THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 073/2024

In the matter between:

BAREND HERMANUS RAUTENBACH	**FIRST APPELLANT**
JOHAN SMIT	**SECOND APPELLANT**
FRANCOIS MALAN	**THIRD APPELLANT**
BAREND DE KLERK	**FOURTH APPELLANT**

and

THE GOVERNING BODY OF DIE HOËRSKOOL DF MALAN	**FIRST RESPONDENT**
THE WESTERN CAPE MINISTER OF EDUCATION	**SECOND RESPONDENT**

Neutral citation: *Rautenbach & Others v The Governing Body of die Hoërskool DF Malan & Another* (073/2024) [2025] ZASCA 78 (4 June 2025)

Coram: MOKGOHLOA, MBATHA, WEINER and SMITH JJA and MODIBA AJA

Heard: 2 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 4 June 2025.

Summary: Administrative law – procedural fairness in terms of s 3 of the Promotion of Administrative Justice Act 3 of 2000 – rationality of the decision to change the name of the school – interpretation of statutes – whether the Schools Act 84 of 1996 vests the power to change a school's name in its governing body.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Henney J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel, where so employed.

JUDGMENT

Smith JA (Mokgohloa, Mbatha and Weiner JJA and Modiba AJA concurring):

Introduction

[1] A public institution's name often says more about its identity, ethos and culture than its written mission statement. This is even more so if the institution is named after a controversial historical figure. It is thus unfortunate that more than three decades into our constitutional democracy there are still public institutions which are named after individuals who were instrumental either in the development or implementation of the universally deprecated apartheid ideology. The DF Malan High School in Belville, Western Cape (the school), which bears the name of one of the chief architects of apartheid, is one such an institution.

[2] While the school takes pride in its culture of academic excellence and its policy of inclusivity, its controversial name has been an albatross around its neck. According to the school's governing body, the name stridently contradicts those admirable values. It therefore came as no surprise when, in 2021, the governing body decided to reconsider its symbols and values, including its name. This came about partly as a result of external pressure – including its own alumni – and partly because of the governing body's own realisation that the retention of the name could no longer be justified.

[3] After the conclusion of a consultative process, the governing body, on 6 May 2021, resolved to review the school's name. That decision was subject to further investigation into the financial implications of the name-change and consequential amendments to its constitution. Eventually, after further consultation with stakeholders, the governing body resolved to change the name of the school to DF Akademie. That name was thereafter submitted to the Provincial Department of Education (the Department) for confirmation that no other educational institution had a similar name.

[4] The appellants took umbrage at the decision and, in December 2021, launched an application in the Western Cape Division of the High Court, Cape Town (the high court) for an order reviewing and setting it aside. The appellants contended that the decision was *ultra vires* the governing body's statutory powers; the consultative procedure adopted by the governing body was unfair; and the decision itself was irrational. They asserted their *locus standi* on the basis that the application concerned a matter of public importance and that their children are learners at the school, as such they pay school fees and thus have an interest in the employment of the school's resources.

[5] The governing body was cited as the first respondent and the Provincial Minister of Education as the second respondent. No relief was sought against the second respondent. The high court, per Henney J, in its judgment[1] delivered on 17 October 2023, dismissed the application with costs.

[6] The high court subsequently granted the appellants leave to appeal only in respect of its finding that the governing body had implied power under the South African Schools Act 84 of 1996 (the Schools Act), to change the school's name. Aggrieved by the limited basis on which it was granted leave, the appellants successfully petitioned this Court for further leave to appeal against the high court's findings in respect of the fairness of the

[1] The high court's judgment was reported as *Rautenbach and Others v Governing Body of Die Hoërskool DF Malan and Another* [2023] 4All SA 801 (WCC); 2024 (4) SA 191 (WCC).

consultative procedure adopted by the governing body and the rationality of the decision to change the school's name.

The facts

[7] The following factual matrix frames the issues which fall for consideration in this appeal. The school is an Afrikaans medium public school, established in 1954. Shortly after its establishment, the school obtained the permission of the then Prime Minister of the Republic, Dr Daniel Francois Malan, to name the school after him. Dr Malan served as South Africa's Prime Minister from 1948 to 1954. He was instrumental in the promulgation of apartheid as a government policy in 1948, a political system based on racial segregation and discrimination.

[8] It is a matter of historical record that the policy of apartheid led to human rights abuses, violent oppression, arbitrary land dispossession and the disenfranchisement of the majority of South Africans. Despite the advent of our constitutional democracy in 1994, the ignominious consequences of apartheid still haunt South African society and it will probably take several generations to eradicate them fully.

[9] Despite the heavy burden of its controversial name, the school has over the years established a reputation for academic excellence. It has, over a period of four years, achieved a 100% matric pass rate with an average mark of 71,8%. In the 2021 matric exams, 62 learners passed with an average mark of 80% or higher and three learners were among the top 40 achievers in the Western Cape. The school considers its core values as being of a Christian ethos, Afrikaans as language of instruction, inclusivity and academic excellence.

[10] The governing body consists of 13 members, including the principal, seven parents, two teachers, two learners and one staff member who is not a teacher. It adopted a constitution in terms of s 18 of the Schools Act, which provides, among others, for the name of the school. Given the controversial figure after whom the school was named, it was inevitable that the governing body would sooner or later be pressurised into

reconsidering the school's name. The first such request came from an alumnus who wrote to the governing body in 2018. He described the name as 'insensitive and inappropriate' and demanded that the school commence with a process to change its name. The school received two more letters in similar tone in September 2019, from a parent of two learners.

[11] The pressure on the governing body to reconsider the school's name intensified during June 2020 when a group of alumni calling themselves 'DF Malan Must Fall', joined the fray. Their stated objective was to agitate for a name change and to address the 'institutional racism' at the school.

[12] At a meeting held on 18 June 2020, the governing body resolved to commence a process that would enable it to decide whether the school's symbols, including its anthem and name, should be changed as well as the cost implications thereof. It also resolved to inform 'DF Malan Must Fall' of the decision.

[13] Since the Schools Act does not prescribe a procedure for the changing of a school's name, the governing body was at sea insofar as this issue was concerned and had to do its best to devise a fair process to enable consultation with stakeholders. All that it had to go on were circulars from the Department and the Federation of Governing Bodies for South African Schools (FEDSAS). However, neither circular purported to be prescriptive but were merely intended to serve as guidelines. Significantly though, both circulars assumed that the power to change the school's name vests in its governing body.

[14] The departmental circular, while instructing governing bodies to submit names to the Department to enable it to check whether other schools bear the same name, expressly stated that a governing body's authority to change a school's name is beyond question. It stated, however, that the new name may only be used once the Head of the Department has confirmed that it does not conflict with the name of another educational institute.

[15] The FEDSAS circular reminded governing bodies that changing a school's name is a sensitive matter and cautioned that wide consultation with all stakeholders, including parents, teachers, learners and the broader community, must inform any decisions regarding a school's symbols, including its name, motto or emblem. It further advised that relevant considerations would include: the name's origin or notoriety; implications that a name-change may have for the school's identity or branding; and how the name is being viewed by members of the community. It suggested that governing bodies should appoint an *ad hoc* steering committee to manage the process of consultation and advise them on proposed new names or symbols.

[16] On 22 June 2020, the governing body, being of the view that it should control the debate about the school's name instead of simply allowing it to continue in social media, wrote to all parents, learners, alumni and school staff on its database, advising them of its decision to embark upon a process to reconsider the school's name and other symbols. Those stakeholders were also invited to make suggestions regarding the process to be followed. At the time there were approximately 1800 parents, 1100 learners, 90 staff members and 6000 alumni on the school's database.

[17] The letter elicited diverse responses, some expressing misgivings about a name-change, others supporting it, and some making suggestions regarding the process that should be followed. One such response came from a practising advocate, Mr de Haan. He was strongly opposed to any name-change. According to him, Dr Malan was an honourable Afrikaner politician, and to remove his name would amount to disregard of Afrikaner history. Later, Mr de Haan filed an affidavit supporting the appellants' application.

[18] On 30 July 2020, the governing body, being mindful of the sensitive nature and the emotional reaction that the debate regarding the school's name would probably evoke on either side of the divide, decided to appoint an independent facilitator to advise it on the process to be followed. The members of the governing body were requested to suggest names of potential facilitators.

[19] By September 2020, the governing body had received 14 names of which 10 were either not available, not sufficiently independent or were otherwise disqualified from acting as facilitators. The remaining four were interviewed by the governing body on 1 October 2020. It decided to appoint Dr Jan Frederick Marais (Dr Marais), a theologian of the Ecumenical Board of Stellenbosch University's Theology Faculty, and renowned mediation expert. Dr Marais has extensive experience in mediating congregational disputes. The governing body therefore regarded his expertise as well-suited for the emotional dialogue that the sensitive issue of the school's name was likely to evoke.

[20] Dr Marais advised against a process that would require a simple 'yes' or 'no' answer to the question whether the school's name should be changed. He advised the governing body instead to adopt a process that would also focus on the school's symbols, such as the uniform, emblems, motto and anthems. He was of the view that the school's name is but one of those symbols, and whether it should be changed would ultimately depend on a dialogue regarding the school's identity and values.

[21] The governing body was convinced by the compelling logic of the process suggested by Dr Marais and, in November 2020, appointed him to propose and facilitate a process through which the school's identity and, if need be, the appropriateness of its name, would be considered. Dr Marais magnanimously agreed to perform those tasks without charging a fee.

[22] On Dr Marais's advice, the governing body formed a steering committee of 16 persons who were chosen to accommodate different views and to ensure fair representation between different role players, namely parents, staff, learners and alumni. Of the 16 steering committee members, eight had expressed their views regarding a name change – four being against it and four in favour.

[23] From December 2020 to February 2021, the steering committee members were trained by a panel of three, which included Prof Erwin Schwella, an Emeritus Professor of Public Leadership at Stellenbosch University. The training focussed on skills required

to facilitate impartial debate in community-based discussions, the importance of impartiality and the protocol for recording input from participants.

[24] The information gathered from these discussion groups would be recorded anonymously and sent to the Unit for Innovation and Transformation (the Unit) at the Theology Faculty of Stellenbosch University. The Unit would then process the information and compile a report which analysed the debates both quantitively (the number of times an opinion was expressed) and qualitatively (the kind of questions posed to participants and their answers).

[25] On 8 March 2021, the governing body addressed a letter to all interested parties on its database, informing them of the process agreed upon and inviting them to participate in discussions that would focus on the school's identity as a basis for a decision regarding the school's symbols, including its name. They were invited to choose a convenient time from 40 discussion sessions between 11 and 18 March 2021. They could also choose to participate virtually, and links were provided for this purpose. To make it convenient for everybody, the sessions were scheduled for the afternoons and evenings. The theme of the process was 'The school of which we dream'.

[26] Dr Marais formulated five questions, which would guide the discussions in the steering group sessions. He was of the view that discussions should focus on dialogue about the school's identity and symbols to diffuse emotions which discussions about the name would evoke. The questions were aimed at eliciting responses in respect of the characteristics that make the school unique; how participants experienced the school; their anxieties and hopes about the school's future; their views regarding the leadership of the school; and their perceptions regarding the school's identity in the community. The 150 people who responded to the invitation were divided into fifteen groups of ten. Each group discussion would be hosted by two members of the steering group, one to guide discussion and the other to take notes (the raw data).

[27] The chairperson of the governing body, Mr Andre Roux (Mr Roux), who deposed to the answering affidavit, asserted that although the steering committee members were advised to focus discussions on the school's symbols and identity, they were not instructed to prohibit discussions regarding the school's name. He said that participants were free to make submissions in this regard, and some had indeed done so. The appellants took issue with this assertion and filed three confirmatory affidavits in support of their contention that participants were not allowed to discuss the school's name. I deal with this issue in greater detail later in the judgment.

[28] The consultation process was delayed by two events, which occurred in early March 2021, namely the implementation of country-wide loadshedding and elections for a new governing body. The process eventually commenced on 11 March 2021 and concluded on 28 March 2021. By that time, the process had reached saturation point, in other words, the discussions did not yield any fresh input, and participants were merely repeating the same views.

[29] The steering group reports were thereafter submitted to the Unit which compiled a draft report. That report was presented to Mr Roux in April 2021 and he distributed it to the other governing body members. The report was thereafter vetted at a meeting attended by Dr Marais, a member of the Unit and members of the governing body. The implications of the report were, however, not discussed at that meeting and, apart from correcting a few grammatical errors, the meeting concluded that the contents of the report were factually correct.

[30] Mr Roux and Mr Conradie, the school principal and member of the governing body, thereafter, met with Dr Marais on 22 April 2021 to discuss the Unit's report. Dr Marais was satisfied that the discussion groups were sufficiently representative of the school community and that the report established that they were ready to discuss the school's future. The report also concluded that there was agreement regarding the school's core values, which were: academic excellence; innovating leadership; Afrikaans as language

of instruction; and an inclusive culture. It was clear to everybody that the school's name and what it represented, were incompatible with those values.

[31] The governing body considered the Unit's report at its meeting on 6 May 2021. The report was not analysed in detail since all the governing body members were aware of its contents and Dr Maris had prepared a briefing based on core characteristics, which he had extracted from the report. The governing body members were asked to express their views on Dr Marais's assessment of the report, namely that the school's symbols, including its name, should be reviewed as well as the process that should be adopted to ensure community participation. They all expressed reservations about the appropriateness of the school's name and were of the view that it was incompatible with the school's core values of a Christian ethos and inclusivity. They were therefore unanimous that the school's symbols, including its name, should be changed, subject to further investigation into the financial implications of that decision and the formulation of a fair process for further consultation regarding a new name.

[32] On 13 May 2021, Dr Marais and Mr Roux met with the steering committee members to provide feedback regarding the decision taken on 6 May 2021. While everybody agreed with the school's core values as formulated by Dr Marais, three steering committee members disagreed with the decision to change the school's name. They were Ms Veronica van Zyl, Ms Mette Warnich – who also filed affidavits in support of the application – and Mr Gert Visser. The other members were of the view that a name change had been supported by most participants at the group discussions.

[33] On Dr Marais's advice, a new task team was thereafter formed to advise the governing body on the formulation of a consultative process with stakeholders; criteria against which proposed new names could be evaluated; and the financial implications of a name-change. The task team decided that invitations should be sent to all persons on the school's database to propose new names – the only qualifications being that the name should not be that of a person, should preferably be Afrikaans, should not have any political connotations, and should enhance the school's identity.

[34] The invitations were duly dispatched on 11 August 2021. Six hundred and twenty-six of the recipients responded – 301 proposing that the current name be retained and 325 suggesting new names. The task team then evaluated the proposed new names, shortlisted eight and eventually submitted four names to the governing body for consideration. They also assessed the cost implications of changes to signage and information technology.

[35] The governing body considered the task team's report at its meeting on 22 September 2021. It decided that only two of the four names submitted by the task team were acceptable, namely Protea Akademie and DF Akademie. The persons on the school database were thereafter invited to vote for one of the two names through a digital 'Voting Crowd' virtual platform. In addition to persons on the database, learners who had already enrolled for the 2022 academic year as well as their parents, were also eligible to vote.

[36] The voting for a new name took place on 15 October 2021. Of the 3 466 votes received, the overwhelming majority, namely 85% proposed DF Akademie. The governing body thereafter ratified the voting results and decided on DF Akademie as the school's new name. The name was thereafter submitted to the Department for verification that there were no other educational institutions bearing that name.

In the high court

[37] In the high court, the appellants relied on the following appeal grounds: (a) in changing the school's name the governing body acted *ultra vires* its powers under the Schools Act; (b) the consultative process adopted by the governing body was procedurally unfair and irrational and did not accord with the prescripts of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and (c) the decision to change the school's name was not rationally connected to the information before the governing body.

[38] While the high court's judgment dealt with several points other than the review grounds raised by the appellants, namely, among others, the question whether the impugned decision constituted administrative action as defined in PAJA and the issue of

undue delay, they were not pursued in this Court. I consequently focus my attention only on those submissions that were repeated in argument before us.

The appellants' contentions

[39] The appellants' submission that the governing body did not have statutory power to change the school's name was founded primarily on the assertion that while s 16(1) of the Schools Act vests the governance of a public school in its governing body, that section expressly provides that 'it may only perform such functions and obligations and exercise only such rights as prescribed by the Act'. Relying on the minority judgment in *Head of Department, Department of Education, Free State Province v Welkom High School and Others* (*Welkom High School*),[2] the appellants argued that the governing body is a creature of the Schools Act and consequently derives all its powers from that statute. According to the appellants, there was, therefore, no scope for inferring any implied powers beyond those provided for by the Schools Act.

[40] They criticised the procedure adopted by the governing body on the following grounds. First, they contended that the governing body has impermissibly departed from the procedure to which it had committed in its letters to parents, learners and other interested parties in June and July 2020. They relied on *Chairpersons' Association v Minister of Arts and Culture and Others*[3] for the submission that an undertaking given by a public authority regarding a procedure is binding.

[41] Second, they submitted that the consultation process during March 2021, which was facilitated by the steering committee members, did not concern the primary issue of the school's name but had by then mutated into a debate about 'The school we dream of' and the identity of the school. The appellants contended that that procedure was disingenuously devised to stifle forthright debate about the question whether the school's

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[2] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (*Welkom High School)* paras 241-242.
[3] *Chairpersons' Association v Minister of Arts and Culture and Others* [2007] ZASCA 44; [2007] SCA 44 (RSA); 2007 (5) SA 236 (SCA) para 45.

name should be changed. Participants at the discussion groups were therefore not allowed to debate that issue, so they argued.

[42] In this regard, the appellants pointed to the fact that Ms van Zyl and Ms Warnich (who were members of the steering committee), as well as Mr de Haan, all confirmed that no discussions regarding the school's name were allowed in the groups. They submitted that the governing body did not address these averments in reply but merely proffered a bald denial.

[43] Third, they asserted that the members of the governing body did not have access to the raw data of the steering committee sessions but were merely provided with a one page summary and recommendations prepared by Dr Marais. The Unit's report was not tabled at the governing body meeting held on 6 May 2021, nor was it discussed or adopted at that meeting. The report could therefore not have informed the governing body's decision to change the school's name. That decision was also taken without any input from the steering committee, so the argument went.

[44] Fourth, they argued that the governing body's decision to cease the consultation process because Dr Marais was of the view that he had heard enough and that a point of 'saturation' had been reached, was irrational. According to the appellants, that decision can also not pass muster because the governing body was required to consult widely and provide a fair opportunity to all interested parties to express their views.

The governing body's submissions

[45] The governing body argued that while the Schools Act does not expressly empower it or, for that matter, any other organ of state or functionary, to change the school's symbols, it must be implied that the power vests in the governing body by virtue of its governance obligations. Its primary function is to serve the best interests of the

school and its learners and it therefore has a fiduciary duty towards the school.[4] Its fiduciary duty to promote the best interests of the school must therefore, by necessary implication, include decisions regarding the school's symbols, including its name. It is manifest that neither the provincial Department nor the Minister of Education is better placed than the governing body to decide on the school's name. This was recognised both by the Department and by FEDSAS.

[46] It further submitted that while contending that the governing body does not have the power to change the school's name, the appellants did not proffer a construction of the Schools Act that vests this power in any other functionary or organ of state. The interpretation contended for by the appellants would therefore lead to the absurd situation that the name of a school can never be changed.

[47] The governing body also took issue with the appellants' submissions regarding the fairness and rationality of the consultative process and the decision to change the school's name. It submitted that the impugned decision was preceded by extensive consultation with all role players and was taken with due consideration of all relevant information gathered during the steering committee group sessions. The decision to change the school's name, which was fundamentally irreconcilable with its stated ethos and values, was, according to the governing body, thus self-evidently rational.

The high court's findings

[48] The high court disagreed fundamentally with the appellants' submissions. Regarding the appellant's submission that s 16(1) of the Schools Act has the effect of limiting the governing body's powers to those expressly mentioned in the Act, the high court said that it is wrong to consider the section in isolation. What was required, the high court found, was a purposive interpretation of the Act that avoids a 'simplistic and one-

[4] *Head of the Department of Education Mpumalanga and Another v Hoërskool Ermelo and Another* [2009] ZASCA 22; 2010 (2) SA 415 (CC); [2009] 3 All SA 386 (SCA) (*Hoërskool Ermelo*); s 16(2) of the Schools Act.

dimensional construction of its provisions'. Based on such a construction, it concluded that the governance functions of the governing body are wide 'but not untrammelled'.

[49] The governance functions mentioned in s 20 of the Schools Act place the governing body in a fiduciary relationship with the learners, educators, parents as well as the broader community. It was in the exercise of that fiduciary obligation always to act in the school's best interests that it decided to change the name.

[50] The high court further found that the power to change the school's name 'was also aligned with the power of the SGB [the governing body] to develop a mission statement for the school.' This is one of the functions mentioned in s 20 of the Schools Act.

[51] The interpretation contended for by the appellants, the high court found, would mean that the name of a school can never be changed under the existing legislation. This is an absurdity that can be avoided by a reasonable and contextual construction of the Schools Act.

[52] The high court found no fault with the procedure adopted by the governing body. Regarding the fairness of the consultative procedure and rationality of the impugned decision, the high court held that it was not unreasonable for the governing body to devise a consultation process in accordance with the advice of Dr Marais and the guidelines contained in the FEDSAS circular; the decision to terminate the consultation after a 'saturation point' had been reached was reasonable in the circumstances; and the decision to change the school's name was taken after 'a proper and fair process with proper consultation given the circumstances of this case'. It accordingly dismissed all the appellants' review grounds.

Analysis

Does the governing body have implied power to change the school's name?

[53] The governing body was established in terms of s 16(1) of the Schools Act. That section vests the governance of public schools in their governing bodies. In *Hoërskool*

Ermelo, the Constitutional Court said that while the concept of governance is nowhere defined in the Schools Act, s 20 confers on the governing body certain core functions relating to the adoption of a constitution and code of conduct for learners; developing a mission statement; determining the times of the school day; administering and controlling the school's property; and recommending the appointment of educators and non-educator staff to the Head of Department. These are the essential governance functions but they are not exhaustive.[5]

[54] In giving content to the concept of 'governance', both the Constitutional Court and this Court relied on the definition of 'governance' in the *English Oxford Dictionary*. It defines the term, among others, as 'the action or manner of governing, controlling, directing or regulating influence, the manner in which something is governed or regulated, method or management, system of regulations'.[6]

[55] One can only truly understand the vital role of school governing bodies in realising the vision of 'a new national education system for schools which will redress past injustices in educational provision, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance',[7] if regard is had to where it fits into the scheme of the Schools Act. A governing body is, in partnership with the relevant Head of Department, Member of the Executive Council and the Minister, responsible for the running of public schools. The provisions of the Schools Act are carefully crafted to strike a balance between the duties of the various partners in ensuring an effective education system.[8] In this partnership, it is the governing body that represents the interests of parents, teachers, present and former leaners as well as the community in which the school is located. It is for this reason that the Schools Act vests in the governing body those functions that relate to the identity and ethos of the school,

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[5] *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) (*Hoërskool Ermelo*). See also *School Governing Body Grey College, Bloemfontein v Scheepers* [2020] 3 All SA 704 (SCA); [2020] 3 All SA 704 (SCA) (*Grey College*) para 47.
[6] *Grey College* ibid para 65; *Welkom High School* fn 1 above para 60.
[7] Preamble to the Schools Act.
[8] *Welkom High School* fn 1 above para 66.

namely, to adopt a constitution, develop the mission statement of the school, and adopt a code of conduct for learners.[9]

[56] Since a governing body exercises 'defined authority over some of the domestic affairs of the school' and is meant to be 'a beacon of grassroots democracy in the local affairs of the school', it stands in a position of trust towards the school.[10] This fiduciary duty, in the words of the Constitutional Court in *Hoërskool Ermelo*, must be exercised on the understanding that a school is not 'a static and insular entity', and the fiduciary duty 'is to the institution as a dynamic part of an evolving society'. A governing body's fiduciary obligations are not limited only to parents and learners, but to 'the broader community in which the school is located and in the light of the values of our Constitution'.[11]

[57] Since the Schools Act is silent regarding in which entity or person the power to change the name of a school vests, this question must be answered through a contextual and purposive interpretation of its provisions.[12] And since the Schools Act regulates the constitutional right to education, the starting point must be s 39 (1) of the Constitution. That section enjoins courts, when interpreting the Bill of Rights 'to promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Section 39(2) of the Constitution enjoins courts, when interpreting any legislation, to promote the 'spirit, purport and objects of the Bill of Rights.

[58] Our courts have pronounced the following principles apropos the interpretation of statutory provisions, which may implicate fundamental rights:

(a) a generous construction, which affords claimants 'the fullest possible protection of constitutional guarantees' should be preferred over 'a merely textual or legalistic one';[13]

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[9] Schools Act subsections 20(1)*(b)*, *(c)* and *(d)*.
[10] *Hoërskool Ermelo* fn 4 above para 57.
[11] *Hoërskool Ermelo* fn 4 above para 80.
[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[13] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) (*Goedgelegen Tropical Fruits*) para 53.

(b) courts should guard against adopting a 'blinkered' approach which considers a particular provision in isolation without due regard to its context;[14]

(c) this Court, in *Hoban v Absa Bank Limited t/a United Bank,*[15] held that 'context' does not only mean those parts of the legislative provision which immediately precedes and follow the passage, which is being construed, but 'it includes the entire enactment in which the word or words in contention appear';[16]

(d) the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits* emphasised that '[a]lthough the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous';[17] and

(e) words can only be read into a statute by implication if the implication is a necessary one 'in the sense that without it effect cannot be given to the statute as it stands.'[18]

[59] The appellants' singular focus on s 16(1) of the Schools Act, which provides that the governing body may only perform such functions and obligations and exercise only such rights as prescribed by the Act, is fundamentally at odds with the abovementioned canons of statutory construction. The governing body's submission that s 16(1) must be contextually construed, having regard to the purpose of the legislation and other relevant provisions thereof, on the other hand, accords with the approach adopted by the Constitutional Court in *Welkom High School*.[19] In that case the Constitutional Court held that a school governing body is 'akin to a legislative authority within the public school setting, being responsible for the formulation of certain policies and regulations in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education'.

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[14] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 12.
[15] *Hoban v Absa Bank Limited t/a United Bank* 1999 (2) SA 1036 (SCA).
[16] Ibid para 20.
[17] *Goedgelegen Tropical Fruits* fn 12 above para 53.
[18] Rennie NO v Gordon and Another 1988 (1) SA 1 at 22E-F.
[19] *Welkom High School*.

[60] The Constitutional Court further found that even though the Schools Act does not expressly empower a governing body to formulate a pregnancy policy, that power must be implied, having regard to its governance functions and fiduciary obligations. Khampepe J, in finding that the promulgation of a pregnancy policy falls within a governing body's governance responsibilities, said that [w]hile the powers of governing bodies are limited to "defined autonomy over some of the domestic affairs of the school", no other partner in the statutory scheme for the running of public schools is empowered, or is as well placed as a school governing body, to formulate a pregnancy policy for a particular school.' [20]

[61] In my view, and by parity of reason, the same must go for the position of a governing body insofar as it relates to decisions regarding the symbols and identity of a school, including its name. The high court correctly found that there is no other entity better placed than the governing body to decide those issues. The governing body is a democratically elected entity, which represents the best interests of the school, educators, learners and the community served by the school. It is thus best placed to decide on issues pertaining to the school's symbols and its identity.

[62] Counsel for the governing body has correctly submitted that governing bodies regularly exercise several functions, which are not mentioned in the Schools Act, such as fundraising, marketing, meetings with parents and enforcement of the obligation to pay school fees. It would be absurd to suggest that governing bodies are precluded from performing those functions simply because the Schools Act does not expressly empower them to do so.

[63] It is furthermore significant that while the Schools Act does not expressly preclude a school's governing body from taking decisions regarding its name, s 21 of the Schools Act expressly mentions other powers which are excluded from a governing body's governance functions, namely, among others, maintenance of school buildings, determination of extra-mural curriculum; choice of subjects in provincial curriculum policy,

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[20] *Welkom High School* para 66.

and the purchase of textbooks and other educational material or equipment. A governing body may, however, apply to the Head of the Department to be allocated those functions.

[64] In terms of s 20(1)*(m)* of the Schools Act, the Minister or Member of the Executive Council may, by notice in the Government *Gazette* and Provincial *Gazette*, respectively, allocate additional functions consistent with the Schools Act to governing bodies. While the departmental circular was not issued in terms of that section, it is significant that both that circular as well as the guidelines issued by FEDSAS assume that the power to change a school's name vests in its governing body. In *Welkom High School*[21] the Constitutional Court also found it 'instructive' that both the National and Provincial Department of Education issued notices predicated on the assumption that the promulgation of a pregnancy policy falls within the governing body's governance responsibilities.

[65] A further indication of the centrality of governing bodies in matters pertaining to the symbols and identity of a school is to be found in s 12A of the Schools Act. That section regulates the merger of public schools and provides, in subsection 6*(b)*, that the merged interim governing body 'must decide on the budget and differences in codes of conduct and school fees, as well as any issue that is relevant to the merger or is prescribed, until a new governing body is constituted in terms of sections 23 and 28'. That section is also silent regarding the power to decide on a name for the merged school but, in my view, it is axiomatic that that power must vest in the interim governing body.

[66] The submission that governing bodies have implied powers to decide on the name of a school or to change it, is thus compelling and consonant with a contextual and purposive interpretation of the Schools Act. The alternative construction, which the appellants contend for, is manifestly incompatible with the purpose and scheme of the Schools Act and will result in absurd consequences.

Procedural fairness

[21] *Welkom High School* para 65.

[67] In terms of s 3 of PAJA, administrative action, which materially and adversely affects the rights of any person, must be procedurally fair. In terms of subsection 2*(a)*, a fair procedure depends on the circumstances of each case. The minimum requirements for fair administrative procedure are adequate notice of the proposed action; reasonable opportunity to make representations; a clear statement of the proposed action; notice of any right to appeal or review; and notice of the right to request reasons. In terms of subsection 3(4) of PAJA, an administrator may depart from any of those requirements if it is reasonably justifiable, having regard, among others, to the objects of the empowering provisions in terms of which the administrative action is contemplated; the likely effect of the administrative action; and the urgency of the matter.

[68] The question then arises whether the consultative procedure adopted by the governing body conformed to these prescripts. I am of the view that it did for the following reasons. First, it is manifest that the procedure adopted by the governing body was informed by its belief that the school's name must reflect its ethos and be representative of its identity. A debate regarding the appropriateness of the school's name and whether it should be changed could therefore not reasonably be based on a simplistic process that required a 'for' or 'against' answer.

[69] Dr Marais's advice that the decision regarding the name should instead be informed by a dialogue regarding the school's ethos, identity and symbols was therefore rational and ensured that the best interests of the school and its learners would remain cardinal. In my view, the governing body's belief that agreement regarding the school's core characteristics should inform a decision either to change or retain its name was eminently reasonable.

[70] Second, the appellants' criticism of the governing body's decision to stop the consultation process when it had reached a point of 'saturation' is untenable. It is self-evident that in any consultative process a point would be reached when no new ideas are proffered and participants are merely repeating the same views. At that stage it would serve no purpose to continue with the process.

[71] Third, the appellants' insistence that the decision should have been taken through a referendum is impractical and irrational. The implication of that submission is that the governing body should be bound by the majority view, no matter how irrational or harmful it may be to the school. In my view, that proposition is self-evidently flawed. The power to decide on the school's symbols vests in the governing body and it has the fiduciary responsibility to exercise that power in the best interests of the school.

[72] Fourth, the contention that the governing body disingenuously departed from the procedure to which it has committed also has no merit. The letters which the governing body dispatched to persons on its database during June and July 2020, were explicit about the fact that the consultation process also related to the possibility of a name-change.

[73] Moreover, the appellants' contention that participants in the group discussions were prohibited from raising the issue of the school's name is not supported by the established facts. Apart from the confirmatory affidavits filed by some of the facilitators at the discussion groups, the fourth appellant, in correspondence to Mr Roux, expressed his satisfaction with the process and confirmed that participants were allowed to raise the issue of the name-change. The procedure adopted by the governing body was therefore manifestly fair and rational.

The rationality of the decision to change the school's name

[74] The appellants' submission that the decision to change the school's name was taken without due consideration of the relevant information, is not supported by the facts. Although the discussions at the meeting on 6 May 2021 were based on Dr Marais's summary of the Unit's report, all the members of the governing body had been furnished with the report previously and were thus aware of its contents. The decision to review the school's name, subject to further investigation into the financial implications, was therefore taken with due regard to the contents of the report.

[75] I find that the decision to change the school's name to DF Akademie was also taken pursuant to a fair and extensive consultative process during which all interested persons were given an opportunity to express a view. Even though the governing body would not have been bound to implement the majority view, the majority did in fact vote in favour of the new name. The name of Dr Malan harks back to the apartheid era, an association that is fundamentally at odds with the school's ethos of inclusivity and its transformative vision. It is undeniably a hindrance to the school's declared commitment to advance its vision of inclusivity and transformation. The papers contain several poignant statements by learners expressing concern that the school's name, and what it connotes, may negatively impact on their future. The governing body's decision to purge the school of this unfortunate association with a disgraced legacy is thus undeniably rational and in the best interests of the school and all its stakeholders.

[76] In summary then, I find that in changing the school's name, the governing body was acting within the ambit of its implied powers in terms of the Schools Act; that the procedure it adopted to consult interested parties was comprehensive, fair and rational; and that the decision to change the school's name was taken with due regard to, and rationally connected to the information before it. The appeal must therefore fail.

Costs and order

[77] The appellants, relying on the principle enunciated in *Biowatch Trust v Registrar, Genetic Resources and Others*,[22] submitted that the application raises constitutional issues of public importance and they should therefore not be mulcted with costs if the appeal is dismissed. I do not agree. The appellants brought the application in their private and personal capacities. The matter also does not raise any constitutional issues but instead concerns the appellants' determination to preserve a name, which is reminiscent of South Africa's archaic past characterised by racial division, inequality and oppression and is manifestly inconsistent with the constitutional values of democracy, racial unity and equality. I am accordingly of the view that costs should follow the result.

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[22] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[78] In the result, I make the following order:

The appeal is dismissed with costs including the costs of two counsel, where so employed.

J E SMITH

JUDGE OF APPEAL

Appearances

For the appellants:	T I Ferreira
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	Honey & Partners Inc, Bloemfontein
For the first respondent:	J C Tredoux SC
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