and primary school monitors, Dr Robinson observed that the vast majority of learners:[273]

277.1 feel that religion has until now never been a contentious issue in the school environment and that they feel comfortable with a Christian ethos in the schools;

277.2 nevertheless, they feel that the school environment is tolerant and accepting to all religions;

[271] **Robinson report** Vol 17 p 1556-1557

[272] **Robinson report** Vol 17 p 1557

[273] **Robinson report** Vol 11 p 962-963

277.3 feel served by the Christian ethos and value system of the schools and learners from the hostels (in Oudtshoorn) especially felt that the value system is very important to them due to their personal circumstances of being away from home;

277.4 feel that their school is friendly, inclusive, non-confrontational and respectful and that they as learners are not forced to believe in anything they do not want to believe in and that there is no measure of force taken at school to indoctrinate learners; and

277.5 are proud of their school, respect and accept the Christian value system at their school, and feel that their school clothes, emblems or motto are not offensive to others.

278. Dr Robinson observed that a minority of learners (less than 10%) felt negatively towards the promotion of Christian values and observances, and the passion of the majority of learners' willingness to participate in religious observances and religious practices.[274]

279. The qualitative data also indicated that some learners may feel uncomfortable with the Christian ethos at the respondent schools because of their own beliefs, and because religious bullying may at times take place. These views were,

[274] **Robinson report** Vol 11 p 963; See also **Robinson report** Vol 16 p 1490-1492

however, only shared by two or three learners from the selected participants in the qualitative study.[275]

Dr Robinson's interpretation of the empirical data

280. Dr Robinson's report makes plain that many learners at the respondent schools feel victimised by the present application:

> "*[Learners] strongly indicated that they feel victimised by the application and that they have not been given an opportunity to be heard and they have not been given a voice.*"[276]

281. Dr Robinson found inter alia that:

281.1 primary school learners at the respondent schools will be negatively affected on various levels inter alia development of trust, emotional security, morality, spirituality, discipline, values and ego-strength development, if religious practices do not form a part of their daily routine;[277]

281.2 the quantitative data obtained from the high school students presents a similar tendency to that of the primary school, in that the learners value

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275 **Robinson report** Vol 11 p 963

276 **Robinson report** Vol 11 p 970

277 **Robinson report** Vol 11 p 969 and Vol 17 p 1556

the Christian ethos at their schools and that the value system serves the majority of learners at the school;[278] and

281.3 the character and moral education provided by the respondent schools and the religious ethos preserved at the respective schools serves the learners, supports them in their school environment, and helps them cope emotionally with the stressors they are faced with in their school and family environments.[279]

282. No coercion[280] was found to be present at the respondent schools.[281] In particular, Dr Robinson found as follows:

> "*No restrictive techniques were present in the school environment as there was no attempt to establish control over the learner children; there was no promotion to reject alternate information and separate opinions and communication were not controlled in any way; no learner child was forced at any given time to re-evaluate the most central aspects of his or her experience and self or prior conduct in negative ways; there was no motivation to create a sense of powerlessness among the learners; there was no indication that strong aversive, emotional arousals (e.g. humiliation, loss of privilege, social isolation, social status changes, intense guilt, anxiety, manipulation) were encouraged.*"[282] (Our emphasis.)

283. We highlight the following further findings and opinions:

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[278] **Robinson report** Vol 11 p 969 and Vol 17 p 1556

[279] **Robinson report** Vol 16 p 1546

[280] For the theoretical basis see **Robinson report** Vol 11 p 951-952 on *Social Influence, Coercion and the Theory on Coercion*; the definition of 'psychological coercion' **Robinson report** Vol 11 p 1011; and para 3.10 Vol 12 p 1066 et seq

[281] AA para 375-376 Vol 3 p 267-268

[282] AA para 376.12 p Vol 3 p 271; **Robinson report** Vol 17 p 1553; and **Robinson reply** para 22 and 24 Vol 26 p 2462

283.1 the observation of learners during assembly showed that the atmosphere during the conducting of religious observances was positive and uplifting and non-judgmental. There was no evidence that learners were pressured to attend or participate;[283]

283.2 the interviews of learners showed that "*the religious practices at the school are voluntary and there were no indications at any time that force or pressure was used to involuntarily burden learners with the Christian ethos*";[284]

283.3 the qualitative information and the quantitative data did not give sufficient evidence that tactics are being used to coerce learners. Dr Robinson says she is able to state "*with confidence*" that: [285]

283.3.1. the atmosphere at the schools, and the individual learner children and staff portray an environment where learners' needs are prioritised and met; the atmosphere is tranquil and no elements of force or power dynamics were observed; and

283.3.2. the majority of learners and staff are happy and content; the majority of learners do not feel controlled by the school but feel that their environment promotes freedom of speech; the

[283] **Robinson report** Vol 16 p 1537-1539

[284] **Robinson report** Vol 16 p 1539

[285] **Robinson report** Vol 16 p 1550

majority of learners feel that they have a voice and are able to give their opinions freely;

283.4 this does not mean, Dr Robinson says, that every single learner is content: Learners from a faith other than the Christian faith might feel uncomfortable at times in the school environment because of the religious observances and an absence of substantive alternatives;[286]

283.5 in turn, the above does not suggest that learners who are not content are being coerced;[287]

283.6 based on an assessment of the qualitative information obtained in the course of her study, Dr Robinson concluded that coercion in the psychological sense of the concept, was absent in the conduct of religious practices at the respondent schools.[288]

284. We respectfully refer again in this regard to paragraphs 19 to 26 of Dr Robinson's reply wherein the findings in her report are clarified and concisely stated.[289]

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286 **Robinson report** Vol 16 p 1550

287 **Robinson report** Vol 16 p 1550

288 **Robinson report** Vol 16 p 1550 – Vol 17 p 1551

289 **Robinson reply** para 19-26 Vol 26 p 2461-2463

285. Dr Robinson's ultimate conclusion is that, based on empirical data, to restrain schools from having a religious ethos would not be in the best interests of the learners attending the respondent schools. To the contrary: it would be to the detriment of learners attending the schools in question if such a great part of their development is restricted. Their interests will not be served by taking religious observances and practices out of the school environment.[290]

286. Notably, Dr Robinson states of the minority of learners who disagree with a religious ethos, that in the case of the Respondent schools their needs are met by voicing these opinions and this leads to their own motivation and personal development.

287. She says that:

> *"learner children's resilience and self-motivation should thus not be underestimated as the study found that the learner children are rather determined to follow their own views. This study shows that to hamper the learners' personality development and behavioural self-regulation would not be beneficial to them".*[291]

Conclusion on the experts

288. Drs Robinson, Botha and de Klerk-Luttig all come to the same conclusion: that it would literally be a tragedy if, what has been achieved in these and other public schools, is forcibly replaced with sterile non-religious uniformity, with the vastly detrimental effect on the majority of learners who will be deprived of what is of

[290] **Robinson report** Vol 11 p 970

[291] **Robinson report** Vol 17 p 1552

considerable value to their development, well-being and ability to cope with life.[292]

289. To their opinions, the applicant has no proper answer.

290. The criticisms of Prof Roux are incorrect and her opinion is unreliable.

291. It is submitted that her report falls to be rejected by the court, which may safely rely upon the expert evidence of Drs Botha, Robinson and de Klerk-Luttig in its determination of the application.

The consequences for the case of the applicant

292. We have already demonstrated in our analysis of the facts that the applicant adduces no evidence that the common cause conduct is either coercive or necessarily causes learners at the respondent schools to suffer discrimination, labelling, ostracism, religious bullying and the like.

293. We respectfully submit that the belated expert evidence of Prof Roux likewise fails to assist the applicant in this regard.

294. The applicant is accordingly left with nothing but the bald and cynical assertions of its deponent.

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[292] **de Klerk-Luttig** para 85 Vol 19 p 1767, **Botha report** Vol 10 p 920, and **Robinson report** Vol 11 p 969 and Vol 17 p 1556

295. It is submitted that such assertions, no matter how often or passionately expressed, do not discharge the onus on the applicant in law to establish in evidence that the common cause conduct:

295.1 is automatically or necessarily coercive in that learners who are non-religious or of a different religious belief are implicitly coerced into attending or participating in the religious observances of the majority in order to hide their religious or non-religious identity to avoid being discriminated against, labelled, bullied or ostracised;

295.2 results necessarily in discrimination, labelling, bullying or ostracising of learners who are part of the minority; or

295.3 causes or gives rise to a conclusion that attendance at religious observances are not free and voluntary as required by section 15(2) of the Constitution.

296. It follows, therefore, that the court need only determine whether the common cause conduct is *per se* unconstitutional.

297. We turn to deal with this. In addition, and in an abundance of caution, we deal substantively with the legal basis for the religious observances and related conduct at the respondent schools.

Postscript: Voices from the coal-face

298. It is not only the respondent’s experts that hold the view that the removal of religion and religious observances from public schools will be tragic and not in the best interests of learners.

299. Ms Carol Millington (Queenstown Girls’ High) ventures to say that it will be hugely surprising if any of the applicant’s members are educationists or has any experience as educator in a public school, since the applicant does not display any understanding of schools, the ethos or spirit of schools, learners, discipline, education and the role religion plays in education.[293] If they were, they would appreciate that the relief sought would have disastrous consequences for education in South Africa and be hugely detrimental to learners.[294] The removal of religion would fundamentally alter the character of the school to the detriment of the learners and educators at the school.[295]

300. In similar vein, Ms Liwane-Mazengwe (Vaal Reefs Technical) finds it astounding that an organisation and individuals that she has never heard of before, may be instrumental in destroying a precious part not only of the school's life but also of the approximately 1, 780 learners at the school, thereby overturning the express wishes of parents and the SGB at her school.[296]

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[293] “AA14” para 7 Vol 9 p 834

[294] “AA14” para 8 Vol 9 p 834

[295] “AA14” para 40 Vol 9 p 846

[296] “AA16” para 8 Vol 9 p 867

301. She continues to say that religion is part of everyone's culture. It is who you are. A person is nothing if he or she does not know who he or she is. In the holistic development of children which educators are called upon to facilitate, the spiritual/religious side of personality cannot be discarded. It is necessary to give attention to and nurture this aspect of a learner's development because it strengthens the character of the learner.[297]

302. She opines that the stripping out of religious identity and religious observances from public schools would have a detrimental effect on education, on learners, and on schools[298]

303. André Marthinus Peens, the principal of Primary School Worcester since 1999, goes out of his way to emphasise the reality that education is not merely the transfer of technical or subject knowledge to a child - it is much more than that, since it has everything to do with the shaping and forming of the character of a child, thereby forming a link with the education a child experiences (or should be experiencing) in their parental homes.[299]

[297] "AA16" para 25 Vol 9 p 871

[298] "AA9" para 14 Vol 9 p 759

[299] "AA10" para 49 Vol 9 p 787

304. He says that at Primary School Worcester, the education of learners in this full sense, is being carried out in the manner envisaged in the school's vision, mission, religion policy and our country's Constitution.[300]

305. If Primary School Worcester's Tuesday practice of separate attendance of religious observances (Muslim, Hindu and Christian faiths) must disappear (because of a view prevailing that a separation on the basis of religious belief, or the pursuit of a single religion observance is unconstitutional), it will mean the end of a very important part of the occasions on which learners are able to express their religious beliefs. Ultimately, the ethos and the character of the school will be suppressed to extinction.[301]

306. This is also emphasised by the views of Mr Schoon of Dr Viljoen Combined School: the learners' legitimate interests will be adversely affected should the applicant succeed in its application.[302] He says that it would be a very sad day if children should pass through his school practically devoid of the experience of spirituality and the expression and experience of it jointly with like-minded learners. They will be deprived, he says, not only of an activity thoroughly enjoyed by all, but also of a spiritually enriching experience.[303]

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300 "AA10" para 51 Vol 9 p 787

301 "AA10" para 28.3 Vol 8 p 782

302 "AA11" para 9 Vol 9 p 791

303 "AA11" para 44 Vol 9 p 799

307. Mr Austen of Golden Grove Primary School submits that removing religion from schools would fundamentally alter the manner in which educators seek to educate children.[304]

308. Mr Reyneke of Laerskool Hendrik Louw states that, from his experience as an educator and principal, the presence and educational use of religion is central to the identity and integrity of a school. Removing the religious dimension from schools whose learners and communities are religious would be damaging to the legitimate interests of learners and the school, and detrimental to education in general.[305]

309. Lastly, Mr Lourens (Knysna High School) is of the view that if schools are to be deprived of their religious character, it will not be in the interests of education or the interests of the learners at the school.[306]

310. These are the voices of principals and educators on the ground. We respectfully submit that the court should allow these voices to sound loudly and clearly in the decision to be made, knowing that this court's decision will affect so many in public schools across the country.

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[304] "AA12" para 10 Vol 9 p 806; para 48 Vol 9 p 814

[305] "AA13" para 11 Vol 9 p 820

[306] "AA15" para 10-11 Vol 9 p 854

PUBLIC SCHOOLS: THE LEGAL FRAMEWORK

311. In the present application, the constitutional challenge of the applicant is directed not at law but at conduct.

312. A constitutional challenge directed at conduct is, of course, competent.[307]

313. But in directing its challenge at conduct only, the applicant fails to recognise and give due regard to the regulatory framework that governs the exercise of religion within the public school context.

314. That failure is material.

315. It is submitted that the constitutionality of the common cause conduct cannot be properly determined in the absence of a full appreciation of how the Constitution, the Legislature, Provincial Legislatures and SGBs of the respondent schools have sought to protect, promote and fulfil the right to freedom of religion in public schools.

316. We therefore briefly set out the legal framework.

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[307] See sections 2 & 172 of the Constitution: "*172(1)(a) When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency*." (emphasis added)

The Constitution

317. The right to freedom of religion is guaranteed in section 15 of the Constitution.

318. It is this right that is the foundation and guiding principle of the legal framework.

319. Section 15, in relevant part, reads:

> *"**15. Freedom of religion, belief and opinion***
>
> *(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*
>
> *(2) Religious observances may be conducted at state or state-aided institutions, provided that –*
>
> > *(a) those observances follow rules made by the appropriate public authorities;*
> >
> > *(b) they are conducted on an equitable basis; and*
> >
> > *(c) attendance at them is free and voluntary."*
>
> *(3) ..."*

Section 7 of the Schools Act

320. The South African Schools Act 84 of 1996 ("the Schools Act") gives legislative effect to section 15. It *inter alia* identifies the SGB as the body responsible for determining the rules referred to in section 15(2) of the Constitution.

321. Section 7 of the School's Act provides:

> *"**7. Freedom of conscience and religion at public schools***
>
> *Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary."*

322. Section 7 cannot be read apart from the regime set in place by the Schools Act for the governance of schools by SGBs or from the specially prescribed composition of SGBs.[308]

323. Membership of SGBs comprises elected members, the principal in his or her official capacity and co-opted members.[309] Elected members of the governing body include educators at the school, members of staff at the school who are not educators, learners in the eighth grade or higher and parents of learners at the school, with parents always in the majority.[310]

324. In establishing the aforesaid structure and function of SGBs, the Legislature gave recognition and effect to the natural and inalienable right of parents to choose the form of education which is best for their children.

325. This right is recognised not only in national education policy[311] but in international law binding on South Africa.[312]

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[308] See *inter alia* sections 16-23 of the Schools Act

[309] Section 23(1) of the Schools Act

[310] Section 23(2), (9) and (10)

[311] See White Paper on Education and Training, Government Notice 196 of 1995 ("White Paper 1") & *"The organisation, governance and funding of schools"* (Education White Paper 2): General Notice 130 of 1996. The relevant provisions are quoted in AA para 251 Vol 3 p 234 to para 252 Vol 3 p 236.

[312] See Article 9 of the African Charter on the Rights of the Child:

"*1. Every child shall have the right to freedom of thought, conscience and religion.*

2. Parents, and where aplicable, legal guardians shall have the duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.

3. State parties shall respect the duty of parents and where aplicable, legal guardians, to provide guidance and direction in the enjoyment of these rights subject to the national laws and policy."

326. The Constitutional Court has described the regime for school governance, and the nature and function of SGBs, as follows:

> *"An overarching design of the [Schools Act] is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school."*[313] (emphasis added)

> *"[SGBs are] meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come with it."*[314]

> *"[SGBs are] akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education."*[315]

See also Article 18(4) of the International Covenant on Civil and Political Rights:

"*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when aplicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions*."

See also Article 14(2) of the Convention of the Rights of the Child:

"*States Parties shall respect the rights and duties of the parents and, when aplicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*"

See also Article 26(3) of the Universal Declaration of Human Rights that establishes that:

"*Parents have a prior right to choose the kind of education that shall be given to their children*."

[313] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 56 ("*Ermelo*")

[314] *Ermelo* para 57

[315] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) (*Welkom)* para 63 (per Khampepe J for the minority, but with which no

Provincial legislation

327. As provided for in section 7 of the Schools Act, the SGB must perform its functions subject to "*any applicable provincial law*".

328. There is no provincial law governing freedom of religion in public schools in the Western Province, where Hoërskool Oudtshoorn and Langenhoven Gimnasium are located.

329. In Gauteng, where the remaining respondent schools are located, the Provincial Legislature has enacted the Gauteng Schools Education Act 6 of 1995 ("the Gauteng Act").

330. The Gauteng Act provides for a religion policy of a public school to be put in place, and defines "*religion policy*" to

> *"include matters relating to –*
>
> *(i) the amount, form and content of religious instruction classes offered at the school; and*
>
> *(ii) the religious practices which are conducted at the school."*

331. The provisions in the Gauteng Act dealing specifically with freedom of religion are sections 21A and 22. These sections read:

> ***"21A Religious policy of public schools***
>
> *(1) <u>The governing body of a public school must determine the religious policy of the school subject to the Constitution, the South African</u>*

judgment disagreed) ("*Welkom*") para 63 (per Khampepe J for the minority, but with which no judgment disagreed.)

Schools Act, 1996 ... and this Act in consultation with the Department.

(2) *The religious policy of a public school shall be developed within the framework of the following principles:*

   (a) *The education process should aim at the development of a national, democratic respect of our country's diverse cultural and religious traditions.*

   (b) *Freedom of conscience and of religion shall be respected at all public schools.*

(3) *The governing body of a public school must submit a copy of the school's religious policy to the Member of the Executive Council for vetting and noting within 90 days of coming into office, and as may be required.*

(4) *If, at any time, the Member of the Executive Council has reason to believe that the Religious Policy of a public school does not comply with the principles set out in sub-section (2) above or the requirement of the constitution, the Member of the Executive Council, after consultation with the governing body of the school concerned, direct that the Religious Policy of the school be formulated in accordance with sub-section (1) and (2).*

"22. Freedom of conscience

(1) *No person employed at any public school shall attempt to indoctrinate learners into any particular belief or religion.*

(2) *No person employed at any public school or independent school shall in the course of his or her employment denigrate any religion.*

(3) (a) (i) *Every learner at a public school, or at an independent school which receives a subsidy in terms of section 69, shall have the right not to attend religious education classes and religious practices at that school.*

(ii) *In this regard the department shall respect the rights and duties of parents to provide direction to their children in the exercise of their rights as learners, in a manner consistent with the evolving capacity of the children concerned.*

(b) *The right conferred by paragraph (a) on a learner at an independent school which receives a subsidy in terms of section 69, may be limited where such limitation is necessary to preserve the religious character of the independent school concerned.*

(c) *Except as is provided for in paragraph (b) no person employed at a public school, or at an independent school*

which receives a subsidy in terms of section 69, <u>shall in any way discourage a learner from choosing not to attend religious education classes or religious practices at that school</u>.

(4) <u>No person employed at a public school shall be obliged or in any way unduly influenced to participate in any of the religious education classes or religious practices at that school.</u>" (emphasis added)

332. As is plain from the above, the Gauteng Act goes further than the School's Act to:

332.1 provide that SGBs will determine the religious policy of public schools. This policy goes beyond the rules contemplated in section 7 of the Schools Act;

332.2 contemplate and provide for religious observances and instruction (religious education) at public schools;

332.3 provide that learners and educators not willing to participate in religious education or observances shall be free not to i.e. determining exemption as a method to ensure voluntariness; and

332.4 prohibit indoctrination.

333. The provisions of the Gauteng Act are of particular significance in the present application because in education, provincial legislation supersedes national legislation.[316]

334. We pause to state that what is said herein concerning the Gauteng Act, of course, only applies to the four respondent schools located in Gauteng, and not to Hoërskool Oudtshoorn and Langenhoven Gimnasium.

Religion policies

335. As may be evident from the above, section 7 of the Schools Act and sections 21A and 22 of the Gauteng Act are not detailed or prescriptive. Apart from prescribing conditions aimed at ensuring that the right to freedom of religion is not infringed, the provisions are broad, empowering and permissive.

336. This is because neither Parliament nor the Provincial Legislatures are in a position to set rules or policies in place for particular school communities, whose particular needs and religious demographic and dynamics are unknown to them.

337. It is for this reason that it is the SGB of each public school whose role and duty it is to set in place rules and policies governing religion and the exercise of religious observances within the local school community.

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[316] *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng* 2016 (4) SA 546 (CC) para 25-29

338. The SGB is the only public authority that is in a position to do so properly and effectively, within the context of a legal framework that respects the fundamental right of parents to determine the form of the education of their children.

339. It is the religion policy of a school that provides concrete rules and directives - formulated in the light of the religious demographic and needs of learners, educators and staff in the school community - for how the right to freedom of religion will be given content within a school. It will also contain rules and directives aimed at protecting the right to freedom of religion of all learners and staff at a school, including religious or non-religious minorities.

340. The religion policies of the respondent schools are attached to the supporting affidavits of the schools.[317] The applicant has elected not to impugn any of them.

Summation

341. Section 15 of the Constitution, section 7 of the Schools Act and sections 21A and 22 of the Gauteng Act provide a permissive legal framework within which the right to freedom of religion may be realised within public schools.

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317 "AA3.2" Vol 5 p 470-471 (Randhart); "AA4.2" Vol 6 p 527-534 (Baanbreker); "AA5.2" Vol 7 p 580-586 (Garsfontein); "AA6.3" Vol 7 p 638-639 (Linden); "AA7.3" Vol 7 p 693-695 (Oudtshoorn); "AA8.3" Vol 7 p 740-748

342. They do not prescribe what the content of the religious or non-religious beliefs or practices must be.

343. Rather, they facilitate the exercise of a choice in regard to religion by learners, educators, staff and the parents, which choice is subject to respect for the right to freedom of religion of all in a public school.

344. We now turn to discuss the proper interpretation of the right that is at the centre of the legal framework.

SECTION 15 OF THE CONSTITUTION AND ITS INTERPRETATION

The proper approach to interpretation

345. The proper approach to the interpretation of the provisions of Chapter 2 of the Constitution is well established.

346. While paying due regard to the language that is used, a right in the Bill of Rights should be given a "*generous*" and "*purposive*" interpretation.[318]

347. The right must not be construed in isolation, but in its context, which

> "*includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the Chapter] of which it is part.*"[319]

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[318] *S v Zuma* 1995 (2) SA 642 (CC) para 15-17 ("*Zuma*"); See also *S v Makwanyane* 1995 (3) SA 391 (CC) para 9-10 ("*Makwanyane*")

[319] *Makwanyane* para 10

348. The duty to interpret a right in the bill of rights generously and purposively, in light of its context, is echoed and affirmed by section 39(1) of the Constitution, the interpretation clause, which states that when interpreting the Bill of Rights, a court, "*must promote the values that underlie an open and democratic society based on human dignity, equality and freedom*".[320]

349. Section 39(1) also enjoins a court to consider international law binding on South Africa in the process of interpretation, and permits a court to have regard to foreign law in that process.[321]

The section 15(1) right

350. The text of section 15 of the Constitution is cited above.

351. Section 15(1) guarantees everyone the right "*to freedom of conscience, religion, thought, belief and opinion*".

352. Though concisely formulated, the right is broad and rich in content.

353. Evident at the outset, is that the right protects both religious and non-religious belief, thought and opinion.[322]

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[320] Section 39(1)(a) of the Constitution

[321] Section 39(1)(b) & (c) of the Constitution

[322] As stated at the outset, the term "*freedom of religion*" in these heads of argument refer to both religious and non-religious belief

354. The Constitutional Court has on three occasions considered the contents of the right to freedom of religion.[323] On each occasion it has accepted that the right to freedom of religion includes at least:

354.1 the right to entertain such religious beliefs as a person chooses;

354.2 the right to declare religious beliefs openly and without fear of hindrance or reprisal; and

354.3 the right to manifest religious belief by worship and practice, teaching and dissemination.

355. The right to freedom of religion and its importance within the context of the Constitution was stated by Sachs J for a unanimous court in *Christian Education* as follows:[324]

> "*The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or Creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concept of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It*

[323] *Solberg* para 92 (per Chaskalson P); *Christian Education South Africa v Minster of Education* 2000 (4) SA 757 (CC) para 18 ("*Christian Education*"); and *Prince v President, Cape Law Society, And Others* 2001 (2) SA 388 (CC) para 38 ("*Prince II*")

[324] *Christian Education* para 36

> *expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.*"

356. That freedom of religion is not limited to protecting the inner sanctum of the human conscience, but includes also the right of individuals to live and interact with others in society in accordance with their beliefs, is clear from the dictum.

357. The same sentiment, although with the emphasis on collective practice of religion, was expressed by the Constitutional Court in *Prince* where it was held that freedom of religion:

> *"includes both the right to have a belief and the right to express such belief in practise … Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial."*[325] (emphasis added)

358. Implicit also in the text of the right to freedom of religion contained in section 15(1) is "*the absence of coercion or restraint*".[326]

359. In *Solberg*, the first occasion in which the Constitutional Court was called upon to interpret the right to freedom of religion, the court had to determine whether a provision in the Liquor Act 27 of 1989 which prohibited the sale of wine on

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325 *Christian Education* para 19

326 *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) ("Prince I") para 38.

Sundays was inconsistent with the right of Ms Solberg to sell wine at a Seven Eleven store.

360. In regard to "*coercion or constraint*", Chaskalson P held that:

360.1 "*freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs*";[327]

360.2 even subtle or indirect constraints could fall foul of the freedom of religion guarantee;[328]

360.3 state action for a "*purely religious purpose*", or "*to promote*" or "*designed to compel adherence*" to a particular religion would violate the right to freedom religion; [329] however,

360.4 endorsement of a particular religion by the State which did not have a demonstrable coercive effect would not infringe the right to religious freedom.[330]

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327 *Solberg* para 92 (per Chaskalson P)

328 *Solberg* para 93 (per Chaskalson P)

329 *Solberg* para 89-90 (per Chaskalson P)

330 *Solberg* para 99-102 (per Chaskalson P)

361. Chaskalson P held that the prohibition on the sale of liquor on Sundays, Good Fridays and Christmas Day in section 90(1) of the Liquor Act did not constitute a breach of section 14.[331] Whilst acknowledging that constraints upon freedom of religion could be imposed in subtle ways,[332] Chaskalson P held that *in casu* there was no constraint upon people's *"right to entertain such religious beliefs as they might choose, or to declare their religious beliefs openly, or to manifest their religious beliefs.*" Nor, he found, was anyone compelled to open or close a shop on a Sunday.[333] He concluded that any constraint imposed by the provisions was too "*tenuous*" to be characterised as an infringement of religious freedom.[334]

362. In a separate judgment, O'Regan J went further than Chaskalson P by stating that it would not be sufficient for a Court to be satisfied in a particular case that there was no direct coercion of religious belief. The Court would need to satisfy itself that there was no inequitable or unfair preference of one religion over others.[335] Thus, referring to section 14(2) of the interim Constitution - the predecessor to section 15(2) - O'Regan held that

> *"the requirements of the Constitution require more of the Legislature than that it refrain from coercion. It requires in addition that the Legislature refrain from favouring one religion over others. Fairness and*

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[331] Section 14 of the Interim Constitution. The text of section 14 of the Interim Constitution corresponds in all material respects with section 15(1) and (2) of the final Constitution

[332] *Solberg* para 93 (per Chaskalson P)

[333] *Solberg* para 97 (per Chaskalson P)

[334] *Solberg* para 105 (per Chaskalson P)

[335] *Solberg* para 123 (per O'Regan J)

> *even-handedness in relation to diverse religions is a necessary component of freedom of religion."*[336]

363. O'Regan J accordingly held that there could be no endorsement by the state of one religion. But the nature of this "*endorsement*" was qualified:

> *"Requiring that the government act even-handedly does not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality. Indeed, at times giving full protection to freedom of religion will require specific provisions to protect the adherents of particular religions, as has been recognised in both Canada and the United States of America. The requirement of even-handedness too may produce different results depending upon the context which is under scrutiny. For example, in the context of religious observances at local schools, the requirement of equity may dictate that the religious observances held should reflect, if possible, the religious beliefs of that particular community or group.* But for religious observances at national level, however, the effect of the requirement is to demand that such observances should not favour one religion to the exclusion of others."[337] (emphasis added)

364. A further key aspect of the right to freedom of religion that may be deduced from the text of section 15(1) is the absence of an "establishment clause" that requires the separation of the church and the state.

365. Contrasting the right to freedom of religion contained in section 14 of the Interim Constitution with the First Amendment to the United States Constitution, the Constitutional Court in *Solberg* held that section 14 did not contain an

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[336] *Solberg* para 128 (per O'Regan J)

[337] *Solberg* para 122 (per O'Regan J)

establishment clause and did not demand a strict separation between the church and the state.[338]

366. It is submitted that what was stated of section 14 of the Interim Constitution in *Solberg*, applies equally to section 15 of the Constitution.

367. Section 15(2) of the Constitution provides that "*religious observances may be conducted at state and state-aided institutions*" following rules made by appropriate public authorities on condition that "*they are conducted on an equitable basis and attendance at them is free and voluntary*".

368. The text of section 15(1) when read with section 15(2) confirms that the right to freedom of religion contained in section 15 also includes *inter alia*:

368.1 the right to collective practice of religion in its scope; and

368.2 the right to participate in religious observances at state or state-aided institutions.

369. The text of section 15(2) is also the most explicit confirmation of the fact that the separation of church and state is not dictated by section 15(1).

[338] *Solberg* para 99-101 (per Chaskalson P) and para 117 (per O'Regan)

370. Section 15(2) does not, and should not be interpreted, to limit the scope of the right to freedom of religion contained in section 15(1) to including a right to conduct or participate in religious observances and not any other religious freedoms at state or state-aided institutions. Section 15(1) must not be read restrictively, but generously and purposively.[339]

371. Section 15(2) merely:

371.1 confirms that the right to freedom of religion contained in section 15 extends also to religious observances at state or state-aided institutions thereby expressly removing the wall between church and state; and

371.2 establishes conditions for the lawful exercise of this aspect of the right on premises funded to some extent by the taxpayer.

372. We consider the provisions of section 15(2) in more detail below.

373. It is submitted that the right to freedom of religion contained in section 15(1), either read separately or together with other rights in the Bill of Rights, encompasses also:

373.1 the right to teach or learn more about one's own religion, that is to impart or receive religious instruction;

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[339] See *Zuma* para 15-17 and *Makwanyane* para 9-11

373.2 the right to have a religious identity;[340]

373.3 the right to wear religious dress or symbols, or to decorate one's environment with religious symbols;[341]

373.4 the right to join others in a voluntary association in order to learn about and practice religion with them.[342]

374. It is submitted that the interpretation of the right to freedom of religion set out above is both confirmed and amplified when the text of section 15 is considered in its historical and textual context.

Religion in schools under apartheid: Christian National Education

375. The history of national government control of religion in public schools under the apartheid policy of Christian National Education ("CNE") is set out in its sad detail in the answering affidavit.[343]

376. CNE was part of the ideological control of educational institutions, including public schools for all racial groups, during apartheid. It mandated the promotion

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[340] Section 15(1) read with section 10, the right to dignity. See *Pillay* para

[341] Section 15(1) read with section 16, the right to freedom of expression. See *Pillay* para

[342] Section 15(1) read with section 18, the right to freedom of association

[343] AA para 75 Vol 3 p 187 – para 118 Vol 3 p 204

of "Christian nationalism", *inter alia* in terms of which people of colour were regarded as inferior to whites.[344]

377. Under apartheid and CNE, and through the promulgation of the Bantu (later "Black") Education Act 47 of 1953, education in South Africa was then gradually divided, through law, into four divisions, namely, White, Indian, Coloured and Black. Education for black people was further divided into ten ethnic groups.[345]

378. A host of legislation and regulations prescribed the role of Christianity and religious observances in the daily lives of all public schools.[346]

379. In this era, the content of teaching and practice in matters of religion was dictated by national government.

380. Coercion was the norm. National law and policy prescribed what religion and religious observances would be adopted and followed by all public schools irrespective of the religious beliefs and needs of learners and the school community, and even went so far as prescribing compulsory religious instruction in a particular religion and the frequency and manner of religious observances.

381. To make matters worse, the brand of religion prescribed was a distorted form of religion - a distorted form of Christianity - twisted to support apartheid ideology.

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[344] AA para 87 Vol 2 p 191

[345] AA para 92-94 Vol 2 p 194

[346] AA para 93-111 Vol 2 p194-202

382. In that era, Christians of whatever denomination, who may not have agreed with the government enforced approach and may have sought to exercise their rights to freedom of religion, would always be tainted by the system enforced on them. A multitude of Christians were unable to exercise a free choice concerning the form and way their religious belief should be manifested or practiced at school, and many Christian groups and leaders who considered their faith to require opposition to the apartheid government feared, often justifiably, reprisals.[347]

383. As a result, "*state endorsement of religion to non-adherents to the effect that they are outsiders and not full members of the political community has special resonance in South Africa*".[348]

The inclusion of the right to freedom of religion in the Constitution

384. The transition to democracy and the adoption of the interim and final Constitutions marked a break from this past.

385. During the negotiations over the text of the Interim Constitution, and the deliberations over the text of the final Constitution, there was consensus at both

[347] For example, the Christian Institute, headed by Dr Beyers Naude, was banned in 1977 under section 4 of the Internal Security Act 44 of 1950. Prior to that, in 1975, it was declared an "affected organisation" under section 2 of the Affect Organisations Act 31 of 1974; See Farlam in Woolman et al *Constitutional Law of South Africa* 2nd Ed. ("Farlam") p 41-1 to 41-2 fn.1 and the sources cited therein

[348] *Solberg* para 152 (per Sachs J)

the Multi-Party Negotiating Forum and in the Constitutional Assembly on the inclusion of a right to freedom of religion. [349]

386. Significantly, that consensus was not limited to guaranteeing the right to freedom of religion in the concise but principled formulation adopted by Canada and other international human rights instruments. [350]

387. The consensus extended to the inclusion in the text of the right to freedom of religion, an in-built express provision for religious observances to be conducted in state and state-aided institutions.[351]

388. The authors of the Interim and final Constitution intended not only to break from the past by guaranteeing the freedom of religion, but to make express provision for the public and collective practice of religion.

389. For this reason, Professors du Plessis and Corder remark of the drafting processes that "*during the negotiations, it soon became clear that the negotiators had no intention whatsoever of using the Constitution and the Bill of Rights to erect walls to separate church and state*".[352]

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[349] AA para 119-143 Vol 3 p 204-210

[350] AA para 141-143 Vol 3 p 209-210

[351] AA para 141-143 Vol 3 p 209-210

[352] L du Plessis and H Corder *Understanding South Africa's Transitional Bill of Rights* (Juta Co Ltd, Kenwyn, 1994) 156

The right to freedom of religion in context

390. There are a number of provisions in the Bill of Rights and several in the balance of Constitution that have a bearing on the interpretation of section 15.

391. These include the following:

391.1 the preamble records that South Africa is a nation "*united in … diversity*". The Constitution gives recognition to the value of unity in diversity[353] and the importance of respect for diversity. It is submitted that the Constitution takes up what was expressly provided for in the post script to the interim Constitution, namely recognition of:

> "*the importance of tolerance and mutual accommodation <u>as one of the underpinnings of our new Constitutional order</u>. Openness coupled with diversity presupposes that persons may on their own, or in community with others, express the right to be different in belief or behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship.*"[354] (emphasis added)

391.2 in this regard, the Constitutional Court held in *Fourie*[355] that

> "*The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. <u>The objective of the Constitution is to allow different concepts about the nature of</u>*

[353] See Preamble to the Constitution

[354] *Solberg* para 147 (per Sachs J)

[355] *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) para 95 ("*Fourie*")

> *human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time allows government to function in a way that shows equal respect and concern for all.*" (emphasis added)

391.3 the preamble to the Constitution closes with the words: "*May God protect our people*" where after the blessing of God is repeatedly invoked upon South Africa as follows:

> *"Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.*
> *God seën Suid-Afrika. God bless South Africa.*
> *Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."*

391.4 the text invokes the words of the national anthem which is a hymn and a prayer calling the blessing of God on South Africa;

391.5 the language provision of the Constitution, section 6, through giving special protection to languages used in diverse religions, recognises and the importance attributed to religion as part of national life and culture;[356]

391.6 section 9 of the Constitution, the equality clause, prohibits discrimination on the grounds of religion, conscience and belief as presumptively constituting unfair discrimination;

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[356] *Solberg* para 144 (per Sachs J). Section 6(5) of the Constitution provides that "*a Pan South African language board established by national legislation must … promote and ensure respect for … all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Português, Tamil, Telegu and Urdu; and Arabic, Hebrew, Sanskrit and other language line used for religious purposes in South Africa.*" (Our emphasis.)

391.7 section 18 of the Constitution guarantees that everyone shall have the right to freedom of association, which includes the right of religious associations to function freely as part of civil society;[357]

391.8 section 31 of the Constitution emphasises the protection to be given to members of communities united by shared language, religion or culture. In terms of section 31, the state is (positively) enjoined to enable individuals to join with other individuals of their community, and is (negatively) prohibited from *inter alia* denying them the rights collectively to profess and practice their own religion.[358] Section 31 confirms and strengthens the protection afforded by section 15 of the individual's right to practice religion in a collective;[359] and

391.9 the Constitution makes provision for the official and public taking of religious oaths by the State's highest officials, adding the words "*so help me God*". It also, in recognition of religious freedom, makes provision for a solemn affirmation without reference to God.[360]

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357 *Solberg* para 142 (per Sachs J)

358 *Christian Education* para 23

359 See *Prince II* para 39: "*[Sections] 15(1) and 31(1)(a) complement one another. Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practice their religion.* See also Woolman *et al Constitutional Law of South Africa* 2nd Ed. p 41-4

360 See schedule 2 to the Constitution. In *Ex Parte Speaker of the Western Cape Provincial* Legislature *in re: Certification of the Constitution of the Western Cape* 1998 (1) SA 655 (CC), the Constitutional Court was called upon to certify the text of the Constitution for the Western Cape Province in it needed to determine the constitutionality of the phrase "*in humble submission to Almighty G-d*" which was the commencing phrase to the preamble. The Constitutional Court stated as follows at para 28:

392. It is submitted that the implication of the historical and textual context of the right to freedom of religion contained in section 15 is manifold:

392.1 first, the Constitution recognises the importance and value of religion in South Africa;

392.2 second, the Constitution recognises that religion is not a matter of private and individual belief only. It is a shared reality exercised *inter alia* in common with others;

392.3 third, the shared nature of religion extends beyond the private sphere of home and community into the realm of shared public life;

392.4 fourth, section 15 of the Constitution does not include an establishment clause and does not require a strict wall of separation between the church and the state; and

392.5 fifth, the right to freedom of religion is sensitive to, and guarantees protection against, interference and coercive prescription in matters of religion by government.

"The invocation of a deity in these prefatory words to the preamble of the [Western Cape Constitution] has no particular Constitutional significance and echoes the peroration to the preamble to the [1996 Constitution]. It is a time-honoured means of adding solemnity used in many cultures and in a variety of contexts … Such words have no operative Constitutional effect nor are they fundamentally hostile to the spirit and objects of the [1996 Constitution] … these words could therefore have no effect on the rights of believers or non-believers. In the circumstances, there is no inconsistency between the preamble of the [Western Cape Constitution] and the [1996 Constitution]."

Section 15(2): religious observances at state or state-aided institutions

393. Section 15(2) of the Constitution provides that religious observances may be conducted at state or state-aided institutions if:

393.1 the observances follow rules made by an appropriate public authority;

393.2 the observances are equitable; and

393.3 attendance at them is free and voluntary.

394. We address the constituent elements of the section 15(2) below and their application to public schools.

Religious observances

395. In *Wittmann*,[361] the Pretoria High Court held that a "*religious observance*" includes acts of a religious character or a rite, which must be religious in the sense of showing human recognition of superhuman controlling power and especially of a personal God or gods that are entitled to obedience and worship, such as are practiced by the Jewish, Christian, Muslim, or Hindu worshippers.

396. The respondent schools submit further that religious observance within the South African context extends to and must include also observances that

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[361] *Wittmann v Deutscher Schulverein, Pretoria and Others* 1998 (4) SA 423 (T) 449-450

manifest and are in terms of other spiritual world views such as African traditional religions.

397. The respondent schools submit that religious observances include prayer, meditation, the reading of sacred texts, reflection on sacred texts, fasting and other dietary observances, dress, acts of praise and worship, singing, witnessing, the observing of days of the calendar year that are of special religious significance to a particular religion, gatherings of adherence and the performance of religious rituals.[362]

398. The religious observances at the schools consist of scripture reading with or without a reflection, prayer and in some instances the singing of a hymn in assembly, scripture and prayer in the quad or register classes, and in the case of two schools, closing prayer at the end of the day.

399. The expert report of Professors Vorster and Muller confirm that in their expert opinion, readings from a sacred text, prayer through which believers respond to God's word and bring each other's needs and the needs of others in society as a whole before God, and the communal singing of hymns during which the body of believers praise God in communion, are Christian religious observances.[363]

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[362] **Vorster** para 12 Vol 19 p 1800, para 13.6 Vol 19 p 1805 (confirmed by **Muller** Vol 20 p 1829), and **Tlhagale** para 23 Vol 29 p 1837 - para 42 Vol 29 p 1844

[363] **Vorster** para 12 Vol 19 p 1800, para 13.6 Vol 19 p 1805 (confirmed by **Muller** Vol 20 p 1829), and **Tlhagale** para 23 Vol 29 p 1837 - para 42 Vol 29 p 1844

State or state-aided institutions

400. The respondent schools are all public schools.

401. In terms of section 15 of the Schools Act, public schools are juristic persons with legal personality independent of the State.

402. Public schools are state-aided to the extent that they are funded, to varying degrees, by funds that are appropriated by the Provincial Legislature provided to them in accordance with s 12(1) of the Schools Act. Further, public schools receive state funds in accordance with norms and standards determined by the Minister for Basic Education in terms of s 35 of the Schools Act.

403. The state, however, is not the only source of funds for public schools. The Schools Act places an obligation on SGBs to generate funds from alternative sources to supplement the resources provided by the state.

404. In the premises, it is submitted that the respondent schools (and all public schools) are "*state-aided institutions*" within the meaning of s 15(2) of the Constitution.

Appropriate public authority

405. Section 7 of the Schools Act prescribes that it is the role the SGB of a public school to formulate the religion policy for the school.

406. The SGB is an appropriate public authority not only by reason of this legislative designation to perform a constitutional duty, but also by reason of its special composition and closeness to the learners, educators and other staff at a public school.

407. The appropriateness of school governing bodies is further emphasised by the fact that, in terms of section 20(1)(d) of the Schools Act, it is an obligatory function of the SGB to develop a mission statement for the school, albeit one that parents can lawfully refuse to subscribe to in terms of section 5(3)(b) of the Schools Act.

408. The underlying rationale is the recognition of the right of parents to educate their children and the recognition of the fact that parents, educators and members in the school community, as well as learners in appropriate circumstances, are best placed to make decisions concerning what is best for learners within the peculiar circumstances of a local school community.

409. The SGB is the appropriate authority[364] because it is able to determine, on the basis of its particular knowledge of the needs of a specific body of learners and school community religion policy is most appropriate in the context of lived local realities - again, consistent with diversity at the local level.

[364] So nominated in section 7 of the Schools Act, probably for this reason

410. The SGB is best able to individuate, to tailor to fit, and to acknowledge the rights and meet the unique needs of the specific learner, parent and educator body.

411. The above interpretation conforms to the principle of subsidiarity in terms whereof rules should be articulated and enforced by the body in closest proximity to the institution being regulated.[365]

412. The appropriateness of SGB as the authority to formulate rules for religious observances arises also from the fact that the SGB bears an element of self-governance. Through the SGB, learners either directly or through their parents choose for themselves how they wish their right of freedom of religion to be given content. This "own choice" - as opposed to outside government prescription - is in accord with logic of the right to freedom of religion.

413. In this regard, the respondent schools answering affidavit provides examples from public schools in the Western Cape, Free State and North West, of how SGBs function in practice.[366]

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[365] Farlam p 41-7

[366] AA para 265-329 Vol 3 p 239-253

Attendance at them is free and voluntary

414. Section 15(2) requires that "attendance at", and we submit by logical extension "participation in", religious observances conducted at public schools must be free and voluntary.

415. Although the *Solberg* court was not directly concerned with the right to freedom of religion and the practice of religious observances in public schools, in the context of interpreting section 14(1) of the Interim Constitution, the court did reflect on the section 14 (2) right.

416. Chaskalson P observed that:

> "*Compulsory … school prayers would infringe freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers s 14 (2) makes clear that there should be no such coercion… But whatever s 14(2) may mean … it cannot, in my view, be elevated to a Constitutional principle incorporating by implication a requirement into s 14(1) that the State abstain from action that might advance or inhibit religion.*"[367] (emphasis added.)

417. O'Regan J also observed:

> "*[it] also seems plain from the provisions of s 14(2) that State endorsement of religious practices is subject to certain qualifications. First, it should not be coercive. The requirement of free and voluntary attendance at religious ceremonies is an explicit recognition of the deep personal commitment that participation in religious ceremonies reflects and the recognition that the freedom of religion requires the State may never require such attendance to be compulsory. It protects the rights of*

[367] *Solberg* para 103 (per Chaskalson P)

> *conscience both of non-believers and of people whose religious beliefs differ from those which are being observed".*[368]

418. O'Regan J also cautioned that a court would not be concerned only with direct coercion but also the "*indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion*" in circumstances where there is an element of state endorsement of a particular religious belief.[369]

419. In order, therefore, for school religious observances to be constitutional, attendance at them must be "*voluntary*", meaning:

    419.1 attendance at or participation in religious observances cannot be compulsory, that is directly coercive;

    419.2 attendance at or participation in religious observances can also not be indirectly coercive, in the sense that minorities are implicitly pressured to attend or participate in religious observances.

420. It is important to emphasise that any indirect coercive effect which a learner might experience (but which on the facts in the present application no learners have in fact experienced) can be constitutionally mitigated by permitting and

368 *Solberg* para 120 (per O'Regan J)

369 *Solberg* para 119 (per O'Regan J)

facilitating necessary exemptions[370] in a manner that is accommodative, respecting of diversity, and which ensures mutual respect.

421. It is submitted that the decision of the German Federal Constitutional Court in 65the *School Prayers Case*[371] is helpful in understanding the requirement of the voluntariness in this context.

422. The case came to the FCC by way of two separate consolidated matters. Broadly the case concerned the permissibility of school prayer, apart from religious instruction, when the parents of a pupil object to its exercise. The first matter presented the complaint of a parent who maintained that the prohibition of prayer violated his constitutional rights. The second matter concerned a complainant who claimed that being forced to pray in school against his will violated his fundamental rights.

423. The FCC held that article 4 of the Basic Law (the right to freedom of religion) requires that school prayer

> *"must be completely voluntary … Even if school prayer is not and cannot be part of the mandatory, regulated class instruction, it remains a school event attributable to the State in each of the forms named – especially when school prayer takes place upon the teacher's instigation during class time. To be sure, the State's role is limited to creating the organisational setting for school prayer and permitting the prayer at the request of parents or pupils or on its own initiative. The*

370 Such as, for example those provided in the Gauteng Act

371 52 BVerfGE 223 (1979). The respondent schools rely on the authoritative translation in Donald P Kommers (2001) *The Constitutional Jurisprudence of the Federal Republic of Germany* 2nd Ed. At p 461 ff

State does not issue an order in this case; it makes an offer which the school class may accept"[372]

…

"To be sure, the State must balance this affirmative freedom to worship as expressed by permitting school prayer with the negative freedom of confession of other parents and pupils opposed to school prayer. Basically, [schools] may achieve this balance by guaranteeing that participation be voluntary for pupils and teachers".[373]

424. Regarding the stigma and/or indirect coercive effect that might befall a minority pupil who may not wish to participate in religious observances at schools, the FCC held as follows:

> "*The objection of a pupil holding other beliefs or of his parent's or guardians' could lead to the prohibition of school prayer only if the [school] did not guarantee the dissenting pupil's right to decide freely and without compulsion whether to participate in the prayer. As a rule however a pupil can find an acceptable way to avoid participating in the prayer so as to decide with complete freedom not to participate … Pupils can avoid praying in the following ways…*
>
> *The pupil can stay out of the classroom while the prayer is being said; for example, he or she can enter the room only after the end of the prayer or leave the room at the end of class, before the closing prayer is spoken. The pupil holding other beliefs may also remain in the classroom during the prayer but not say the prayer along with the others; he may then remain seated at his desk, unlike his fellow pupils saying the prayer. Admittedly, whenever the class prays, each of these alternatives will have the effect of distinguishing the pupil in question from the praying pupils – especially if only one pupil professes other beliefs. His behaviour is visibly different from that of the other pupils. This distinction could be unbearable for the person concerned if it should place him in the role of an outsider and serve to discriminate against him as opposed to the rest of the class. Indeed, the pupil in a classroom is in a different, much more difficult position than an adult who publicly discloses his dissenting conviction by not participating in certain events. This is especially true of the younger school child, who is hardly capable of critically asserting himself against his environment.*

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[372] *German School Prayer case* para 3(b)

[373] *German School Prayer case* para 3(c)

With respect to the issue of school prayer, the child will generally be involved in a conflict not of his own choosing, but rather one carried on by his parents, on the one hand, and the parents of the other school children or teachers, on the other hand. None the less, one cannot assume that abstaining from school prayer will generally or even in a substantial number of cases force a dissenting pupil into an unbearable position as an outsider. An assessment of the conditions under which the prayer is to occur, the function that the teacher has in connection with this exercise, and the actual conditions in the school leads us to conclude that we need not fear discrimination against a pupil who does not participate in the prayer."[374] (emphasis added)

425. The respondent schools submit that the decision of the FCC is particularly useful in the determination of the present case because section 15(2) of the Constitution requires the SGB to balance the competing rights of learners who are religious and learners who are non-religious within the school environment.

426. The tension cannot be resolved by scrupulous neutrality as in Canada,[375] or by strict separation as in the United States.[376]

427. Section 15(2) renders the task of balancing unavoidable.

Are conducted on an equitable basis

428. Section 15(2)(b) of the Constitution requires that religious observances at public schools be conducted on an equitable basis.

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374 *German School Prayer case* part II para 3 to 4

375 See *Zylberberg v Sudbury Board of Education* [1988] 65 OR 2d 641 (CA) and *Canadian Civil Liberties Association v Ontario* [1990] 71 OR 2d 341 (CA) discussed below

376 See *Everson v Board of Education of Ewing* TP 330 US1 (1947) p 1, 15-16 and *Abington School District v Schempp* 374 US 203 (1963) p 223

429. In *Solberg* Chaskalson P opined -

> "*[section 14(2)] requires the regulation of school prayers to be carried out on an equitable basis. I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the 'non-believers'*"[377]

430. Similarly, O'Regan J explained:

> *"In my view, this additional requirement of fairness or equity reflects an important component of the conception of the freedom of religion contained in our Constitution. Our society possess a rich and diverse range of religions. Although the State is permitted to allow religious observances it is not permitted to act inequitably … The requirement of equity must therefore be something in addition to the requirement of voluntariness. It seems to me that at the least, the requirement of equity demands that the State act even-handedly in relation to different religions … Requiring that government act even-handedly does not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality … for example, in the context of religious observances at local schools, the requirement of equity may dictate that the religious observances held should reflect, if possible, the religious beliefs of that particular community or group. But for religious observances at national level, the effect of the requirement is to demand that such observances should not favour one religion to the exclusion of others."*[378]

431. The respondent schools submit that the requirement of equity is not the same as equality and equality is not "sameness". Rather, equity requires that the religious observances held at a school should reflect, if possible, the religious beliefs of the particular community or group.

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[377] *Solberg* para 103 (per Chaskalson P)

[378] *Solberg* para 122 (per O'Regan J)

432. Where there is an overwhelming majority that subscribes to one religion and only a handful of individuals that subscribe to another, it is not required of a school to give both religions equal time and equal treatment within the daily timetable at a school. Rather, in such a context, equity requires that the school reasonably and practically meets the needs of the majority and at the same time respects the freedom of religion of minorities by taking measures to reasonably accommodate them.

433. By way of further example:

433.1 where there is a not-insubstantial minority religious contingent or where the profile of religious belief is substantially spread, equity would dictate that separate facilities be provided and (if appropriate) the guidance or presence of ministers of the not-insubstantial minority religion or religions at the school to guide learners in their religious observances; and

433.2 in a 50:50 environment, equity would require equal treatment, equal facilities and perhaps an alternation between religious observances by the one religion and then the other at school assemblies if they cannot be provided separately simultaneously.

434. Equity depends intimately on the facts. It demands that the rules regarding religious observances are tailored to suit the religious profile and dynamics of

the particular school concerned, subject to the overriding aim of unity in diversity and equal respect and concern for all.

Reasonable accommodation

435. It is submitted that the principle of reasonable accommodation may usefully be applied:

435.1 in satisfying the requirements of equitability and voluntariness contained in section 15(2); and

435.2 in determining whether those requirements have been met in a particular instance.

436. It may also be usefully applied in ensuring the right to freedom of religion of minorities, or indeed of competing religious or non-religious groups of learners of varying sizes, are respected in respect of religious conduct other than religious observances.

437. The concept of reasonable accommodation is not new to South African law.[379]

438. It has been repeatedly referred to and applied by the Constitutional Court when considering matters of religion.[380]

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[379] *MEC for Education, KwaZulu-Natal And Others v Pillay* 2008 (1) SA 474 (CC) para 72 ("*Pillay*")

439. In *MEC for Education, KwaZulu-Natal And Others v Pillay* 2008 (1) SA 474 (CC) (*Pillay)*, the Constitutional Court stated that the core of the notion of reasonable accommodation is that:

> "*sometimes the community, whether it is the state, an employer or a school, must take positive measures and possibly incur hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms."*[381]

440. The court held that application of the principle of reasonable accommodation

> *"is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck."*[382] (emphasis added)

441. Reasonable accommodation is an "*exercise in proportionality that will depend intimately on the facts*"[383] and on the nature of the competing values and interests involved.

442. It is submitted that the principle of reasonable accommodation can be, and at the respondent schools has been, applied to achieve the striking of a balance between

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380 *Pillay* para 72 referring to *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) ("*Prince I*") para 17 and *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) ("*Prince II*") para 76, 146-148 and 170-172. See also *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) ("*Fourie")* para 159 and the labour law cases cited at fn 53 of *Pillay*

381 *Pillay* para 72-74

382 *Pillay* para 78

383 *Pillay* para 76

442.1 learners who are religious and whose right to freedom of religion in the school context must be fulfilled by providing them opportunities to participate in religious observances, on the one hand; and

442.2 learners who are not religious or from a minority religious group whose right not to subscribe to the majority religion or be coerced into participating in its activities should be respected.

443. As indicated above, that the rights of learners in the context of religion in schools are in tension and need to be balanced, was recognised by the FCC in the *School Prayers Case*[384] and the *Interdenominational Schools Case*.[385]

444. Explaining the negative and positive dimensions to Article 4, the right to freedom of religion in the German Basic Law, and in the context of public schools and the inherent tension between the wishes of the majority versus the minority, the FCC identified in the *Interdenominational Schools Case*[386] that:

> "*There is a tension here between 'negative' and 'positive' religious freedom. The elimination of all ideological and religious references would not neutralise the existing ideological tensions and conflicts, but would disadvantage parents who desire a Christian education for their children and would result in compelling them to send their children to a lay school that would roughly correspond with the complainant's wishes … .*
>
> *Because life in a pyrolytic society makes it practically impossible to take into consideration the wishes of all parents in the ideological or*

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[384] *School Prayers Case* 52 BVerfGE 223 (1979)

[385] *Interdenominational School Case* 41 BVerfGE 29 (1975). See translation in Donald P Kommers (2001) *The Constitutional Jurisprudence of the Federal Republic of Germany* 2nd Ed. p 461 ff

[386] *Interdenominational School Case* 41 BVerfGE 29 (1975) para 2(b)

> *organisation of compulsory state schools, [we] must assume that the individual cannot assert his right to freedom pursuant to article 4 of the Basic Law free of any limitation at all … In school matters, the task of resolving the inevitable tension between negative and positive religious freedoms falls to the Democratic State Legislature. In the process of making public policy, the Legislature must seek a compromise which is reasonable for all while considering the varying views*."

445. It is submitted that under a constitution that expressly provides for religion in shared public life and enjoins South Africans not only to accept but celebrate difference in accordance with the value of unity in diversity, the achieving of a balance cannot be avoided.

446. It is submitted that the application of the principle of reasonable accommodation is a constitutionally permissible means by which that balance might be achieved.

THE CONSTITUTIONAL DUTY OF SGBs TO PROMOTE THE RIGHT TO FREEDOM OF RELIGION

447. Section 7(2) of the Constitution provides that "[*t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights*."

448. The obligation to protect the rights in the Bill of Rights goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right.[387] The Constitutional Court has held that in some circumstances the Constitution imposes a positive obligation on the "*[s]tate and its organs to*

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[387] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 para 105.

provide appropriate protection to everyone through laws and structures designed to afford such protection."[388]

449. While the constitutive members of SGBs are drawn from the public school communities that they govern, they are performing a public function. They accordingly have been held to be organs of state.[389]

450. As organs of state, SGBs have an obligation under section 7(2) of the Constitution to respect, protect, promote and fulfil the rights entrenched in the Bill of Rights,[390] including the rights of all leaners, educators and parents to the freedom of religion.

451. It is submitted that in the case of the respondent schools where the vast majority of learners are Christian, the SGBs are under a positive duty to provide opportunity *inter alia* for Christian religious observances, instruction, the promotion of Christian values and allow the formation of voluntary Christian associations.

452. All of the above must be balanced by, and subject to the safe-guarding of the right to freedom of religion of those who are not Christian by ensuring their freedom to not participate or attend Christian activities. In contexts where there

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388 *Carmichele v Minister of Safety and Security and Another (Centre for Aplied Legal Studies intervening)* 2001 (4) SA 938 (CC) para 44.

389 *Welkom* para 141 (per Froneman and Skweyiya JJ); *Welkom* para 202 (per Zondo J)

390 *Welkom* para 202 (per Zondo J)

are a not-insubstantial minorities, SGBs would likewise be enjoined by section 7(2) to take positive steps to promote and fulfil the right to freedom of religion of such minorities.

453. In this context, the obligations imposed under section 7(2) read with section 15 of the Constitution can, the respondent schools submit, "*be key to an affirmation and celebration of Otherness in (and through) the construction of, inter alia, religious and related rights*".[391]

454. The Constitution brings together a wide range of diverse peoples and cultures. It envisages a society that is united in diversity and, as has been repeatedly affirmed by the Constitutional Court, celebrates difference.

455. In *Pillay*,[392] the Constitutional Court held that expression of religion and culture by learners in public schools:

> "*is something to be celebrated, not feared. As a general rule, the more learners will feel free to express their religions and cultures in schools, the closer we will come to the society envisaged by the Constitution. The display of religion and culture in public is not a 'parade of horribles' but a pageant of diversity which will enrich our schools and in turn our country*"

456. Section 7(2) of the Constitution places an obligation on SGBs to take the leading role in giving full effect to the right to freedom of religion in public schools.

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[391] Du Plessis p 382

[392] *MEC for Education, Kwa-Zulu Natal, and Others v Pillay* 2008 (1) 474 (CC) para 107

THE CONSTITUTIONALITY OF THE COMMON CAUSE CONDUCT

457. It remains to consider whether the common cause conduct is, as the applicant claims, unconstitutional.

458. It is submitted, having regard to the proper interpretation of section 15 of the Constitution set out above and the decision of the Constitutional Court in *Solberg*[393], that what SGBs, cannot do under section 15(1) of the Constitution is

458.1 coercively to require conduct, or

458.2 to permit or facilitate conduct in a manner indirectly coercive or intent on inducing conformity

such that it's overall purpose and effect is to:

(i) compel adherence to a particular religion;

(ii) endorse one religion to the exclusion of others with a demonstrable coercive effect;

(iii) favour of one religion over another in a manner which is not equitable; and

(iv) force learners or educators to act or refrain from acting in a manner

[393] *Solberg* para 92-102 (per Chaskalson P) & para 122-128 (per O'Regan J)

contrary to their religious beliefs.

459. It is submitted that none of the common cause conduct falls into the categories of conduct delineated in paragraph 458 above.

Religious values

460. It is not disputed that school education necessarily includes an education in values.

461. The fundamental importance of education in values for the proper growth and development of learners, as testified to by Dr De Klerk-Luttig, is also not disputed.

462. As much is stated in the National Religion Policy:

> *"The full development of our children is fundamental to the education process. Outcomes Based Education and the National Curriculum Statements for General and Further Education and Training are geared to develop the cognitive, social, emotional, physical, spiritual and ethical dimensions of pupils."*[394] (emphasis added)

463. In accordance with their religion policies, each of the respondent schools seeks to impart Christian values to learners who attend the schools.

464. It is submitted that such conduct is not unconstitutional.

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[394] National Religion Policy para 20

465. The only evidence of the effect of the imparting of Christian values at the respondent schools is a single claim made by a learner, who attends Höerskool Oudtshoorn. It is reported that she says she feels it is “unfair” that the subject *Geestesweerbaarheid* discusses issues from a Christian perspective, and not another perspective.

466. There is no claim by her that such discussions are coercive or offensive in any manner

467. There is no evidence adduced by the applicant that the imparting of Christian values in the ordinary life of the respondent schools is coercive or detrimental.

468. To the contrary, the undisputed evidence of Dr Robinson is that the vast majority of pupils in a school with a Christian ethos feel empowered and uplifted with the religious practices at the school; feel a definite need for a Christian value system in their school as this serves them and they are aware that they should be accommodating to other religions and faiths; and want to adhere to a Christian ethos as this is an innate psychological need that is the basis for the learner’s self-motivation and to foster positive processes.

469. The imparting of Christian values at the respondent schools also does not constitute the inequitable endorsement of Christianity by the state, insofar as the decision to promote Christian values at the respondent schools was not the decision of the provincial or national government. Rather, it was the decision of

the SGB, whose special composition provides this is effectively the choice of parents of learners attending public schools and, where applicable, the learners themselves. There is more than enough evidence that, where demographics shifted sufficiently, observances are adapted, as for example at Queenstown Girls' High[395] and Pinelands North.[396]

470. In the *Interdenominational Schools Case*[397] the FCC, the complainants objected to their children being educated in accordance with any religious or ideological precepts.

471. The FCC held:

> "*[T]he State Legislature is not absolutely prohibited from incorporating Christian references when it establishes a state elementary school, even though a minority of parents have no choice but to send their children to this school and may not desire any religious education for their children. However, the [Legislature], must choose a type of school which, in so far as it can influence children's concerning faith and conscience, contains only a minimum of coercive elements. Thus the school may not be a missionary school and may not demand commitment to Christian articles of faith. Also, it must remain open to other ideological and religious ideas and values. The [Legislature] may not limit a school's educational goals to those belonging to a Christian denomination, except in religion classes which no one can be forced to attend. Affirming Christianity within the context of secular disciplines refers primarily to the recognition of Christianity as a formative cultural and educational factor which has developed in western civilisation. It does not refer to the truth of the belief. With respect to non-Christians, this affirmation obtains legitimacy as a progression of historical fact … . Confronting non-Christians with a view of the world in which the formative power of Christian thought is affirmed does not cause*

[395] Queenstown affidavit para 22-37 Vol 9 p 837-845

[396] Pinelands North affidavit para 34-50 Vol 6 p 765-768

[397] *Interdenominational School Case* 41 BVerfGE 29 (1975)

discrimination either against minorities not affiliated with Christianity or against their ideology…"[398] (emphasis added)

472. It is submitted that insofar as the imparting of Christian values, or basing the education process on those values, is concerned, there is no requirement that minority religious or non-religious learners assent in any way to the truth of Christian belief.

473. In the premises, it is submitted that the applicant's various claims for declaratory or interdictory relief prohibiting the imparting of religiously based values at public schools in general, and the respondent schools in particular, must fail.

Religious instruction

474. Only the primary schools provide religious instruction.[399]

475. In the case of all three schools, Bible classes are presented on a voluntary, and non-promotional basis.

476. As such, the religious instruction is offered in accordance with the National Religion Policy.[400]

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398 *Interdenominational School Case* para 3

399 See the discussion in the section above on common cause facts

400 National Religion Policy para 55: "*Religious Instruction may not be part of the formal school programme, as constituted by the National Curriculum Statement, although schools are encouraged to allow the use of their facilities for such programmes, in a manner that does not interrupt or detract from the core educational purposes of the school.*" We do not dispute that this Policy lawfully expresses itself on matters of curriculum, as is the case here.

477. Learners who do not wish to attend or participate are accommodated by being allowed to spend the period in the media centre where they are supervised by an educator.

478. There is no evidence that learners are coerced into attending such Bible classes, or that the measures offered by the respondent schools to reasonably accommodate are insufficient to prevent coercion.

479. As discussed above, the subjective fears reported of the two learners at Laerskool Baanbreker are unfounded. Learners belonging to minorities have been excused from Bible class have not been ostracized or suffered discrimination. There is no expert evidence identifying that such learners are being directly or indirectly coerced in a manner that may give rise to the inference that their right to freedom of religion is being infringed.

480. The giving of religious instruction by a school is not unconstitutional *per se*.

481. The right to religious instruction falls within the scope of the right to freedom of religion.

482. There is finally no express or implied establishment clause contained in section 15 which prohibits state or state-aided institutions from conducting an

activity that has a religious purpose.[401]

483. In the premises, it is submitted that the applicant's various claims for declaratory or interdictory relief directed at prohibiting religious instruction must fail.

Religious symbolism and decorations

484. The applicant provides no evidence of any learner that is coerced or in any other way affected by the religious significance attributed by Laerskool Randhart and Laerskool Garsfontein to their respective coat of arms, by the religious symbols and decorations on the walls of the school at Langenhoven Gimnasium or by the decorations on the inner walls of the educator's class at Höerskool Linden.

485. The learners and educators at the respondent schools have confirmed to Dr Robinson that the presence of religious symbols is of no concern.

486. The claim of the applicant is undermined further by the fact that at Langenhoven Gimnasium, all of the religious symbolism and decorations are the voluntary work of learners, and at Hoërskool Linden, the personal decorations of an educator that are appropriately balanced with non-religious decorations.

487. The hyper-theoretical opinion of Prof. Roux on this score, completely out of touch with the reality on the ground, falls to be rejected for the reasons dealt

[401] Cf. *Abington School District v Schemp* 374 US 203 (1963) where a law prescribing the reading of ten verses of the Bible each day was held to be unconstitutional on account of being in breach of the establishment clause.

with above.

488. Adornment of the school walls with religious symbolism or decoration is not *per se* unconstitutional. This case is not one where there is direct state endorsement of religion through a legislative requirement that a crucifix or other religious symbol be displayed in every classroom at a school.[402]

489. There is no establishment clause prohibiting such religious symbolism or decoration as in the case of *Stone v Graham* (1980) 449 US 39, where the US Supreme Court declared the posting of the ten commandments on the wall of a school a violation of the separation of church and state mandated by the First Amendment.

490. In the premises, it is submitted that the applicant's various claims for declaratory or interdictory relief directed at religious symbolism and decorations must fail.

[402] In the *Classroom II Crucifix Case* 93 BVerfGE 1 (see Kommers p. 461ff) the FCC was FCC was confronted with a school ordinance which required the display of the crucifix in every elementary school classroom. The parents of children attending one of the schools objected to the display of the crucifix in classrooms. The parents, members of a group known as Anthroposophy, which is based on the naturalistic quasi-religious teachings of the Rudolf Steiner, claimed that the display of the crucifix offended their children's religious beliefs and thus violated the Basic Law. Whilst acknowledging its previous decisions permitting public interdenominational schools to have Christian values and the basis for education and school prayer, the court held that a requirement that a crucifix hang in each classroom was not permitted: "*The affixing of crosses in classrooms goes beyond the boundary thereby drawn to the religious and philosophical orientation of schools. As already established, the cross cannot be divested of its specific reference to the beliefs of Christianity and reduced to a general token of the Western cultural tradition. It symbolizes the essential core of the conviction of the Christian faith*" (see para 3(a))

Voluntary Associations - VCSV and JIK groups

491. There is no evidence that the activities of the VCSV and JIK groups at any of the respondent schools are anything but voluntary.

492. It is submitted that section 15(1) read with the right to freedom of association contained in section 18 of the Constitution forcefully protects the rights of learners to form or belong to voluntary religious associations allowed to operate at public schools.

493. The conduct is not unconstitutional *per se*. There is no establishment clause in the Constitution prohibiting the use of school facilities by VCSV groups.

494. No proper case is made out that the respondent schools inequitably or coercively advertise or endorse VCSV groups. The evidence is that such groups receive no more exposure than any other cultural club.

495. In the premises, it is submitted that the applicant's various claims for declaratory or interdictory relief directed at prohibiting VCSV groups at public schools in general, and the respondent schools in particular, must fail.

Religious observances

496. The admitted religious observances at the respondent schools are described above in considerable detail.

497. In all instances, participation in the religious observances is voluntary.

498. All of the respondent schools either accommodate or offer to accommodate those learners not wishing to attend at religious observances either by allowing them to arrive after the religious observances have been conducted, or by accommodating them in a supervised classroom, office or media centre.

499. Dr Robinson's evidence (undisputed) is that the majority of learners are passionate about the religious observances at their schools, experience their schools to be non-judgmental, non-discriminatory and inclusive, feel empowered by the religious messages given during assembly and feel that there is no coercion or measure of force used for them to participate and that all activities, including religious observances, are voluntary.

500. Her personal observations of learners during assemblies showed that the atmosphere whilst conducting of religious observances was positive and uplifting and non-judgmental. There was no evidence that learners were pressured to attend or participate.

501. The applicant's expert was not able to contradict the evidence of Dr Robinson.

502. It is submitted that the nature of the above religious observances and the manner in which they were carried out in practice, subject to reasonable accommodation of minorities, was equitable within the meaning of section

15(2).[403]

503. The religious observances are the "*the most appropriate for the school*"[404]. They "*reflect … the religious beliefs of [the] particular community or group*".[405]

504. It is submitted that the applicant's reliance on the Appeal Court of Ontario's decisions in *Zylberberg*[406] and *CCLU*[407] and the United States Supreme Court's decision in *Lee*[408] is misplaced.

505. These decisions are distinguishable in several material respects.

506. Firstly, the text of section 2(a) the Canadian Charter[409] and of the First Amendment to the United Stated Constitution[410] are entirely unlike section 15 of the Constitution.

507. Neither has a provision similar to section 15(2) which provides for religious

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403 *Solberg* para 103 & 122

404 *Solberg* (per Chaskalson P) para 103

405 *Solberg* (per O'Regan J) para 122

406 *Zylberberg v Sudbury Board of Education* [1988] 65 OR 2d 641 (CA)

407 *Canadian Civil Liberties Association v Ontario* [1990] 71 OR 2d 341 (CA)

408 *Lee v Weisman* 505 US 577 (1992)

409 Section 2(a) of the Charter reads: "*Everyone has the following fundamental freedoms: (a) the freedom of religion*"

410 The First Amendment in relevant part reads: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..*".

observances to be conducted in state or state-aided institutions.[411]

508. Secondly, in both the Canadian and the US cases the constitutional attack was directed at a state law or regulation that required the conducting of religious observances in question.[412] In the present case, the attack is directed at conduct in terms of a religion policy adopted a particular public school by the SGB comprising parents, learners and educators of the school.

509. Thirdly, although the court made reference to journal articles on peer pressure, the religious observances prescribed in *Lee* were held unconstitutional because it violated the establishment clause.[413] In any event, the "evidence" relied on in Lee has been utterly discredited by Dr Botha who states that:[414]

> *"The studies are dated. Research in Psychology and Developmental Psychology has accelerated to such an extent over the past 50 years, it is not considered good practice to rely on findings older than 10-15 years (except for seminal works). Recent findings on group conformity and peer pressure in particular, indicate that these processes are more complex than early findings described them to be. In addition, due to globalisation and extensive changes in world politics, culture, access to information, and technology; research populations from the previous century cannot be considered representative of current research populations. Today's cohort of adolescents has different characteristics and experiences compared to a 1980's cohort of adolescents.*

510. Fourthly, in both Canadian decisions the Ontario Court of appeals accepted

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[411] See *Adler v Ontario* [1996] 3 SCR 609 where a challenge on the basis of the freedom of religion clause failed because it was contradicted by another provision of Canada's Constitution. In similar vein, it is submitted that the aplicant cannot rely on section 15(1) to render section 15(2) nugatory.

[412] *Zylberberg* p …; *CCLU* p … *Lee* p 586-599

[413] *Lee* p 587-589

[414] **Botha report** Vol 10 p 913 third para

expert evidence adduced by the complainants to the effect that the legislative prescription of compulsory religious observances (*Zylberberg*) and instruction (*CCLU*) indirectly coerced the complainants' children to conform. In the present application, it is submitted that the opinion of the expert for the applicant is unreliable and is outweighed by the opinions of Dr Robinson and Dr Botha.

511. Fifthly, and perhaps most importantly, the current South African public schools' context is different. In this regard, it is not disputed that the transition to democracy and the success of religion education have been effective in informing learners at the respondent schools about the religious or non-religious "other" and have created a context where educators and learners in the public school environment are geared to accepting and respecting those who hold beliefs that may be different from their own.

512. And finally, neither the court in *Lee* nor the court in *Zylberberg* operates from the premise that religion and unity in religious diversity in public schools is a goal to be achieved, still less something to be celebrated.

513. It is submitted that in view of section 15(2) of the Constitution and the jurisprudence of the Constitutional Court affirming the importance of religion and the accommodation of diversity, the court should follow the balancing approach of the German FCC in the *School Prayers Case* and the *Interdenominational Schools Case* referred to above.

The applicant's misplaced reliance on *Hasan* and *Folgero*

514. It is submitted that the applicant's reliance on the decision of the European Court of Human Rights in *Folgerø v Norway* (2008) 46 E.H.R.R. 47 ("*Folgerø*") and *Hasan and Eylem Zengin v Turkey* (2008) 46 E.H.R.R. 44 ("*Hasan*") is also misplaced.

515. These cases concerned the refusal of exemption by the state respondents to applications for exemption from compulsory school subjects with religious content.

516. In *Hasan*, the complainant had applied to the Turkish education authorities for exemption for his daughter from compulsory religion and ethics classes. He and his daughter subscribed to Alevism. The religion and ethics classes were taught from the perspective of orthodox Islam.[415] The application was made in the face of the section 24(3) of the Turkish Constitution that made it compulsory for all children in primary and secondary school to attend classes in religion, culture and ethics. It was also made in the face of national legislation that made the subject compulsory. The Turkish Authorities had refused exemption to *Hasan*.[416]

[415] *Hasan* para 1-10

[416] *Hasan* para 11

517. In *Folgerø*, the complainant parents had sought exemption for their children from attendance at the KRL subject, a compulsory subject in primary and secondary schools on morals and religion that promoted Evangelical Lutheranism. The education authorities were only prepared to grant partial exemption (from religious practices not from the education/knowledge content of the KRL subject) which placed an even greater burden on the parents for they were required to identify those parts of the syllabus that were in conflict with their religious and philosophical convictions and motivate the need for exemption from those parts.[417]

518. In both *Hasan* and *Folgerø*, the complainant parents brought challenges in terms of Article 2 of Protocol 1 of the European Convention on Human Rights which states that:

> "*In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions.*"[418]

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[417] *Folgerø* para 23 & 27, 51 & 57-65

[418] *Hasan* para 35; Folgerø para 51

519. The parent complainants also brought a separate challenge on the basis that their right to freedom of religion contained in Article 9 of the European Convention was also infringed.[419]

520. In both cases, the ECHR held that under Article 2 of Protocol 1, state parties are under an obligation to present subjects on religion and culture in a manner that is "*objective, critical and pluralistic manner, enabling pupils to develop a critical mind with regard to religion*"[420]

521. The ECHR held in each case that the subject presented was not presented objectively or in a pluralistic or critical manner. In *Hasan*, the compulsory subject promoted Islam[421] whereas in *Folgerø* the subject promoted Christianity, in particular, Evangelical Lutheranism.[422]

522. In *Hasan*, insofar as the challenge under Article 9 of the European Convention was concerned, although the ECHR made reference to its own jurisprudence in which it had held that religious conviction was a matter of individual conscience[423] and stated in *Hasan* that requiring disclosure of religious convictions "*may raise a problem under Article 9*":

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[419] *Hasan* para 78; Folgerø para 51

[420] *Hasan* para 52; *Folgerø* para 84(h)

[421] *Hasan* para 60-70

[422] *Folgerø* para 89-94

[423] *Hasan* para 73

522.1 the ECHR held that in view of the fact that the state authorities had a discretion to refuse exemption, the exemption was not appropriate and did not give satisfactory protection to the convictions of parents;[424] and

522.2 the court refrained from deciding the challenge under Article 9. The ECHR therefore made no decision on whether the complainant's right to freedom of religion had been infringed.[425]

523. In *Folgerø*, referring to the fact that religious convictions fall within the realm of intimate personal life, the ECHR held that the exemption procedure "*may constitute a violation of Article 8 of the Convention and possible also of Article 9*"[426] but did not decide the issue.

524. It decided the complaint on the basis that the partial exemption procedure was unduly burdensome on the complainants, and because of the difficulty in drawing a distinction between religious practices and information, did not confer satisfactory protection for the purposes of Article 2 of Protocol 1.[427]

525. Notably, in *Folgerø* the complainants asserted that the previous regime, in terms whereof parents could apply for and obtain full exemption, "*would have satisfied both the state obligations and the parental rights as protected by the*

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[424] *Hasan* para 76

[425] *Hasan* para 78-79

[426] *Folgerø* para 89

[427] *Folgerø* para 97-101

Convention".[428]

526. Therefore, neither the case of Hasan nor of Folgerø are of assistance to the applicant because:

526.1 the ECHR (within the context of Article 2 of Protocol 1) decided that the exemptions were ineffective because the state authorities retained a discretion to refuse (*Hasan*) or were only partial and unduly burdensome (*Folgerø*). In the present application, the exemptions offered by the respondent schools are full exemptions obtainable on the mere asking;

526.2 the ECHR made no decision on the basis of the right to freedom of religion. The very brief and passing statements by the ECHR concerning possible infringements the right to freedom of religion or the right not to disclose religious convictions is (very weak) *obiter*.

Conclusion

527. For the above reasons, it is respectfully submitted that the applicant's various claims for declaratory or interdictory relief directed at prohibiting religious observances at public schools in general, and the respondent schools in particular, must fail.

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[428] *Folgerø* para 103

Other impugned conduct

528. The applicant's notice of motion identifies no less than 104 iterations of conduct (albeit with many repetitions).

529. We have dealt herein with the conduct impugned by the applicant by category:

529.1 for the sake of convenience; and

529.2 in view of the fact that the applicant has made no attempt to address each iteration of conduct in its heads of argument.

530. We respectfully record the respondent schools' right to deal with particular conduct not addressed herein in oral or supplementary written argument.

DECLARATORY RELIEF: NON-JOINDER, THE COURT'S DISCRETION AND BRUTUM FULMEN

The problem of non-joinder

531. In view of the glaring fact that only a miniscule number of schools were joined as respondents, the respondent schools raised the point of non-joinder of all the other public schools in the country.[429]

532. It is trite law that, whether the respondent schools have raised the point or not, the court may *mero motu* find that interested parties ought to have been joined.

[429] AA para 646 Vol 4 p 346 - para 662 Vol 4 p 349

533. The respondent schools wish the matter to proceed on the merits, but are duty bound to make their submissions to assist the court in dealing with the problem.

534. Each public school is an independent juristic person with legal personality separate from the state,[430] the governance of which is vested in an SGB.[431] Their functions extend to making rules, specific to each school, regarding the conduct of religious observances.[432]

535. It is therefore hard to avoid the inference that other public schools have a direct and substantial interest in this matter. Binns-Ward J recently stated the position as follows:[433]

> *It is a fundamental principle of law that a court should not at the instance of any party grant an order whereby any other party's interests may be directly affected without formal judicial notice of the proceedings having first been given to such other party. This is so that all substantially and directly interested parties may be heard before the order is given, which is a matter of fairness. And also so that the order may be binding on all parties whose interests its terms should affect, and not just some of them, which is a matter of sound judicial policy. The excursus in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) is the locus classicus on the subject in our jurisprudence. It is thus mandatory for a party that institutes proceedings to join every other party that has what is called 'a direct and substantial interest' in the relief sought. If the parties do not themselves raise a point of non-joinder when it is indicated, the court should do so mero motu.*

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[430] Section15 of the Schools Act

[431] Section 16(1) of the Schools Act

[432] Section 7 of the Schools Act

[433] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] 1 All SA 520 (WCC) para 35-36 ("*EFF*"); *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657; and *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168–70

536. Yet, the approximate 24 060 other public schools[434] have not been joined. No effort was made by the applicant to ensure such joinder despite the matter having been raised explicitly in answer almost two years ago.[435]

537. There are divergent views on the question whether a court retains discretion to allow a matter to proceed despite the apparent existence of other interested parties. The commentary in *Erasmus* favours the existence of discretion.[436] A full bench of the erstwhile TPD held that that the rule is not a mechanical or technical one which "*must be ritualistically applied*".[437] This decision may be worth following in this instance.

538. In this regard, it is submitted that it is barely conceivable that any argument for or against the relief sought, will not have been either canvassed in the papers or by the parties and the numerous *amici*. It is submitted that the court may in such circumstances consider allowing the matter to proceed on its merits.

539. If this court determines, however, that joinder of all other public schools ought to have been effected, the applicant is entirely to blame for that state of affairs. The

[434] It includes public schools on private land – section 14 read with sections 56 and 57 of the Schools Act – in which event the owners of those schools, predominantly Catholic, also have a legal interest not to be deprived of their religious observances by the sweeping orders sought

[435] It has not even resorted to efforts to obtain informal consents to the judgment. In this regard, see *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) para 20; and *EFF* para 47 and 49

[436] *Erasmus Superior Court Practice* 2016, D1-125-126.

[437] *Wholesale Provision Suplies CC v Exim International CC and Another* 1995 (1) SA 150 (T) 158 D-E; See the discussion in *EFF* para 37-39

applicant should accordingly be ordered to pay the costs of any postponement on an attorney and own client scale, including the costs of three counsel, for any costs wasted as a result of any postponement of the application for the purpose of joining or at least giving formal notice of the application to all public schools.

Brutum fulmen

540. The notice of motion lists some 104[438] prayers and sub-prayers directed at the respondent schools.

541. It is submitted that it is unworkable to require of a court to make an order declaring conduct described in some 104 prayers and sub-prayers that are directed at six public schools, against all public schools.

542. The result is that the court's function is elevated to regulation-making, par excellence. It would not recognise the individual circumstances of any of the schools not before court. How will it be policed? It will be a brutum fulmen, an academic exercise, of major proportions.

543. The same applies even to the prayers 1.2.1 to 1.2.7 of the notice of motion. For example, Queenstown Girls and Pinelands North do not promote adherence to only one or predominantly one religion during its religious school activities. There are no doubt many thousands of public schools in the country that are similarly placed? Why allow an order against them? It is submitted that such

[438] The number is 97, if the first seven prayers directed at all schools are not included

order will be a hollow, unjustified order - a brutum fulmen.[439]

544. In addition, many of the orders sought to be granted, will be in conflict with the provisions of section 22(3) and (4) of the Gauteng Act insofar as the Gauteng schools are concerned. There is no prayer to seek the unconstitutionality of those provisions, neither has the appropriate MEC been joined. Making an order such as prayer 1.2.6 (segregating learners on the basis of religious adherence) will conflict with those provisions.

The interdictory relief sought can only have limited scope

545. This is closely linked with standing. The applicant's assertion of standing on the basis of acting in the interests of its members[440] is admitted[441] but not the claim to acting in the public interest.[442] The applicant only has members with children at Laerskool Baanbreker and Hoërskool Oudtshoorn.

546. Any alleged breaches of fundamental rights at these two schools, can, at best, be called into account in respect of the two members.

547. In effect, the high watermark for the applicant is the possibility of relief in respect of the conduct specifically complained of by the children of the two sets of

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[439] Cf *New National Party of South Africa v Government of the RSA and Others* 1999 (4) BCLR 457 (C) 479.

[440] FA para 15 Vol 1 p 28

[441] AA para 848 Vol 4 p 392

[442] AA para 856-7 Vol 4 p 393

parents.

THE REQUIREMENTS FOR A FINAL INTERDICT HAVE NOT BEEN MET

548. It is submitted, however, that the requirements for a final interdict have not been met.

549. An applicant for a final interdict must prove:

549.1 a clear right;

549.2 an injury actually committed or reasonably apprehended; and

549.3 no other satisfactory remedy.[443]

550. It is submitted that the interdictory relief sought in the notice of motion must fail because the applicant has failed to establish:

550.1 that any of the common cause conduct at the respondent schools is unlawful; and

550.2 that an injury is being, or will be, caused to it or its members by the respondent schools.

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[443] *Setlogelo v Setlogelo* 1914 AD 221

THE NATIONAL RELIGION POLICY

Introduction

551. The National Policy on Religion and Education was promulgated and published by the Minister of Education as Government Notice No. 1307 in *Government Gazette* No. 25459 of 12 September 2003.

552. The respondent schools and the Minister of Education, the seventh respondent, agree that the policy concerned "*part of the national curriculum, namely, Religion Education*"[444] and was accordingly duly published under section 3(4)(l) of the National Education Policy Act 27 of 1996 "*which empowers the Minister to make policy on the national curriculum*".[445]

553. The Government Notice says as much.[446]

554. The National Religion Policy, which introduced the subject Religion Education into the compulsory national curriculum in South African schools, did so with the purpose of educating all learners in South Africa about the religions subscribed to by their fellow citizens with a view *inter alia* to "*expanding understanding, increasing tolerance, and reducing prejudice*".[447]

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[444] Education Minister's affidavit para 25 Vol 23 p 2106

[445] Education Minister's affidavit para 25 Vol 23 p 2106

[446] See National Education Policy as published in the *Government Gazette* in annexure "AA42" Vol 21 p 1915

[447] National Religion Policy para 18 Vol 21 p 1925

555. In the experience of the respondent schools, it has been a remarkable success in this respect.[448] Religion Education has been:

> "*a major catalyst for the authentic transition to a constitutional approach to religion and religious observances in public schools...*"[449]

556. Religion Education was first introduced in South African schools in 2003.

557. Because the adults of the present generation, including the legal representatives involved in the present application and the court, are therefore likely to be unfamiliar with Religion Education, there is a risk that the allegations of the respondent schools to this effect may be considered an overstatement. For this reason, the respondent schools' affidavit has summarised the curriculum for Grade 1 to 11, and attached the learning material to the answering affidavit.[450] It is submitted that, upon perusal of the aforesaid, any reasonable person would understand that the attitudes of learners towards learners or educators of other faiths today are not what they might have been previously. In this regard, each of the respondent schools supporting affidavits confirms the content of the answering affidavit regarding the success of religion education in increasing openness and respect for diversity.

558. Despite being a policy promulgated in terms of section 3(4)((l) of NEPA, the National Religion Policy contained two sections in which the Education Minister

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[448] AA para 547-556 Vol 4 p 315-317

[449] AA para 547 Vol 4 p 315

[450] AA para 557-566 p 317-324 read with annexures "AA43.1"-"43.15" p 1945-2088

purported to deal with "*religious instruction*"[451] and "*religious observances*".[452]

559. The applicant has in its founding affidavit quoted extensively but selectively from the National Religion Policy and has relied indiscriminately on that policy as an alternative basis for the relief sought in the notice of motion.[453]

560. This necessitates a response from the respondent schools. The detailed response of the respondent schools is contained in the answering affidavit.[454] The court is respectfully referred thereto

561. The submissions contained in these heads of argument will be brief.

No cause of action

562. It is submitted that the applicant cannot succeed in obtaining any of the relief sought in the notice of motion on the basis of a National Religion Policy because that policy is not binding in law on the respondent schools or their SGBs.

563. The SCA dealt with the non-binding nature of policy in the *Akani*-decision.[455] The SCA held:

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[451] National Religion Policy para 54-57 Vol 21 p 1936-1937

[452] National Religion Policy para 58-65 Vol 21 p 1937-1939

[453] FA para 23-23.50 Vol 1 p 31-44

[454] AA para 663-822 Vol 4 p 349-387

[455] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7

"*I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear.*"

564. The SCA decision in *Akani* has been approved and applied by the Constitutional Court in *Minister of Education v Harris* 2001 (4) SA 1297 (CC), a case dealing precisely with education policy published by the Minister under NEPA.[456]

565. In *Harris*, the Constitutional Court held that policy published by the Minister under NEPA was not even binding on the MEC for Education in the province who, according to the statutory scheme set up by the Legislature in NEPA and the Schools Act respectively, is only required to "*tak[e] full account*" of a policy published under NEPA before exercising powers in terms of the Schools Act.[457]

566. It is submitted that the respondent schools and their SGBs are even further removed from national policy published under NEPA in the case of religion at public schools in that:

566.1 in section 7 of the Schools Act, the same Legislature confers the power to formulate rules for the conducting of religious observances for a school on the SGB subject only to the Constitution and "*any applicable provincial law*";

[456] *Harris* para 8-11
[457] *Harris idem*; See also section 2(2) of the Schools Act

566.2 the respondent schools located in Gauteng, are bound by the Gauteng Act.

567. For the above reasons, the applicant's case on the basis of the National Religion Policy must fail.

The respondent school's religion policies are consistent with the National Religion Policy

568. In the alternative, it is respectfully submitted that the respondent schools' religion policies are in any event consistent with the National Religion Policy, properly interpreted.

569. The respondent schools' answering affidavit deals comprehensively with the correct interpretation of the policy and how the respondent schools are in accord therewith.[458]

570. For the sake of avoiding unnecessary duplication, the content thereof will not be repeated herein. The court is respectfully referred thereto.

571. Nevertheless, two critical points merit the court's immediate attention:

571.1 firstly, insofar as religious instruction is concerned, the policy does not forbid religious instruction in schools but only sets conditions for the

[458] AA para 682-795 Vol 4 p 353-381; See also National Religion Policy Vol 21 p 1915-1941

carrying out of religious instruction. It only forbids that religious instruction may not be a promotional subject that is part of the compulsory curriculum:

> "*Religious instruction may not be part of the formal school programme, as constituted by the National Curriculum Statement, although schools are encouraged to allow the use of their facilities for such programmes, in a manner that does not interrupt or detract from the core educational purposes of the school.*" [459]

571.2 the respondent schools and the Minister are in agreement in this regard;[460]

571.3 the Bible classes taught on a non-promotional basis at the primary school respondents are therefore precisely in accord with the National Religion Policy;

571.4 secondly, the National Religion Policy does not forbid religious observances but assumes that these will continue to take place in public schools, including during assemblies.[461]

571.5 moreover, the policy itself expressly states that it is not prescriptive about what religious observances a public school may adopt:

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459 National Religion Policy para 55 Vol 21 p 1936

460 Education Minister affidavit para 66-74 Vol 23 p 2117-2119; see also AA para 748-769 Vol 4 p 369-374

461 National Religion Policy para 61-63 Vol 21 p 1938-1939

"*This policy provides a framework within which Religious Observances could be organised at public schools. Schools and teachers should take cognisance of the opportunities that the framework offers for the development of ethical, moral and civic values. The policy does not prescribe specific ways in which religious observances at public schools must be organised, and encourages creative and innovative approaches in this area. It is our hope that schools will make use of these opportunities.*"[462]

571.6 It is submitted that there is accordingly no room for the applicant to impugn the admitted religious observances at the respondent schools on the basis of the National Religion Policy.

Challenge to the National Religion Policy

572. In the further alternative, the respondent schools conditionally challenge the legality and constitutionality of the religion policy.[463]

573. The challenge is a limited challenge in that the respondent schools accept that the policy was validly promulgated in terms of section 3(4)(l) of NEPA insofar as the curriculum subject Religion Education is concerned.

Legality challenge

574. The Education Minister had no power under NEPA, however, to make binding policy[464] (insofar as it is held to be binding, a precondition to the present challenge) on:

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462 National Religion Policy para 65 Vol 21 p 1939
463 AA para 796-822 Vol 4 p 381-387

464 Insofar as it is held to be binding, a precondition to the present challenge

574.1 religious instruction, beyond specifying that it may not be part of the national curriculum; and

574.2 religious observances.[465]

575. Insofar as the Minister purported to make binding policy outside the confines of his powers in terms of 3(4)(l)[466] the policy provisions are invalid.[467]

576. The sections of the policy on religious instruction and religious observances are for that reason alone unconstitutional and invalid.[468]

577. The respondent schools are entitled to disregard such sections, and may resist attempts by the applicant or the Minister to enforce those sections of the policy against them.[469]

The Education Minister cannot prescribe multi-faith religious observances

578. Paragraph 61 of the National Religion Policy reads:

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465 Section 3(4)(l) authorises the Minister to make policy on "*curriculum frameworks, core syllabuses and education programmes, learning standards, examinations and the certification of qualifications, subject to the provisions of any law establishing a national qualifications framework or a certifying or accrediting body;*"

466 Education Minister's affidavit para 25 Vol 23 p 2106; (which the respondent schools and the Minister agree is the section in terms of which the Education Minister published the policy),

467 *Minister of Justice and Constitutional Development v The South African Restructuring and Insolvency Practitioners Association and Others* 2017 (1) All SA 331 (SCA) para 64

468 *Insolvency Practitioners idem* para 64

469 See *Kouga Municipality v Bellingan and others* 2012 (2) SA 95 (SCA) and *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) para 55

"*School Governing Bodies are required to determine the nature and content of religious observances for teachers and pupils, such that coherence and alignment with this policy and applicable legislation is ensured. It may also determine that a policy of no religious observances be followed. Where religious observances are held, these may be at any time determined by the school, and may be part of a school assembly. However an assembly is not necessarily to be seen as the only occasion for religious observance, which may take place at other times of the day, and in other ways, including specific dress requirements or dietary injunctions. Where a religious observance is organised, as an official part of the school day, it must accommodate and reflect the multi-religious nature of the country in an appropriate manner.*"[470] (emphasis added)

579. The respondent schools' answering affidavit deals with a proper interpretation of this paragraph and demonstrates how, properly interpreted in context, it does not place an obligation on the respondent schools to conduct multi-religious observances in assembly.[471]

580. However, insofar as it is contended or the court holds that the only interpretation that can be given to the policy is that it requires multi-religious observances in assemblies, the respondent schools submit it is unconstitutional.

581. No learner or educator can be required to lead or participate in a religious observance of a mixed or multi-religious nature. Stated otherwise, no learner or educator can be required to lead or participate in a religious observance that is not of their own chosen faith or belief.

582. To require a learner or educator to do so offends the core of the right to freedom

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470 National Religion Policy para 61 Vol 21 p 1938
471 AA para 777-795 Vol 4 p 375-381

of religion which includes the right to:

582.1 entertain the belief of one's choosing; and

582.2 to manifest that belief in worship and practice.[472]

583. That National Religion Policy is, in this respect, not even in accord with the Gauteng Act:

583.1 which takes precedence[473] (in the case of Laerskools Randhart, Baanbreker and Garsfontein, and Höerskool Linden);

583.2 which confers authority on SGBs to make religion policies for public schools;

583.3 which contemplates both religious education and religious observances, without prescribing the content thereof; and

583.4 in terms of which no learner or educator may be required to participate in a religious observance against his or her will.[474]

584. On a practical and concrete level, at public schools such as the respondent

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472 *Solberg* para 92 (per Chaskalson P); *Christian Education* para 18; and *Prince II* para 38

473 *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng* 2016 (4) SA 546 (CC) para 25-29

474 See section 21A and 22 of the Gauteng Act

schools where learners are in the vast majority (Laerskool Garsfontein & Langenhoven Gimnasium virtually 100%) it would be confusing if not distressing for educators and learners to have to conduct religious observances that were not Christian but multi-religious in nature.

585. It is in fact inconceivable that the Minister of Education would, by means of the policy, have intended to require this of schools with the religious demographic of the respondent schools. It is submitted that insofar as the Minister intended it, he was acting unconstitutionally.

586. It is submitted that in view of the fundamental nature of the right to freedom of religion, such a policy statement (if it were binding) would be invasive and overbroad and could not be justified in terms of section 36 of the Constitution.

JOHAN DU TOIT SC

ADRIAN D'OLIVEIRA

JEREMY RAIZON

JERRY MERABE

Chambers, Sandton and Johannesburg

28 February 2017

ANNEXURE A: TABLE OF DEFINITIONS

587. In these heads the terms listed below will bear the following meanings:

587.1 "*freedom of religion*": the right to freedom of conscience, religion, thought, belief and opinion guaranteed by section 15 of the Constitution;

587.2 "*the Schools Act*": the South African Schools Act 84 of 1996;

587.3 "*school*" or "*public school*": a public school within the meaning of Chapter 3 of the Schools Act;

587.4 "*learner*": a school pupil receiving education or obliged to receive education in terms of the Schools Act;

587.5 "*educator*": any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school;

587.6 "*SGB*": school governing body in which the governance of a public school is vested to the exclusion of the state in terms of section 16(1) of the Schools Act, and composed in terms of section 23 of the Schools

Act of parents, educators, school staff who are not educators, the school principal and, in the case of secondary schools, also learners, but with parents always in the majority in terms of section 23(9);

587.7 "*mission statement*": the formal mission statement of a public school formulated by the SGB in fulfilment of its functions in terms of section 20(1)(c) of the Schools Act. A parent is free to refuse to subscribe to the mission statement of the school and a learner may not be refused admission on that basis according to section 5(3)(b) of the Schools Act;

587.8 "*ethos*" is the characteristic spirit of a people, community, culture or era as manifested in its attitudes and aspirations; the prevailing character of an institution;

587.9 "*NEPA*": the National Educational Policy Act 27 of 1996 (as amended);

587.10 "*National Religion Policy*": the National Policy on Religion and Education published in terms of section 3(4) of NEPA as GN1307 in GG25459 dated 12 September 2003;

587.11 "*Policies*" are a set of principles, rules and guidelines formulated or adopted by an organisation to reach its long-term goals and these are typically published in a booklet or other form that is widely accessible. Policies and procedures are designed to influence and determine all

major decisions and actions, and all activities take place within the boundaries set by them. Procedures are the specific methods employed to express policies in action in day-to-day operations of the organisation. Together, policies and procedures ensure that a point of view held by the governing body of an organisation is translated into steps that result in an outcome compatible with that view (Oxford Dictionary, 2014). The singular “policy” conveys the same meaning.

587.12 "*religion education*": religion studies in diverse religions and other worldviews forming part of the subject Life Orientation, a compulsory part of the national curriculum for schools. The outcome of religion education, as defined according to the National Religion Policy is that "*the learner will be able to demonstrate an understanding of and commitment to constitutional rights and responsibilities, and to show an understanding of diverse cultures and religions*";

587.13 "*religious instruction*": instruction in a particular religion or worldview;

587.14 "*religious observance*": an act of a religious character that manifests belief and is in accordance with it. Common examples of religious observance includes prayer, reading of sacred texts, meditation and reflection on sacred texts, praise and worship, witnessing, fasting and other dietary observances, dress, observance of days of the calendar year that are of special significance, gathering of adherents and

religious rituals. Practice of religion or religious practice will broadly have the same meaning as "*religious observance*" within this affidavit;

587.15 "*Bible study*": the non-promotional subject taught at Laerskool Randhart, Laerskool Baanbreker and Laerskool Garsfontein in which learners learn about the Bible and Christianity on a non-denominational basis;

587.16 "*religious beliefs*" or "*religious worldviews*": beliefs or belief systems that acknowledge the existence of a G-d, gods or deities, or other spiritual beings, including African traditional religions;

587.17 "*non-religious beliefs*" or "*non-religious worldviews*": beliefs or thought systems that do not acknowledge, or are indifferent to, the existence of a G-d, gods or deities, or other spiritual beings.[475]

The distinction between religious and non-religious beliefs for ease of reference and the sake of clarity only. The term "*religion*" should be understood to encompass both religious and non-religious beliefs or worldviews unless stated otherwise.

[475] The term non-religious belief is preferred to the term "secular" which is frequently used in opposition to religion, but since religion is properly understood to have a public dimension and the public should be understood to, at least in part, include religion, this affidavit prefers to use "non-religious" as the opposition to religious beliefs rather than "secular"

ANNEXURE B: TABLE OF AUTHORITIES

South African Case Law

1. *Setlogelo v Setlogelo* 1914 AD 221.

2. *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

3. *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O).

4. *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T).

5. *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* 1978 (1) SA 173 (W).

6. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

7. *Wholesale Provision Supplies CC v Exim International CC and Another* 1995 (1) SA 150 (T).

8. *S v Zuma* 1995 (2) SA 642 (CC).

9. *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC).

10. *Ex Parte Speaker of the Western Cape Provincial* Legislature *in re: Certification of the Constitution of the Western Cape* 1998 (1) SA 655 (CC).

11. *Wittmann v Deutscher Schulverein, Pretoria and Others* 1998 (4) SA 423 (T).

12. *New National Party of South Africa v Government of the RSA and Others* 1999 (4) BCLR 457 (C).

13. *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) ("*Prince I*").

14. *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA).

15. *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA).

16. *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC).

17. *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

18. *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) ("*Prince II*").

19. *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA).

20. *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

21. *Louwrens v Oldwage* 2006 (2) SA 161 (SCA).

22. *MEC for Education, KwaZulu-Natal And Others v Pillay* 2008 (1) SA 474 (CC).

23. *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC).

24. *Head of Department, Mpumalanga Department of Education And Another v Hoërskool Ermelo And Another* 2010 (2) SA 415 (CC).

25. *Schneider NO v AA And Another* 2010 (5) SA 203 (WCC).

26. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

27. *Kouga Municipality v Bellingan and Others* 2012 (2) SA 95 (SCA).

28. *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA).

29. *Head of Department, Department of Education, Free State Province v Welkom High School And Others* 2014 (2) SA 228 (CC).

30. *Jacobs and Another v Transnet Ltd t/a Metrorail And Another* 2015 (1) SA 139 (SCA).

31. *My Vote Counts npc v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC).

32. *Economic Freedom Fighters v Speaker of the National Assembly* [2016] 1 All SA 520 (WCC).

33. *Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* [2017] 1 All SA 331 (SCA).

Foreign Case Law

34. *Everson v Board of Education* 330 US 1 (1947).

35. *Abington School District v Schempp* 374 US 203 (1963).

36. 41 BVerfGE 29 (1975) ("*Interdenominational School case*").

37. 52 BVerfGE 223 (1979) ("*School Prayer case*").

38. *Zylberberg v Sudbury Board of Education* [1988] 65 OR 2d 641 (CA).

39. *Canadian Civil Liberties Association v Ontario* [1990] 71 OR 2d 341 (CA).

40. *Lee v Weisman* 505 US 577 (1992).

41. *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68.

42. Das sog "Kruzifix-Urteil" 93 BVerfGE 1 (1995) ("*Classroom Crucifix case*").

43. *Adler v Ontario* [1996] 3 SCR 609.

International Case Law

1. *Folgerø v Norway* (2008) 46 E.H.R.R. 47 ("*Folgerø*")

2. *Hasan and Eylem Zengin v Turkey* (2008) 46 E.H.R.R. 44 ("*Hasan*")

Secondary Sources

1. L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (Juta Co Ltd, Kenwyn, 1994).

2. Donald P Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (Duke University Press, Durham, 1997).

3. L du Plessis “Affirmation and celebration of the ‘religious Other’ in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?” (2008) 8 *AHRLJ* 376.

4. Evan Bell “Judicial Assessment of Expert Evidence” (2010) 2 *Judicial Studies Institute Journal* 55.

5. Ian Currie & Johan de Waal *Bill of Rights Handbook* 6 ed (Juta Co Ltd, Cape Town, 2013).

6. Paul Farlam Chapter 41 “Freedom of Religion, Belief and Opinion” in Stuart Woolman & Michael Bishop *Constitutional Law of South Africa* 2 ed (Revision Service 6, 2014).

7. D E van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice* (Revision Service 3, 2016) at D1-125-126.