REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11/08340

DATE:07/12/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

THE GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Applicant
RIVONIA PRIMARY SCHOOL	Second Applicant
and	
MEC FOR EDUCATION: GAUTENG PROVINCE	First Respondent
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Respondent
DISTRICT DIRECTOR: JOHANNESBURG EAST D9 – GAUTENG DEPARTMENT OF EDUCATION	Third Respondent
CELE: STHABILE	Fourth Respondent
MACKENZIE: AUBREY	Fifth Respondent

DRYSDALE: CAROL Sixth Respondent

J U D G M E N T

MBHA, J:

INTRODUCTION

[1] In this application the applicants seek:

1.1 certain declaratory relief and an order setting aside a decision taken by the Head of Department: Gauteng Department of Education ("*the HoD*"), instructing the Principal of the Rivonia Primary School ("*the school*") to enrol a learner in Grade 1 at the school, alternatively himself enrolling the learner at the school, contrary to the provisions of the admission policy of the school ("*the admission policy*") and not having been taken or arrived at in accordance with the provisions of Circular 21 of 2010 ("*the Circular*");

1.2 an order declaring that the appeal by the learner's parent to, and the decision by the HoD was not in accordance with the

provisions of the admission policy and the Circular and that it be reviewed and set aside; and

1.3 an order setting aside the decision of the HoD withdrawing the admission function delegated to the Principal of the school.

[2] The applicants also seek wider interdictory relief to the effect that:

2.1 the Member of the Executive Council for Education: Gauteng Province ("*the MEC*") and officials of the Gauteng Department of Education ("*the Department*") are interdicted from unlawfully interfering with the governance of the school;

2.2 the first to fifth respondents are interdicted from compelling the school or its Principal to admit learners other than in compliance with the school's admission's policy.

[3] There is also a constitutional issue for determination in respect of which Equal Education and the Centre for Child Law have intervened as *amici curiae*, namely:

3.1 Whether on a proper interpretation of the statutory framework for admissions to public schools in accordance with section 39(2) of the Constitution and with due regard to the fundamental rights to

equality (section 9 of the Constitution) and education (section 29 of the Constitution):

3.1.1 The governing body of a public school is vested with the power to determine the enrolment capacity of that school as an incident of its power under section 5(5) of the South African Schools Act 84 of 1996 to determine the admission policy of a school; or

3.1.2 The governing body's power to determine admissions policy does not extend to the power to determine the enrolment capacity of a school, having regard to the duty of the provincial MEC's for Education under section 3(3) of the South African Schools Act 84 of 1996 to ensure that the public education system can provide school places to all learners of compulsory school going age.

[4] This application was launched on 24 February 2011 and was ultimately enrolled and argued over two days on 3 and 4 October 2011. Having regard to the effluxion of time and the best interests of the learner, the applicants no longer seek to reverse the admission of the learner or to prevent her continued attendance at the school. The remainder of the orders sought remain in dispute for determination by this court.

[5] At the outset, the court commends the stance adopted by the applicants to allow the learner to remain at the school. The court also appreciates the enormous assistance provided by counsel and the professional manner in which matter was presented. I am particularly grateful for oral submissions so ably presented by counsel and the well-prepared heads of argument.

THE FACTUAL MATRIX AND BACKGROUND TO THE DISPUTE

[6] The first applicant, a school governing body duly elected and constituted in terms of sections 16 and 23 of the South African Schools Act 84 of 1996 ("the Act"), has determined a policy governing the admission of learners to the second applicant, a public primary school as defined in section 1 of the Act, which provides *inter alia*, that:

6.1 Having regard to certain material and relevant factors like the number of appropriately sized classrooms, the optimum desk working space requirements of learners, the number of available educators and so forth, the school has the capacity to admit a maximum of 840 learners in all 7 grades, that is 120 learners per grade;

6.2 Applications for admission commence in July and close at the end of September for the enrolment of learners for the following year, as stipulated by the HoD;

6.3 A parent who wishes to enrol a child at the beginning of a particular year, must register the learner in the year preceding the school year in which the learner seeks admission;

6.4 The application for admission must be duly and properly completed on the relevant documentation and be supported by the documentation required under the relevant legislation;

6.5 The admission of learners is determined *inter alia* by the residence of the learner's parents and/or their place of employment relative to the geographical position of the school ("the catchment area").

[7] The school opened the application process for the admission of learners to Grade 1 for the school year starting January 2011 on Tuesday 13 July 2010. On 15 July 2010 the fourth respondent, the mother of the learner, came to the school and collected an application form which she subsequently returned to the school on 21 July 2010. Chronologically, the fourth respondent was the 140th applicant and the learner was allocated number 140 on the "A" waiting list which catered for children whose parents resided or were employed within the school's catchment area.

[8] On 17 August 2010 the school wrote to all prospective applicants, including the fourth respondent, informing them that they would be notified by no later than 5 November 2010 whether or not their applications were

successful. On 26 October 2010 the school wrote to the fourth respondent and notified her that her application for the admission of the learner was unsuccessful and that all unsuccessful applicants' details had been forwarded to the District Office which would communicate with her regarding the learner's admission to a school closest to her residence and/or work area and which had space to accommodate the learner.

[9] On 5 November 2010 the school notified the fourth respondent that the learner had been placed on a waiting list "A" as the school had reached its capacity for Grade 1 for the year 2011. On the same day, the fourth respondent purportedly launched an appeal directly to the Office of the Member of the Executive Council against the non-admission or refusal by the school to admit the learner.

[10] On 2 February 2011 the second respondent telefaxed a letter to the Principal of the school, recording that the learner's parent had approached his office for assistance, that he had perused all documents submitted to him regarding the application for the admission of the learner and that according to the "*10th day statistics*" which relate to the number of learners in the school on the 10th day of the new school year, the school had not reached its capacity. The second respondent instructed the school to admit the learner without delay. This 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 the Department.

[11] On Monday 7 February 2011 the fourth respondent arrived at the school with the learner demanding that the learner be admitted to Grade 1. The Principal suggested that the fourth respondent take the learner home pending the resolution of the dispute concerning the learner's admission which was between the first applicant and the second respondent.

[12] On 8 February 2011 the fourth respondent and the learner returned to the school accompanied by an official from the second respondent's office, Mr Petlele, who demanded that the learner be enrolled in a Grade 1 class at the school. Mr Petlele advised the Principal that the admission function delegated to her in terms of the Circular was withdrawn with immediate effect. On that same day, a notice was telefaxed to the Principal in which it was recorded that the HoD, acting in terms of section 62(3) of the Act, was withdrawing the admission function that had been delegated to her in terms of the Circular in her capacity as the Principal of the school.

[13] The District Office Director, Mr Matabane, also arrived at the school and handed a notice to the Principal in which it was recorded that the HoD had delegated the admission function to Mr Matabane in his capacity as the District Director. The said Mathabane then marched the learner to the nearest Grade 1 classroom and deposited her on an empty desk.

THE MAIN ISSUE FOR DETERMINATION

[14] The central dispute in this application concerns the question whether the capacity of a public school is determined by that school's governing body, having regard to the sectional interests of learners admitted to that school, or by the provincial education department that is under a statutory duty to find sufficient capacity within all the public schools of the province to provide public schooling to all of the school age learners in the province.

THE APPLICANTS' CORE SUBMISSIONS

[15] The applicants' core submissions are, briefly, that:

15.1 In terms of section 5(5) of the Act, which provides that *"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",* a public school's governing body ("*SGB*") is the sole body that can determine its admission policy. This policy must comply with the Constitution, the South African Schools Act 84 of 1996 and the applicable provincial law;

15.2 there is no statutory or other legal power given to the MEC or HoD to determine the capacity of a public school. Determining the capacity of a school is an inherent and necessary incident of any admissions policy;

15.3 the HoD, MEC and departmental officials (collectively referred to as "*the Department*") are bound by the school's admission policy and may not ignore or override it. This follows from the constitutional principle of legality;

15.4 should the Department disagree with any aspect of a school's admission policy, it may not ignore it but should use the remedies available to it to set those aspects aside;

15.5 the HoD has no authority or power to determine a school's capacity;

15.6 departmental circulars are not applicable provincial law; and

15.7 any appeal to the MEC must be fair, providing all parties namely the parents, Principal and school governing body the opportunity to make representations.

THE FIRST TO THIRD RESPONDENTS' CORE SUBMISSIONS

[16] The first to third respondents' contentions can be summarised as follows:

16.1 Having regard to the relevant statutory framework as interpreted in accordance with section 39(2) of the Constitution with due

regard to the fundamental rights to equality and education, which are found in sections 9 and 29 respectively of the Constitution, the question of school capacity is not one which can legitimately be determined by the admission policy drawn up by an individual school governing body. Rather it is one which has to be determined at a systemic level by the provincial education department

16.2 If each public school were entitled to determine how many learners it would accommodate, this would prevent the public educational resources of the province from being used in an equitable and efficient manner having regard to the schooling needs of the learners of the province and would create the risk of a class of school age children being denied access to public education

16.3 The racially discriminatory system of education spending under apartheid has bequeathed to the province a public schooling system in which some schools (the former model C schools of the old "*white*" education department situated in historically "*white*" suburbs) are much better resourced than most other schools in the system. Thus if the school governing bodies of these former model C schools were to be allowed to determine their school capacities at levels far lower than those of the rest of the public schooling system, the racially discriminatory

historical privileges bequeathed by apartheid would be capable of entrenchment under the new democratic order.

THE LEGISLATIVE FRAMEWORK AND THE PRINCIPLES OF STATUTORY INTERPRETATION

[17] Section 29 of the Constitution entrenches the right to education and provides in relevant part that:

> "*(1) Everyone has the right –*
>
> *(a) to a basic education, including adult basic education; and*
>
> (b) *to further education, which the state, through reasonable measures, must make progressively available and accessible.*"

[18] Section 39(2) of the Constitution provides that:

> "*When interpreting any legislation … every court … must promote the spirit, purport and objects of the Bill of Rights.*" (emphasis added)

[19] The Constitutional Court has repeatedly pronounced on the obligations arising from section 39(2) for the interpretation of legislation. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) ("*Hyundai*") at para [23], Langa DCJ stressed that because of section 39(2), "*judicial officers must*

prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section".

[20] In *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* 2007 (6) SA 350 (CC) at paras [26] to [27], the court emphasised that the section 39(2) duty is one in respect of which "*no court has a discretion*" and must "*always be borne in mind*" by the courts. Indeed, this is so even if a litigant has failed to rely on section 39(2).

[21] There are two independent obligations that emerge from the Constitutional Court's jurisprudence in this regard. The first obligation might conveniently be referred to as the "*Hyundai obligation*": This is that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution. Thus, in *Hyundai* the Court held that:

> "*The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*
>
> *… judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.*"

[22] The second obligation is that if the provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that "*better*" promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional. See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras [46], [84] and [107].

[23] Thus, as the Constitutional Court explained in *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para [47]:

> "*Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific right, like the right to a fair trial ….*"

[24] Our Constitution places a duty on all the courts to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values.

[25] The primary right involved in this matter is the right to a basic education. This right is guaranteed by section 29(1)(a) of the Constitution. It is enshrined in the Bill of Rights. In terms of section 7(2) of the Constitution the State must respect, protect, promote and fulfil these rights. Accordingly, the statutory powers, rights and obligations of the applicants and the first to third respondents must be understood in the context of the constitutional

commitment to substantive equality in section 9, and, importantly the constitutional guarantee of access to a basic education in section 29(1)(a).

THE RIGHT TO BASIC EDUCATION

[26] The importance of the right to basic education is underscored by the fact that, unlike other socio-economic rights it is not subject to the limits of "*availability of resources"* or *"reasonable legislative measures".* As Nkabinde J succinctly summed it in *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at para [37],

> "*It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 21(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.*"

26.1 Secondly, central to the quest and government's commitment to transforming the current, unjust and unequal basic education system is not only about redressing past injustices, but importantly it is also about breaking the cycle of poverty that

perpetuates the patterns of class and racial inequality generation after generation. Undoubtedly, the right to education is an empowerment right that enables people to realise their potential and improve their conditions of living. The importance of education as a tool to liberating and affirming people was recognised in *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo* 2010 (2) SA 415 ("*Hoërskool Ermelo*") at para [2] where Moseneke DCJ observed that:

> "*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.*"

[27] Nkabinde J expressed herself at para [42] to [43] as follows:

> "*[42] The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.*
>
> *[43] Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.*"

[28] The same approach was taken by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) which explained the position in General Comment 13 as follows:

> "*Education is both a human right in itself and an indispensible means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.*"

THE RIGHT TO EQUALITY

[29] Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefits of the law. It further provides that equality includes the full and equal enjoyment of all rights and freedoms. Clearly, the Constitution is committed to redressing the injustices of our racist past including the creation of an equal and egalitarian society that is not only formally equal, but substantively equal. Substantive equality requires positive and purposive action to redress current imbalances in the distribution of resources. In *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism and Others* 2004 (4) SA 490 (CC), at para [74], Ngcobo J pointedly if not poignantly observed:

> "*In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that*

> *decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.*"

[30] Expressing the same commitment to dismantling the huge legacy of inequalities spawned by apartheid, Moseneke J said in *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), at para [27] ("Van Heerden") that the Constitution "*enjoins us to dismantle*" all "*forms of social differentiation and systematic under-privilege, which still persist*" and to "*prevent the creation of new patterns of disadvantage*".

[31] While many facets of present-day South African society remain unequal, the inequality is particularly stark and tragic in the realm of basic education. Our society still has a gargantuan challenge to undo what the Constitutional Court described in *Hoërskool Ermelo (supra)* at para [2] as the "*painful legacy of our apartheid history*" that effectively deprived black schools of resources, while lavishing resources on white schools. Regrettably this ill-advised policy resulted in a plethora of socio-economic problems plaguing our society, including the rampant crime. The Constitutional Court explained, in *Hoërskool Ermelo (supra*) at para [46], the root cause of continuing inequality in basic education as follows:

> "*It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced.*

> *They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.*"

[32] It is with that understanding of the right to equality (section 9) and the right to basic education (section 29(1)) of the Constitution in mind, that I proceed to consider the proper interpretation of the South African Schools Act, 84 of 1996 in the context of the specific issues to be determined.

THE SOUTH AFRICAN SCHOOLS ACT, 84 OF 1996 ("*THE ACT*")

[33] The primary purpose of the Act is to provide for the organization, governance and funding of schools. It commenced on 1 January 1997. Section 5 deals with admission to public schools. In terms of section 5(1), a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. In *Hoërskool Ermelo* (*supra*) at para [55], the Constitutional Court recognised that the purpose of the Act is to give effect to the constitutional right to education.

[34] The Act identifies four key role-players in the running of public schools and delineates their specific roles and responsibilities. These are:

34.1 the National Minister of Education who is responsible for norms and standards;

34.2 the MEC who is responsible for establishing and providing schools;

34.3 the HoD who exercises executive authority over the school through the Principal; and

34.4 the school governing body which exercises "*defined autonomy*" over certain domestic affairs of the school.

[35] As will be seen shortly, the school governing body exercises its delineated functions subject to various forms and degrees of oversight, supervision and intervention exercised by the HoD and the MEC in fulfilling their broadly stated functions.

[36] Section 3(1) introduces the notion of compulsory attendance and provides for the compulsory attendance of learners at school. This section states that every parent must cause every learner to attend school from the first school day of the year in which the learner turns seven (7) years, until the last school day of the year in which the learner reaches the age of fifteen (15) or the ninth grade, whichever occurs first.

[37] Crucially, section 3(3) places an obligation on the MEC for education 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 his or her obligation under section 3(3) because of a lack of capacity existing at the date of commencement of the Act, section 3(4) provides that he or she must take

steps to remedy such lack of capacity as soon as possible and must report, on an annual basis, to the Minister on the progress achieved in doing so. Section 12(1) of the Act places an obligation on the MEC to provide public schools for the education of learners out of funds appropriated for that purpose by the provincial legislature.

[38] The Act places the obligation on the HoD to ensure compliance by learners with the requirement of compulsory attendance. It also empowers the HoD to exempt a learner from compulsory attendance.

[39] Section 16(1) of the Act provides that subject to the Act, the governance of every public school is vested in its governing body. This section provides further that the governing body may only perform such functions and obligations and exercise only such rights as prescribed by the Act. The HoD is represented in the school governing body by the Principal of a school.

[40] In *Hoërskool Ermelo (supra)* at para [57], the Constitutional Court defined the primary function of the school governing body as being to look after the interests of the school and its learners. The court further held that the school governing body is meant to be a beacon of grassroots democracy in the local affairs of the school.

[41] Section 16(3) provides that subject to the Act and any applicable provincial law, the "*professional management*" of a public school must be

undertaken by the Principal under the authority of the HoD. "*Professional management*" includes, *inter alia*, the implementation of all educational programmes and curriculum activities, the management of all educators and staff and the implementation of policy and legislation.

[42] Section 20 sets out the functions of school governing bodies and provides that a school governing body must:

42.1 promote the best interests of the school and strive to ensure its development with the provision of quality education for all learners at the school;

42.2 adopt a constitution and develop a mission statement of the school;

42.3 support the Principal, educators and staff in the performance of their functions;

42.4 determine times of the school day;

42.5 administer and control the school's property. The Act provides however that in doing so, the school governing body does not hamper the implementation of the decision made by the MEC or HoD in terms of any law or policy;

42.6 discharge all other functions imposed upon the school governing body by the Act and as determined by the Minister or the MEC;

42.7 section 21 allows for the school governing body to apply to the HoD for the allocation of further functions listed in the section;

42.8 section 22 provides that the HoD may on reasonable grounds withdraw a function of a governing body. Thus in Hoërskool Ermelo (*supra)*, at para [71], the Constitutional Court held that the power to withdraw a function of a governing body extends to all functions of a governing body envisaged in sections 20 and 21. The court found that the school governing body's power to formulate the school's language policy could be withdrawn under section 22.

[43] On matters of discipline, only the HoD has the power, in terms of section 9(2) of the Act, to determine whether or not to expel a learner if such learner has been found guilty of serious misconduct after disciplinary proceedings conducted in terms of the Act. The parent or the learner may appeal against the expulsion to the MEC. If a learner is expelled, and if such learner is subject to compulsory attendance, the Act places an obligation on the HoD to make alternative arrangements for the learner's placement at a public school. The school governing body does not have the powers to expel a learner. If the learner has been found guilty of serious misconduct after due process, the school governing body may impose a suspension for a period not

exceeding seven days or make recommendation to the HoD to expel the learner.

[44] Most importantly, in matters affecting learners' attendance at schools, the Act makes all the decisions of the school governing body subject to the oversight of the HoD. As will show later, this approach applies not only to disciplining learners who are already attending schools, but also in determining how many learners each public school must accept. Section 16(4) of the Act provides that the HoD may close a public school temporarily in the case of an emergency if he or she believes on reasonable grounds that the lives of learners and staff are endangered or that there is a real danger of bodily injury to them or of damage to property. Only the MEC may, in terms of section 33, close a public school permanently. Clearly, the school governing body does not have any role in school closures.

[45] Section 35 of the Act provides that the Minister must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council for Education Ministers and the Minister of Finance. This funding is for non-personnel, non-infrastructural expenditure relating to the daily running of the school. Section 36(1) of the Act places an obligation on a school governing body to take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education. Section 36(2) however, imposes a restriction that the school governing body may not enter into any loan or

overdraft agreement so as to supplement the school fund without the written approval of the MEC.

[46] The school governing body has the duty to establish a school fund and to administer it in accordance with directions issued by the HoD. The school governing body is also required, annually, to prepare the school budget which shows the estimated income and expenditure for the school for the coming year. This budget first has to be approved by the majority of parents at a special general meeting. Again, the school governing body has some autonomy but operates subject to the direction and oversight of the MEC and the HoD.

[47] Clearly, the Act makes provision for an important but limited role for school governing bodies in managing schools. One sees that across a variety of functions, school governing bodies are subordinate to the HoD and the MEC.

THE PROVINCIAL ADMISSION POLICY REGULATIONS : CIRCULAR 21/2010

[48] In June 2010 the second respondent distributed the Circular, issued in terms of section 5(7) of the Act and Regulation 2(1) of the Admission Regulations promulgated by General Notice No. 4138 of 2001 under the Gauteng School Education Act No. 6 of 1995 (“the Regulations”), and which

purports to regulate the management of admissions to public ordinary schools for 2011, the relevant provisions of which provide that:

48.1 No school will be declared full before the admission process is finalized;

48.2 The District Director is the person who determines and declares a school to be full and his or her decision in this regard will be informed by *inter alia*, the school's capacity and admission data;

48.3 The District Director shall consider declaring a school full upon receipt of a written application together with supporting evidence, from the Principal;

48.4 A school that is declared full by the District Director will be informed in writing;

48.5 The learner enrolment capacity of a school is determined by the HoD;

48.6 A parent of a learner who is dissatisfied with the Principal's decision not to admit a learner may lodge an objection to the District Director by completing Annexure B1 (to the Circular); and

48.7 A parent of a learner may appeal against the decision of the District Director to the MEC by completing the MEC's appeal form.

[49] In terms of Regulation 2(1) of the Regulations, the administration of the admission process is the responsibility of the HoD. For reasons of convenience, the HoD generally delegates the school based stage of this process to the school Principal. However the ultimate responsibility remains that of the HoD. Regulation 13(1)(a) provides that if a Principal, acting on behalf of the HoD refuses to admit a learner to a school, he or she must provide reasons in writing for his or her decision to the HoD and the parent and the HOD must either confirm or set aside the decision made by the Principal. This provision supplements section 5(9) of the Act by requiring the HoD to consider whether to confirm or set aside a refusal of admission before there is a need for the MEC to consider an appeal against a refusal of admission. Clearly, Regulation 13(1)(a) creates a statutory safeguard which the HoD can use:

1. to correct errors made by his delegated officials, like the school Principal, in administering the admissions process,

2. to remedy admission decisions which have been taken in circumstances which are calculated to create a reasonable apprehension that the learners who have been refused admission have not been treated fairly, and

3. to address systemic imbalances in the admission of learners to public schools and thereby to ensure that unplaced learners are accommodated within the schools best placed to admit them.

[50] Following from what I have stated above, the applicant's contention that the Circular is not legislation or regulation and that there is no empowering statute or regulation authorising its creation and, consequently, that it has no binding effect save to the effect that it echoes already binding legislation, is misconceived and simply incorrect. The Circular clearly forms part of the applicable provincial legislation that regulates admissions to public schools in Gauteng Province. Consequently, it is binding on the applicants in this case.

DOES THE SCHOOL GOVERNING BODY'S POWER TO DETERMINE THE SCHOOL ADMISSIONS POLICY INCLUDE THE POWER TO DETERMINE THE MAXIMUM CAPACITY OF THE SCHOOL?

[51] The applicants contend, on the strength of section 5(5) of the Act, that there is no statutory or other legal power given to the MEC or the HoD to determine the capacity of a public school and that determining the capacity of a school is an inherent and necessary incident of any admissions policy which is determined solely by the school governing body. They contend accordingly, that as section 5(5) of the Act does not confer any power on the MEC or the HoD to determine the admission policy of a public school, their

only remedies in respect of unreasonable conduct by a school governing body are judicial review or the withdrawal of functions from a school governing body.

[52] In support of these submissions, the applicants place reliance on the following decisions:

52.1 In *Minister of Education, Western Cape and Others v Governing Body Mikro Primary School and Another* 2006 (1) SA 1 (SCA) ("*Mikro*") the Supreme Court of Appeal held that:

52.1.1 Section 20(1) of the Act provides that a school governing body must perform a number of functions, including the determination of the admission policy, and neither the Act nor the Norms and Standards confer any power on the MEC or HoD to determine the admission policy of a public school;

52.1.2 In the event of a school governing body unreasonably refusing to change its language policy, and by necessary implication, also its admission policy, the MEC and the HoD may take steps to have such unreasonable refusal reviewed and set aside in terms of section 6(2)(h) of PAJA. Secondly, the HoD may, subject to certain

procedural requirements, withdraw a function of the school governing body; and

52.1.3 Although the Department admits learners to a public school, the admission policy of the school is determined by the governing body of the school. By admitting learners or instructing the Principal to admit learners contrary to the admission policy of the school, the Department substitutes its own admission policy for that of the school. In so doing, it is acting unlawfully as it does not have the power to determine an admission policy for a school. Even if the admission policy is invalid, the Department, MEC or the HoD does not, in terms of the Act, have the power to determine an admission policy for the school.

52.2 In *Queenstown Girls High School v MEC, Department of Education, Eastern Cape and Others* 2009 (5) SA 183 (CK) ("*Queenstown Girls High*"), the Full Bench of the Eastern Cape High Court, Bisho, held that it is not the responsibility or function of officials in the Department to second-guess a Principal's decision relating to the admission of a prospective eligible learner to a public school. The court held further, that if the HoD appoints the Principal of a school to act under his or her authority in giving effect to the school's admission policy, other

officials in the Department have no authority to instruct the Principal to change his decision or to instruct him to admit a particular learner to the school.

52.3 In *Welkom High School and Others v HoD Education Free State Province and Others* (Cases 5714 and 5715/2010) ("*Welkom High School*") the court held that the HoD and the Department of Education in the Free State, had no power to override the admission policy of a school and that a school governing body exercises defined autonomy over particular domestic affairs of a school such as the admission policy and language policy of the school.

[53] The applicants submit that it is clear that *in casu*, the HoD and the Department had no right to disregard the school's admission policy and instruct the school to admit the learner. It follows, so it was submitted, that the decision to withdraw the delegation to the Principal was designed to give effect to unlawful conduct and could not have been *bona fide*.

[54] The contentions by the applicants, however, beg the following questions:

54.1 Does the power to determine a school's admissions policy include the power to determine how many learners it would accommodate?

54.2 Even if the school governing body did have the power to set out in its admissions policy how many learners a school could accommodate, would that bind the HoD and the MEC when they exercise their powers under the Act?

[55] As I have pointed out above, the Act has delineated specific roles and functions for various role-players in the running of public schools, one of which is the school governing body. Clearly, the Act envisages a very defined role for the school governing body in the running of a public school. As the Constitutional Court aptly pointed out in *Hoërskool Ermelo* (*supra*) the school governing body's role is confined to focusing on the "*local affairs*" of the school. Even within the context of admissions, while the school governing body is empowered to determine a school's admission policy, the application thereof must be made in a manner determined by the HoD. An ultimate right of appeal to the MEC exists. This right of appeal to the MEC in respect of a decision refusing admission, by definition applies to specific decisions in respect of individual learners. Most importantly, the Act even goes so far as to empower the HoD to withdraw a function of the school governing body.

[56] In contradistinction, the Act places the obligation to realise the rights of learners on the MEC and the HoD. It creates the obligation of compulsory attendance but requires the MEC to ensure that every learner in his or her province is accommodated in a public school. It also gives the HoD the right to decide whether or not to admit or to expel and then gives the relevant

learners the right to appeal against those decisions to the MEC. Even where the HoD decides to expel a learner, the Act obliges him or her to ensure that if the learner is subject to compulsory attendance, the learner is accommodated in another public school.

[57] This scheme of the Act is important to understanding section 5(5), and the impact of an admission policy on the manner in which the HoD and the MEC carry out their functions under the Act.

THE MEANING OF SECTION 5(5) IN THE LIGHT OF SECTIONS 3(3) AND 3(4)

[58] While section 5(5) empowers the school governing body, subject to the Act and applicable provincial legislation, to determine the admission policy of a school, the exact meaning and content of that function is not spelt out in the Act. Significantly, despite the fact that the applicants invoke and rely on section 5(5), they make no attempt whatsoever to define what the section encompasses.

[59] From the provisions of the Act it is clear that the function of determining the admission policy of a school, is not an all encompassing one since the Act has allocated certain admissions related powers and functions to other role-players as I have demonstrated above. This means that, under the Act, the MEC is the ultimate arbiter of whether or not a learner should be admitted to a public school.

[60] Section 5A(1)(b) of the Act, empowers the Minister, after consultation with the Council of Education Ministers, to prescribe by regulation minimum uniform norms and standards for "*capacity of a school in respect of the number of learners a school can admit*". According to section 5A(2), the norms and standards contemplated in subsection (1) must provide for, but not be limited to the following:

> "*(b) in respect of the capacity of a school –*
>
> *(i) the number of teachers and the class size;*
>
> *(ii) quality of performance of a school;*
>
> *(iii) curriculum and extra-curricular choices;*
>
> *(iv) class room size and;*
>
> (v) *utilisation of available class rooms of a school.*"

[61] Once such norms and standards have been prescribed, section 58C(2) provides that the MEC "*must ensure that the policy determined by a governing body in terms of section 5(5) and 6(2) complies with the norms and standards*". In addition, section 58C(6) provides that the HoD 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.*"

[62] It is clear from the provisions of sections 5A and 58C of the Act that in providing for the promulgation of norms and standards on capacity, the Act envisaged national government limiting the ambit of the power conferred on a school governing body to adopt an admission policy.

[63] In my view it would provide significant guidance to school governing bodies and provincial governments on the issues raised in this matter if the National Minister of Basic Education were to act in terms of section 5A read together with section 58C, and promulgate norms and standards on capacity.

[64] It is however important to point out that the Act does not only confer powers on the national sphere of government in this regard. These provisions must be read with the obligations on the MEC, which are contained in sections 3(3) and (4) of the Act, to ensure that there are enough school places so that every child who lives in a province can attend a public school. This would be consonant with the Constitutional right of access to basic education for all children. Section 3(3) imposes an obligation on the MEC to ensure that there is sufficient capacity so that each individual child in the province can attend a public school. Section 3(4) imposes an additional, remedial obligation on the MEC: if he or she is unable to comply with the obligation under section 3(3), he or she must take steps to remedy such lack of capacity as soon as possible. Thus sections 3(3) and (4) impose two types of an obligation and power on the MEC:

64.1 The first is to take steps, at a provincial and systemic level, to increase capacity within different parts of the province. This may entail building new schools, increasing the capacity of existing schools by building new classrooms and taking similar steps.

64.2 The second is to take individualised action to ensure that "*every child*" is able to attend school and to take steps "*as soon as possible*" to remedy any lack of capacity preventing any child from attending school. Most importantly, this obligation is only triggered when, on the facts of a particular case, there is a threat that a child will be prevented from accessing a public school due to lack of capacity.

[65] Clearly, the obligation established in section 3(3) has two related but distinct components. The first obligation is to ensure that there are enough school places. The second obligation is to ensure that every child in the province can attend school. The second obligation cannot be totally subsumed under the first. In other words, the obligation should not be reduced simply to the act of building classrooms numerically sufficient, in theory, to accommodate the aggregate of all learners in the province. The MEC is also duty-bound to utilise the full range of his or her powers to ensure that every child attends school.

[66] In my view, the applicants' contention that the MEC or HoD has no statutory or other legal power to determine the capacity of a school is unsustainable. It would be extraordinary if the question of school capacity were to fall outside of the provincial education department when that department is statutorily bound by section 3(3) of the Act, to ensure that every child in the province can attend school.

[67] I am also of the view that the powers of MEC's under sections 3(3) and 3(4) should ideally be exercised in terms of policies adopted by provincial governments in respect of the capacity of public schools. This will ensure that the first power to take steps at a systemic level is embodied in a carefully developed policy that sets out the objectives of the relevant provincial government in respective of capacity. The adoption of a policy will also guard against the arbitrary exercise of the second remedial power to act in respect of individual learners who are threatened with exclusion from a public school due to capacity constraint.

[68] The applicants contend that the provisions of sections 3(3) and 3(4) do not override the power conferred on school governing bodies but that they only qualify such power. Although they do not squarely address the nature of the obligations and the concomitant powers of the MEC under section 3(3) and (4), the applicants appear to contend that the power of school governing bodies under section 5(5) is insulated from the MEC's powers under section 3(3) and 3(4).

[69] This argument is however flawed having regard to the following:

69.1 the school governing bodies' power under section 5(5) is expressly made subject to the Act;

69.2 the applicants have stopped short of defining what is understood by the term "*admissions policy*" and why it includes within its ambit the power to declare the maximum capacity of a school; and

69.3 to the extent that it is textually plausible to interpret sections 3(3) and (4) in the manner contended for by the applicants, a court is obliged to choose an interpretation which best gives effect to the rights contained in the Bill of Rights, an aspect I now turn to consider.

[70] As the first to third respondents correctly submit, it cannot be disputed that the racially discriminatory system of education spending under apartheid has bequeathed to this country and to the Gauteng Province in particular, a public schooling system in which some schools (the former Model C schools of the old "*white*" education department situated in historically "*white suburbs*") are much better resourced than most other schools in the system. The first to third respondents have ably demonstrated that the traditionally white schools have systemically lower learner-to-class ratios than historically black schools. It is also true that in most cases, formerly black schools support a larger

number of students without the physical resources of privileged schools in traditionally white areas, or the ability to hire additional teachers.

[71] Although all schools are now open to children of all races, the consequences of apartheid forced removals and racially exclusive zoning mean that the majority of formerly white schools remain disproportionately white, while the majority of black schools continue to serve almost solely black children. As Langa DP noted in *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at para [32]:

> "*The effect of apartheid laws was that race and geography were inextricably linked.*"

[72] The second applicant is no exception to this pattern of continued racial disparity. It operates in a predominantly white area and continues to serve a predominantly white group of children while maintaining the lowest learner to class ratio in the area. The applicants contend that the school governing body had to raise private funds for the construction of nine of the school's thirty classrooms and to employ additional teachers to attain the current low learner to class ratio in the area. However, whilst the applicants' desire to offer the best possible education for its learners is laudible, the Constitution does not permit the interest of a few learners to override the right of all other learners in the area to receive a basic education.

[73] In my view, providing a basic education across race and class requires government intervention in the preliminary power of school governing bodies to determine admissions policies. Leaving schools to determine their admission policy, including the power to determine their capacity, and subject only to appeals in individual cases, one unwittingly creates space privileged schools can use and manipulate that power to fortify rather than dismantle existing inequalities. Schools such as the applicants could thus craft admissions policies that allow them to continue to offer a premium education to their learners, while ignoring the increased demand their action places on other schools in the area that are already operating with fewer resources and higher learner-to-class ratios.

[74] In my view, interpreting the Act to deny government the ability to intervene to ensure an equitable distribution of learners across all schools in the areas prevents it from fulfilling its obligation under section 7(2) of the Constitution to "*respect, protect, promote and fulfil*" the right to equality and to a basic education. Denying government the power to distribute and equalise schooling resources is a serious barrier to its valiant and laudable attempts, as was stated in *Van Heerden* (*supra*) at para [31], to "*eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege*". As committed South Africans this is the new vision that we should all be aspiring for. A society where, irrespective of race or class, every child can, without hindrance, access education.

[75] The problem is not confined to the admission policies of traditionally privileged schools. The question that arises is what would happen if a large number of schools grouped together decided to alter their admissions policies to reduce the number of learners they would accommodate? On the applicants' approach, the MEC would be powerless to intervene to ensure that there are enough school places for every child who lives in his or her province to attend school as required by section 3(3) of the Act. The MEC would simply have to accept such attempt to derail the movement towards substantive equality and in the process deny children their right to a basic education. Such an approach is not only untenable but is incongruent with the Constitutional vision of transforming our society, including all its facets into an equal and egalitarian one where people will be given the space and opportunities to realize their full potential.

[76] The applicants' reliance on the decisions in *Mikro (supra), Queenstown Girls High School (supra) and Welkom High School (supra)* in support of their submission that their interpretation of the Act is such that it prevents government interference with a school governing body's determination of its admissions policy is misplaced. The singular and important distinguishing factor *in casu* is the existence of Regulation 13(1)(a) of the Admission Regulations in the Gauteng Province, which empowers the HoD to inter alia, either confirm or set aside the refusal of an admission of a pupil to a public school, and which does not exist or find application in the respective provinces where these above-named cases originated. Hence the facts of this case are distinguishable.

[77] Clearly, while the power to determine an admission policy vests in the first instance in school governing bodies, that power *must,* as the court found in *Hoërskool Ermelo (supra)* at para [61] "*be understood within the broader constitutional scheme to make education progressively available and accessible to everyone"*. This is a constitutional imperative. The court also emphasised the vital role of government in regulating the language, and by logical extension, the admissions policies of schools. It held that permitting the power to rest exclusively with school governing bodies would be inconsistent with the state's duty to ensure that there are enough school places for every child who lives in a province in terms of section 3(3) of the Act, and its duty to ensure that a public school must admit learners without unfairly discriminating in any way as determined by section 5(1) of the Act. In fact to allow this kind of situation to prevail might subvert the very noble ideals by government to ensure equal and quality education for all.

[78] I accordingly conclude that section 5(5) does not and should not be interpreted to include the unqualified and exclusive power to any school governing body to determine a school's maximum capacity.

[79] It has to be stressed that the school governing body does not have or should not have interests which are at odds with the department. Both must be committed to one vision of offering a basic education to all children in the area where it is situated. As the Constitutional Court held in *Laerskool*

Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd 2009 (10) BCLR 1040 (CC), at para [3]:

> "*SGB's are part of the state apparatus designed to secure the provision of the right to education under the Bill of Rights.*"

[80] In circumstances in which capacity limits threaten to prevent one or more children from access to education by attending a public school within a province, the MEC, quite apart from his or her obligation to take steps to increase capacity, has the power under section 3(4) to intervene in relation to one or more schools to require that children threatened with being deprived of access be accommodated. In those circumstances, this power is not ultimately subject to the contents of any admission policy adopted by a school governing body, as this would render it impossible for the MEC to discharge this obligation. This power exists in addition to the HoD's power under section 22 of the Act to remove the function of a school governing body to determine its admission policy. The section 22 power permits the HoD to take over the function of determining the school's admission policy. The MEC's power under 3(3) and 3(4) does not permit him or her to take over the determination of the admission policy. It does however permit him or her to establish the policy basis upon which questions of school capacity should be determined by school governing bodies, and to take remedial steps to ensure that every learner is accommodated in a manner that maintains a fair allocation of educational resources in the province.

[81] Needless to say, the principle of legality which underpins our Constitution, requires that the power on the HoD and the MEC to intervene to ensure access to a public school will need to be exercised lawfully. I have no doubt that in intervening in the manner they did in this matter, they acted within the powers entrusted to them.

[82] For the reasons set out above, I find that the applicants have not made out a case that:

82.1 section 5(5) includes the power of school governing bodies finally to determine a school's maximum capacity; and

82.2 that the admissions policy determined by the school governing body binds the MEC and HoD.

THE PROCEDURAL FAIRNESS COMPLAINT: DECISION OF THE HOD INSTRUCTING THE PRINCIPAL TO ENROL THE LEARNER, ALTERNATIVELY HIMSELF ENROLLING THE LEARNER AT THE SAID SCHOOL

[83] I have set out the structure of Regulation 13(1)(a) above. In terms of this Regulation there was, in my view, no need for the HoD to consult the Principal or the school prior to taking his decision because the reasons for their refusal of the learner's admission had to be conveyed to him administratively. In any event, the Principal had furnished the reason for the

learner's unsuccessful application in her email of 5 November 2010 wherein the Principal advised the learner's parent that the reason for the non-admission of the learner was that "*the school had reached its capacity for Grade 1 2011*".

[84] Furthermore, quite apart from the Principal's aforesaid e-mail, the Department and its representatives consulted with the school on four different occasions in an attempt to resolve the problem relating to the learner's admission to the school before the HoD made the decision to set aside the school's decision not to admit the learner. Such meetings occurred on 17 September 2010, 23 September 2010, 5 October 2010 and on 30 November 2010.

[85] In my view, the Department was accordingly well aware of the school's attitude in relation to the application for the learner's admission and there was no violation of procedural fairness in the HoD's decision on 2 February 2011 to set aside the decision to refuse the learner admission to the school.

[86] The HoD acted lawfully in deciding to overturn the Principal's refusal of the learner's application for admission. Once the learner's application had been accepted by the HoD, she had to be admitted to the school. It follows that there can be no valid complaint about the HoD's direction to the Principal to admit her.

[87] In the light of all that has been stated above, it follows that the orders sought in prayers 2 to 7, 9 and 10 of the Notice of Motion are inconsistent with and fail to acknowledge the power of the MEC in terms of sections 3(3) and (4) of the Act to take remedial steps to ensure that no child is prevented from accessing a public school due to incapacity fall to be dismissed. In any event, the specific order that was sought to remove the learner form the school has since been abandoned by the applicants and has become academic.

THE COMPLAINT IN RELATION TO THE WITHDRAWAL OF THE ADMISSION FUNCTION DELEGATED TO THE PRINCIPAL OF THE SCHOOL

[88] The applicants aver that the withdrawal of the admission function delegated to the Principal of the school was not exercised *bona fide*.

[89] It is common cause that on 8 February 2011, the fourth respondent and the learner came to the school accompanied by Mr Tlhage Petlele, an official employed in the office of the HoD who advised the Principal that the admission function delegated to her in her capacity as Principal of the school in terms of Circular 21/2010 is withdrawn by the second respondent. A telefax to this effect was sent to the Principal on the same date in which the HoD confirmed that the Principal's delegated admission function was withdrawn in terms of section 62(3) of the Act.

[90] The first to the third respondents admit the withdrawal of the Principal's powers but contend that the reason for the withdrawal was that she had failed to give effect to the decision of the HoD to overturn her original failure to admit the learner to the school and that it was as a result, untenable for the delegated power to remain in place.

[91] The relief sought must be considered in the light of the broader context within which the department has to discharge its constitutional duty to provide public schooling to all learners of school going age and within the statutory framework of the Act and the Admission Regulations. As I have pointed out above, in terms of Regulation 2(1) the HoD is responsible for the administration of the admission of learners to a school. The Principal acting in her official position as such and also as an employee of the department, administers the process of admissions on behalf of the HoD.

[92] I have already found that the HoD acted lawfully when he overturned the Principal's decision to refuse the learner admission to the school. Whilst the HoD acted within his rights and powers to set aside the Principal's decision, the question arises whether the procedure followed in withdrawing the Principal's delegated powers was done in a fair manner.

[93] It is common cause that the withdrawal of the Principal's powers was done summarily and that she was never afforded an opportunity to furnish reasons why her delegated powers of admissions should not be withdrawn. In my view, the withdrawal of the Principal's delegated powers in relation to

the admission of pupils at the school was widely couched and was unnecessary in the circumstances. This is because this entire dispute concerned a single learner in whose respect I have already found that it was pertinently legal for the Department to intervene regarding her admission to the school.

[94] As the Principal was never afforded an opportunity to state her case before the withdrawal of her delegated powers of admissions, I find that the HoD's conduct in this respect was arbitrary and unlawful and consequently falls to be reviewed and set aside. Even though the Principal was acting as the delegated official and employee of the Department, the nature of her job function as a school Principal charged with the administration of admissions of learners to the school, is such that she should have been afforded an opportunity to furnish reasons why her delegated powers of admissions should not be withdrawn. This is in line with the age-old *audi* alteram principle. It is obvious that such arbitrary action by the HoD must have had a negative impact on the general administration of admissions at the school. I am accordingly of the view that the withdrawal of the delegated power could have been couched in a more specific manner and confined to the learner in this case.

[95] For these reasons I am of the view that the withdrawal of the delegated powers of the Principal was unlawful and falls to be set aside. It follows that the applicants have made out a case for the grant of this specific order in the Notice of Motion.

THE PUBLIC NAMING OF THE LEARNER INVOLVED

[96] An issue I find very disturbing in this case has been that the learner involved has been openly and freely named, not only in the present court papers, but also in the media debates that have taken place around this case.

[97] The learner's mother, who is the fourth respondent, states in her answering affidavit:

> "*After the meeting on 9 March 2011 this matter was discussed on 702 Radio and reported in The Star Newspaper. In these reports the identity of the parents was mentioned as well as the grade of the learner. This conduct is prejudicial to* [the learner] *and has a potential to isolate her.*"

This is not denied or dealt with in the applicants' replying affidavit.

[98] The Constitutional Court has referred to the fact that it has adopted a practice of not disclosing the identities of children involved in cases before it whether by referring to the children or their parents. In *Johncom Media Inv Ltd v M and Others* 2009 (4) SA 7 (CC), at para [42], Jafta AJ said:

> "… *this court could in terms of section 172(1) prohibit all publication of the identity of and any information that may reveal the identity of any party or child in any divorce case before any court. This is the position adopted in the Child Care Act* [section 8(3) No. 74 of 1983]*. It is also important to emphasise that this court has adopted the approach of not disclosing the identities of children and vulnerable parties in all appropriate cases.*"

[99] Regrettably, however, by the time that this occurs, it is often too late for the damage caused by the unfortunate disclosure already made to be undone.

[100] The present case demonstrates the point. At the commencement of the proceedings I made an order that the identity of the learner be no longer publicly disclosed. However, the fact of the matter is that it is already publicly known that the learner was the subject of the dispute between the school, the Department and her mother. This is particularly disturbing given the serious allegations and counter-allegations that have already been made.

[101] In my view, the applicants ought not to have named the learner in the present application at all. Furthermore all the parties – the applicants, the Department and the learner's mother – ought to have prevailed upon the media to ensure that they did not reveal the learner's identity. In any event the media were under an independent constitutional duty not to reveal the learner's identity. The duties not to reveal the learner's identity flow from the learner's rights under the Constitution, including:

101.1 the right to have her best interests to be paramount in all matters concerning her, in terms of section 28(2) of the Constitution;

101.2 the right to be protected from maltreatment, abuse or degradation, in terms of section 28(1)(d) of the Constitution;

101.3 the right to human dignity, in terms of section 10 of the Constitution; and

101.4 the right to privacy, in terms of section 14 of the Constitution.

[102] As the Constitutional Court has explained in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at para [18]: the learner's rights are independent from those of his or her parents:

> "*Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.*"

[103] There can be no doubt that the applicants, the department, the learner's parents and the media all bore constitutional duties in relation to the learner's rights as set out above. In the circumstances this Court implores all parties in similar situations in the future to be sensitive insofar as reporting on and the revealing the identity of children in proceedings of this nature is concerned.

[104] Another disturbing aspect that needs specific mention is the unsatisfactory manner in which the learner was brought to the second

applicant's premises both on 7 and 8 February 2011, and ultimately deposited in an empty desk in one of the Grade 1 classes. No doubt this must have been traumatising for the learner to be at centre stage while there was ongoing dispute between her mother, the officials from the Department and some school personnel regarding her admission. All of this could have been avoided by leaving the learner at home whilst the problem played itself out.

RECOMMENDATION TO THE NATIONAL MINISTER OF BASIC EDUCATION

[105] I direct that this judgment, specifically the contents of paragraphs [60-63] above, be brought to the attention of the National Minister of Basic Education.

COSTS

[106] Save for the fourth and fifth respondents, all other parties are of the view that each party should pay their own costs. Regard being had to the nature of this case, in particular that it is of public interest and is designed to give guidelines on the interpretation of statutory powers and obligations of all the role-players involved in the education of our children, the suggestion finds favour with the court.

[107] It is noteworthy that the fourth and fifth respondents elected not to file any heads of argument. Furthermore, the applicants saw it fit to abandon

seeking the relief that the learner be removed from the school. I have also taken into consideration that there are serious disputes of fact between the applicants and the fourth and fifth respondents which are so far-reaching that no costs order could be made without first hearing oral evidence.

[108] In the circumstances, I am unable to assent to the fourth and fifth respondents' request that they be awarded costs by the applicants.

[109] I accordingly make the following order:

1. Section 5(5) of the South African Schools Act No 84 of 1996, does not appropriate to a school governing body the unqualified power to determine a public school's admission policy

2. The power to determine the maximum capacity of a public school in Gauteng Province vests in the Gauteng Department of Education and not in the school governing body.

3. The Gauteng Department of Education has the power to intervene with the school governing body's power to determine the admission policy of a public school.

4. The Member of the Executive for Education, Gauteng Province, is the ultimate arbiter whether or not a learner should be admitted to a public school.

5. The application in respect of prayers 2 to 7, 9 and 10 of the Notice of Motion is dismissed.

6. The application succeeds in respect of prayer 8 of the Notice of Motion.

7. Each party shall pay their own costs.

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B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATES OF HEARING	:03-04 OCTOBER 2011
DATE OF JUDGMENT	:07 DECEMBER 2011
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