CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 135/12
[2013] ZACC 34

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION IN GAUTENG PROVINCE	First Applicant
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Applicant
DISTRICT DIRECTOR JOHANNESBURG EAST D9: GAUTENG DEPARTMENT OF EDUCATION	Third Applicant
and	
GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Respondent
RIVONIA PRIMARY SCHOOL	Second Respondent
MS CELE	Third Respondent
MR MACKENZIE	Fourth Respondent
MS DRYSDALE	Fifth Respondent
and	
EQUAL EDUCATION	First Amicus Curiae
CENTRE FOR CHILD LAW	Second Amicus Curiae

SUID AFRIKAANSE ONDERWYSERSUNIE Third Amicus Curiae

Heard on : 9 May 2013

Decided on : 3 October 2013

JUDGMENT

MHLANTLA AJ (Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Nkabinde J and Skweyiya J concurring):

Introduction

[1] Section 29 of the Constitution guarantees everyone the right to a basic education.[1] That is the promise. In reality, a radically unequal distribution of resources – related to a history of systematic discrimination – still makes this constitutional guarantee inaccessible for large numbers of South Africans. The impact of this painful legacy was recognised by this Court in *Ermelo*[2] as follows:

> "Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage.

[1] Section 29(1) of the Constitution provides:

> "Everyone has the right—
>
> (a) to a basic education, including adult basic education; and
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> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[2] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*).

> Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us."[3]

[2] Continuing disparities in accessing resources and quality education perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity.[4] The question we face as a society is not whether, but how, to address this problem of uneven access to education. There are various stakeholders, a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward. The Constitution provides us with a reference point – the best interests of our children.[5] The trouble begins when we lose sight of that reference point. When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of children.

[3] This case is a reflection of that type of failure. The issues arise from a school admissions dispute that occurred in 2010. The dispute has brought to the fore the right of learners to access basic education. It requires us to strike an appropriate balance between

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[3] Id at para 45.

[4] Id at para 2, where Moseneke DCJ stated:

> "It is trite that education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage."

[5] Section 28(2) of the Constitution provides:

> "A child's best interests are of paramount importance in every matter concerning the child."

the powers and duties of provincial education departments and school governing bodies. Implicated in this are the interests of parents in the quality of their children's education, and the state's obligation to ensure that all learners have access to basic schooling.

Parties

[4] The applicants are functionaries in the Gauteng Department of Education (Department). The first applicant is the Member of the Executive Council for Education in the Province of Gauteng (Gauteng MEC). The second applicant is the Head of the Department of Education in the Province of Gauteng (Gauteng HOD). The third applicant is the District Director Johannesburg East D9: Gauteng Education Department (District Director).

[5] The first respondent is the Governing Body of the Rivonia Primary School (Rivonia Governing Body). The second respondent is Rivonia Primary School (Rivonia Primary). For ease of reference, I say "the school" when referring to the first and second respondents jointly.

[6] The third and fourth respondents are the parents of the learner whose placement at Rivonia Primary is in dispute. The fifth respondent is the principal of Rivonia Primary (principal).

[7] Equal Education is a movement of learners, parents and community members. It advocates for quality and equality in the South African education system. The Centre for Child Law is an organisation established to promote child law and uphold the rights of children in South Africa. Both were admitted jointly as the first and second friends of the court, or amici curiae.

[8] The Suid Afrikaanse Onderwysersunie (Onderwysersunie), admitted as the third amicus curiae, is a registered trade union for educators and school administrators. The Onderwysersunie has more than 34 000 members nationwide, comprising employees from both public and private schools.

Background

[9] Rivonia Primary is a public school situated in a historically privileged suburb of Johannesburg. In 2010, a prospective Grade 1 learner residing within the feeder-area[6] of Rivonia Primary was unsuccessful in finding placement at that school for the academic year starting in 2011. According to the school, it had reached its stated capacity of 120 learners for the grade, as provided for in its admission policy.[7] The learner was

[6] The Gauteng Department of Education Regulations Relating to the Admission of Learners to Public Schools, Provincial Gazette 439, General Notice 61 of 1998 defines the feeder-area of a school as that "area which is closer to that school by any public route than to any other school."

[7] There are two versions of the admission policy on record. One version was certified by the Department on 4 March 2010 and stated that the maximum capacity of the school was 770 learners. Another version of the policy was adopted by the Rivonia Governing Body in August 2010, which states:

> "The Governing Body has determined that Rivonia Primary has the capacity to admit a maximum of 840 learners (120 learners per grade) and in determining the capacity of Rivonia Primary has taken into account all relevant factors relating to the facilities and programmes".

accordingly placed on the waiting list.[8]

[10] The mother of the learner, dissatisfied with the admission processes, complained to the Department. Her complaints set off a range of meetings and correspondence involving the Department, the parents and the school from September to November 2010. By late November 2010, the Department and the school had seemingly settled on the view that the learner had been properly placed on the waiting list and would simply have to wait her turn.[9]

[11] On 5 November 2010, in the course of the fray, the mother of the learner also lodged an appeal with the Gauteng MEC. Due to admitted administrative failures within the Department, the appeal was only brought to the attention of the Gauteng MEC in late January 2011, at which stage the provincial school term had already begun. The Gauteng MEC then referred the matter to the Gauteng HOD.[10] Notwithstanding the resolution that

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According to the school, the difference between the two versions of the policy is explained by the fact that the first did not include an accounting of Grade 0 learners, whereas the second did.

[8] The outcome of the learner's application to the school was communicated to the learner's mother on 5 November 2010 by the principal. The letter from the principal reads in relevant part:

> "Dear Mrs. Cele
>
> According to the School's Admission Policy you have been placed in Waiting List 'A' for parents who reside in our catchment area, as the school has reached its capacity for Grade 1 2011.
>
> . . .
>
> Number on Waiting List 'A': 14 as of 25th October 2011".

[9] See *Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others* [2012] ZASCA 194; 2013 (1) SA 632 (SCA) (Supreme Court Appeal judgment) at para 11 and the discussion at [66] below.

[10] The Gauteng MEC was concerned that it would be premature for her to consider the appeal, since the Gauteng HOD had not yet taken a decision in terms of relevant provincial regulations.

had been reached at the end of November 2010 between the Department and the school, the referral brought the dispute to life again.

[12] When the Gauteng HOD eventually considered the matter, in February 2011, the school year was well underway. By this time the learner had been enrolled at a private school, and Rivonia Primary's 'tenth-day statistics' had become available.[11] It was conveyed to the Gauteng HOD that, according to the tenth-day statistics, the school had admitted 124 learners and had five Grade 1 classes. This meant that there were 24 or 25 learners per Grade 1 class. The Gauteng HOD took the view that the tenth-day statistics demonstrated that, notwithstanding the provisions of its admission policy which purported to restrict Grade 1 enrolment to 120 learners, Rivonia Primary had the capacity to admit the additional learner in one of its five Grade 1 classes. Purporting to exercise his powers in terms of provincial regulations,[12] the Gauteng HOD proceeded to overturn the refusal of the learner's application and issued an instruction to the school that the learner be admitted immediately.[13]

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[11] This is a reference to statistics kept by the Department of learner numbers on the tenth day of the new school year.

[12] Regulation 13(1) of the Gauteng Department of Education Regulations for the Admission of Learners to Public Schools, Provincial Gazette 129, General Notice 4138 of 2001 (Gauteng Regulations). The Gauteng Regulations were issued in terms of the Gauteng School Education Act 6 of 1995 (Gauteng Act). It should be noted that the Gauteng MEC amended the Gauteng Regulations on 9 May 2012 (see Provincial Gazette 127, Government Notice 1160, 9 May 2012). These amended regulations are not before this Court and are not relevant for the purposes of these proceedings.

[13] The letter from the Gauteng HOD, dated 2 February 2011 and communicated to the principal on 3 February 2011, states:

> "Dear Madam
>
> ADMISSION OF [THE LEARNER] TO GRADE ONE AT RIVONIA PRIMARY SCHOOL IN 2011
>
> 1. I have perused all the documents submitted to me and wish to note the following:

[13] As a result, on the morning of 7 February 2011, some four weeks into the new school year, the mother of the learner arrived at Rivonia Primary with her daughter in full school uniform. She insisted that the child be admitted to the school. The principal refused and explained that an urgent meeting of the Rivonia Governing Body had been called to resolve the issue.

[14] On 8 February 2011, the Gauteng HOD purported to withdraw the principal's admission function by delegating it to another official. The Department's representatives proceeded to take control of the situation and physically placed the learner in one of the school's Grade 1 classrooms, seating her at an empty desk that had been installed for a learner with attention and learning difficulties.

[15] The principal was later subjected to a disciplinary hearing for not complying with the Gauteng HOD's instruction. She eventually pleaded guilty, was given a final warning and had a month's salary deducted.[14]

1.1 According to the tenth day school statistics, the school has not reached its capacity.

2. Ms. Cele approached the HOD for assistance in this matter.

3. You are hereby instructed to enrol [the learner] to grade one at Rivonia Primary School without delay."

[14] The Supreme Court of Appeal held that the instruction given to the principal to admit the learner was contrary to the school's admission policy and that the placing of the learner in the school was unlawful. The principal nonetheless received a written notification after the Supreme Court of Appeal decision indicating that the sanction would be implemented. She has indicated that she will appeal the sanction, and the Department agreed to suspend its implementation until this matter has been resolved.

High Court

[16] The school approached the South Gauteng High Court, Johannesburg (High Court) on an urgent basis for declaratory and interdictory relief aimed at the Department's decision to override the school's admission policy, the forced admission of the learner and the withdrawal of the principal's admission function. The school hinged its argument on the power afforded to governing bodies in section 5(5) of the South African Schools Act[15] (Schools Act), which provides:

> "Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school."

[17] The school asserted that determining the capacity of a school is an inherent and necessary incident of any admission policy. Further, there was no statutory or other legal power given to the Gauteng MEC or Gauteng HOD to determine the capacity of a public school. Therefore, school governing bodies have the sole and final say on the maximum capacity of a school, and the Gauteng HOD lacked the power to admit a learner to the school in excess of the capacity fixed in its admission policy.

[18] The High Court (per Mbha J) held that section 5(5) of the Schools Act does not give a school governing body the unqualified and exclusive power to determine finally the school's maximum capacity. Rather, in the light of both the scheme of the

[15] 84 of 1996.

Schools Act and the relevant provincial regulations, the power to determine the maximum capacity of a public school in the Gauteng Province vests in the Department.

[19] The High Court concluded that the Gauteng MEC is the ultimate arbiter as to whether a learner should be admitted to a public school, and that the Department is empowered to intervene where necessary to ensure that children threatened with being deprived of access to schooling may be accommodated. On the facts of the present case, the Court was satisfied that the Department had acted fairly and reasonably.

[20] Regarding the withdrawal of the principal's admission function, the High Court held that the withdrawal was arbitrary and set it aside. The Department did not cross-appeal this aspect of the order, and it is no longer an issue in this Court.

Supreme Court of Appeal

[21] Dissatisfied with the outcome, the school appealed to the Supreme Court of Appeal. That Court (per Cachalia JA) unanimously upheld the appeal. It declared that the instruction given to the principal to admit the learner, contrary to the school's admission policy, was unlawful, as was the placing of the learner in the school.[16]

[16] The Supreme Court of Appeal made an order in the following terms:

> "It is declared that the instruction given to the principal of the Rivonia Primary School to admit the learner contrary to the school's admission policy, and the placing of the learner in the school, were unlawful."

[22] The Court held that section 5(5) of the Schools Act expressly provides that the admission policy of a school is determined by its governing body, and that this necessarily includes the determination of its capacity. This was made, the Court said, clear by section 5A of the Schools Act, which allows the Minister of Basic Education to prescribe minimum norms and standards for "the capacity of a school in respect of the number of learners a school can admit". According to the Supreme Court of Appeal, the fact that a school governing body is enjoined, in terms of section 5A(3), to compile and review its admission policy in accordance with those norms and standards leaves no doubt that the admission policy of a school governing body includes determining the capacity of the school. The Supreme Court of Appeal accepted that the Gauteng HOD, acting through the relevant principal, is responsible for the administration of the admission process. But the Court reasoned that this must necessarily be done in accordance with the admission policy of the school governing body. Having determined its admission policy, it remains for the Rivonia Governing Body to apply it.

[23] The Supreme Court of Appeal considered section 5(9) of the Schools Act, read with Regulation 14 of the Gauteng Regulations, which allows an appeal to the Gauteng MEC where admission is refused by a principal. It also considered Regulation 13(1)(a), which gives the Gauteng HOD the authority to set aside the decision of the principal before the appeal. All of this, held the Court, had to be done in accordance with the admission policy. The Court held that, if the Gauteng Regulations purported to vest the

Department with the power to compel a school to admit learners in excess of the capacity fixed in the admission policy, the Regulations would be contrary to the statute.

[24] The Court rejected the Department's reliance on section 3(3) and (4)[17] of the Schools Act to contend that the provincial government has the final say on the capacity of a school. Properly understood, said the Supreme Court of Appeal, section 3 deals with compulsory attendance and the obligation to ensure the provision of infrastructure for that purpose. This, held the Court, is completely unrelated to the admission policy of a school (dealt with in section 5 of the Schools Act) and to the authority to override it.

[25] Further, the Court commented that it would be inappropriate for the Department to be vested with a power to use the additional capacity at Rivonia Primary, because that capacity had been created through additional funds raised by the Rivonia Governing Body. It would be a disincentive for parents to contribute to school funds if the increased capacity created by these funds could be used to accommodate more learners than the Rivonia Governing Body wanted to admit.

[17] Section 3 is headed "Compulsory attendance" and provides in relevant part:

> "(3) Every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2).
>
> (4) If a Member of the Executive Council cannot comply with subsection (3) because of a lack of capacity existing at the date of commencement of this Act, he or she must take steps to remedy any such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so."

[26] The Department approached this Court seeking leave to appeal against the judgment and order of the Supreme Court of Appeal.

This Court

Applicants' submissions

[27] According to the applicants, the Supreme Court of Appeal erred in its interpretation of the provisions of the Schools Act. Whilst the applicants no longer contest that the governing body of a school is entitled to determine capacity as part of its admission policy, they submit that the power vested in governing bodies by section 5(5) should not be overstated. They contend that, although the governing body makes admission policies, the Schools Act and provincial legislation make it clear that a decision to reject a learner taken at school level is never final, but is rather subject to confirmation by the Department.[18]

[28] Further, the Department is under a constitutional and statutory obligation to ensure that the existing public-school infrastructure in the province is utilised as efficiently as possible. The Department cannot allow a situation where some public schools operate at levels considerably below the capacity that their infrastructure can and should support, while other public schools are overcrowded and some learners are unable to find places.

[18] The applicants contend that this is implicit in section 5(6) to (9) of the Schools Act, and was made explicit in Gauteng through the Gauteng Regulations read with the Gauteng Act.

[29] The applicants contend that this interpretation of the applicable statutory framework is one required by section 39(2) of the Constitution[19] read with the fundamental rights to equality and education and the duties resting on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[20] This is because the fundamental rights to education and equality require school capacity to be determined ultimately at a systemic level by a provincial education department, and not at the level of an individual school by its governing body.

Respondents' submissions

[30] The respondents support the Supreme Court of Appeal's reasoning that the Schools Act vests the power to determine the capacity of a school in the school governing body. They submit that the applicants' interpretation of the Gauteng Regulations conflicts with national legislation, and that the national legislation must prevail. In any event, the Gauteng HOD did not have the right simply to ignore the admission policy and instruct the principal to admit the learner. The Gauteng HOD should have taken steps to set the admission policy aside or withdraw the power from the Rivonia Governing Body.

[31] Further, the respondents emphasise that the scheme of the legislation provides other mechanisms through which the Department should be dealing with the problem of placing additional learners in public schools. There is no evidence that the Department

[19] Section 39(2) of the Constitution requires every court to "promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation.

[20] Section 7(2) of the Constitution.

attempted to use these mechanisms. The real problem lies with the Department's general failure to fulfil its obligations in terms of the Schools Act.

Leave to appeal and issues for determination

[32] It is clear that this matter raises important constitutional issues concerning the education of children, the determination of the roles and powers of various stakeholders in the governance of schools and the lawful exercise of those powers.[21] There are reasonable prospects of success and it is in the interests of justice that leave to appeal be granted.[22]

[33] There are three material issues for determination by this Court. The first is whether the Gauteng HOD was vested with decision-making power in relation to the admission of learners to public schools. If so, the second question is whether the Gauteng HOD was empowered to depart from the admission policy of the Rivonia Governing Body and admit the learner contrary to the capacity determination in that policy. And if so, the third question is whether the Gauteng HOD's exercise of that power to admit the learner was reasonable and procedurally fair.

[34] The determination of the first issue requires a consideration of the relevant statutory context, which is where my analysis begins.

[21] *Ermelo* above n 2 at paras 42-3.

[22] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

Statutory context: powers relating to determination of school capacity and admissions

[35] The core of this matter requires a consideration of the respective roles of a school governing body and a provincial department in determining admissions to, and the capacity of, a school. The entry point into this enquiry is the Schools Act. The primary purpose of the Schools Act is to provide for the organisation, governance and funding of schools and to give effect to the constitutional right to education.[23]

[36] The Schools Act envisages that public schools are run by a three-tier partnership consisting of: (i) national government; (ii) provincial government; and (iii) the parents of the learners and the members of the community in which the school is located. As this Court stated in *Ermelo*:

> "An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school."[24] (Footnotes omitted.)

[23] *Ermelo* above n 2 at para 55.

[24] Id at para 56.

[37] Following the three-tier approach, when the Schools Act addresses issues of admissions and capacity, it does so with reference to national government, provincial government and school governing bodies.

[38] At a national level, the Minister of Basic Education may prescribe minimum uniform norms and standards for the "capacity of a school in respect of the number of learners a school can admit",[25] including norms and standards relating to class size, the number of teachers, and utilisation of available classrooms.[26] Those norms and standards have to date not been prescribed and, regrettably, this case demonstrates the difficulties that may arise in their absence.

[39] At a provincial level, section 3(3) of the Schools Act places an obligation on the relevant provincial MEC to ensure that "there are enough school places so that every child who lives in his or her province can attend school". If the MEC cannot comply with this obligation because of a lack of capacity existing at the commencement of the Schools Act, then, in terms of section 3(4), "he or she must take steps to remedy such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so." Further, section 58C of the Schools Act contemplates that the MEC and the head of department will play a role in ensuring that the admission policy determined by the school governing body complies with the national norms and

[25] Section 5A(1)(b) of the Schools Act.

[26] Id section 5A(2)(b).

standards, where prescribed.[27] In terms of section 58C(6), the head of department is under an obligation to determine the minimum and maximum capacity of a public school in accordance with the national norms and standards contemplated in section 5A, and to communicate the determination to the school governing body and the principal.

[40] At school level, the governing body is responsible for determining the admission policy of that school. This is provided for in section 5 of the Schools Act, which reads in relevant part:

> "(5) Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.
>
> . . .

[27] Section 58C of the Schools Act is headed "Compliance with norms and standards" and provides in relevant part:

> "(1) The Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005), ensure compliance with—
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> (a) norms and standards determined in terms of sections 5A, 6(1), 20(11), 35 and 48(1);
>
> . . .
>
> (2) The Member of the Executive Council must ensure that the policy determined by a governing body in terms of sections 5(5) and 6(2) complies with the norms and standards.
>
> (3) The Member of the Executive Council must, annually, report to the Minister the extent to which the norms and standards have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply.
>
> . . .
>
> (6) The Head of Department must—
>
> (a) in accordance with the norms and standards contemplated in section 5A determine the minimum and maximum capacity of a public school in relation to the availability of classrooms and educators, as well as the curriculum programme of such school; and
>
> (b) in respect of each public school in the province, communicate such determination to the chairperson of the governing body and the principal, in writing, by not later than 30 September of each year."

(7) An application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department.

(8) If an application in terms of subsection (7) is refused, the Head of Department must inform the parent in writing of such refusal and the reason therefor.

(9) Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council."

It is immediately clear from section 5(5) that the governing body of a school determines the admission policy. That this may include a determination as to the capacity of the school is no longer a contentious point between the parties. Indeed, as the Supreme Court of Appeal pointed out, having regard to section 5A(3) of the Schools Act,[28] a governing body's admission policy may include a determination as to capacity. And it is significant that school governing bodies are afforded this role. As the Onderwysersunie emphasised before us, the governing body is in a position to have regard, in an admission policy, to a range of interconnected factors relating to the planning and governance of the school as a whole. However, this is only the starting point. Neither the Schools Act nor any related national legislation, such as the National Education Policy Act,[29] goes further than sections 5(5) and 5A(3) in describing a more extensive role for the governing body in the implementation of the admission policy or in the determination of capacity.

[41] Rather, there is an important textual qualifier in section 5(5) subjecting a school governing body's power to other provisions of the Schools Act, as well as to applicable

[28] See [22] above.

[29] 27 of 1996.

provincial law. The effect of this is that the determination of admissions may be subject to provincial government's intervention in terms of the Schools Act, or applicable provincial law if the intervention is provided for in those instruments. Of course, it should be emphasised that any powers of the governing body must also "be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."[30]

[42] Following from the above, subsections 5(7) to (9) of the Schools Act recognise that provincial government plays a direct role when it comes to the implementation of a learner's admission to the school. In terms of these provisions, an application for the admission of a learner to a public school is made to the Department (in a manner determined by the head of department),[31] and it is the head of department who is responsible for informing a parent of a refusal of an application and the reasons for it.[32]

[43] In terms of the Schools Act, the implementation of the admission policy at the school level is the responsibility of the principal, acting under the authority of the head of department. This follows from sections 16(3) and 16A(2)(a)(vi) of the Schools Act. Section 16(3) provides that, "[s]ubject to [the Schools Act] and any applicable provincial

[30] *Ermelo* above n 2 at para 61.

[31] Section 5(7) of the Schools Act.

[32] Id section 5(8).

law, the professional management of a public school must be undertaken by the principal under the authority of the head of department." That the professional management of a school includes the implementation of policy is set out in section 16A(2)(a)(vi), which provides:

> "The principal must in undertaking the professional management of a public school as contemplated in section 16(3), carry out duties which include, but are not limited to the implementation of policy and legislation".

[44] Thus, while the school governing body determines admission policy, individual decisions on admission are taken only provisionally at school level, by the principal acting under the authority of the head of department. Where the need arises, section 5(9) provides a safety valve, which allows the MEC to consider admission refusals and overturn an admission decision taken at school level.

[45] Insofar as applicable provincial law is concerned, the Gauteng Regulations are pertinent.[33] At the relevant time, Regulation 13(1) of the Gauteng Regulations provided that if a principal, acting on behalf of the Gauteng HOD, refused to admit a learner to a school, he or she had to provide reasons in writing to the Gauteng HOD and the parent. The Gauteng HOD would be required either to confirm or to set aside the decision made

[33] Section 2 of the Interpretation Act 33 of 1957 provides that "law" shall, unless the context or law under consideration otherwise requires, mean "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". This wide definition certainly allows for the inclusion of delegated provincial legislation in the meaning of "law". There are no indications in the Schools Act to suggest that the phrase "any applicable law" in section 5(5) should be given a narrower construction. To the contrary, the use of the word "any" in the phrase suggests a broader rather than more restrictive interpretation.

by the principal.[34] A learner or parent who was dissatisfied with the decision of the Gauteng HOD was entitled, in terms of Regulation 14, to an appeal to the Gauteng MEC, who then had to make a final determination.[35] Regulation 13(1) provided that the Gauteng HOD could overturn the rejection of a learner's admission to a school. The vexing question is whether the Gauteng HOD was entitled to act contrary to the school's admission policy when he exercised that decision-making power.

Status of a school's admission policy

[46] This matter is the latest instalment in a trilogy of school-related cases in this Court which, at their heart, concern the powers of a provincial department in relation to policies adopted by school governing bodies.[36] The question that keeps coming back to this Court

[34] Regulation 13 is headed "Refusal of admission" and provides:

> "(1) If a principal, acting on behalf of the Head of Department, refuses to admit a learner to a school, he or she must provide—
>
> (a) reasons in writing for his or her decision to the Head of Department and the parent and the Head of Department must either confirm or set aside the decision made by the Principal; and
>
> (b) a copy of these regulations to the parent and the address of the Member of the Executive Council (MEC)."

[35] Regulation 14 is headed "Appeals" and provides:

> "(1) A parent or learner who is dissatisfied with the decision referred to in regulation 13(1) may appeal in writing to the Member of the Executive Council (MEC) against the decision of the Head of Department within 15 days after receipt of the notification of the refusal of admission.
>
> (2) The appellant must furnish the MEC with all relevant information pertaining to the appeal.
>
> (3) The MEC, must, within 15 days of receiving an appeal referred to sub-regulation (1), consider that appeal and must confirm, or set aside the relevant decision and forthwith notify the principal and the parents of his or her decision."

[36] The predecessors were *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* [2013] ZACC 25 (*Welkom*) and *Ermelo* above n 2.

is whether a head of department is entitled to override or depart from a policy adopted by a school governing body.

[47] In *Ermelo*, the head of department was unhappy with the exclusionary effect that a school's single-medium language policy had on learners. The head of department relied on section 25 of the Schools Act in appointing an interim committee to determine a new language policy for the school so as to accommodate both English- and Afrikaans-speaking learners. The Court held that the head of department acted unlawfully, in that section 25 of the Schools Act could not properly be invoked in the circumstances.

[48] In *Welkom*, the head of department was unhappy with the exclusionary effect that certain schools' pregnancy policies had on pregnant learners. Khampepe J[37] held that the head of department was not empowered by any statutory provision to summarily re-admit a learner to a school. The head of department could have relied on section 22(1) to withdraw the relevant function from the school governing body, or section 22(3) if he felt that the matter was urgent, but he did not do so. In the circumstances, the instructions issued by the head of department, which effectively required the principal to ignore the two schools' pregnancy policies, were unlawful. In a separate concurring judgment, Froneman J and Skweyiya J[38] agreed that the head of department acted unlawfully. They

[37] In a judgment concurred in by Moseneke DCJ and Van der Westhuizen J.

[38] In a judgment also concurred in by Moseneke DCJ and Van der Westhuizen J.

emphasised that the parties had failed to engage with each other in good faith, to uphold the principles of co-operative governance, and to comply with their concomitant duty to avoid litigation.

[49] Distilling the core of these judgments, the principles that have emerged from the case law can be set out as follows:

(a) Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it.[39] This is so even where the functionary is of the view that the policies offend the Schools Act or the Constitution. But this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances.[40]

[39] *Ermelo* above n 2 at paras 73-5. The majority of the Court endorsed this principle in *Welkom* above n 36 (see Khampepe J at paras 74-6 and 79 and Froneman J and Skweyiya J at para 150).

[40] In *Ermelo* above n 2 at para 78 this Court said:

> "Put otherwise, the statute devolves power and decision-making on the school's medium of instruction to a school governing body. *It would, however, be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice*. The Constitution itself enjoins *the State to ensure effective access to the right to receive education in a medium of instruction of choice*." (Footnote omitted and emphasis added.)

This Court went on to say at para 81:

> "What is more, the governing body's extensive powers and duties do not mean that the HOD is precluded from intervening, on reasonable grounds, to ensure that the admission or language policy of a school *pays adequate heed to section 29(2) of the Constitution. The requirements of the Constitution remain peremptory*." (Emphasis added.)

See also Khampepe J in *Welkom* above n 36 at para 73 and Froneman J and Skweyiya J at para 149.

(b) Rather, a functionary may intervene in a school governing body's policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation. This is an essential element of the rule of law.[41]

(c) Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the governing body (or to depart from a school governing body's policy), then the functionary must act reasonably and procedurally fairly.[42]

(d) Further, given the partnership model envisaged by the Schools Act, as well as the co-operative governance scheme set out in the Constitution, the relevant functionary and the school governing body are under a duty to engage with each other in good faith on any disputes, including disputes over policies adopted by the governing body. The engagement must be directed towards furthering the interests of learners.[43]

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[41] See *Ermelo* above n 2 at paras 88-9. See also *Welkom* above n 36 at para 86, where Khampepe J stated:

> "The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process. Accordingly, section 7(2) and the rule of law demand that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help. I pause to emphasise that this Court has consistently and unanimously held that the rule of law does not authorise self-help." (Footnotes omitted.)

See also para 105.

[42] *Ermelo* above n 2 at para 73. See also *Welkom* above n 36 at para 77 (Khampepe J) and para 150 (Froneman J and Skweyiya J). See also the discussion starting at [59] below.

[43] *Welkom* above n 36 at paras 120-4 (Khampepe J) and the judgment of Froneman J and Skweyiya J.

[50] What then of the present debacle? The applicants submit that an admission policy is not law, but merely policy. As such, it guides decision-making but cannot bind the Department inflexibly. The Gauteng HOD was therefore entitled, when exercising his constitutional and statutory powers, to depart from a capacity determination provided for in the admission policy.

[51] The school submits that interpreting Regulation 13(1) to afford the Gauteng HOD the power to act contrary to the admission policy would result in a conflict between national legislation (the Schools Act and the National Education Policy Act)[44] on the one hand, and provincial delegated legislation on the other. It contends that the relevant national statutory instruments envision that the governing body of a school is responsible for the implementation of its admission policy, whereas the Department is merely responsible for the administration of the admission policy process.

[44] The respondents rely on the "Admission Policy for Ordinary Public Schools" (*Government Gazette* 19377, General Notice 2432, 19 October 1998) determined by the Minister of Education in terms of the National Education Policy Act. Sections 5 to 7 thereof effectively mirror parts of section 5 of the Schools Act and provide:

> "5. The Head of Department must determine a process of registration for admission to public schools in order to enable the admission of learners to take place in a timely and an efficient manner. The Head of Department and the school governing bodies should encourage parents to apply for the admission of their children before the end of the preceding school year.
>
> 6. The Head of Department is responsible for the administration of the admission of learners to a public school. The Head of Department may delegate the responsibility for the admission of learners to a school to officials of the Department.
>
> 7. The admission policy of a public school is determined by the governing body of the school in terms of section 5(5) of the [Schools Act]. The policy must be consistent with [the Constitution], the [Schools Act] and applicable provincial law. The governing body of a public school must make a copy of the school's admission policy available to the Head of Department."

[52] As my analysis of subsections 5(7) to (9) above demonstrates,[45] I am not persuaded by this view. Rather, the scheme of the Schools Act in relation to admissions indicates that the Department maintains ultimate control over the implementation of admission decisions. And the Gauteng Regulations afforded the Gauteng HOD the specific power to overturn a principal's rejection of a learner's application for admission.[46]

[53] This finding – that the Gauteng HOD did have the power to admit a learner who had been refused admission to the school – is a key distinguishing factor from the circumstances in *Welkom*. To emphasise, in that case the head of department had no power or authority to ignore the relevant schools' policies, and thereby summarily to order the re-admission of the excluded learners. That is why Khampepe J held that the intervention, which effectively ignored the schools' policies, was unlawful.

[54] However, having found that the Gauteng HOD was lawfully empowered to admit learners to Rivonia Primary, the suggestion that the Gauteng HOD was rigidly bound by a school's admission policy when exercising that power is untenable. That a policy serves as a guide to decision-making and cannot bind the decision-maker inflexibly was

[45] See [42] to [44] above.

[46] It is worth noting that the respondents attempted to persuade the Court that the Department should have followed the processes in Regulation 7 of the Gauteng Regulations rather than depart from the school's capacity determination in its admission policy. This Regulation provides that the Gauteng HOD may, in consultation with representatives of the school governing bodies, determine feeder zones for schools. If a feeder zone is created, then there is a prescribed formula for how to manage admission of learners where a school is oversubscribed. The respondents' reliance on the feeder-zone scheme is untenable. Firstly, the provisions are permissive, not mandatory. Secondly, reliance on Regulation 7 was not raised by the school in its papers before the High Court and, as such, the Department was not placed to deal with that issue on a factual level. Finally, as counsel for the Department submitted before this Court, the feeder zones have not in fact been established.

well expressed in *MEC for Agriculture v Sasol Oil*,[47] where the Supreme Court of Appeal held:

> "As explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[48] a court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. *Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly*".[49] (Footnote omitted and emphasis added.)

[55] In *Akani v Pinnacle Point Casino*[50] the relationship between policy and legislation was soundly expressed as follows:

> "*[L]aws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments.* Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear."[51] (Emphasis added.)

[56] In conclusion, the general position is that admission policies must be applied in a flexible manner. The capacity determination as set out in Rivonia Primary's admission policy could not have inflexibly limited the discretion of the Gauteng HOD. If there were

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[47] *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) (*MEC for Agriculture v Sasol Oil*).

[48] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[49] *MEC for Agriculture v Sasol Oil* n 47 at para 19.

[50] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA).

[51] Id at para 7.

good reasons to depart from the policy, it was always open to the principal or the Gauteng HOD to do so.[52] Indeed in this case, the school itself applied the policy flexibly when it admitted four extra learners, thus exceeding the maximum capacity set in its policy.

[57] The Supreme Court of Appeal therefore erred when it concluded that the Schools Act placed admission decisions squarely in the hands of the Rivonia Governing Body and that the Gauteng HOD could not override the admission policy. In other words, the Supreme Court of Appeal erred in finding that the Gauteng HOD could only exercise the Regulation 13(1) power "in accordance with the [school's admission] policy."[53]

[58] However, a decision to overturn an admission decision of a principal, or depart from a school admission policy, must be exercised reasonably and in a procedurally fair manner. In this regard, O'Regan J's statement in *Premier, Mpumalanga*[54] is particularly apt:

> "This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the

[52] See also *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 9 and *Britten and Others v Pope* 1916 AD 150 at 158.

[53] Supreme Court of Appeal judgment above n 9 at para 50.

[54] *Premier, Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) (*Premier, Mpumalanga*).

> government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."[55]

[59] It is to the analysis of procedural fairness that I now turn.

Procedural fairness

[60] It has not been contested, and rightly so, that the decision of the Gauteng HOD to admit the learner in terms of Regulation 13(1)(a) constitutes administrative action and that the Department has a duty to act fairly.[56] The Department submits that the requirements of procedural fairness were satisfied through the scheme of

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[55] Id at para 1.

[56] In terms of section 3(1) of the Promotion of Administrative Justice Act 3 of 2000, "[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair." In this regard, it is worth recalling the dictum in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 216, where it was stated:

> "The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a 'legitimate expectation of a hearing' exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances."

In *Premier, Mpumalanga* above n 54 at para 35, O'Regan J recognised that a legitimate expectation might arise in at least two circumstances:

> "first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing; and, secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made."

As will follow from my analysis at [63] to [68] below, I am of the view that the Gauteng HOD had a duty to act fairly. In the least, the school had a legitimate expectation that it would be heard by the Gauteng HOD prior to a decision being made regarding the placement of the learner.

Regulation 13(1)(a), which requires a principal to provide written reasons for his or her decision to refuse admission to a learner. This the principal did in her letter dated 5 November 2010. According to the Department, it would not be feasible to require a further hearing in every case where the Gauteng HOD exercises the power to confirm or set aside the principal's decision. In this regard, the Department argues as follows:

> "Nor would it have been feasible to have required any further hearing at the Regulation 13 stage. In the scheme of the 2001 Regulations, Regulation 13(1)(a) operated automatically in respect of every learner who was refused admission to any Gauteng public school in the admissions process. So the Head of Department (and his/her delegated officials) would have had to take literally thousands of decisions in terms of Regulation 13(1) within a short period of time *between the end of the school based admissions process and the start of the next school year*. It would have been wholly impractical to have afforded the learner and the school a dedicated hearing in each of these thousands of cases. Any requirements of procedural fairness were satisfied by providing for the Head of Department to have regard to the parents' application and the reasons furnished by the principal for the refusal." (Emphasis added.)

[61] In addition, the Department contends that there were no special circumstances in this case requiring any further consultation with the school. This is because the Department and its representatives had already consulted with the school from September to November 2010.[57]

[57] The High Court agreed with the Department's view and was satisfied that the Gauteng HOD had acted procedurally fairly when overturning the learner's rejection by the school in terms of Regulation 13(1). The Supreme Court of Appeal did not deal specifically with the procedural fairness complaint of the school. This was presumably because of that Court's finding that the Gauteng HOD did not have the power to override the school's admission policy at all, and had therefore acted *ultra vires*. As already explained, I differ from the Supreme Court of Appeal regarding the Gauteng HOD's powers. It is therefore necessary for me to consider whether the power in Regulation 13(1)(a) was exercised procedurally fairly.

[62] It is well established that the requirements of procedural fairness must be determined flexibly, having regard to the facts of the particular case.[58] The Department's concern that it would be overly onerous to require a further hearing in every instance when the Regulation 13(1)(a) power is exercised is an understandable one. Indeed as this Court recognised in *Joseph*:[59]

> "The spectre of administrative paralysis . . . is a legitimate concern. Administrative efficiency is an important goal in a democracy, and courts must remain vigilant not to impose unduly onerous administrative burdens on the State bureaucracy."[60] (Footnotes omitted.)

However, for the reasons that follow, it is plain to me that the Gauteng HOD was required to go further in the circumstances of this case.

[63] First and most important: timing. As the Department itself has suggested, the Gauteng HOD exercises the power contemplated in Regulation 13(1) mainly in the period "between the end of the school based admissions process and the start of the next school year." This makes sense. The purpose of the power afforded in Regulation 13(1)(a) is to ensure that a learner's refusal of entry to a public school can be corrected, where necessary, so as to ensure placement of the learner in a public school. Ideally this should

[58] See, for example, *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 190.

[59] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).

[60] Id at para 29.

take place before the school year has begun.[61] This aligns with the view expressed in *Ermelo* that "[p]rocuring enough school places implies proactive and timely steps by the Department. The steps should be taken well ahead of the beginning of an academic year."[62]

[64] However, the circumstances of this case demonstrate a significant departure from what may have been expected in the normal course. Due to the Department's admitted administrative failures, the appeal made to the MEC on 5 November 2010 only filtered down to the Gauteng MEC's office in late January 2011, and was responded to by the Gauteng HOD in February 2011, once the school year had already begun. By this time, the situation at the school was likely to have been different from the situation at the time when the principal offered reasons, in her letter dated 5 November 2010, for the rejection of the learner's application. Almost four weeks into the school year, the dictates of fairness required affording the school an opportunity to address the Gauteng HOD on the

[61] This fits in with the scheme contemplated by a circular headed "Management of Admissions to Public Ordinary Schools for 2011", published by the Department and dated 4 June 2010 (Circular). One of the stated purposes of the Circular is to "determine the timeframes within which [registration] processes are to be managed". In terms of the Circular, the principal of a school must communicate with successful or unsuccessful parents "by no later than 05 November 2010." In turn, a parent who wishes to object to the decision of the school principal is expected to do so (by means of a representation to the District Director) within seven days of receiving notification that the application was unsuccessful. Where an appeal against the decision of the District Director is made, the MEC is expected to make a decision on such appeal within 14 days of receipt thereof. I do not place reliance on the provisions of the Circular as the source of obligations on the parties. It merely illustrates the point that, even according to the Department's own policies or guidelines, it was generally envisioned that the objection and appeal processes should have been completed before the beginning of the school year in 2011.

[62] *Ermelo* above n 2 at para 103. See also para 75, where it was stated:

> "In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. *It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation.*" (Emphasis added.)

impact that such a placement would have on factors such as the quality of education of other learners at the school, access to resources for the learner herself, and the time that may have been required to accommodate the learner effectively. This opportunity was never afforded to the school.

[65] Second, and related to the element of timing, the Gauteng HOD based his decision on the school's tenth-day statistics. Such statistics became available long after the principal had submitted her reasons for the refusal of the learner's application as per the 5 November 2010 letter. The school therefore had no opportunity to consider or make representations on the Gauteng HOD's interpretation of those statistics, or on the implications of the Gauteng HOD acting on the basis of them. I am therefore not persuaded by the submission that the Department was "well aware of the school's attitude in relation to the application for the learner's admission". By the time the Gauteng HOD actually exercised his power in terms of Regulation 13(1)(a) – which was almost three months after the principal's letter of 5 November 2010 – the school's attitude in relation to the tenth-day statistics was unknown.

[66] Third, I am unpersuaded by the Department's argument, upheld by the High Court, that the consultations held from September to November 2010 satisfy the requirement of procedural fairness in this case. Not only were these discussions held completely independently of the Gauteng HOD's exercise of his Regulation 13(1)(a) power, but the outcome of those discussions actually lends support to the school's position. The final

meeting between representatives of the Department and the school regarding the learner's placement was held on 30 November 2010. There was a dispute on the papers regarding the details of that meeting. For our purposes, however, it seems to be common cause that the school's position (that the learner would have to wait her turn on the waiting list) was acknowledged, and that the District Director had indicated a willingness to assist with the alternative placement of the learner should the parent of the learner be in agreement with such a proposal.[63] It is worth noting that the Supreme Court of Appeal made a finding that at the meeting of 30 November 2010 "it appear[ed] to have been accepted that the child would have to wait her turn until a place became available."

[67] The Gauteng HOD's decision in February 2011 constituted an about-turn from the impression which had been created. It came as a rude shock to the school, which had already settled into the school year thinking the matter had been resolved. This is not to say that the Gauteng HOD was not entitled to exercise his power when he did. But the

[63] The school's version of the meeting's consensus goes further. It suggests that the Department's representatives were satisfied that there was no capacity at Rivonia Primary, given its admission policy, and that the learner had properly been placed on the waiting list. The school substantiated this account by attaching two reports of the meeting. One is an unsigned report under the name of the District Director, which indicates that the meeting resolved as follows:

> "Ms Cele will have to patiently wait her turn on the waiting list until a space opens up. [The school governing body] will not move her up the list.
>
> District Office willing to assist with alternative placement if Head Office Interventions can get parent to agree to proposal."

Though a representative of the Department at the meeting denied that the first resolution was completely accurate, he did accept that the school indicated that it was of "the view that Mrs Cele would have to wait on the list". And he did not deny the second of the two resolutions. In reply to the dispute as to the report's accuracy, the school attached its own minutes of the meeting, which support the version of the resolutions expressed in the unsigned Departmental report.

circumstances affect what the demands of procedural fairness were when he made his final decision.

[68] As I see it, the Gauteng HOD should have afforded the school an opportunity to make representations and respond to the tenth-day statistics report, before the learner was forcibly placed in the school. In the result, I find that the decision by the Gauteng HOD was not exercised in a procedurally fair manner.[64] Moreover, little attention seems to have been paid to the partnership and cooperation framework envisaged in the Schools Act, which, as I discuss below, is of essential importance when confronting capacity constraints in our public schooling system.

Systemic capacity issues

[69] Apart from the specific procedural fairness flaws in the circumstances of this case, it is necessary to emphasise that, in disputes between school governing bodies and national or provincial government, cooperation is the required general norm. Such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised.

[70] Both provincial government and individual schools have to grapple with systemic capacity problems and their impact on education. At school level, parents and governing

[64] In other words, the school's legitimate expectation of a hearing was materially and adversely affected when the Gauteng HOD made his decision without allowing such a hearing.

bodies have an immediate interest in the quality of children's education. And they play an important role in improving that quality by supplementing state resources with school fees. However, the needs and interests of all other learners cannot be ignored. As was recognised in *Ermelo*:

> "The governing body of a public school must . . . 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."[65]

[71] At the provincial level, government is under an obligation to ensure that there are enough school places for every child to attend school. However, this obligation must, as the Onderwysersunie submitted, take into account the fact that determination of capacity is a complex process that applies not only to the school as an entity, but also to each and every grade and class within the school. It involves a consideration of a range of interwoven factors relating to the planning and governance of the school as a whole. Planning and coordination in partnership with school governing bodies is crucial.

[72] Where a provincial department requires a school to admit learners in excess of the limits stated in the school's admission policy, there must be proper engagement between all parties affected. This principle of cooperation permeated this Court's approach in

[65] *Ermelo* above n 2 at para 80.

Ermelo and was reaffirmed recently by the majority of this Court in *Welkom*, where Khampepe J stated:

> "Given the nature of the partnership that the Schools Act has created, the relationship between public school governing bodies and the state should be informed by close cooperation, a cooperation which recognises the partners' distinct but inter-related functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith. The goals of providing high-quality education to all learners and developing their talents and capabilities are connected to the organisation and governance of education. It is therefore essential for the effective functioning of a public school that the stakeholders respect the separation between governance and professional management, as enshrined in the Schools Act."[66]

[73] The concurring judgment of Froneman J and Skweyiya J placed a strong emphasis on the relevant stakeholders' constitutional and statutory obligation to engage in good faith before turning to the courts. I can do no better than to repeat those sentiments:

> "It is salutary to remember that although, formally, this case is a dispute between the school governing bodies and the [head of department], their respective functions are to serve the needs of children in education. Section 28(2) of the Constitution makes it clear that the best interests of children 'are of paramount importance in every matter' concerning children. That applies to education too.
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> . . .
>
> [W]e consider that there is a constitutional obligation on the partners in education to engage in good faith with each other on matters of education before turning to courts. In the present case they should have done so and that may well have prevented this long journey through the courts.
>
> . . .

[66] *Welkom* above n 36 at para 124.

> The Constitution and applicable legislation thus require the partners in the governance and management of schools to engage with one another in mutual trust and good faith on all material matters relating to that endeavour."[67] (Footnotes omitted.)

[74] This case illustrates the damage that results when some functionaries fail to take the general obligation to act in partnership and cooperation seriously. In the early stages of the tussle there was some engagement between the parties, albeit tense. The value of that engagement was demonstrated by the understanding between the school and the Department reached at the end of November 2010.

[75] By contrast, the manner in which the Gauteng HOD thereafter exercised his powers completely upended the process. The heavy-handed approach he used when making his decision raised the spectre that the Department would use its powers to deal with systemic capacity problems in the province without any regard for the role of school governing bodies in the Schools Act's carefully crafted partnership model. It created antagonism and mistrust, causing the Rivonia Governing Body to recoil.

[76] Equally problematic was the Rivonia Governing Body's reaction. Desiring to safeguard its own authority, the school failed to place the interests of the learner first. Instead, it resorted to litigation. Absent from the school's founding papers was any reference to the best interests of the particular learner, and the impact that the relief sought by the school would have on her. Rather, and quite ill-advisedly, the school not

[67] Id at paras 129, 135 and 152.

only sought a declaratory order to establish the relative powers of the Rivonia Governing Body and the Department to determine admission capacity, but also sought relief requiring the learner to be placed in another primary school until she could be accommodated at Rivonia Primary. However, as counsel for the school conceded before us, ordinarily one additional learner would not burden a school to the point of collapse.

[77] In this case there is particular reason to emphasise the duties of co-operative governance and the impact they might have on the children concerned. The duty on the parties to cooperate and attempt to reach an amicable solution is intimately connected to the best interests of the child. The failure of the Gauteng HOD and the Rivonia Governing Body adequately to engage had a direct effect on the learner. I would imagine that starting Grade 1 is a stressful and scary time for any child. Due to the failure of the parties to engage and reach agreement, the learner was physically placed at a desk and was caught in the middle of a disagreement which may well have been very traumatising for her. To me this highlights the fact that the principle of co-operative governance is not merely a tool to ensure smoother intra-governmental relations, but one which has a direct effect on the people whom the government serves.

[78] Both parties could and should have done more to prevent the need for litigation. As stated earlier, disagreement is not necessarily a bad thing, and we must expect that in trying to determine what the best interests of learners are there may be differing visions. But one organ of state cannot use its entrusted powers to strong-arm others. All sides are

required to work together in partnership to find workable solutions to persistent and complex difficulties – and resorting to court in every skirmish is not going to help in that process.

Disciplinary proceedings against the principal

[79] An application for the review of the disciplinary proceedings instituted by the school against the principal is not before us. On this issue it is worth reiterating that, in the light of this judgment, there is an expectation that all relevant parties will take heed of this Court's approach to school-based disputes and will resolve them in as cooperative a manner as possible.

Costs

[80] The appeal is upheld, and the Supreme Court of Appeal order is set aside. However, given my conclusions relating to the manner in which the Gauteng HOD exercised his powers, I am of the view that it would be fair that each party pays its own costs.

Order

[81] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld to the extent set out below.

3. The order of the Supreme Court of Appeal is set aside and replaced with the following order:

"(a) It is declared that the Head of Department of Education in the Province of Gauteng was empowered to issue an instruction to the principal of Rivonia Primary School to admit the learner in excess of the limit in its admission policy.

(b) In exercising the power to instruct a principal of a public school to admit a learner in excess of the limit in its admission policy, the Head of Department of Education in the Province of Gauteng must act in a procedurally fair manner.

(c) It is declared that the Head of Department of Education in the Province of Gauteng did not act in a procedurally fair manner when he issued instructions to the principal of Rivonia Primary School to admit the learner and when he placed the learner in the school."

4. There is no order as to costs.

JAFTA J (Zondo J concurring):

[82] This case concerns a little black girl whose dream was to obtain education at the school closest to her home. Standing in the way of realising that dream was an inflexible application of the school's policy that limited the number of learners who could be

admitted in the first grade. This policy was adopted by the Governing Body of Rivonia Primary School (governing body) ostensibly to protect the interests of the school and its learners.

[83] The school in question is a public school which falls under the administration of the applicants who are all organs of state. These applicants have a constitutional obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights."[68] But this duty is also imposed on the school concerned and its governing body because they too are organs of state. One of the rights they are all obliged to protect and fulfil is the little girl's right to a basic education which she wanted to realise.[69]

[84] These parties, instead of cooperating and working towards discharging their constitutional obligation, have fought over whether the school's policy should be applied rigidly to exclude the girl from the school and who between them had the final say on whether she could be admitted despite the fact that the maximum number of learners to be admitted, set in the policy, had been reached.

[85] The dispute between the school and its governing body on the one side and the girl's parents and the applicants on the other, escalated with no regard to what was in her best interests. From an early stage relations were hostile between the girl's parents and

[68] Section 7(2) of the Constitution provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[69] Section 29 of the Constitution guarantees the right to a basic education.

the school. Attempts by the applicants to have the girl admitted to the school failed. Ultimately the applicants adopted robust action to force the school to admit her.

The dispute

[86] When the school refused to admit the girl, her mother approached the applicants for intervention. It was this intervention which gave rise to the dispute between the school and the applicants. On being forced to admit the learner the school approached the High Court for relief. They sought the review of the decision by the Head of Department: Gauteng Department of Education (Head of Department) to admit the girl at the school on the basis that it was inconsistent with the school's policy and therefore beyond his power.

[87] They also sought that the impugned decision be set aside on the basis that it was procedurally unfair because the school or its principal was denied the opportunity to furnish reasons for not admitting the learner. However, no facts were pleaded nor was there evidence furnished to support the latter claim. I return to this point below. The High Court was not persuaded that any of the claims was established and consequently it dismissed the application.

[88] The governing body and the school appealed to the Supreme Court of Appeal. The Supreme Court of Appeal approached the case on the footing that the principal question for determination was whether the governing body could decide the number of learners to

be admitted to the school.[70] The Court interpreted the relevant legislation in the context of section 39(2) of the Constitution.[71] Having adopted a particular interpretation, the Supreme Court of Appeal held that the power to determine the number of learners to be admitted at the school in question vests in its governing body. The power of the Head of Department to intervene, so it was held, was limited to cases where the school has exercised its power unreasonably, unconstitutionally or unlawfully.[72]

[89] Having found that the refusal to admit the girl was done in terms of a policy lawfully adopted by the governing body, the Supreme Court of Appeal issued the following order:

> "It is declared that the instruction given to the principal of the Rivonia Primary School to admit the learner contrary to the school's admission policy, and the placing of the learner in the school, were unlawful."

[90] This is the sole order that forms the subject matter of the appeal before us. It determines the scope of the appeal because in our law an appeal ordinarily lies against orders only. The proposition is so trite that no authority need be cited for it.

[70] Supreme Court of Appeal judgment above n 9.

[71] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[72] Supreme Court of Appeal judgment above n 9 at para 50.

In this Court

[91] I have read the judgment prepared by my Colleague Mhlantla AJ (the main judgment). I agree that leave to appeal must be granted and that the appeal ought to succeed. I also support setting aside the order issued by the Supreme Court of Appeal and replacing it with an order declaring that the Head of Department was empowered to instruct the principal to admit the learner in excess of the limit in the school's admission policy. However, I do not agree that the granting of the second and third declaratory orders is justified. In my respectful view the question whether the Head of Department acted in a procedurally fair manner in issuing the instruction to the principal and in placing the learner in the school without giving the school the opportunity to make representations on the tenth-day statistics was not an issue raised in this Court by any of the parties.

[92] Before us the sole issue was whether the order issued by the Supreme Court of Appeal was wrong. The parties themselves focused on that order. The applicants challenged the order while the school defended it. In these circumstances I am unable to support the second and third declarators issued in the main judgment, even in the light of procedural fairness having been mentioned in argument. This is so because procedural fairness was mentioned in the context of the complaint made by the school in its papers. It asserted that the principal was denied the opportunity to give her reasons for refusing to admit the learner.

[93] It will be remembered that here we are concerned with motion proceedings. It is a fundamental principle of our law that the notice of motion and founding affidavit, together with its annexures, constitute pleadings and evidence which must justify the grant of the relief sought.[73] Therefore, in the founding affidavit, the applicant must set out facts that are sufficient to disclose the cause of action relied on and evidence establishing that cause of action. In *Skjelbreds Rederi*,[74] this principle was stated in these terms:

> "In application proceedings the affidavits constitute not only the evidence but also the pleadings and therefore these documents should contain, in the evidence they set out, all that would have been necessary in a trial."[75]

[94] Another basic rule in application proceedings is that the facts necessary to prove a claim must appear in the founding affidavit and its supporting documents. Hence the proposition that an applicant must stand or fall by its petition and the facts alleged in it.[76] However, in exceptional circumstances a court may exercise its discretion to allow the applicant to supplement in reply the allegations in the founding affidavit.[77]

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[73] *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* [2011] ZASCA 97; 2011 (4) SA 492 (SCA) at para 23 and *Louw and Others v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA) at para 17.

[74] *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 739 (W) (*Skjelbreds Rederi*).

[75] Id at 742C.

[76] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636.

[77] *Skjelbreds Rederi* above n 74 at 742D.

[95] It is now convenient to refer to allegations in the founding affidavit sworn to by the Deputy Chairperson of the governing body. In relevant part she states:

> "[The learner] was enrolled as a Grade 1 learner at Lifestyle Montessori School and on 12 January 2011 started the school year there.
>
> The aforementioned status of the matter was unexpectedly turned on its head on 2 February 2011 when the Second Respondent telefaxed a letter to Drysdale, recording that he had perused all documents submitted to him and that according to the 'tenth day statistics', the school had not reached its capacity. This refers to the number of learners in the school on the tenth day of the new school year and is dealt with more fully hereunder.
>
> He then instructed the school to admit the learner without delay. . . . [A] letter was sent to the school under cover of a memorandum which recorded that its content was the purported outcome of an Appeal from the Head of Department. . . .
>
> I respectfully submit to the above Honourable Court that this could not refer to an appeal process as it is envisaged in the relevant education legislation. As I understand it, such an appeal needs to be resolved within 14 days after the appeal was lodged.
>
> The Second Respondent's letter instructing the school to admit the learner refers to the 'tenth day school statistics'. This is a reference to statistics kept by the Gauteng Department of Education of student numbers on the tenth day of the new school year. It now appears to be used by the Department to compare the attendance of a particular school with what it believes to be the capacity for each school.
>
> I humbly submit that this statistic cannot override the admission policy of the First Applicant. Any attempt by the First Respondent to impose a learner upon a school at variance with the First Applicant's admission policy must be *ultra vires*."

[96] This extract sets out the only cause of action pleaded, namely, that the Head of Department's decision to admit the learner at the school based on the tenth-day statistics was contrary to the school's admission policy and therefore *ultra vires*. The focus of this cause of action is the decision-maker's lack of power to make the decision taken. The reason furnished for the contention is that the decision-maker acted beyond his powers. The pleading does not refer at all to procedural fairness.

[97] In fact, barring the recordal of the relief set out in the notice of motion, the founding affidavit does not mention the failure to be heard at all. Even in that regard, the school did not assert that it was denied a hearing in relation to the use of the tenth-day statistics. The claim was that the decision was taken without affording the governing body or the principal the right to furnish reasons for the principal's decision not to admit the learner. The claim for relief was framed in these terms:

> "Declaring that the purported appeal to, and decision by, the Second Respondent, dated 2 February 2011, is not in accordance with the provisions of the admissions policy and the Circular and was taken without affording the [school governing body] or Principal the right to furnish reasons for the Principal's decision not to admit [the learner] as a Grade 1 learner and was accordingly procedurally unfair."

[98] Apart from the fact that this claim was not properly pleaded in that no facts whatsoever were alleged in the founding affidavit to support it, there is undisputed evidence on record showing that the principal did furnish reasons for refusing admission to the Head of Department. Indeed the main judgment finds that the principal submitted

her reasons in November 2010. Therefore the claim for procedural fairness could not succeed even if it had been properly pleaded. It follows that the High Court was right in dismissing this claim on the basis that the principal was afforded the opportunity to furnish reasons for her decision. Without a doubt the pleaded claim for procedural fairness has no merit.

[99] The question that arises sharply is whether a different claim for procedural fairness which was neither pleaded nor established in evidence may be upheld by this Court. This is the core of the differences between this and the main judgment.

Declarator on procedural fairness

[100] Just as they bind other courts, the rules of procedure must be followed in this Court too. In our system of law the issues determined in any court are defined in the pleadings by the parties themselves. Adjudication of issues is undertaken at the instance or request of parties. In other words, it is the parties who decide which cause of action they would like to pursue in litigation. Where a particular cause of action has been chosen and pleaded by an applicant or plaintiff and it turns out that the evidence adduced in its support does not sustain the action a court cannot, of its own accord, choose a different cause of action and find in favour of a losing litigant. This is simply not open to any court.

[101] Pleadings are crucial to adjudication of civil cases, particularly in constitutional litigation. This principle was affirmed by this Court in many decisions. Writing for a unanimous Court in *Gcaba*,[78] Van der Westhuizen J said:

> "Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in [*Chirwa v Transnet Limited and Others*], and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the [Labour Relations Act], one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court."[79] (Footnotes omitted.)

[102] It is important to note that in *Gcaba*, the applicant's cause of action was based on administrative action but the facts pleaded ostensibly in its support sustained a violation of a right to fair labour practices which falls within the jurisdiction of the Labour Court. This Court upheld the order of the High Court dismissing the applicant's claim on the

[78] *Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[79] Id at para 75.

basis that the pleaded facts did not sustain it. The Court did not, of its own accord, decide the matter on the basis of the unfair labour practice claim, even though the facts pleaded sustained this claim.

[103] The same approach was followed in *Shaik*.[80] In that case the applicant had challenged the constitutionality of section 28(6) of the National Prosecuting Authority Act[81] on the basis that it was inconsistent with section 35(3) of the Constitution. The High Court dismissed the challenge and the applicant sought leave to appeal to this Court. In a unanimous judgment this Court, while accepting that section 28(8) and (10) were inconsistent with the Constitution, refused leave on the ground that the cause of action pleaded targeted section 28(6) instead of section 28(8) and (10).

[104] The fundamental principle of deciding cases on the basis of the pleaded cause of action was followed by this Court in other cases as well.[82] Judicial precedent which forms an integral part of the rule of law, one of the values upon which our Constitution is founded, demands that the Court in this matter follow the decisions referred to above.

[80] *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC).

[81] 32 of 1998.

[82] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC); *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC); *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) (*Bel Porto*); *Prince v President, Cape Law Society, and Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

This Court is obliged to follow them until they are overturned. On this point the Court in *Gcaba* said:

> "Therefore, precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot 'rule' unless it is reasonably predictable. A highest court of appeal – and this Court in particular – has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order – as it was intended to do. But it is young; so is the legislation following from it. As a jurisprudence develops, understanding may increase and interpretations may change. At the same time though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so."[83]

[105] In these circumstances the main judgment errs in deciding a cause of action which was neither pleaded nor supported by established facts. As illustrated earlier, the cause of action pleaded in relation to procedural fairness was that the Head of Department took the impugned decision without affording the governing body or the principal the opportunity to furnish reasons for the principal's decision not to admit the learner.

[106] Moreover, the declaration that the impugned decision was procedurally unfair is premised on the finding that the school was denied the opportunity to make

[83] *Gcaba* above n 78 at para 62. See also *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 39.

representations on the tenth-day statistics. But there is no evidence on record supporting this finding. This is at odds with a principle entrenched in our law that any relief granted by a court must be based on established facts.

[107] The fact that the present applicants canvassed the procedural fairness point in their argument in this Court does not and cannot justify a determination of an issue that was neither pleaded nor proved in evidence on record. In any event, the applicants' argument shows that the pleaded complaint on procedural unfairness could not succeed because the evidence that the principal was allowed to give reasons for her decision is overwhelming. This can hardly be a basis for holding that the school was denied the opportunity to make representations on the statistics. To hold that the applicants' argument is a legitimate basis for the finding that the impugned decision was procedurally unfair is not only inconsistent with established principles but also prejudicial and unfair to the applicants. That was simply not the case they were called upon to meet in any of the courts before which the matter served.

[108] Moreover, the school did not ask this Court to grant a declaratory order. Both in the opposing affidavit and written argument, the school asked for the dismissal of the application for leave and nothing more. In our law a court ordinarily grants relief at the instance or request of litigants. Yet here the declaratory order on procedural unfairness is granted in circumstances where it was not requested. This is unusual. More so, when the fact that this order is not supported by the proven facts is taken into consideration.

[109] In *Bel Porto*,[84] the majority in this Court declined to grant orders which were proposed by the minority on the basis that the proposed orders were not asked for, nor were they supported by the pleaded cause of action and the evidence adduced. Writing for the majority Chaskalson CJ said:

> "In the joint judgment of Mokgoro J and Sachs J it is said that 'although formally employed by the appellants' schools and not by the Department,' the general assistants employed by the appellants 'were in effect public servants working in government schools' and as such, administrative justice 'required that they be given a right to participate in negotiations as to retrenchments similar to that afforded to their counterparts in other Elsen schools'. Similar comments are made by Madala J in his judgment.
>
> . . .
>
> I am unable to agree with this approach. The general assistants at the appellant schools are not parties to this litigation. Although reference is made to the fact that the scheme is likely to lead to their retrenchment, no claim was made by the appellants on behalf of the employees. The appellants' claim is based on alleged infringement of their own constitutional rights, and the rights of the children of their schools, not their employees' rights. The relief the appellants seek is relief designed to relieve them of the burden of continuing to employ the general assistants, and of having to pay the costs of retrenchments that might take place.
>
> There is no evidence on record as to the terms and conditions of service of the general assistants of the appellant schools, other than that they are different to those of the general assistants employed by the [Western Cape Education Department]. Nowhere is it alleged in the affidavits made on behalf of the appellants that the general assistants were only 'technically' employees of the schools, or that they were in substance 'public servants'. No averment is made anywhere in the affidavits lodged on behalf of the

[84] *Bel Porto* above n 82.

> appellants that the general assistants at their schools have any rights against the [Western Cape Education Department], or that they believe that they had such rights."[85] (Footnotes omitted.)

[110] Later in the same judgment Chaskalson CJ refused to grant an order proposed by Ngcobo J. In this regard the Chief Justice said:

> "In his judgment Ngcobo J holds that the [Western Cape Education Department] infringed the rights of the appellants by failing to consult with them concerning the implementation of the scheme. Although he concludes that the appellants are not entitled to the relief claimed by them, he would have made a declaration that the rights of the appellants to just administrative action have been infringed and would have directed the parties to submit further affidavits and argument dealing with the appropriate relief in the light of the finding made by him.
>
> Due to the course that the litigation took, the implementation of the scheme was not raised in the founding affidavits and no relief was sought in that regard in the notice of motion. The details of the scheme were placed on record by the [Western Cape Education Department] in [its] answering affidavits lodged on 14 February 2000. The appellants, in replying affidavits lodged some two months later on 17 April 2000, complained that they had not been included in the negotiations that had taken place between the [Western Cape Education Department] and the trade unions. The relief they sought, however, as expressed in the affidavit of Mr van der Merwe, the chairman of the first appellant, was that:
>
> > 'The fair and proper course of action is to first bring the applicant schools in line with all other schools. At that point negotiations between respondents and the trade unions, if necessary, will be meaningful.'
>
> . . .
>
> I am therefore unable to agree with Ngcobo J that the appellants are entitled to relief in the form proposed by him. This was not the relief sought by the appellants in the

[85] Id at paras 75-7.

> High Court or in this Court, and it is inconsistent with the attitude adopted by the appellants throughout the litigation."[86] (Footnote omitted.)

Meaningful engagement and cooperation

[111] The main judgment criticises the Head of Department for the manner in which he exercised the power to deal with systemic capacity problems. It is asserted that the Department exercised its powers with no regard to the role of the governing body.[87] This too was never an issue between the parties. Nor did it form part of the sole issue before this Court, namely, whether the Head of Department had the power to overturn the principal's decision and admit the learner to the school. Therefore what is said on this aspect does not form part of the *ratio decidendi*. As something that is said "by the way" it has no binding effect.[88]

[112] In terms of the doctrine of judicial precedent it is the *ratio decidendi* which has binding authority. The *ratio* comprises the reasoning necessary for the decision of the issues before a court. What is stated in the course of articulating that reasoning but which is not essential to the determination of the issue at hand constitutes *obiter dicta*. The *obiter dicta* have no binding authority.[89]

[86] Id at paras 106-7 and 115.

[87] Main judgment at [75] above.

[88] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 30.

[89] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 316-7.

[113] But apart from the fact that the resolution of the systemic capacity problems was not an issue for determination, the main judgment it seems, conflates this issue with what was done by the Head of Department in setting aside the principal's refusal and admitting the learner to the school. This was not done as part of addressing the systemic capacity problems but as resolution of a particular complaint. But even in the context of systemic capacity problems, the Head of Department can hardly be accused of failing to engage with the school.

[114] When the complaint relating to the refusal to admit the learner was brought to the Department, no less than four consultations were held with the school. None of them produced a positive result because the school refused to relax its admission policy and admit the learner, even though that policy had been relaxed in other cases. The school persisted in a rigid application of its policy despite the Department's plea for a flexible approach. In the founding affidavit, the school said about the meeting of 30 November 2010:

> "The Department called this meeting, apparently after the First and Second Respondents had requested Mabena to intervene in respect of the Fourth Respondent's application. *The meeting was nothing but a plea to the school and the First Applicant to relax its policies in order to grant the learner a place in the school for 2011*." (Emphasis added.)

[115] The evidence on record demonstrates that the Department consulted the school on a number of occasions. On one occasion the Department suggested that the learner's

mother be furnished with certain information relating to the waiting list. The school responded to the request by a letter of 8 October 2010, written by the governing body's attorney. In relevant part it reads:

> "Request: Rivonia Primary provide Mrs. Cele with a reviewed number.
> Reply: Our instructions are that the request to review the received waiting list number *was rejected with the contempt it deserves*. . . . Rivonia Primary and [its governing body], will not be part of any *underhand activities*." (Emphasis added.)

[116] Despite the contempt with which the request was treated, the Department was still willing to meet the school and its governing body, hence the meeting of 30 November 2010 in which the plea to relax the application of the admission policy was turned down. These facts illustrate that even in the face of scorn, the Department was willing to cooperate with the school in seeking an amicable solution to the problem. In the meeting of 30 November 2010 when their plea failed, the officials from the Department suggested that they would place the learner at an alternative school if her parents agreed. Apparently they did not agree, hence the impugned decision by the Head of Department.

[117] Against this background, it can hardly be argued that there were no serious attempts to have the problem solved in cooperation with the school. The assertion that the Head of Department adopted the heavy-handed approach to the issue loses sight of what really happened. Faced with a contemptuous governing body and an intransigent principal, it is difficult to imagine that the Head of Department could have acted differently. Once it is accepted that he had the power to overturn the principal's refusal

and admit the learner, what was done by the officials in admitting the learner can hardly be described as heavy-handed because the principal refused to carry out the instruction to admit the learner. The principal associated herself with the stance adopted by the governing body.

Legal principles

[118] With reference to *Ermelo*[90] and *Welkom*,[91] the main judgment lists four principles deduced from these cases.[92] I am unable to agree with the formulation of the first principle, especially the part that says a Head of Department cannot act contrary to a policy which in his or her view offends the Constitution. The main judgment indicates that this principle is distilled from certain paragraphs in *Ermelo*.[93] But the reading of the relevant paragraphs does not support the proposition that a Head of Department cannot override or act contrary to a policy that offends the Constitution.

[119] In the first place, paragraphs 73 to 75 in *Ermelo* do not deal with overriding or acting contrary to a school's policy. Instead these paragraphs deal with the revocation of a function entrusted to a school governing body. In these paragraphs *Ermelo* addresses the exercise of power to revoke the authority to make policy. *Ermelo* states that the power to revoke must be exercised on reasonable grounds and in accordance with

[90] *Ermelo* above n 2.

[91] *Welkom* above n 36.

[92] Main judgment at [49] above.

[93] *Ermelo* above n 2 at paras 73-5 and 78.

procedural fairness required by section 22(2) of the Schools Act. Therefore, these paragraphs do not support the principle formulated in the main judgment.

[120] In addition paragraph 73 in *Ermelo* is also cited as supporting the third principle which says when officials intervene or depart from policy, they must act reasonably and in a manner that is procedurally fair. But as already illustrated paragraph 73 deals with revocation of power which must be done on reasonable grounds and in a manner that complies with the procedural fairness in section 22(2). In paragraph 73, *Ermelo* states:

> "Indeed, my conclusion does not entail that the [Head of Department] enjoys untrammelled power to rescind a function properly conferred on a governing body whether by him or by the Schools Act or any other law. The power to revoke will have to be exercised on reasonable grounds. In addition the [Head of Department] must, in revoking the function, observe meticulously the standard of procedural fairness required by section 22(2) and, in cases of urgency, by section 22(3)."[94]

[121] What emerges from this paragraph is that the Court in *Ermelo* was stating principles applicable to a revocation of power undertaken in terms of section 22. It was not laying down a general principle relating to a departure from a school governing body's policy.

[122] Reference to *Welkom* does not take the matter further, because the cited paragraphs in *Welkom* draw, as authority for what is stated, from *Ermelo*. I have illustrated that

[94] Id at para 73.

Ermelo was interpreted incorrectly in the main judgment, as it was in *Welkom*. I may add that the judgment relied on in *Welkom* does not, in my view, constitute a majority judgment. In my opinion none of the three judgments amounted to a majority judgment. Instead there is an order in that case which was supported by a majority but for different reasons.

[123] Therefore I cannot agree with the principle that says a head of department cannot override or act contrary to a policy which is inconsistent with the Constitution. To require the Head of Department to comply with such policy would be at odds with section 2 of the Constitution.[95] This section proclaims the supremacy of the Constitution and declares that conduct inconsistent with it is invalid.

[124] *Ermelo* is not authority for the proposition that an unconstitutional policy may not be followed only if the Schools Act is adhered to. The issues in that case were whether the Head of Department had the power to withdraw a language policy adopted by the school governing body and if so, whether the power of withdrawal had been properly exercised. As to the first issue, this Court overturned a finding by the Supreme Court of Appeal and held that the Head of Department had such power. The Supreme Court of Appeal had arrived at a different finding. Regarding the second issue, the Court held that section 25 of the Schools Act, on which the Head of Department relied, did not empower

[95] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

him to withdraw the policy in issue. Because the validity of that policy was not an issue before it, the Court did not declare it invalid but in the exercise of its justice and equity power, the Court directed the school's governing body to amend its language policy to be in line with the Constitution.[96]

[125] For all these reasons I do not support the main judgment, save for the finding that the Head of Department had the power to reverse the principal's decision and admit the learner to the school.

[96] *Ermelo* above n 2 at paras 96-102.

For the Applicants:	Advocate M Chaskalson SC and Advocate N Mji instructed by the State Attorney.
For the First and Second Respondents:	Advocate G Pretorius SC and Advocate A Kemack SC instructed by Shepstone & Wylie Attorneys.
For the First and Second Amici Curiae:	Advocate S Budlender and Advocate J Brickhill instructed by the Legal Resources Centre.
For the Third Amicus Curiae:	Advocate R Keightley instructed by Erasmus Inc Attorneys.