IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 12630/21

In the matter between:

BAREND HERMANUS RAUTENBACH	First Applicant
JOHAN SMIT	Second Applicant
FRANCOIS MALAN	Third Applicant
BAREND DE KLERK	Fourth Applicant

and

GOVERNING BODY OF	First Respondent
DIE HOËRSKOOL DF MALAN	
THE WESTERN CAPE MINISTER OF EDUCATION	Second Respondent

Date of hearing: 13 February 2023
Date of Judgment: 17 October 2023 (delivered electronically to the respective counsel)

JUDGMENT

Henney J:

Introduction and Background:

[1] This application is concerned with the proposed name change of DF Malan High School ("DF Malan") to DF Malan Akademie. Situated in Bellville, Western Cape, the school was established in 1954 and was initially known as Bellville secondary

school, and it operated from the building currently serving as the Bellville police station. It was then, as it still is today, an Afrikaans medium public school.

[2] Shortly after it was established, Dr Daniel Francois Malan, the fourth Prime Minister of the Republic of South Africa who served from 1948 to 1954, was approached for his permission to name the school after him. Dr DF Malan was the leader of the National Party and during his tenure, racial segregation laws based on the policy of apartheid was enforced. The following is reported in Encyclopedia Britannica[1] '. . . *From 1948 until the time of his retirement in late 1954, Dr Malan's administration was preoccupied with establishing absolute apartheid. His objective was to secure white (particularly Afrikaner) rule for all time. The basic components of his strategy were the full separation of the racial groups (as defined under apartheid policies) in South Africa, including the establishment of separate residential and business sections in urban areas for each race, the ban on sexual relations between the races, the establishment of separate educational standards that disadvantaged black Africans, the removal of the Natives (black Africans) Representative Council, and disenfranchisement of Coloured (mixed race) people. The government's attempt to remove Coloured people from the common voting roll of Cape Province in 1951 was declared invalid by the courts in 1952, so Malan bade his time, working to build broader support, which became nearer after the National Party increased its majority in the 1953 elections.'*

[3] The constitutionality of the decision of Malan and his cabinet to remove the coloured people from the voters' roll was dealt with by the courts in the decision of

[1] https://www.britannica.com/biography/Daniel-F-Malan: Written and Fact checked by The Editors of Encyclopedia Britannica most recently revised by Amy Mckenna.

Harris v Minister of the Interior[2] and *Minister of the Interior v Harris*[3], which is not a topic for discussion in these proceedings. In January 1957, the school commenced as DF Malan High School. The school soon established a reputation of academic excellence. It grew from an initial matric class of 28 learners to 225 matric learners in 2021. Whilst much has changed over the past 68 years, the school's core values always included Afrikaans as the language of instruction, Christian ethos and academic excellence.

[4] As far as academic excellence is concerned, the school is proud of its 100% pass rate over the last four years. During the 2021 matric exam 62 learners passed with an average of 80% or higher, three of the learners were on the Western Province merit list (Top 40 learners in the province and the average mark for the entire matric class was 71.8%).

[5] Given the fact that the school was named after Dr DF Malan, who can be regarded as one of the architects of apartheid, it is not surprising that the retention of such name would come under political scrutiny in a post-apartheid era and that people would demand a name change, and in my view, rightly so. It is for these reasons that the school governing body ("SGB") decided to re-consider the symbols of the school, which included the name of the school. Aggrieved by this decision the applicants launched this application to review and set aside the decision by the SGB.

[6] The application is opposed by the SGB, whilst the second respondent, the Western Cape Minister of Education, does not oppose the application and abides with the decision of the court. Mr. T I Ferreira appears for the applicants and Mr. J Tredoux

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[2] 1952 (2) 428 (A)
[3] 1952 (4) SA 769 (A)

for the SGB. The review is essentially one in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[7] The applicants seek the following relief in their Notice of Motion:

1) That the first respondent's decision to change the name from Die DF Malan Hoerskool to DF Akademie, alternatively to any other name, be reviewed and set aside;

2) Insofar as it is necessary, that the period of 180 days referred to in section 7 (1) of PAJA be extended in terms of section 9 of PAJA, to include the date of institution of this application;

3) That this Court grant the applicants such alternative relief as may be deemed fit;

4) That the costs of the application be paid by the first respondent, jointly and severally with any other party opposing the application.

The facts and circumstances giving rise to the decision of the SGB

[8] According to the SGB in an opposing affidavit filed by the chairperson, Mr. Andre Roux,[4] they were required to reconsider the school symbols, which included the name the school, to determine whether they still complied with the vision of all the stakeholders and the broader school community.

[9] During 2018, the school received correspondence from an alumnus who demanded from the SGB to commence with the process to change the school's name.

[4] Page 8- rule 53 record

This was addressed in a letter in which the author disassociated himself from Dr Malan and his political legacy, and described the use of this name as insensitive and inappropriate. During September 2019, the school received another letter from a parent of two learners who described the use of Dr DF Malan's name as insensitive in its association with the apartheid leadership.

[10] During June 2020, the SGB received a letter[5] from a group campaigning under the name 'DF Malan Must Fall', demanding that the school change its name. The author described the group as alumni of the school and stated that the group's aim was to change the school's name and thereby address the 'alleged' institutional racism in the school. The author further remarked that DF Malan was not an individual to be honoured with the school's name.

[11] In addition to writing the letter, the DF Malan Must Fall campaign received social media traction, notably on the Instagram platform; at the time of deposing of the chairperson's affidavit, this group had 318 followers. At a meeting the SGB held on 18 June 2020, it was resolved to consider the matter and to commence with some or other process to eventually decide whether issues such as the school's anthem and name should be changed, the financial implications thereof and to report to the DF Malan Must Fall group regarding the process to be initiated.

[12] The SGB at that stage consisted of voting members of the school community which included 7 parents, 2 teachers, the school's financial officer, principal and the two head prefects. The co-opted and non-voting members included a parent and 3

[5] Page12- rule 53 record

teachers. At that stage, the SGB had no clarity in respect of the process to be followed as there was no clearly defined process for the change of a school's name. Furthermore, there was no legal precedent to be followed.

[13] The SGB then decided to embark on some or other approach to consider the appropriateness of inter alia, the school's name and they had very little information available to it to serve as a guideline. What they had though, was a circular from the Western Cape Education Department dated 19 September 1997, as well as a circular from the Federation of Governing Bodies for South African Schools (FEDSAS) dated 10 August 2016. The Western Cape Education Department circular stated the following:

a) That confusion had arisen due to the change of educational institutions' names without notice to the Western Cape Education Department;

b) To avoid more than one educational institution in the Province carrying the same name and to ensure that proper record is kept of all such names, the Department requested that the following processes be adopted;

    i) That the name change is approved by the SGB;

    ii) That the name is there after presenting it to the Education Department for confirmation; and

    iii) That the new name may be used only after the Head of Education had confirmed the new name.

[14] The circular expressly stated that the Education Department did not intend to question the SGB's authority to approve a name, but the reason why the name should

be presented to the Department was only to ensure that there are no other educational institutions with the same name.

[15] The Head of Department's function was simply to check that there are no duplicate names. The Head of Department does not approve the name. The FEDSAS circular states that there is a duty on the SGB to act in the school's interests, but also to manage the school's interest in the broader community in which the school is located; to consider this interest, it states that governing bodies should consider the school's name, motto, and emblems. It recommends that during such consideration, the following should be considered:

a) The origin of the name;

b) The name's notoriety and to what extent it has become a brand;

c) To what extent the school's identity rests on the name or emblem and what implications the change thereof would entail for the school's identity;

d) Whether the community has a negative connotation to the name; and

e) Whether the name or emblem could be offensive to members of the community.

The FEDSAS circular further suggested that the SGB appoint an ad hoc committee to include interested parties (not necessarily members of the SGB) to manage the entire process.

[16] It further recommended that the ad hoc committee should provide the SGB with a written motivation for proposed new names, mottos or emblems. It further suggested that once the SGB has considered the ad hoc committee's proposals, meetings should be convened with the parents, teachers, learners, and the broader school community.

According to FEDSAS, the governing bodies carry a constitutional duty to preserve peace and national unity in South Africa.

[17] According to the SGB the FEDSAS circular emphasized that the choice of a school's name was a sensitive matter and should be approached with the necessary sensitivity and caution. It also cautioned that not all interested parties will be satisfied with the new name or with the process that was to be followed.

[18] According to the chairperson, whilst these two circulars were helpful guidelines, they did not lay down the law. They were therefore in uncharted territory with very little to rely on. The SGB had to make a decision in this regard because the debate about the school's name could no longer be allowed to continue on social media platforms where people, some, with no real interest in the school, seemed to exercise little restraint in the way they expressed their views. It was further decided that the SGB should facilitate a process to allow meaningful discussions regarding the change or retention of the DF Malan name.

The Process:

[19] On 22 June 2020 the SGB addressed a letter to all parents, learners, alumni, and school staff on its database, advising them of the SGB's decision to embark on the process to ultimately arrive at a decision in respect of the name change. The database consists of approximately 1800 parents, 1100 learners, 90 school staff (teachers and non-educators) and 6000 alumni. The alumni database in fact exceeds 6000 addresses, but some alumni had opted not to receive correspondence from the

school. The letter was accompanied by an invitation to the recipients to contact the SGB should the recipient be able to assist with facilitating the anticipated dialogue.

[20] This letter elicited various responses. Some of the recipients immediately voiced their objections to even considering the potential change of the school's name whilst others immediately supported the change. A few contacted the SGB with their views on the process to be followed. One of the responses received was from Adv De Haan, who filed a supporting affidavit in addition to the applicants' supplementary affidavit, who strongly opposed the potential change to the school's name. His resistance to the name change was premised on his view that Dr Malan is an honourable man and politician, and his fear was that the name change would be indicative of disregard of Afrikaner history. The chairperson emphasized that a school's name encompasses more than just honouring Afrikaner history. According to him, it is equally important that the school name reflects the changes in the community in present day South Africa and encourage inclusivity, after all, the school is not exclusively a school for Afrikaner children.

[21] According to the SGB, they expected resistance to the potential change of the school's name given the nature of the response. It was for that reason that the members of the SGB agreed that whatever process was to be followed, it had to provide a safe environment and a meaningful exchange of all ideas. None of the members of the SGB had expertise to determine what kind of process would be followed, or how to facilitate it.

[22] It is for this reason that the SGB, during its meeting on 30 July 2020, decided to identify a person or body to advise it on such a process and to act as a facilitator. In this regard, every member of the SGB was requested to give his/her input on the profile of a suitable facilitator, and if possible, the suggested candidates. By 13 August 2020, the SGB had received seven names of potential facilitators. Some suggestions came from the members of the SGB and some from the parent community.

[23] It was decided that the facilitator should be independent and that the school's executive committee should interview each candidate. It was also during that time, on 12 August 2020, that the SGB received a letter from attorneys writing on behalf of DF Malan Must Fall, wherein it was demanded that the SGB provide a timetable stating how the process will work. At that stage, the SGB was not able to provide the timeline and declined to do so.

[24] By early September 2020, the list of potential facilitators had grown to 14 and the Chairperson of the SGB contacted each of them to inquire about their availability and willingness to assist. Of the 14 persons, 11 were disqualified or had become unavailable[6] for various reasons which ranged from a lack of independence, an unwillingness to participate, unavailability or language barriers. The SGB was left with three potential facilitators whom they interviewed and the SGB ultimately elected Dr. Jan Frederick Marais (Dr Marais) as the facilitator. Dr Marais is a theologian of the Ecumenical Board of the Theology Faculty of the University of Stellenbosch, who according to the SGB, is a widely known and recognized consultant on congregational disputes, and his expertise seemed well suited to the debate the SGB wished to have

[6]Page 331 at Para 51-52

facilitated. Meetings were arranged with Dr. Marais for his input on the process to be followed.

[25] On a very simplistic level Dr. Marais explained that there could be different approaches to the question of whether the school should change its name or not. The one approach is a simple ‘yes’ or ‘no’, which could be resolved through a referendum. He however advised that in truth, it would be a superficial debate as participants will be requested to indicate only whether they were for or against it, with little room for motivating and debating the various views on the subject. Some people may dislike the name because it glorifies an individual, others because it reminds them of the apartheid regime. On the other hand, people may like the name for the very same reasons. He was not in favour of such an approach.

[26] The chairperson further states that in his interaction with the initial list of 14 facilitators, many (if not all) of them were opposed to approaching the issue via a referendum. Dr. Marais was of the view that the whole process could be approached in a more nuanced fashion. He explained that one could hold the view that the school's name is but one of its symbols. Apart from their names, schools have many symbols such as the uniforms, colours, emblems, mottos, and anthems. According to Dr. Marais, symbols communicate the meaning about the things they represent and in the case of the school symbols, it represents the school's identity. Dr. Marais accordingly explained that a dialogue about the school's name is therefore, on a deeper level, a dialogue about the school's identity.

[27] According to the chairperson, whilst Dr. Marais was not familiar with the FEDSAS circular, his view echoed the same sentiments expressed therein. Dr. Marais further advised that before deciding whether the school's symbols should change or not, a process ought to be implemented where all the parties could express their views on the school's identity. Dr. Marais further advised that the views so expressed should be empirically processed, both quantitatively and qualitatively. And upon receipt of such processed data, one could then consider whether the school's name, as one of its symbols, reflected or detracted from the school's agreed identity.

[28] The SGB found this proposed nuanced approach preferable over the yes – no debate. Dr. Marais further explained that the more simplistic yes – no debates, which were often decided by way of referendums; firstly, did not provide a platform for inclusive debate; secondly, it divided people into one of two groups (and eventually into winners or losers) and did not accommodate any middle ground views; lastly it would not address the issue of the school's identity.

[29] The SGB was unanimously persuaded by Dr. Marais's approach and supported the notion that the debate about the name should be grounded on the school's identity and prefer the process in which all interested parties could be afforded an opportunity to voice their views in this regard. After Dr. Marais was appointed by the SGB during November 2020, he was tasked to propose and facilitate a process through which the school's identity, which includes his name, could be considered.

[30] He advised that there were two potential strategies to be followed in such a process. Firstly, an outcomes-based approach where a decision is taken up front and

the processes would then aim to get all the participants to ‘buy into’ that decision. Secondly, a community -based inclusive process where no decision is taken up front and all relevant parties are invited to participate in discussions about the school's identity. All data obtained through such a process will then inform the decision.

[31] The SGB preferred, and Dr. Marais also suggested that the second strategy be adopted. As a first step, he proposed that a steering group be formed comprising a small group of individuals representing all potential different views. These individuals should then be trained to facilitate the discussion process. Based on this suggestion the SGB identified 16 individuals whose names and association to the school appear on the school’s circular dated 1 December 2020, in which the proposed process was communicated to the school community. This group was chosen on the basis of establishing a balanced membership which would also allow for representation as wide as possible among parents, learners and alumni. This representative group included the following persons:

a) Arinda Aggenbach, an alumna and a teacher;

b) Josias (Sias) Hendrick Conradie, the principal who was selected in that capacity also as a member of the SGB;

c) Stephanus (Stiaan) Dippenaar, a teacher at the school who would later become a member of the SGB but at the time of his appointment to the steering group, was not. He favoured the change of the school's name;

d) Anneke Du Plessis, a parent of a learner and member of the SGB;

e) Hunter Kennedy, an alumnus who favoured the change of the school's name;

f) Gert Kotze, a teacher and member of the SGB, who also favoured the change of the school's name;

g) Clement Martin, and alumnus;

h) Hennie Nel, a parent of a learner who also favoured the change of the school's name;

i) Lize Steyn, an alumna and teacher at the school;

j) Veronica van Zyl, a parent who in June 2020 expressed her objection to changing the school's name, and who has now filed a supporting affidavit to the applicants' supplementary affidavit;

k) Ronel Viljoen, a parent of a learner, who was against the changing of the school's name;

l) Gert Visser, a teacher and co-opted member of the SGB and who was openly against changing the school's name;

m) Mette Warnich, an alumna and teacher at the school, who was also against changing the school's name;

n) A learner, whose name cannot be disclosed because he/she might still be a minor;

o) Andries Harmse, the head boy for 2021 and who has since achieved majority;

p) The chairperson of the SGB, Andre Roux, the deponent to the answering affidavit.

Of the 16 people, only five were members of the SGB (one of them a non-voting co-opted member). Of them, and at the time when they joined the steering group, only two (Mr. Kotze and Mr. Visser) had openly expressed their view on the issue at hand as referred to earlier.

[32] The chairperson of the SGB further states that of the five remaining staff members (excluding Messrs. Conradie, Kotze and Visser) two (Mr. Dippenaar and Miss Warnich) had openly expressed a view regarding the name change. Mr. Dippenaar, in favour of the name change and Miss Warnich against it. Of the remaining 6 members of this group, only 4 had openly expressed their views. Mr. Kennedy and Mr. Nel were in favour of it, whereas Ms. Van Zyl and Ms. Viljoen were against it.

[33] According to the chairperson, the views of the other members were not known at the time of their selection to the steering group. According to him, there can be no question of the steering group having been selected by the SGB for their alleged bias in favour of a name change. Any allegation of bias is devoid of truth, unsubstantiated and disrespectful to the eight members who had not openly expressed any view, and the four members who were openly against it.

[34] Only two members of the steering group were people of colour, namely Mr. Martin and the learner whose name may not be disclosed. According to the chairperson, whilst this is only 2 out of 16 people, it represents the current racial demographic of the school. From the period December 2020 to February 2021, the steering group under the guidance of Dr. Marais went through a training process and they held discussions with the following three individuals. These individuals are:

1) Prof Erwin Schwella, an Emeritus Professor in public leadership who gave an overview of the political landscape against which the debate would take place. He was also a member of the school's SGB many years ago during the 1990s;

2) Mr. Hunter Kennedy, a member of the steering group and alumnus of the school, and a member of a famous rock band well known to the Bellville community. His contribution was about branding issues;
3) Mr. Igor Boonzaaier, a former teacher, historian and facilitator in land restitution claims. He provided the members with a historical overview of the school. He is a person of colour and shared his view on how people of colour perceive the DF Malan name. According to him, the name of the school suggested that its commitment to transformation could be called into question.

[35] Dr. Marais facilitated the training sessions of the steering group that was aimed at teaching members to host discussions impartially. Members were requested to reserve their own opinions and were given a protocol to be followed in the noting of remarks and opinions from the discussion group. The aim thereof was to facilitate meetings in an environment where participants could freely share their views on the school's future and its symbols. Additionally, it aimed to prevent the discussion from being hijacked and dominated by political agendas regarding the school's name. The chairperson stated that anyone attending the meetings was welcome to share their perspective on the name change, and those present had the freedom to contribute any additional thoughts or comments.

[36] The next part of the process was to anonymously send all the information gathered at the discussion groups to a central point. Thereafter, it would be transcribed if it was recorded and then sent to the Unit for Innovation and Transformation ("the Unit") at the Faculty of Theology of the University of Stellenbosch. Under the supervision of Dr. Pieter Van Der Walt and Reverend Ankia Du Plooy, this information

would be processed, and a report compiled on the discussions held, both quantitatively and qualitatively. The quantitative aspect of the report would relate to the number of times a certain opinion was voiced and the qualitative side relates to the kind of questions posed to the discussion groups, as well as the responses received.

[37] Dr. Marais explained that the proposed methodology was a bottom-up process, to note the opinions expressed by the learners, teachers, alumni, and members of the school community until a point of quantitative and qualitative saturation was achieved. This meant the point where all ideas and opinions around the school's identity have been voiced by the participants, subsequently recorded and reached a point of repetition and nothing new was raised.

[38] Dr. Marais further explained that the suggested methodology was a well-known and academically recognized research methodology that entailed that one need not have to consult every single member of the school community to achieve the point of saturation. He was further of the view that such a point could best be achieved through small discussion groups. Dr. Marais further suggested that the process should be future focused and the process accordingly became known as 'The school of which we dream'. At conclusion of the training sessions of the steering group, invitations were sent out to all interested parties to attend the discussion groups. To achieve this, the SGB on 08 March 2021, addressed a letter to all potentially interested parties on their database.

[39] This invitation informed the recipients that the school had received media attention because of its name. It expressed the SGB's appreciation of the fact that

people had divergent views on the subject and briefly explained the process that has been followed thus far. Recipients were invited to participate in discussions about the school's future to achieve consensus on the school's identity, and to use that as a basis for making decisions about matters such as the school's name, symbols, and educational focus. Lastly, interested parties were advised that a roster with 40 discussion opportunities during the period 11 to 18 March 2021, was available and the participants could choose to attend these discussions either at the school or online (Links were provided for making a booking).

[40] These discussion opportunities were scheduled in the afternoons and evenings and were hosted by two members of the steering group. The aim thereof was to enable the participants to attend to a dialogue about the school's identity, and not to get side tracked by political agendas regarding the school's name. This at its core, is a dilemma with any referendum because it does not address the interaction between identity and symbols, it focuses only on the symbol without giving it any context.

[41] Dr. Marais advised, and the SGB agreed that a meaningful discussion about the appropriateness of the school symbols required context and that the simplistic demand of a participant to choose between a “yes” and a “no” was not an appropriate process. Because the focus of the discussion groups related to the school's identity none of the questions directly related to the school's name. The five questions that were proposed for discussion first related to the perception of the participants of the school, by requesting the participant to describe the school to another and state what would make the school unique. The second question related to the participant’s perception of what it is to be part of the school community. The third question related

to what would make the participant anxious about the school's future and the participants future vision of the school. The fourth question related the participants' view about the recent changes at the school. The fifth question explored the participants' feelings about recent changes in the community to gain an understanding about the participants' perception of the school's identity in the community.

[42] According to the chairperson, the steering group was not instructed to prohibit discussions about the school's name but were encouraged only to link such discussion to the above questions and to maintain those questions as the main focus and not let the discussions be dominated by the name change debate. The purpose was to achieve consensus on the school's identity as a whole and not only the name.

[43] According to the chairperson, the process which the SGB adopted on the advice of an experienced facilitator is not only fair but also takes into consideration what should be taken into account in a discussion about the potential change of the school's name, which according to him is rational.

[44] A further opportunity was afforded to potential participants during March 2021 for fear that they may have been excluded from the process due to the National State of Disaster at that time, which may have affected their ability to participate in the process. New SGB elections were also held during that time and of the new SGB members only 5, including the chairperson who served on the SGB that made the decision to undertake the process, were still serving on the new SGB.

[45] It was decided again at Dr. Marais's suggestion that the discussion groups be limited to about 10 people. Approximately 150 people responded to these invitations and were divided into 15 groups. There were two discussions held on 11 March 2021, three on 15 March 2021, one on 16 March 2021, two on 17 March 2021, three on 23 March 2021, three on 24 March 2021 and one on 28 March 2021. Each discussion was hosted by two members of the steering group to facilitate the discussions and to take notes. The applicants in their affidavits refer to these notes as raw data. No objections to the process were recorded during these discussions.

[46] According to the chairperson, he co-hosted five of these discussions of which four were online sessions and one at the school. By the fifth session, participants were sharing information that had already been discussed in previous sessions, with little new content being introduced. In his discussion with some members of the other steering groups, including Mr. Stiaan Dippenaar, it became apparent that they had a similar experience. They therefore concluded that the saturation point mentioned by Dr Marais had been achieved. In this regard, he also had a discussion with Dr. Marais who by then had sight of some of the steering group reports who advised that no further discussions would be necessary for the purposes of gathering further opinions.

[47] According to the chairperson, the allegation by the applicants that the participants of the discussion groups were not allowed to talk about the school's name is untrue. This fact is confirmed by Messrs. Conradie, Dippenaar and Andries Harms. According to him, it is ironically further evident from the MS Teams discussion between Mr. Barend De Klerk (the fourth applicant) and himself on 23 and 24 March 2021. In

this regard, the fourth applicant attended one of the discussion opportunities on 23 March 2021 and in his report from the discussions, he advised the following:

a) That his experience of the discussions was good. That there were divergent views, but they were expressed in a good spirit;
b) That both left and right political views were expressed but never in ugly terms;
c) Every person received an equal opportunity to express his or her views with respect towards the other participants' views;

That the discussions turned mostly on the name and culture of the school with little focus on other dreams of the school's future;

According to the chairperson, the fourth respondent stated that what he found interesting was the questions that related to things that made participants anxious and things that gave them hope; t the participants expressed numerous thoughts on this and most of this turned on their fears of what the potential changes may hold. These fears were expressed by both sides, and some feared that it may signify and move away from the school's identity while others feared that if changes were not made, things could get worse in the future.

[48] The steering group's reports were provided to the Unit for Innovation and Transformation and accordingly processed. This was later compiled in a written draft report which was emailed to Mr. Conradie, the principal, and the chairperson of the SGB in early April 2021, and distributed to the other members of the SGB.

[49] Thereafter, a meeting was arranged between Reverend Ankia Du Plooy of the Unit, Dr Marais, members of the SGB and the members of the steering group on 15

April 2021. This meeting was held at the school and the purpose was for the Unit to provide oral feedback and for the steering group to confirm the content of the report.

[50] At this meeting, Reverend Du Plooy made it clear that the Unit had no interest in the outcome of the process, that it was not advised what the purpose of discussions were, and that the Unit had only one objective, that was to report on the data as objectively as possible. Thereafter, the draft report was analysed in detail and save for minor grammatical issues, the content of the draft report was factually confirmed. There are, however, no minutes of this meeting. The implications of the draft report were not discussed at the above meeting. The Unit made the requested corrections and shortly thereafter the final report was presented by the Unit.

[51] At a subsequent executive meeting of the SGB, held on 22 April 2021, it was decided that Mr. Conradie and the chairperson should discuss the report with Dr. Marais and enquire what the next step should be. Thereafter, a meeting was held with Dr Marais on 30 April 2021 where he explained that 150 participants in the discussions about school's identity was a sufficient number of participants to indicate that the school community was ready to have discussions about the school's future. And it outlined the core characteristics of the school's identity which I will be discussing at a later stage in this judgment.[7]

[52] According to Dr. Marais, this signalled that the school symbols should be reviewed and should symbolize the school's identity more accurately. He furthermore pointed to the core characteristics and in his opinion, the school's name and the public

[7] At paragraph 157 infra

perception around the name is not aligned with the school's identity. According to him, the participants have expressed their appreciation that a review of the symbols could create tension, but they were aware that retention of inter alia the school's name could be a risk. In his view, the name of the school should change in order to accurately represent the identity and history of the school.

[53] On 6 May 2021 the SGB held a meeting[8], which were attended by all 13 voting members of the SGB at the initial stages, plus the two co-opted and non-voting members. However, one of the members, Mr. Brink had excused himself after approximately one hour due to other commitments. Shortly before this meeting, Dr. Marais prepared a short report on his conclusions which was distributed to each of the members prior to the meeting. During this meeting, the core characteristics of the school's identity were discussed, as well as the political risk attached to the name DF Malan. The members of the SGB did not analyse the report in any great detail but what they accepted from the report were core characteristics as identified by Dr. Marais.

[54] The SGB relied entirely on Dr Marais' expertise for the formulation of those characteristics. The members were confronted with the question whether they agreed with Dr. Marais' assessment that the school symbols which included its name should be reviewed and if so, how the school community should be included in that process. Whilst the minutes of 6 May 2021 meeting do not capture the full extent of the discussions that followed, each member of the SGB was requested to state his or her view except for Mr. Brink who by that time had left the meeting. The following views of the members of the SGB were expressed at that meeting regarding the name change:

[8] Minutes at Page 264-268 of the rule 53 record

1) Mr. Conradie, the school's principal, was adamant that the school could not continue under the name of DF Malan. When he became principal one of his colleagues' made inquiries about the continuous use of the school's name. According to Mr. Conradie, the name DF Malan was not aligned with innovative and accommodating leadership. He further remarked that if the name did not change the school would continually be under fire, which was not conducive to a safe environment within which the school had to operate. In addition, the name was offensive to some people and they chose other schools for their children's education. He further remarked that with the name DF Malan the entire Afrikaans community could not be served;
2) Mr. Willemse stated that the name DF Malan did not play a role when he chose a school for his children. He further stated that the SGB had to look to the future and to that end he thought that the name should change;
3) Mr. Reyneke's view was that the name DF Malan was incompatible with an inclusive culture. He was also of the view that the decision should be future based and that one should consider that the current South African community differs vastly from that of the DF Malan era;
4) Mr. Jordaan stated that there was no place for the name DF Malan in the new South Africa;
5) Mr. Kotze stated that he had always favoured a name change, and reiterated his position. He further thought it was unfair for learners to have to put DF Malan on their CV's and that it jeopardized their futures. It is his view that the school's name and anthem should change but none of the other symbols;
6) Mr. Dippenaar also focused on the effect of educating learners at an institution which carried the DF Malan name and what effect it would have on their

character and future. To him, DF Malan represented to many a hurtful history, and one could not in the same breath denounce apartheid but retain a name with a strong tie to its leadership. He also thought that the name did not represent an inclusive educational community in that certain Afrikaners would simply feel unwelcome. The name is a throwback to apartheid, which also offend his Christian beliefs. It is for this reason also that he favoured a name change;

7) Ms. Solms was impressed with the process the SGB had adopted. She stated that the experience of the group discussions was very positive. She also thought that the name DF Malan was divisive and exclusive rather than inclusive. She was also of the view that innovative and accommodating leadership required the name to change;
8) Andries Harmse, the head boy of 2021 was in agreement with the core characteristics as stated in the report. He also heard participants experiencing the name DF Malan as offensive and he was also of the view that innovative leadership required the name to change. He further remarked that to him the name hardly represented any of the school's core characteristics;
9) Ms. Myburgh also agreed that the name should change and was of the view that progress was required, and by clinging to the name would be clinging to the past;
10) Ms. Kruger remarked that despite the name, the school had grown tremendously since the time that she attended the school as a learner during 1986. To her, a name change carried many implications such as choosing a new one, and in the sense detracted from her own association as an alumna with the school. She nonetheless stated that she will vote with the majority;

11) The head girl, whose name is not stated due to her age was also in favour of the name change;

12) Ms. Du Buisson made the point that the school was not just a name. While she appreciated that DF Malan did a lot for Afrikaner education, his view was exclusive and now was the time to be more inclusive. She thought that DF Malan's views on white supremacy were incompatible with an inclusive educational community of valued Christian beliefs. She was also of the view that the name could potentially place learners applying for jobs and bursaries at a disadvantage and consequently, undermine the school's identity and academic excellence. She therefore also favoured a name change;

13) Mr. Louw recalled how his daughter remarked that she did not wish the name of the school to be a barrier to her future. He further stated that to retain the name was akin to people saying 'I am not a racist, but . . .'. As an inclusive school the name had to change, and retaining the name would be offensive to some, which undermined the school's identity as an Afrikaans school serving the entire Afrikaans community;

14) Lastly, the chairperson states that while the minutes of the meeting do not record him voicing an opinion, he was of the view that the name DF Malan is divisive and incompatible with inclusive education. To retain the name created division and polarization which to him was contrary to the school's Christian ethos. It was for these reasons that he favoured the name to change.

[55] According to the chairperson, there was no doubt that at the conclusion of the above discussions, there was a unanimous agreement between the SGB's members that the school symbols, in particular its name, had to be reviewed and changed

subject to an acceptable new name being identified, that it should be affordable and other further feasibility considerations taken into account.

[56] The decision of the SGB of 6 May 2021 was reported to Dr. Marais and advice was sought on the way forward. He suggested that the steering group remain involved and therefore suggested a follow-up meeting with them which was arranged for 13 May 2021. At this meeting that was held at the school, feedback was given to the steering group and Dr. Marais provided the attendees with his written recommendations in respect of a way forward.

[57] The chairperson of SGB gave feedback on the 6 May 2021 decision. Dr Marais also expressed his views on the report. Three people disagreed with the SGB's decision to review the school's name. A debate then ensued. These 3 people held the view that the majority of persons at the group discussions did not expressly favour a name change. The chairperson disagreed that this view was factually correct. These 3 persons were also not in agreement that the name DF Malan was no longer an appropriate name to symbolize the characteristics of the school's identity, whilst the majority of the steering group were in favour thereof. The question whether the school's name or other symbols should change was not put to a vote at the meeting of 13 May 2021. That was for the members of the SGB to decide and therefore, it had taken a view on the matter namely, that in principle, the symbols should be reviewed and changed subject to further consideration.

[58] The only argument against the review of the school symbols that was raised at the 13 May 2021 meeting was that it was allegedly not supported by the majority

participants to the group discussions. The chairperson did not agree with this view because it was not factually accurate. The SGB, at that stage, had already taken the view that it would not be bound to a referendum and according to the chairperson, the 13 May 2021 discussions offered nothing new in this respect of the debate.

[59] After the 6 May 2021, a decision was taken to appoint a new task team to assist the SGB in determining the criteria against which a new name could be evaluated and to decide on a process through which a new name would be identified. It was also tasked to assess further considerations like the costs involved. On 13 May 2021, everyone on the steering group was invited to be part of this task group that was formed; some accepted the invitation, others did not.

[60] The task team decided that an invitation should be sent out to all recipients on the SGB's database to suggest new names and to indicate which other aspects of the school symbols they think should be reviewed. In addition, the task group `advised that the new name should not be the name of a person, should preferably be in Afrikaans, should have no political connotation and should enhance the school's identity.

[61] On 5 August 2021 the SGB invited all interested parties to propose potential new names. It received a total of 626 proposals, 301 of which were to retain the name DF Malan, and 325 were new names that were proposed. On 7 September 2021, the task group commenced with the evaluation of the proposed names. Of the 325 new names that were proposed, 4 names made it to the shortlist. Those 4 names were submitted to the SGB for consideration.

[62] The task group also considered the financial implications and after having received the information, concluded that the cost of changing signage would be in the region of R70,000 and the cost of IT charges in the region of R50,000. On 22 September 2021, the SGB considered the report prepared by the task group including the 4 proposed names, the criteria used and the cost implications. Eventually only two names namely, Protea Akademie and DF Akademie were found to be feasible. The SGB decided to put the choice of the name to a vote by using the voting crowd platform. It furthermore decided that in addition to the recipients of its data base, learners who had already enrolled for the next year and the parents would be entitled to participate in the vote.

[63] The voting took place on 15 October 2021 and 85% of 3466 votes favoured DF Akademie. Thereafter, between 20 and 25 October 2021, members of the SGB ratified the name and thereby decided DF Akademie was to be the new name to be submitted to the Department for confirmation. In accordance with the Western Cape Education Department circular, the new name was sent to the Department for its confirmation on 28 October 2021. It is against this rather lengthy and detailed backdrop and factual matrix that was followed by the SGB, that the court will now consider the submissions by the applicants as well as the respondents.

The Applicants Case:

[64] The applicants submit that the provisions of PAJA are applicable because the decision that was taken by the SGB can be regarded as administrative action as defined in section 1 of PAJA. In this regard, they submit that the SGB exercised a public power or performed a public function in terms of the South African Schools Act

84 of 1996 (“Schools Act”). Furthermore, the SGB’s decision to change the name of the school constitutes administrative action in terms of PAJA, in that the decision adversely affects the rights of the applicants and the community at large.

[65] They do not agree with the submission of the SGB that its decision do not constitute administrative action as defined in PAJA, on the basis that the SGB has not yet convened a meeting to amend the school's constitution and that it did not exercise its powers as an organ of state.

[66] According to the applicants, this decision was in fact made by SGB to change the school's name at the meeting of 6 May 2021. That is apparent from the minutes of the meeting of the SGB that states that the decision was made ‘*that the school’s symbols which included its name, should be reviewed and, if so, how the school community should be included in the process’.*

[67] The applicants further submit that the answering affidavit filed by the SGB expands upon the minutes of the meeting where it is stated that ‘*there was unanimous agreement between the first respondent’s members and the school’s symbols, in particular its name, had to be reviewed and changed’* subject to certain further considerations. According to the applicants, this fact is confirmed where it is later stated in the answering affidavit[9], ‘[they] *had really taken the view on the matter… that in principle they should be reviewed and changed, subject to the further considerations as explained above.’*

[9] Paragraph 109

[68] According to applicants this overwhelmingly proves that the SGB decided to change the school's name on 6 May 2021. After that, neither the process report nor the Stellenbosch report was ever again considered. They further submit that during the name suggestion process the present name was, despite its overwhelming popularity, not considered as a candidate as only two names were put up as choices for the name of the school.

[69] In the alternative, the SGB acknowledged that after certain investigations were conducted between 20 and 25 October 2021, the members of the SGB ratified the vote and thereby decided that DF Akademie was to be the new name to be submitted to the Department for confirmation. Furthermore, on 28 October 2021, the SGB submitted the newly chosen name to the second respondent for its confirmation.

[70] According to the applicants, what is also important in this regard based on the SGB's own version, it contended that in terms of the circular from the Department of Education, it has the power to change the school's name and that the Department merely monitors that there are no other schools with such a name.

[71] According to the applicants, insofar as the SGB contends in its answering affidavit, the decision has not been concluded on the basis that the school's constitution has not been amended to reflect the change. Whilst in terms of section 18(1) of the School’s Act the SGB adopts a constitution, and that the adoption of such a constitution is peremptory in terms of section 18(2), which provides for certain procedural aspects like the holding of meetings, it does not require that the name of the school should be established therein.

[72] Thus, there is no requirement for the school which is a separate legal entity to adopt a constitution. Moreover, there is no requirement that the name of the school is to be recorded in the constitution and the coincidental recordal thereof is of no significance. The governing body therefore has made a decision to change the school's name on 6 May 2021, alternatively 28 October 2021.

[73] Regarding the question whether the SGB is an organ of state, the applicants relied on the decision of *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another*[10], the Constitutional Court case of *Head of Department, Department of Education, Free State Province v Welkom High School and Another: Head of Department, Department of Education, Free State Province v Harmony High School and Another* ("Welkom")[11] and the Supreme Court of Appeal, where it was held that the school governing bodies are organs of state. According to the SGB's own contention, they were authorized to act in terms of the Schools Act; they purported to exercise a public power and therefore an organ of state, which make the provisions of PAJA applicable.

[74] Regarding the specific grounds of review in terms of PAJA, the applicants made the following submissions:

a) That the SGB exceeded its powers when purporting to change the name of the school (section 6(2)(a)(i) of PAJA);

[10] 2006 (1) SA 1 SCA at 20
[11] 2014 (2) SA228 (CC) at 141

b) That both the processes followed by the SGB before making the decision and in making the decision itself, was procedurally unfair (section 6(2)(c) of PAJA);

c) That in making the decision, the SGB relied upon irrelevant considerations and failed to consider relevant considerations (section 6(2)(e)(iii) of PAJA);

d) That the decision was not rationally connected to the information before the SGB (section 6(2)(f)(ii)(cc) of PAJA).

e) That SGB was biased when it decided to change the school's name.

[75] Regarding the first ground stated under a), the applicants contend that the SGB is not empowered in terms of the Schools Act or any other empowering provision to change the name of the school. In this regard, the applicants contend that the SGB relies upon what they refer to as an 'implied' power which vests in it, in respect of school specific issues.

[76] According to the applicants, this contention is misplaced because the SGB as a state functionary may only do what the law empowers them to do. In this regard, the applicants rely on the decision of *Hoerskool Welkom*[12].

[77] They further submit that the Schools Act contains various provisions governing the relationship between the various role players in the governance of public schools. In terms of section 16(3), the professional management of public schools falls within

[12] 2014 (2) SA 228 (CC)

the purview of the principal of the school and is subject to the authority of the head of department. Section 16(1) states *'. . .[T]he governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the [Schools Act]'.*

[78] According to the applicants, the functions and obligations of governing bodies are circumscribed in sections 5, 6, 6B and 20 of the Schools Act. They further contend that in terms of section 20(1)(m) the National or Provincial Minister may prescribe other specified functions governing bodies are to fulfil. Section 21 of the Schools Act provides for certain functions which can be granted to the governing bodies upon application to the head of department. The SGB has not relied on such power.

[79] They further submit that the provisions of the Schools Act are carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system. The broad scheme of the Schools Act has been described by the Constitutional Court in *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* ("Ermelo"),[13] where it was held the SGB at a school represents the parents of learners and the members of the community, which exercises defined autonomy over some of the domestic affairs of the school.

[80] The applicants submit that as was held in *Hoerskool Welkom*[14] a governing body is akin to a legislative authority in the public-school setting that is responsible for the formulation of certain policies and regulations in order to guide the daily

[13] 2010 (2) SA 415 (CC)
[14] Para 63

management of the school and to ensure an appropriate environment for the realization of the right to education.

[81] They further submit that in relation to this case, changing the name of the school is anything but a matter relating to the daily management of the school. On the contrary, they submit that it relates to the issue of the current and future leaders, but also as an impact on the broader community, which includes teachers, alumni, and members of the local community who come up with specific political connotations. It was submitted that even if it was found that the SGB has a general governance power, such power could not and does not extend to the changing of the school's name.

[82] They maintain that the comprehensive list of powers afforded to governing bodies by the Schools Act are the only powers it may exercise and these powers constitute a *numerous clausus*; which stands in contradiction to the powers afforded to the principal who exercises his or her powers in terms of section 16A (2) (a) '*in undertaking the professional management of a school as contemplated in section 16 (3), carry out duties which include but are not limited to. . .'*

[83] They submit that properly interpreted in its context within the Schools Act, section 16 provides that a governing body is not vested with an unqualified general power in relation to school governance. On the contrary, it may expressly perform only those specific functions and exercise those specific powers that are vested in it by, or in terms of the Schools Act.

[84] According to the applicants, none of the powers and functions vested in governing bodies by the Schools Act extends to the changing of a school's name. They contend that this is illustrated by the SGB's strained attempt to locate such a power in an 'implied' general power where the Schools Act expressly limits its power to the prescribed powers. In this regard, they rely on the decision of *Democratic Alliance v Minister of International Relations and Cooperation and Others*[15], where it was held that the national executive can only exercise those powers and perform those functions conferred upon it by the constitution, or by law which is consistent with the Constitution.

[85] They submit in this case, that if the legislature intended to grant a governing body the power to change a school's name or indeed the general power as contended by the SGB, it would have expressed such a general power in the same fashion as with the powers of a principal. Therefore, according to them, the SGB exceeded its powers when purporting to change the name of the school in terms of section 6(2) (a) (i) of PAJA.

[86] Regarding the second ground of review in terms of PAJA, they submitted the administrative action was not lawful, reasonable and procedurally fair. In this regard, they submitted in terms of Section 4(1) of PAJA, the SGB was required, in order to comply with the requirement of a fair procedure, to either hold a public inquiry in terms of Section 4(2), or to follow a notice and comment procedure in terms of subsection 4(3). Alternatively, another procedure to give effect to the procedural fairness requirement in section 3 of PAJA.

[15] 2017 (1) SACR 623 (GP) at 54

[87] They further submit that whilst Section 4(4) provides that the provisions of subsection 4(1) may be departed from *'(if) it is reasonable and justifiable in the circumstances. . .'*, no such reasons had been advanced by the SGB. The applicants referred to various decisions[16] about what consultation entails and the duties that rests on a decision maker to comply with its obligations in law when it is required to consult in terms of section 4 of PAJA.

[88] The applicants state that when the SGB, in a meeting on 18 June 2021, initiated the process to change the school's name, it recognized the procedural requirement to consult with various groups within the school community in its letter dated 22 June 2020. In this letter it made several commitments and advised that it was of the utmost importance to establish an agreed and transparent process which must be narrowly followed.

[89] On 22 July 2022, the SGB communicated in another letter to explain the process it would embark on. Several commitments were made, which inter alia entailed; that is of the utmost importance that the transparent and agreed process must be narrowly followed; that it should be given sufficient time; that as a next step, all interested groups would be involved in dialogue; that it would compile a representative group which would investigate and report back to it; that the facilitator would be appointed and the aspects such as financial implications and funds must be investigated and approved with a majority vote.

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[16] *Scalabrini Centre and others v Minister of Home Affairs* SA 2013 (3) 531 (WCC) at 85 and in particular 71; *Doctors For Life International v Speaker of National Assembly* 2006 (6) SA 416 (CC) at 101; *School Governing Body of Ntilini J.S.S and Others v Makhitshi and Others* 2010 JDR 0356 (ECM) at 6*; Attorney – General of Hong Kong v NG Yuen Shiu* [1983] 2 AC 622 PC([1983] 2 All ER 346) at 638 E-F and *President of South Africa and Others v Reinecke* 2014 (3) SA 205 (SCA) at ft 11

[90] The SGB committed itself to follow the process with regard to the name correctly and that it would remain neutral. It further indicated that it would keep consensus at the forefront by seeking to establish consensus and from such questions, to come to a decision. In its letter dated 22 June 2020, the SGB indicated that an invitation would be sent to all learners, parents, teachers, and alumni to become part of the discussions. They indicated that these discussions were to be undertaken in respect of no other issue than the change of the school's name. The SGB therefore bound itself to this process.

[91] The SGB convened a meeting with Dr. Marais on 10 November 2020 to discuss inter alia involving, or gathering all interest groups in having a meeting, to include alumni, teachers, learners' etcetera. At this meeting, according to the applicants, a request was made to meet with teachers and staff; one of the teachers, a Miss Warnich was told not to talk about the proposed name change of the school. Teachers were never asked what their view was in respect of the possible name change. Such meetings were also never held and the SGB never consulted with the schoolteachers as an interest group. This allegation is denied by Mr. Roux the chairperson of the SGB.

[92] Dr. Marais suggested that the SGB compile its own representative work group that must include the leaders of different interest groups and who should represent different viewpoints on the name. The applicants submitted that this represented a departure from the SGB 's initial process because it initially committed itself to invite interest groups to discussions or dialogue from which it would compile a representative working group.

[93] The eventual steering committee did not include any leaders of interest groups, which included learners, teachers or alumni or the group headed by the applicant. The SGB did not execute the undertaken process at all, and the process actually adopted did not constitute conventional consultation sessions characterized by forthright dialogue dealing directly with the issue at hand.

[94] The SGB admitted that the process adopted was rather aimed at discussing the vague notion of ‘symbols’ and ‘the school we dream of’. It further admitted that it was never the purpose of the consultations to consult with the various groups and the changing of the school's name. According to the applicants, the purpose of the consultations was rather a process that was implemented where all interest groups could express their views on the school's identity, not discussions around the changing of the school’s name.

[95] The consultations that took place between 11 and 18 March 2021, of which the SGB did not give sufficient notice, were later extended on short notice to 28 March 2021. The applicants stated that these sessions followed proposed guidelines and prohibited or limited discussion in general, in particular, the school's name. The session was facilitated by the chairperson of the SGB, Mr. Roux. The applicants submit that during this consultation process in some instances, the name was not discussed at all and in other incidents people were discouraged from discussing the name.

[96] According to the applicants, it is clear from the questions the participants were required to answer, that it was not related to the school's name. On 10 March 2021,

the SGB circulated an internal memorandum that provided guidance on the upcoming consultations. In the circular the primary question which should have been posed was whether the school's name should be changed but this question had now become obscured by either ‘the school we dream of’ and or what the school's identity was.

[97] In the record of decision it seems that the methodology employed, as was apparently devised by Dr. Marais, was to conduct consultation sessions until a point of quantitative and qualitative saturation was achieved, which he described as being the point where all ideas and opinions on the school's identity had been voiced coming to a point of repetition. After having hosted 5 sessions, Mr. Roux alleges that he concluded that there is hardly anything new that was said by the participants. When Dr. Marais had sight of some of the steering group reports he, and not the SGB, decided that no further consultations would be necessary, which resulted in the conclusion of the consultations.

[98] Thereafter on 15 April 2021, a meeting was held between the SGB and the steering committee in order for the steering committee to confirm the content of the report. According to the applicants, this was an irrational exercise because according to the SGB, this report was a collection of information gathered under the guidance of various members of the steering committee at various positions which was then processed and analysed by a third party.

[99] The applicants contend that there is no reasonable manner in which the steering committee, none of whom attended all the sessions, could confirm the content of an aggregated and processed set of data to which he or she contributed but a

fraction of. No further minutes were kept of this meeting and it was in any event only attended by some of the SGB's members.

[100] There is furthermore no record or allegation that the report of the Unit was ever circulated, tabled or discussed at the meeting of 15 April 2021 or indeed at any other meeting. The applicants contend in this regard that the only report which was tabled at the meeting of 6 May 2021, was the one prepared by Dr. Marais on the day of the meeting.

[101] It was decided to change the school's name on 6 May 2021 whereafter a meeting was arranged with the steering committee to provide feedback. Three members in the steering committee disagreed with Dr. Marais, finding and a heated exchange ensued between Miss Warnich and Dr. Marais. Miss Warnich was of the view that no consensus was reached because the school community was not allowed to discuss the name change; and that the chairperson and the SGB were dishonest and manipulated the process to give them the outcome they wanted. This was confirmed by Van Zyl. In a concession later made by Mr. Ferreira he conceded that that there was no evidence that the chairperson and the SGB, was biased, acted dishonestly and manipulated the process.

[102] The applicants further submit that the SGB breached its undertaking to remain neutral as it actively participated in the process. They further submit that:

1) The procedure actually adopted was a clear departure from the process the SGB initially committed itself to, which was to be an open discussion regarding the name of the school;

2) That the procedure was designed with the express purpose to exclude forthright debate (the so-called simplistic yes – no debate) or the submissions of representations on the actual question at hand;

3) The procedure did not call for, nor allow representations on the direct implications on the name of the school, such as the financial implications, the advantages or disadvantages of such a change, which considerations did not fall within the ambit of ‘symbols’;

4) The primary question, whether to change the school's name or not, had come up with by design or by accident and become obscured by the notions of ‘the school we dream of’ and or what the school's identity was;

5) The process sought to only elicit responses from the community regarding the identity of the school, the actual decision regarding whether the name would be changed was therefore on the SGB's own version, only designed to inform a specific aspect of the myriad of considerations which should have been taken into account;

6) That the notion that a referendum or in fact, a conventional debate would not provide the platform for inclusive debate, has no basis and is an irrational premise;

7) The approach of terminating the consultation process upon reaching a so-called saturation point could never pass muster in the public consultation context for the following reasons:

7.1 Due to the fact that the SGB is required to consult widely (in this case with the school community), and it is not at liberty to stop such consultation when it has been decided it has heard enough;

7.2 That the undertaking to consult is aimed at ensuring that the affected persons and groups have their voices heard, and is not a research project in the scientific sense in which the methodology may conveniently be employed;

7.3 The methodology is dependent upon the subjective notion that the saturation point had been reached;

7.4 The subjective opinion in the present matter was that of Dr. Marais, who did not attend any of the consultation sessions;

7.5 The members of the SGB participated in the steering committee and was therefore not neutral;

7.6 That instead of this steering committee making recommendations to the SGB, the SGB made the decision on 6 May 2021 without any input from the steering committee.

For all these reasons, the applicants submitted the procedure adopted by the SGB was unfair and irrational and the decision is to be set aside on this ground.

[103] The next ground of review is that the SGB relied upon irrelevant considerations and failed to consider relevant considerations and that the decision was not rationally connected to the information before it. In this regard, the applicants submit that the SGB decided that the name of the school should be changed at the meeting of 6 May 2021. The principle however, of the name change was never discussed.

[104] The applicants say this, firstly because the meeting reflected that the SGB concluded from the report of Dr. Marais, that it had been granted a mandate from the

various groups to review the school's name. It was furthermore said that there was sufficient consensus to look at the school symbols. According to the applicants, these considerations were central in the making of the decision.

[105] The applicants submit there is no basis for either of these conclusions, for the following reasons:

1) The report of the Unit does not lend itself to any conclusion that there is consensus for either position of the proposed name change;
2) The Unit report make no mention of any mandate, either express or implied to have been furnished to the SGB;
3) Even if it is accepted that the Unit report does not support the conclusion that the SGB draw from it.

[106] The applicants submit that their own careful analysis of the report revealed that, from those participants who commented on the name, approximately 30 were against the changing of the name and between 15 to 20 were in favour of it.

[107] Secondly, the applicants submit that the decision was taken without having regard at all to the Unit’s report, because the draft report was presented to the steering committee for the purpose of confirmation thereof. It was however, never discussed by the SGB and the final report was never tabled at a meeting, nor was any indication given that such report was circulated to the members of the SGB. They further submit that the Unit report which was envisioned to be the culmination of the consultation sessions, was accordingly not utilized by the SGB and did not inform the decision.

[108] Thirdly, according to the applicants, it seems what was discussed was the progress report that was compiled by Dr. Marais, which was merely a summary of the Unit report that did not deal with any aspect relating to the change of the school's name. It merely concluded that the school community was now ready to change the school's name to better symbolise its identity and history.

[109] The applicants contend that the SGB by its own admission did not analyse the report in great detail and relied entirely on the expertise of Dr. Marais for the formulation of those core characteristics and his recommendation. In this regard, they further submit that this assertion is supported by Mr.Conradie's declaration to the meeting that Dr. Marais first words to Mr. Roux and himself where that '*you will have to change the name'*.

This according to them, is patently irrational and the SGB failed to have regard to the Unit report.

[110] The applicants submit that in arriving at a decision considered that summary of Dr. Marais and his conclusion without any regard for the source of the material upon which he based his conclusion. By doing so, it abdicated the duty to apply its mind to the views of the various participants of the consultations. They therefore submit that by doing so, it took into account irrelevant material.

[111] The final ground of review against the decision of the SGB is that it was biased in making their decision, in terms of section 6(2) (a) (iii) of PAJA. In this regard the

applicants submit that the steering group comprised of individuals that represented the particular bias on the school's name and not representing all potential different views.

[112] They submit that some of the members of the SGB that were also part of the steering committee, being Conradie, Dippenaar, Du Plessis, Kotze and the chairperson Roux at least two of them expressly favoured the name change prior to the process commencing, and these two members were also part of the SGB when the decision was made.

[113] The applicants therefore submit that it is common cause that certain of the members of the SBG were especially biased towards a certain outcome from the exception. They therefore have made out the case on this fact alone for the relief in terms of section 6(2) (a) (iii) of PAJA.

<u>The SGB opposes the application on the following grounds:</u>

<u>Delay:</u>

[114] Firstly, that the applicants have failed to institute the proceedings for judicial review without unreasonable delay and not within a period of 180 days. In this regard, they submit that although the applicants seek an extension of time, they failed to make out the case for it. Nowhere in the founding affidavit do they provide any reasons why the application for review was launched late. They further submitted that failure to bring the review within the reasonable time in terms of PAJA may cause prejudice to the SGB as there is a public interest in the finality of administrative decisions and the exercise of administrative action.

[115] In this regard, they submit that the decision the applicants want reviewed and set aside was taken on 6 May 2021 and this application was launched on 7 December 2021, which is more than 180 days later. They also submit that it was not a final decision, and the final decision will be taken when the SGB votes for an amendment to its constitution. This application is therefore premature, and it should fail on this ground alone. On the other hand, they submit if it is held that the application is not premature, the granting of an extension in terms of section 9(2) of PAJA depends on the facts and circumstances of each case. It is incumbent upon the party seeking the extension of time, to furnish a full and reasonable explanation for the delay which covers the entire duration thereof. Such factors must include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants and lastly, the importance of the issues to be raised in the intended proceedings and the prospects of success.

[116] They submit that in this matter the applicants simply failed to make out the case for an extension of time and as far as the decision of 6 May 2021 is concerned, the applicants are out of time. This is so because they failed to establish a basis on which this court should exercise its discretion to condone their actions. The application therefore must fail on this ground alone.

[117] The second ground for opposing the application is based on the contention of the SGB, that the applicants do not have locus standi to bring this application and the application is not susceptible to review under PAJA. This is based on the following submissions:

Decision not that of an organ of state in terms of PAJA, but exercised in a different capacity as a juristic person:

[118] In this regard, they contend that if regard should be had to the definition of administrative action in section 1 of PAJA, the SGB on its own may not necessarily fall within the definition of an organ of state. It, however, submits that if it exercises a public power or performs a public function at any given time, it may constitute administrative action as per the definition of PAJA.

[119] It further submits that while every public school is a juristic person, the governance of the school is vested in the governing body. The SGB is the representative of the public school for governance purposes and if it exercises or performs a public power or a public function in that regard, it is an organ of state; if it does not, it is simply a juristic person who may not exercise a public power or perform a public function at any given time.

[120] According to the SGB, the mere fact that it derives powers from statute does not automatically translate their decisions into the exercise of any public power or performing a public function. They submit that the SGB is a juristic person created by the Schools Act and not a department of state or administration in the national, provincial, or local sphere of government. It is also not a functionary or institution as contemplated in section 239 of the Constitution.

[121] The SGB submits that whilst it was held by the Supreme Court of Appeal in *Minister of Education v Governing Body, Mikro, School* (supra) that the school,

together with its governing body was clearly an institution performing a public function and consequently an organ of state as contemplated in PAJA; however, in circumstances where the governing body acts in terms of its own powers to determine the language and admission policy, that is not subject to executive control of any level of government and it cannot be said to be part of any sphere of government.

[122] It further concedes that the SGB acting as a juristic person exercising a public power or performing a public function in terms of an empowering provision as contemplated in subsubsection (b) under the meaning of administrative action in PAJA when it exercisers powers derived from the Schools Act. And where it performs functions in terms of its own constitution the minimum requirements are determined by the MEC for Education in the Western Cape Province.

[123] The governing body in terms of section 8 of the Schools Act may adopt a code of conduct in creating an appropriate school environment for learners where it would include stipulations in the code, which is prudent and necessary, as well as the adoption of a governing body's constitution. However, according to the SGB, any other provision contained in such a code or the constitution, not specifically specified in the Schools Act, as well as decisions taken by a governing body in respect of the provisions provided for in the code, or in the constitution, not expressly provided for in the Schools Act, are not decisions of an administrative nature.

<u>The decision to change the name is implied in terms of the School Act:</u>

[124] It further submits that although it is not expressly stated that a governing body may change a school's name, it is implied in term of the Schools Act that a governing

body exercises a discretion that is in the best interests of the school, which may be expressed in the mission statement, its constitution and code of conduct, provided it contains the mandatory provisions and complies with the prescribed minimum requirements as well.

[125] According to the SGB, besides the minimum requirements provided for in section 18 of the Schools Act, a governing body may add or supplement the provisions of its constitution from time to time, provided it is not inconsistent with any of the prescribed minimum requirements, its code of conduct, mission statement, the Schools Act, the Constitution of the Republic, or any other law.

[126] The SGB further submits that its mission statement may be developed, which may include identification symbols like uniforms, distinctive emblems (for instance, a coat of arms), a flag or an anthem, to which they collectively referred to as the ‘school's symbols’. They further contend that while the Schools Act does not expressly empower the SGB, or anybody else to determine or to change the school's symbols, it is implied that the SGB has such powers as part of the core functions they have.

<u>The decision did not adversely affect the rights of the applicants or the community:</u>

[127] The SGB further contend that if it is to be found that it is empowered by the Schools Act, (and not its constitution, the code of conduct or its mission statement or as part of its fiduciary duty) to determine or change the name of the school, such decision would constitute administrative action as defined in PAJA, and only in

circumstances where the decision adversely affects the right of any person, and it has a direct and external effect.

[128] According to the SGB, for the applicants to show that the decision of the SGB was of an administrative nature, such a decision must have the capacity to affect legal rights. Furthermore, if regard is to be had to the definition of administrative action in terms of Section 1 of PAJA, it must be a decision which adversely affects the rights of any person and which has a direct external legal effect.

[129] The SGB submits that, despite the applicants claiming that the decision to change the school's name would adversely impact their rights as parents of current learners, representatives of specific alumni, teachers, and other parents, as well as representatives of the broader community, they did not substantiate this claim. They failed to identify which rights have allegedly been affected by the change of the school's name and even how they or the broader community are prejudiced in any way.

[130] The applicants' submission that they have an interest in the changing of the school's name, in response to the assertion that the change in the school's name has not directly or adversely affected the applicants' rights and according to the SGB, is not sufficient to bring it in the definition of administrative action. The SGB therefore contends that a mere interest in the changing of the school's name is simply not sufficient to make the decision susceptible to review in terms of PAJA.

[131] It furthermore contends that the applicants by their own admission do not deny that they are not entitled as a matter of law, to have a school in their vicinity carry any specific name and they have also failed to assert any such right or to assert that any of the rights have been adversely affected by the SGB's decision. Moreover, the SBG asserts that in terms of Section 3 of PAJA, the applicants have failed to show that any of their legal rights had been affected, which also applies to administrative action that materially and adversely affects the right or legitimate expectation of any person.

[132] Once again, even on this definition, the applicants failed to show or even allege which individual rights have been adversely affected by the decision to change the school's name. Furthermore, they failed to allege or show which of them or members of the community they purport to represent, had the legitimate expectation that the name of the school will not be changed. Based on these submissions they have consequently failed to prove their locus standi to bring this application.

Not a final decision by an administrative decision maker

[133] In advancing this submission, the SGB relies on the decision of *Van Zyl v New National Party*[17] where it was held that the meaning of direct effect means it must be a final decision by an administrative decision maker that constitutes a legally binding determination of another legal entity's rights. The SGB submits that no rights of the applicants or the community had been implicated by the decision of the SGB on 6 May 2021. Therefore, the decision was not at the final stage.

[17] 2003 (10) BCLR 1167 (C)

[134] They submit that ‘direct effect’ means it must affect the applicants or the community directly, and only when the last step in the administrative process may be considered as ‘administrative action’, can it be taken to court for judicial review. In this particular case, they submit that the last step is to change the constitution of the SGB in order for the decision to be final and that step has not been taken. It can only be taken after the provisions of the SGB's current constitution are amended.

[135] According to the SGB, the applicants have conceded that they are not entitled to have the school carry any specific name and have also failed to allege how they are prejudiced, yet they contend that they are entitled to ensure that the SGB act lawfully and procedurally fair in all its decisions. The SGB therefore contends that this in itself does not entitle the applicants to apply for a judicial review of its decision in terms of PAJA, the Constitution or the common law.

[136] The SGB further contends that the applicants also state in their papers that they have a vital interest in the matter and are therefore entitled to administrative action that is lawful, reasonable and procedurally fair. According to the SGB, even a vital interest is not sufficient. Based on all of these reasons, the SGB submits that the applicants can therefore not proceed with the application in terms of PAJA, as the decision in issue is not administrative action as defined. Furthermore, they submit that the applicants do not have locus standi because they have failed to show that any of the rights have been adversely affected, which necessitated them to bring this application.

Evaluation:

Whether a final decision had been made?

[137] Firstly, it is important to ascertain whether a final decision had been made. I agree with the applicants, in that the decision to change the name of the school had been made on 6 May 2021. I furthermore agree that based on the undisputed facts in terms of a circular issued by the second respondent, the SGB has the sole power to change the school's name, and that the Department of Education only monitors the process to satisfy itself that the new name adopted has not already been allocated to another school.

[138] Furthermore, I agree that section 18 of the Schools Act requires that the governing body of the school must adopt a constitution to deal with certain procedural aspects regarding meetings that must be held by the governing body. Section 18(2) states that *'A constitution contemplated in subsection (l) must provide for –*

(a) a meeting of the governing body at least once every school term;

(b) meetings of the governing body with parents, learners, educators and other staff at the school, respectively, at least once a year;

(c) recording and keeping of minutes of governing body meetings;

(d) making available such minutes for inspection by the Head of Department; and

(e) rendering a report on its activities to parents, learners, educators, and other staff of the school at least once a year.'

[139] It does not require the school's name to be established therein. The adoption of a new name is not dependent on whether it is reflected in the constitution. Whilst it would only make sense to record the name of the school in the constitution to reflect that it is the constitution of that particular school, but once a decision is taken by the

governing body if it has such power (to which we will refer to later), that decision is lawful and binding. Therefore, I agree with the applicants' submission that the decision that was taken on 6 May 2021 is the subject of these review proceedings.

Delay in launching the review proceedings.

[140] It is clear on the applicants' version that the decision they want reviewed and set aside was taken on 6 May 2021 and this application was launched on 17 December 2021, which is more than 180 days later. The applicants in paragraph (b) of their notice of motion seeks that '. . . *Insofar as it is necessary the period of 180 days refer to in section 7 (1) of PAJA be extended in terms of section 9 of PAJA, to include the date of institution of this application'.* Nowhere in their founding affidavit, however, does the applicants provide any reasons why this application for review was not launched within the 180 days as required in terms of Section 7(1) of PAJA.

[141] When the issue of delay was raised by the SGB after the start of these proceedings, the applicants, in an additional note supplied to the court on 30 October 2022 during the hearing of the application, relying on section 7 (1) (b) PAJA, stated that the reason for their delay in lodging the application is due to the fact that they only became aware of the decision of 6 May 2021 on 1 September 2021, in a meeting held between the applicants and members of the SGB.

[142] I agree with the SGB that this version is not a correct reflection of when the applicants became aware of the date when the decision to change the school's name was made. Firstly, it appears that shortly after the meeting of 6 May 2021 and 13 May 2021, both of which were attended by some of the applicants or by individuals

sympathetic to the applicants who were present at these meetings and who filed supplementary affidavits in respect of the decision of 6 May 2021, was either known to them or communicated to them. Secondly, the SGB in a letter dated 20 May 2021, also communicated to the school community, which further included, the first, second, third and fourth applicants as parents[18] in which it states that '*Ons is daarom nou **gereed om die naam van die skool te verander** op 'n manier wat die **identiteit en geskiedenis van die skool beter te simboliseer'*.[19] (The words in bold was also reflected in the letter sent to the school community and it is not that of the Judge).

[143] Lastly, in a letter dated 30 May 2021, from the first applicant[20]who is also the attorney of record for the applicants, a request was made under paragraph 3.2 of that letter that they be supplied with *'a copy of the minutes held during the meeting in which it was decided that the school's name may change'*. The chairperson complied with this request on 20 June 2021[21] and supplied the applicants with an extract of the relevant part of the minutes stating when the decision was taken.

All the above points to the fact that the earliest date when the applicants became aware of the decision was on 6 May 2021, if not then, it would have been on 13 May 2021 or 20 May 2021, but not later than 20 June 2021.

[144] The applicants therefore clearly did not institute the proceedings within a period of 180 days after the decision was made by the SGB to change the name of the school.

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[18] In para 25 of the FA, they all state they have locus standi because they are parents of learners attending the school.

[19] Loosely translated – *'We are therefore **now ready to change the name of the school** in a manner in which the **identity and history of the school are better symbolised.'***

[20] BHR 12 page 82 record.

[21] BRB 9 page 77 of the record.

The question now to consider is whether the court, in terms of section 9(2) of PAJA should grant an extension of time as requested by the applicants in the notice of motion. The SGB contends that no facts were placed before the court upon which the court should exercise its discretion in the interest of justice to grant such an extension.

[145] Given the important and wide-ranging implications of the issues that had been raised by the parties and given the fact that the subject of this dispute which relates to the name change of the school from that of an apartheid era Prime Minister to a different name has evoked enormous public interest. Thus, it would be the interest of justice to condone the failure of the applicants the institute the proceedings within the 180 days, as required in terms of PAJA.

[146] Furthermore, the SGB has not, apart from making this bald allegation, shown how they will be prejudiced if the court should grant the application for condonation especially in light of the fact that they submitted that the decision to change the name of the school has not yet reached its conclusion and is therefore premature. I, therefore, in terms of section 9(2) of PAJA extend the time period for the institution of this application, to include the date of the institution of this application.

Does the School's Act permit the SGB to change the school's name?

[147] While I agree with the applicants that the Schools Act does not explicitly grant a governing body the power to change a school's name. I, however, do not agree that the governing body has no such power. There is nothing in the Schools Act that prohibits a governing body from exercising such a power.

[148] The Schools Act grants governing bodies in public schools certain circumscribed powers, as referred to by the applicants to deal with certain issues at a school level. These defined powers are set out in section 5 dealing with the admission policy of learners at a public school; section 5A dealing with the policy regarding the norms and standards for basic infrastructure and capacity in public schools; section 6(2) dealing with the language policy at public schools; section 8 dealing with the code of conduct that can be adopted by a public school and section 9 dealing with the suspension of learners from a public school.

[149] All these provisions seem to lay down uniform standards in terms of which inter alia regulates access to a public school; the provision of basic infrastructure and capacity; the language policy; the code of conduct as well as the suspension of learners at public schools. The purpose of these provisions is to prevent unfair discrimination regarding the admission of learners to a public school; to promote norms and standards for the basic infrastructure and capacity in public schools; to promote a uniform language policy at public schools which is subject to the Constitution, the Schools Act and the applicable provincial law; to regulate codes of conduct which are subject to the applicable provincial laws and to regulate the procedures in terms of which such code of conduct would give effective disciplinary procedures.

[150] All these provisions as set out in these particular sections are there to provide for a uniform system of education for the organization, governance and funding of schools and to put in place a uniform standard for the education of learners at public schools throughout the Republic of South Africa. These provisions with its concomitant

powers granted to governing bodies deal with the basic needs of education of learners in public schools.

[151] Section 16(1) of the Schools Act states that *'Subject to the provisions of this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by this Act'*. This provision rather than restrict, confirms that the power to govern a school only vests with the school governing body. It is a provision that gives the governing body broad powers to deal with a range of issues dealing with the governance of a school. Whilst sections 5, 5A, 6, 8 and 9 deals with powers of the governing body to deal with specific and circumscribed issues, section 20 deals with much broader issues of policy and governance at a public school. Section 16(2) states that the governing body '*stands in a position of trust towards the school'*. It has also been said that the governing body has a fiduciary duty towards the school.

[152] It does not prohibit a governing body from conducting the affairs of a public school other than those as set out in these specific provisions of the Schools Act. Section 20 of the Schools Act broadly sets out the functions of all governing bodies at public schools including those functions for the day-to-day running and functioning of a public school. It affords wide powers to a governing body, especially in terms of section 20(1)(a), (b) (c) and (d) which deal with issues of policy and governance, not referred to in the previous sections mentioned.

[153] In *Hoerskool Ermelo*, Moseneke DCJ expressed a view with regard to the provisions of section 20(1) of the Schools Act, which in my view, also serves as a

useful guide in interpreting the provisions of the Schools Act dealing with the powers of a governing body. He says the following about the role and functions of a school governing body at [80]:

'It is correct, as counsel for the school emphasised, that section 20(1) compels a governing body to promote the best interests of the school and of all learners at the school. Counsel also emphasised, rightly, that the statute places the governing body in a fiduciary relation to the school. However, a school cannot be seen as a static and insular entity. Good leaders recognise that institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located, and in the light of the values of our Constitution.' (Footnote omitted)

[154] The duties, functions and powers of a school governing body are on the one hand, circumscribed in the Act and on the other hand, when it comes to the governance and policy in relation to a school, such powers are wide, but not untrammelled. It is therefore not helpful to look at specific provisions of the Schools Act which prescribe certain functions and powers and conclude that those are the only functions and powers a governing body has in terms of the Act. One must interpret the Act having regard to the purpose thereof and avoid an interpretation which is simplistic and one-dimensional as that may not give effect to the purpose thereof. The preamble of the Schools Act sets out the tone and purpose of the Act, which in my view also serves as a useful guide in interpreting the Act. In *Hoerskool Ermelo* the Constitutional Court said the following in this regard at [55]:

'[55] The avowed purpose of the Schools Act is to give effect to the constitutional right to education. Its preamble records that the achievement of democracy has consigned to history the past system of education which was based on racial inequality and segregation and that the country requires a new national system for schools which will redress past injustices in the provision of education and will provide education of a progressively high quality for all learners. The new education system must lay a foundation for the development of all people's talents and capabilities and advance the democratic transformation of society, and combat racism, sexism, unfair discrimination, and the eradication of poverty. The preamble also expresses the intent to advance diverse cultures and languages and to uphold the rights of learners, parents and educators. It also makes plain that the statute aims at making parents and educators accept the responsibility for the organisation, governance and funding of schools in partnership with the state.'

[155] The court in *Hoerskool Welkom* stated the following with regards to the interpretation of the Schools Act, specifically in relation to the powers and functions of a governing body: '[63*] To my mind, therefore, a governing body is 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. By contrast, a principal's authority is more executive and administrative in nature, being responsible (under the authority of the HOD) for the implementation of applicable policies (whether promulgated by governing bodies or the Minister, as the case may be) and the running of the school on a day-to-day basis. <u>It is this understanding of a governing body's governance obligations which must inform our interpretation of the Schools Act.'</u>* (Footnote omitted)

[156] In terms of Section 20(1) of the Schools Act, some of the functions of a governing body dealing with policy and governance are the following:

a) Promote the bests interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;
b) Adopt a constitution;
c) Develop a mission statement of the school;
d) Adopt a code of conduct.

[157] In my view, all these functions place the governing body in a fiduciary duty towards the school and to act in the best interest of the school as pointed by the SGB. Their power to change the name of the school is derived from these provisions. The powers of a governing body should therefore be informed by these principles as enunciated by Moseneke DCJ in *Hoerskool Ermelo* above. In my view, by embarking on the name changing exercise, the SGB realised that the school cannot be seen as a static or insular entity, that as the leadership of the school it realised that the school must adapt and that the school is a dynamic part of an evolving society in a constitutional democracy; that it must manage the school not only in the interest of the learners and parents at the time, but also in the interests of the broader community.

[158] A further function in complying with this fiduciary duty is to develop a mission statement of the school. That is clearly what the SGB was trying to achieve. In my view, the power to change the name was also aligned with power of the SGB to develop a mission statement for the school. This was after the SGB adopted the core characteristics of the school's identity which are the following:

a) The school should strive to be an institution of academic excellence;
b) The school's leadership should be accommodating and innovative;

c) The language of instruction must be Afrikaans, to serve all Afrikaans speaking members of the community;
d) The school has an inclusive culture which should strive to break through the traditional white Afrikaans barriers; and
e) The school has Christian values, whilst accommodating at the religions.

[159] According to the SGB at the meeting on 6 May 2021, these core characteristics, which in my view is nothing but a mission statement, was adopted and discussed. Based on these core characteristics which the SGB adopted, there was agreement by the SGB that the school symbols which included its name should be reviewed. In my view the conduct of the SGB falls squarely within the powers given to it in terms of section 20 (1) of the Schools Act. This core characteristics formed a major part of the discussions and feedback given by the members of the SGB at their meeting held on 6 May 2021.[22]

[160] This is exactly what the SGB was seeking to achieve in this case, by reassessing the values of the school in a post-apartheid society, which included a name change. Given the applicants' interpretation of the Schools Act, it would seem that no public school in South Africa can change its name, not even by *'a body in whose hands the effective power to run schools were placed in the hands of parents and guardians of learners through a school governing body'.*[23] Such an interpretation is an irrational one which seeks to undermine the provisions of the School's Act.

[22] See para 53 and 54 supra and paragraph 103 at page 350 , in the answering affidavit of Mr.Roux.
[23] Ermelo High School at 79

[161] On the contrary, a governing body as the elected representatives of a public school at a local level are best placed to change the name of a public school. This it seems in my view, is also the view of the second respondent, through the circular it adopted regarding name changes. The Constitutional Court in *Hoerskool Welkom,* with reference to a circular issued by the provincial department, found it instructive that a policy document in the absence of clear legislative provision set out the powers given to a governing body in that particular case albeit in a different context where the court said the following at [65]: '*While we should refrain from purporting to use subordinate legislation and similar instruments to interpret primary legislation, I think it is instructive that the various policy documents issued by the Department of Basic Education and its provincial counterpart in this matter are all predicated upon the promulgation of a pregnancy policy falling within a governing body's governance responsibilities. For example, the 2010 Circular states that it is "imperative that all schools should have a policy on the prevention and management of learner pregnancy" and goes on to stipulate certain principles that should be given effect to by schools "when drawing up such policies".'* (Footnotes omitted)

[162] In this particular case, the Western Cape Education Department under circular number 0081/9097 dated 19 September 1997 states the following at paragraph 1.1 of the circular: '*Naamgewing of naamsverandering . . .word* ***deur beheerliggaam self goedgekeur*** *en word daarna deur die gebruiklike kanale . . .vir kondonering aan die WKOD voorgelê. Die* ***naamgewing, soos deur die beheerliggaam goedgekeur****, kan gebruik word nadat die Onderwyshoof dit gekondoneer het.1.2 Dit is nie die* ***bedoeling om die***

beheerliggaam se bevoegdheid *om 'n naam aan 'n onderwysinrigting toe te ken te betwyfel nie . . .'*[24] (Eie beklemtoning - Own emphasis)

For all these reasons, I am therefore of the view that the SGB does have the necessary power to change the name of the school.

Does the decision to change the name amount to administrative action in terms of PAJA?

[163] The SGB in its heads of argument conceded that if it found that the governing body is empowered by the Schools Act or its mandate to develop the mission statement in terms of section 20(1)(c) of the Schools Act, to determine the name and to change the name; such decision would constitute an administrative action as defined in PAJA. This concession in my view, was correctly made.

Did the decision adversely affect the rights of the applicants, and which has a direct external legal effect?

[164] The SGB in their answering affidavit states the following in this regard '*With regards do the applicants rights, they are not entitled to, as a matter of law, to have a school in their vicinity carry any specific name, not to mention the name of a leader of the apartheid regime. Their children have no such right either. Indeed, the applicant did not assert any such right in these proceedings, nor do they assert that any of their rights have been directly affected by the first respondent's decisions. This much appears to be conceded in paragraph 106 of the founding affidavit*.' This was said in reply to what the applicants' state in the founding affidavit: '*I respectfully submit that we do not want to withhold the school's name from being*

[24] Loosely translated ***'The*** *naming or renaming of educational institutions . . . is approved by the governing bodies themselves,* ***whereafter it is sent for condonation to the WCED. The naming or change of name as approved by a governing body may only be used after it had been condoned by the Head of Education.*** *1.2 It is not the intention to deny the governing body its power to name an institution. . .'*

changed, per se. What we seek are fair and precisely correct administrative procedures and a fair and rational process.'

[165] The SGB submits that the applicants have failed to prove that their rights or that of other people they purport to represent was adversely affected, and that they have also failed to identify which legal rights have allegedly been affected by a change in the school's name or how they or the broader community are prejudiced by the change of the school's name. In response to this, the applicants in their replying affidavit merely state that they have an interest in the changing of the school's name. In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) ("Greys Marine") it was held that while the definition of administrative action purports to restrict that as a fact, 'adversely affect the rights of any person' and held that the literal meaning could not have been intended. It further held that for administrative action to be characterized by its effect in particular cases (either beneficial or adverse) seem to be paradoxical and finds no support from the construction that has until now been placed on section 33 of the Constitution.

[166] The court further stated that the literal construction would be inconsistent with section 3(1) of PAJA, which envisages that administrative action might or might affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a *'direct and external legal effect'*, was probably intended to convey that administrative action has the capacity to affect legal rights.

[167] It was further stated in *Grey's Marine* at [24]: *'Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than the identity of the person who does so.'* What is apparent from this

decision is that our courts have frowned upon a restrictive interpretation of the term administrative action where it would only be open to an applicant who has shown that his or her rights were adversely affected by the administrative action, where such a failure to show that would result in an applicant becoming non-suited.

[168] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*[25] Cameron J said the following *'. . .[T]he interest of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if an applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.'*

[169] I do not agree with the SGB's contention that this court should give a narrow meaning and scope to the administrative action undertaken by it, to conclude that it does not affect the rights of the applicants. In my view, as has been pointed out in *Greys Marine*, the term 'adversely affected' should not be interpreted in the strict literal sense because it would lead to absurd results which would disqualify deserving litigants from the reach of the court.

[170] It would also restrict members of the public to institute review proceedings against decisions of organs of state that would affect the rights of the public. Lastly, which is important for this particular case, is that all the applicants were invited to take part in the name change process initiated by the SGB, which clearly made them an

[25] 2013 (3) BCLR 251(CC) at 34

indispensable interested party to this whole process. They were invited to make submissions about the name change, and they were not satisfied with the process. As active participants in the process as parents of learners at the school, they were entitled to launch these proceedings. When they became participants in the process they were entitled to fair and just administrative action, and after having been aggrieved by the process that was followed, they were entitled to vindicate their right to just administrative action.

Whether the process that was followed resulted in administrative action that was fair and rational?

[171] The next question to consider is whether the procedure that was adopted by the SGB was fair and rational. The applicants advance various reasons as referred to earlier, as to why they regard the procedure that was adopted by the SGB in the change of the name of the school was not fair or rational. The main thrust of the complaint against the procedure followed by the SGB, was that there was no proper consultation; that people were not provided with a proper opportunity to discuss the question of the name change at meetings held.

[172] Furthermore, that the process that was adopted did not constitute conventional consultation sessions characterised by forthright dialogue dealing directly with the issue at hand. The SGB rather adopted the process that was aimed at discussing the vague notion of ‘symbols’ and the ‘school we dream of’; that it was never the purpose of the consultations to consult with the various groups regarding the changing of the school’s name. The SGB, takes issue with these allegations and denies that the process that was followed was unfair and irrational. On a conspectus of the evidence,

I do not regard this denial as bald and unsubstantiated. The allegation of unfairness and irrationality in my view given the totality of the facts and circumstances are without merit and lacks substance. This also totally contradicts the version of the fourth applicant, Barend De Klerk, regarding his experience as a participant in one of the discussion groups he attended on 23 March 2021.[26]

[173] In this regard, it is common cause that the SGB had no idea what process had to be followed as there was no clearly defined process for the change of the school's name and no legal precedent that could be followed. One of the first decisions the SGB made around this issue was to address a letter on 22 June 2020 to all the parents, learners, alumni, and school staff on its data base which consisted of approximately 8990 individuals, advising them of the SGB's decision to embark on a process to ultimately arrive at a decision. This letter was also accompanied by an invitation to the recipients to assist in facilitating the SGB with the anticipated dialogue.

[174] After having received the responses from some of the recipients, some of which were vehemently opposed against the idea that the school's name should be changed. It was decided to identify a person or body to advise them and to act as a facilitator. The SGB denies that it committed itself to a specific process except to disclose its intention to initiate discussions with the school community. The proposed process it followed was clearly set out in a further letter dated 1 December 2020.[27]The composition of the steering committee consisted of representatives of all the relevant interested parties, as set out in this letter.

[26] See paragraph 47 (supra).
[27] Page 45 of trial record.

[175] In my view, it was eminently reasonable for the SGB to appoint a facilitator who acted as an independent person to facilitate the process. Whilst the applicants expressed their reservations about the appointment of Dr. Marais, who holds a doctorate degree in practical theology, is a theologian and the Director of Theological Training at the Faculty of Theology of the University of Stellenbosch, whose experience, qualifications, and expertise is well suited. His academic field of expertise is congregational studies, more specifically, theories and practices in the transformation of church and society.

[176] He has also published numerous articles and books in this field. He has facilitated the resolution of many congregational disputes and implemented renewal and reunification processes. This was mostly between traditional white and non-white congregations. He is also well versed in the facilitation of such processes and resolution of disputes between churches, NGOs and school communities that came up along the way. Because of his experience he has become an expert in the mediation of disputes between people of divergent political backgrounds and views. In his view, before taking on the assignment, because DF Malan High school which is situated in the northern suburb of Cape Town which attracts mostly white learners, he anticipated that any dialogue about the potential change of the school's name could attract resistance of the same kind he experienced during the unification of white and non-white congregations. In his view, the dialogue about the school's name is in the first instance a dialogue about the school's identity. He therefore advised the SGB to arrange small group discussions to which the participants were to consider aspects of the school's identity. In my view, his experience and expertise made him eminently

suitable to act as facilitator and to advise the SGB about the name changing process; as well as the manner in which it should be conducted.

[177] It was therefore not unreasonable or irrational for the SGB to follow the advice of Dr. Marais as to the approach to be adopted in respect of changing the school's name. I also agree that the approach evolving around the school's name should not be determined by a simple 'yes' or 'no' as it would have left very little room for motivating and debating the various views on the subject. The SGB was alive to the sensitivity around the potential name change of the school because it had to engage with two diverse groups forming part of the school community, on the one hand the DF Malan Must Fall group that demanded a name change and those who are outright opposed to it; especially to those who regarded Dr. Malan as a hero and an honourable person and those who had not yet expressed an opinion.

[178] Given these circumstances, it was not unreasonable or irrational to follow the advice of Dr Marais which was also expressed by a prominent school governing body representative body in South Africa, FEDSAS, who advised that the dialogue around the school's name should be grounded in the school's identity. The FEDSAS circular, which the SGB in addition to the advice and guidance given by Dr. Marais, also served as a guide and was incidentally without Dr. Marais being aware of the content thereof, similar to the advice given to the SGB by Dr. Marais. In the FEDSAS circular inter alia it stated the following:

1) There is a duty on a governing body to act in the school's interest but also to manage the school in the interest of the broader community in which the school is located;

2) It would therefore be for the governing body to consider the school's names, mottos and emblems.

[179] While I am of the view that the overall process with its underlying components which resulted in the decision that was followed by the SGB was a proper one, it cannot be faulted and it is not offensive to the provisions of PAJA. I will nevertheless deal with one or two of the specific complaints as highlighted by the applicants of the process.

[180] The applicants complained that the manner in which the consultation process was terminated upon reaching the saturation point is contrary to the notion that public consultation requires the decision-maker to consult widely. I do not agree that the process followed was flawed after a decision was made that further consultation should be terminated because the saturation point had been reached; that the administrative action in this particular case, although it elicited a great deal of public interest and debate, it can hardly be characterised as administrative action which adversely affects the rights of the public that requires wide public consultation.

[181] The administrative action which is complained of as being unfair in this case seems to be to a greater extent that which affects the rights of a group of persons aligned with the school, which is the school community of DF Malan. These includes the learners, parents, alumni, and members of the staff which included teachers. The complainants which are the applicants in this matter all form part of this group. Whilst it may also affect the public at large, given the negative political connection of the person after whom the school was named, an apartheid era Prime Minister. This

application is more concerned with the question whether the administrative action complained of was fair to the applicants. However, it seems that the applicants' complaint is based on the fact that there was non-compliance with section 3 of PAJA, and not section 4 of PAJA, which deals with the right to a fair administrative action affecting the public.

[182] Section 3 states the following: *'Procedurally fair administrative action affecting any person.—*

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

(5) . . .'

[183] It cannot be argued that the consultation process was compromised where the consultation process was terminated because the process of consultation in that particular group had reached a saturation point. The applicants do not take issue with SGB's and Dr. Marais' contention in this regard.

The process of consultation should not be repetitive and reach a point where there would be no meaningful contribution that can be made by persons within a specific group, in this case the school community, otherwise it would be meaningless and serve no value or purpose. This underlines the purpose of the so-called qualitative approach; which means that more consultation does not mean that the quality and the substance thereof would be better after a saturation point had been reached. This approach is also in line with what was held in *Scalabrini* (infra at paragraph 188), where Rogers J (as he then was) held at the consultation process should be meaningful and should '*not be treated as perfunctorily or as a mere formality'.*

[184] A further complaint was that the SGB was biased towards the outcome from the inception because at least two of these persons expressly favoured the name change

prior to the process commencing, because two members of the SGB who served on the steering committee favoured the name change prior to the process commencing. In argument, as referred to earlier, Mr. Ferreira conceded that the applicants presented no facts to substantiate this claim and conceded that it could not make out a case that there was bias on the part of the SGB and that members were influenced to favour a decision towards a name change. It seems members of the applicants, as well as their supporters prior to the process having started, also expressed a view which were against any name change. On conspectus of the evidence and facts, especially the minutes of the meeting held on 6 May 2021, the correctness of which was not disputed, it seems that the members of the SGB, whether in favour of the name change or not, expressed their views openly and honestly without the influenced by anyone to do so.

[185] In my view, when the SGB embarked on this process to change the name of the school, it did not do so without due and proper consideration of all the facts and circumstances surrounding the name change. All of the circumstances had to be considered in embarking upon the process which the SGB decided to follow.

[186] The process undertaken to bring about a name change of the school from that of an apartheid era Prime Minister, is a very difficult task that had been placed on the shoulders of the SGB. If regard is to be had to the origin of the name, the negative connotations attached to the name and the fact that the name is offensive to many South Africans, especially from previously disadvantaged backgrounds, the process to be followed had to be carefully scrutinised in a democratic society such as ours, which underpins the values of the Constitution, of human dignity, equality, the

advancement of human rights and freedom as well non-racism, to which Dr. Malan showed utter contempt and disdain.

[187] The glorification of his name by an insistence that a school be named after him in post-apartheid South Africa where young people have to embrace a culture based on the values of our Constitution is an insult not only to them, but to the millions of South Africans who suffered at the hands of the apartheid regime. The only purpose to be served by preserving and holding onto this name is an illogical and unreasonable *'affinity and mourning of the apartheid regime characterised by its degrading and undignified treatment of black South Africans'*[28]. This is clearly what some of the applicants and those who support their cause seeks to achieve.

[188] In *City of Tshwane Metropolitan Municipality v Afriforum and another*[29] Mogoeng CJ said the following albeit in the context of name changes to cities, streets and towns that still bears the name of persons which implemented the evil system of apartheid:

' [8] *As a people who were not only acutely divided but were also at war with themselves primarily on the basis of race, one of several self-imposed obligations is healing the divisions of the past. The effects of the system of racial, ethnic and tribal stratification of the past must thus be destroyed and buried permanently. But the healing process will not even begin until we all make an effort to connect with the profound benefits of change. We also need to take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity. That would be achieved partly by removing from our cities, towns, "dorpies", streets, parks, game*

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[28] In the words of Schippers JA at para 41 in A*friforum NPC v Nelson Mandela Foundation Trust and Others* 2023 (4) SA 1 (SCA)

[29] 2016 (6) SA 279 (CC) (21 July 2016)

reserves and institutions, names that exalt elements of our past that cause grief to other racial groups or reopen their supposedly healing wounds . . .'

[189] In my view, a proper and fair process with proper consultation given the circumstances of this case, was undertaken. All the parties forming part of the school community, were required to give their input about the proposed name change although it was characterised as a process to review the "symbols "of the school, it was all part of the process to bring about a change of the name. This was known to all the parties, and they expressed their views about it, some of which were very strong views. There can therefore be no question that there was no consultation or proper consultation.

[190] In *Scalabrini Centre and Others v Minister of Home Affairs and others*[30] the following was said by Rogers J (as he then was) regarding consultation [72]:

'There are two points to emphasise from the cases: [First], a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice (see R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities [1986] 1 WLR 1 (QB) ([1986] 1 All ER 164) at 167g – h (All ER); Hayes and Another v Minister of Housing, Planning and Administration, Western Cape, and Others 1999 (4) SA 1229 (C) at 1242C – F). Consultation is not to be treated perfunctorily or as a mere formality (Port Louis Corporation v Attorney-General of Mauritius [1965] AC 1111 (PC) at 1124d – f). This means, inter alia, that engagement after the decision-maker has already reached his decision or once his mind has already become "unduly fixed" is not compatible with true consultation (Sinfield v London Transport Executive [1970] 2 All ER 264 (CA) at 269c – e). [Secondly], At the procedural level, consultation may be conducted in any appropriate way determined by the

[30] 2013 (3) SA 531 (WCC)

decision-maker, unless a procedure is laid down in the legislation. However, the procedure must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the consulted party to enable it to tender helpful advice; and sufficient time must be available to allow the advice to be considered (Association of Metropolitan Authorities supra at 167h – j; Hayes supra at 1242C – 1243B).'

[191] Based on the principles laid down in *Scalabrini*, although the facts and circumstances differ to this case, the process embarked upon by the SGB constitutes fair administrative procedure, which included adequate consultation and a proper chance by all concerned to give their input. So much so, that almost half of the persons namely, 626 participants who were requested to propose a name change, a total of 301 participants proposed that the name remain unchanged, which is substantial.

[192] The applicants for all of the reasons mentioned, has failed to show that they are entitled to the relief sought as set out in paragraph (a) of the notice of motion, to have the decision of the SGB to change the name of the public school, Die Hoerskool DF Malan to DF Akademie. The relief in paragraph (b) of the notice of motion is granted but would have no effect on the outcome of this application.

[193] In the result therefore, I make the following order:

193.1) That the application is dismissed with costs.

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R.C.A. Henney

Judge of the High Court

Counsel

Applicants: Adv T I Ferreira

First Respondent: Adv J Tredoux

Attorneys

Applicants: Harmse Kriel attorneys

Respondents: Bern Rautenbach attorneys