IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 86367/2017

DATE: 2018-01-15

**DELETE WHICHEVER IS NOT APPLICABLE**
**(1) REPORTABLE: YES / NO.**
**(2) OF INTEREST TO OTHER JUDGES: YES / NO.**
**(3) REVISED.**
**DATE**
**SIGNATURE**

In the matter between

GOVERNING BODY HOËRSKOOL OVERVAAL APPLICANT

and

HEAD OF DEPARTMENT OF EDUCATION RESPONDENT

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**JUDGMENT**

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**PRINSLOO (J):** This matter came before me in the urgent Court of last week during the session of 9 to 12 January. The case had to stand down until Thursday 11 January because of the late filing of a replying affidavit. I heard lengthy argument on 11 and 12 January and when the court adjourned at 19:00 on Friday 12 January I undertook to give judgment this afternoon Monday 15 January.

Logistically there was no opportunity to prepare a written more comprehensive judgment. I regret this because delivering an

extempore judgment as I will do this afternoon can be a time consuming affair and I apologise to those present in this very hot courtroom.

On Thursday I also heard argument on two point in limine raised by the respondents namely that no case for urgency had been made out and also that the application was bad for non-joinder. I delivered two separate judgments both in favour of the applicants. It is not necessary to revisit details of those judgments.

In essence the urgent relief sought is the reviewing and setting aside of an instruction issued on 5 December 2017 by the District Director (Second Respondent) to the principal of Hoërskool Overvaal, a single medium Afrikaans secondary school which is the second applicant to place 55 grade eight English learners with the school for the 2018 school year starting on 17 January.

Broadly speaking the School Governing Body (SGB) which is the first applicant argues that the school is full to capacity; that neighbouring English medium schools have sufficient capacity to accommodate 55 grade eight English learners. That the second respondent's instruction is procedurally flawed and also unlawful and that it also offends against the school's language police.

These contentions are in dispute. Before me Mr Lamey appeared for the applicants and Mr Toma appeared for the respondents. I turn to a brief synopsis and background sketch. The second applicant is an Afrikaans single medium high school ("The School") situated in the Vereeniging area. It is a public school as defined in Section 1 of the South African School's Act 84 of 1996 ("The Act").

In terms of Section 15 of the Act every public school is a juristic person with legal capacity to perform its functions in terms of the Act. I was informed by counsel that such school is also an organ of state as defined in the constitution.

The first applicant is the governing body of the second applicant. The first applicant is a governing body as contemplated in Section 16 (1) of the Act which provides: "Subject to the Act the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act".

The first four respondents are the provisional and national government officials as described in the heading and will be referred to where applicant in this judgment. The fifth respondent is the principal of the school.

The sixth and seventh respondents are two neighbouring English single medium schools also with the status of public schools as intended by Section 15 of the Act. It is useful and relevant for present purposes to at this point mention brief details of the locality of the school and some neighbouring schools.

The school is situated in a suburb of Falcon Ridge in Vereeniging and on the border between Sonland Park and Falcon Ridge. The Department of Education of Gauteng Province has created certain school districts, each with a district director. As such Overvaal falls within the Sedibeng East district apart from Overvaal there are five other secondary or high schools in the town of Vereeniging which fall within

the same school district and which are in relative close proximity to one another.

This is relevant because in terms of Regulation 510 which are the regulations relating to the admission of learners to public schools ("The Admission Regulations") promulgated in terms of the Gauteng School's Education Act 6 of 1995 ("The Gauteng Act") with commencement date 3 July 2001.

The District Director (Second Respondent) in placing a learner at a particular school must apart from considering the proximity of the school to the learner's residence or the parent's workplace also consider the capacity of the nearest school to accommodate the learner relative to the capacity of other schools in the district. These other neighbouring schools are:

1. General Smuts High School and English Medium (the seventh respondent).
2. Phoenix High School an English single medium secondary school (the sixth respondent).
3. Drie Riviere High School a double medium Afrikaans/English secondary school.
4. Riverside High School an English single medium secondary school.
5. Hoërskool Gimnasium (formerly Vereeniging Hoërskool) a single medium Afrikaans High School.

According a printout of an extract from Google Maps attached to the founding papers in order to give an overview of the locality of the

aforesaid schools in relation to Overvaal, Overvaal is located approximated the following distances from neighbouring school:

1. From General Smuts High School eight kilometres.
2. From Phoenix High School eight kilometres.
3. From Drie Riviere High School eight kilometres.
4. From Riverside High School ten kilometres.
5. From Hoërskool Gimnasium six kilometres.

Of all the aforesaid schools in the town of Vereeniging only Overvaal and Hoërskool Gimnasium are single medium Afrikaans schools.

I turn to mentioning some statutory provisions by which basic education in public schools including the admission of learners to such schools which is the central issue in dispute in this case is government. They can be tabulated as follows:

The Act, the Gauteng Act, the admission regulations, the regulations relating to minimum uniform norms and standards for public school infrastructure which was published in the Government Gazette on 29 November 2013 in terms of Section 5 (K) (1) (a) of the Act, the norms and standards for language policy in public schools determined by the minister of basic education (fourth respondent), in terms of Section 61 of the Act and also determined in terms of the language and education policy, in terms of Section 3 (4) (m) of the National Education Police Act 27 of 1996.

In terms of Section 5 (5) of the Act the admission policy of a public school is determined by the governing body of a school subject to the

Act and any applicable provincial law. In terms of Section 6 (2) of the Act the governing body of a public school is empowered to determine the language policy of a public school subject to the constitution, the Act and applicant provincial law.

It is trite law that the exercise of the powers and duties of a Head of Department which is the first respondent and the District Director which is the second respondent in terms of the admission regulations and other laws is subject to the legality principle and also amount to administrative action and as such is subject to review in terms of the promotion of Administrative Justice Act 3 of 2000 ("Paja").

Where the language policy of the school also comes into play in this dispute it is convenient to make a few remarks in regard thereto. I have mentioned that the governing body (here the first applicant also commonly referred to in the papers as the SGB or School Governing Body) may determine the language policy of the school.

Section 6 (2) of the Act to which I have referred stipulates that: "The governing body of a public school may determine the language police of the school subject to the constitution. This Act and any applicant provincial law. It is actually subject to the constitution, this Act and any applicable provincial law."

Section 18 (A) of the Gauteng Act provides: "(1) The governing body of a public school must determine the language policy of the school subject to the constitution, the South African School's Act 1996 (Act 84 of 1996). This Act and any norms and standards for language police in public schools as determined by the Minister in consultation

with the Department. (2) The governing body of a public school must submit a copy of the school's language policy to the member of the executive counsel for vetting and noting within 90 days of coming into office and as may be required. (3) If at any time the member of the executive council has reason to believe that the language policy of a public school does not comply with the principals set out in Subsection 1 above or the requirement of the constitution the member of the executive council after consultation with the governing body of the school concerned direct that the language policy of the school be formulated in accordance with Subsection 1."

I now turn to a chronological sequence of events which in essence led to the dispute which ultimately inspired the applicants to seek relief in the form of this urgent application. I have mentioned that in terms of the Act the governing body or SGB is empowered to determine the admission policy of the school.

Section 5 (5) of the Act stipulates 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."

In this case much turns on the capacity of the school to accommodate learners and more particularly for present purposes grade eight learners for the 2018 school year. Broadly speaking the applicant contend that the school is actually operating beyond its capacity. Whereas it is argued by the respondents that the school has not reached full capacity and is in a position to accommodate more learners for 2018, more particularly 55 English grade eight learners to

which I will refer in due course.

One of the main areas of dispute turns on the number of learners per class which ought to be accommodated. The respondents contend for 40 whilst the applicants contend that the present ratio of 36 per class prevailing at the school already exceeds relevant safety limits prescribed by expert consultants approached by the school for advice. The respondents also argue that the 17 classrooms of the school ought to be increased by converting some of the laboratories of the school into classrooms.

Of particular importance regarding the dispute about the capacity of the school in my view is what I consider to be compelling evidence to the effect that neighbouring English medium school, notably the sixth and seventh respondents have capacity to accommodate many more than 55 grade eight English pupils for 2018. This is why the applicants when launching this urgent application joined these two respondents as interested parties.

Evidence of the capacity of those two schools was tendered in the founding papers by the chairperson of the first applicant who naming the two principals testified that they informed him of the additional capacity. In the opposing affidavit this evidence was rejected as inadmissible hearsay and the deponent (second respondent) declared under oath that these schools are “full to the brim”.

Attached to the replying affidavit filed on 9 January one finds written communications by both these principals confirming the extra capacity. There is no suggestion that the respondents made any effort

to verify the capacity of these two schools before filing the opposing affidavit.

To counter the complaint that the evidence of the two principals as conveyed to the SGB chairperson amounts to inadmissible hearsay and also to deal with the vague statement of the respondents that both schools were “full to the brim” the chair person as he was entitled and supposed to do obtained affidavits from both these principals.

It is convenient and important to quote the content of these two affidavits both deposed to under oath before different commissioners of oaths on 8 January and attached to the 9 January replying affidavit. I am not mentioning the names of the principals, although of course their names appear on the affidavits which form part of the record.

The principal of Phoenix High School whom I will refer to as Mr B or B says the following on oath on 8 January 2018: “To whom it may concern, I AB in my capacity as principal at Phoenix High School Vereeniging and as employee of the Gauteng Department of Education hereby state that I am staying neutral in the case of Hoërskool Overvaal against the Department of Education.

I acknowledge that I was contacted around the 15 November 2017 about numbers where we only had 56 pupils in our admissions list that was accepted and registered on our school’s system. At this currently stage we have about 740 learners expected to arrive on the first day of school in January 2018 from grade eight to grade 12. Our feeder area correlates with that of Hoërskool Overvaal as by the five kilometre radius set out by the Department of Education. Yours in Education, Mr

AB Principle."

As I said it was deposed to before a commissioner of oaths. Mr AB also on 8 January 2018 in a separate document also deposed to on oath says the following: "To whom it may concern, additional information to my initial affidavit. We currently have approximately 125 grade eight learners registered on our system for 2018. We have the capacity to take up to 240 learners for grade eight. Yours in Education" as he quaintly put is, "Mr AB Principle".

The principle of General Smuts High School to whom I will refer to as Mr M or Mr JLM says the following in his affidavit deposed to before a commissioner of oaths dated 8 January 2018: "To whom it may concern, the purpose of this letter is to verify that General Smuts High School still have place for learners for the 2018 academic school year. We have been gradually been losing learners which meant a reduction in staff due to the staff post establishment regulations. We stared last year with about 1 572 learners and ended with around 1515.

Our enrolment for 2018 grade eight stands 215 (confirmed) plus another 87 for who we have applications forms but they have not yet registered with us. Last year we ended up with 337 learners in grade eight. There is therefore a definite capacity to enrol more grade eight learners.

We have had an enrolment of 1 800 before so can take that amount if necessary but over the last years averaged 1 700 until Phoenix opened their doors. Since then our learner enrolment have been in the 1 500 plus category.

Although I have forwarded this information to you the position of this institution remains a neutral one and I have forwarded this information to you on your request. Yours Sincerely JLM Principle."

It does not state to whom this was addressed but it may well have been the first applicant or his attorney. This is important evidence which no doubt serves as strong support for the case of the applicants in view of the applicable statutory provisions and other considerations.

Sadly there was a dramatic development on 11 January when the respondents no doubt realising the significance of these affidavits for their case applied to file new evidence in the form inter alia of shorthand written affidavits by the same two principles dated 9 January to the effect that the affidavit they had made on 8 January were after all incorrect and their schools are in fact full.

I ruled that the second respondent should file an affidavit if so advised to explain why new evidence should be admitted and gave the applicants leave to answer if so inclined. On Friday evening 12 January after hearing counsel I ruled that the affidavits would be received as part of the record for consideration. I will revert to this "sting in the tail" development later in this judgment.

On this subject of capacity it is important to have regard to the provisions of Section 5 of the Admission Regulations as well as Regulation 8. Regulation 5 (8) provides: "Notwithstanding the provisions of any school admission policy, in the case of a learner who has not been placed at any school within 30 days after the end of the admission period the District Director may place that learner at any

school: (a) which has not been declared full in terms of Regulation 8; (b) in respect of which there are no remaining unplaced learners on a waiting list."

Regulation 5 (9) stipulates: "Within 45 school days after the end of the admission period the Head of Department must ensure that every learner who has applied to a school within the province is placed at a school within the province."

Regulation 5 (10) provides: "In placing a learner at a particular school in terms of Sub-regulation (8) and (9) above, the District Director and Head of Department respectively shall have regard to; (a) the proximity of the school to the learner's place of residence or his/her parent's place of work; (b) the capacity of that school to accommodate that learner relative to the capacity of other schools in the district."

Regulation 8 provides: (1) notwithstanding the provisions of the admission policy of a school or the provisions of any national or provincial delegated legislation or any determination made in terms thereof for the purpose of placing learners whose applications for admission have not been accepted at any school in the public schooling system until such time as norms and standards contemplated in Section 5 (A) (2) (b) of the South African Schools Act are enforced the objective entry level learner enrolment capacity of a school shall be determined by the Head of Department. (2) The Head of Department or his or her delegate may on his or her own initiative or at the request of the school itself declare the school to be full for the purposes of entry level admissions at the school. (3) The school that has reached its objective

entry level enrolment capacity must be declared full by the Head of Department or his or her delegate for the purpose of entry level admissions. (4) a school that is declared full by the Head of Department of his or her delegate for the purpose of entry level admissions will be informed in writing." I add that it is common cause that the norms and standards contemplated in Section 5 (A) (2) (b) of the Act are not yet enforced.

I make the following observations:

1. Regulation 5 (8) is not couched in peremptory terms in view of the use of the word "may".
2. It is common cause that the Head of Department (HOD) who is also the first respondent never determined the objective entry level learner enrolment capacity. He is the only official authorised to do so given the mandatory language and the use of the word "shall" in Regulation 8 (1).
3. On the weight of the evidence to which I will make more references I have come to the conclusion that the school has reached its objective entry level learner capacity in the spirit of Regulation 8 so that the HOD "must" in any event declare it full so that Regulation 5 (8) (a) probably cannot be applied.
4. In any event before placing learners in the spirit of Regulation 5 (8) the second respondent and HOD are implored in peremptory language "shall" to have regard to the capacity of the school to accommodate the learners "relative to other schools in the district". The "objective entry enrolment capacity" is defined as

follows in the Admission Regulations: "Means the act of officially admitting a learner (s) to a total school programme in the maximum amount that the school can accommodate in a classroom and / or facilities as determined by the HOD on consideration of, amongst others the following factors: The availability of space, classroom and educators; resources linked to teaching and learning; available state resources; and the immediate need of the learner (s) to receive basic education."

As pointed out earlier the second respondent and the HOD did not as implored in peremptory language have regard to the capacity of the school to accommodate the learners "relative to other schools in the district". Had they made the effort they would inevitably have discovered the abundance of capacity of at least the sixth and seventh respondents as described. I make this remark despite the new evidence submitted, details of which I will refer to later.

This would have precluded them from placing any more children with the school let alone:

1. English children at an Afrikaans medium school when there was ample room for them in neighbouring English medium schools. In any event such placements offends against the norms and standards for language policy in public schools published in terms of Section 6 of the Act by the then Minister of Education as will be pointed out and;
2. Doing so at a school used to capacity after the schools had closed for the December holiday by insisting that in the nick of

time during the holiday period some laboratories of the school had to be restructured into extra classrooms when as will appear later they were already in full use as they are today during the 1980's.

The school building was initially commissioned on 1 January 1980. Any attempt to restructure the facilities or dispose thereof will not be in the interest of the school and its learners. As recently as 2016 the department itself authorised the school to offer a new subject as part of an expanded curriculum programme.

For this purpose one of the 18 classrooms had to be specially converted leaving the total number of ordinary classrooms at 17. The letter which the department wrote to the school's principal the fifth respondent on 19 April 2016 reads as follows:

"Dear Colleague, it is my pleasure to inform you that the school has met all the conditions for full approval to offer electrical power systems. Please inform your school management team of this decision. With thanks, Don Harry Persat, Director FET CC. Date 19 April 2016."

A copy of the letter was sent to the then District Director Ms Maloi who did not object to this development. Now it appears that the respondents are attempted to force the applicants in an arbitrary fashion on very short notice to convert to a double medium institution when it is not practically possible to do so.

I make some more remarks about capacity. Section 5 (A) of the Act deals with minimum norms and standards which the Minister may prescribe by regulation for basic infrastructure and capacity in public

schools. Section 5 (A) (2) provides that these minimum contemplated in respect of school infrastructure must provide for but need not be limited to "…vi laboratories for science, technology, mathematics and life sciences.

In the replying affidavit the arbitrary allegation by the respondents in the opposing affidavit that the school has 21 classes is denied and the document signed by the school official Mr Esbend as recently as November 2017 confirming that there are 17 classes and dealing with various laboratories is dealt with. This is Exhibit H30.

I quote brief extracts from the evidence. "24.3. Another assessment was done during November 2017 by the same official who brought with him the completed assessment of 2014 and presumably to assess any changes since the previous assessment. This time it was attended to by the principal Mr Rabie who subsequent to the completion of the assessment together with Mr Esbend was signed by Mr Rabie with the official school stamp dated 27 November 2017. I point out that it was on this occasion that the original number of classrooms which was numbered as 18 in 2014 was changed to 17. Below they change on the document it can be seen that it was signed by Mr Rabie and Mr Esbend.

> 24.4. I was advised by the principal that the reason for the change from 18 to 17 in the number of classrooms was as a result of the fact that permission was granted by the department (Annexure H30) to present a subject called Electrical Technology Power Systems for which a special facility was required. To present the

subject a class requires special electrical equipment which makes a class unsuitable to be used as an ordinary class.

24.5. It is further to be noted from the completed information form that the specialist facilities have also been attended to and been numbered for example two physical science laboratories, two live signs laboratories, three computer rooms, a library, a multi-media room and an art and culture room as well as one facility for hospitality and consumer studies. Last mentioned subject is the new description for 'huishoudkunde'.

24.6. All of these specialist facilities are utilised in full in order to meet the requirements of the curriculum and subjects that the school offers. In the light of this the deponent fails to state how the number of 21 classrooms has been derived at. I need to add that the original assessment form which was completed by Mr Esbend was taken by him back to the department and a copy was left with the principal Mr Rabie. I deny that there are 219 learners less capacity of the school.

24.7. I need to emphasise that when one considers the capacity of the school there are a number of factors to be considered not mentioned and which have clearly not been considered by the deponent. One has to take into consideration all of the facilities, in particular the ordinary classrooms of 17 which are required also for the register classes of each class in each grade. The entire curriculum which the school offers and which were approved by the department other resources connected to the teaching of the

curriculum, the rotating rooster in respect of each grade and all classes, the number of educators, physical space in classes for learners, classroom size as well as the utilisation of all facilities and available classrooms in order to present all of the various subjects in respect of all of the grades and classrooms size. There are no additional separate classrooms available in Overvaal considering all the aforementioned in order to create a separate English learning class for grade eight in a parallel medium setting if one fully appreciates how a parallel medium school functions.

24.9. Nowhere does it appear from the answering affidavit that the first respondent whose duty it is has in fact determined the entry level learner and enrolment capacity of Overvaal at any stage.

24.10. One would expect him to do so prior to the commencement of an application period in each year in respect of all schools in particular district as envisaged by Regulation 8 of the Admission Regulations. Had the first respondent done so it is submitted that he should have informed the school accordingly so as to enable the school to make representations or to give input where that assessment does not correspond with the assessment of capacity by the governing body. Determination of capacity is also vitally important so as to enable the District Director and Head of Department to fulfil their functions in terms of Regulation 5 (10).

24.11. Nowhere does it appear in the answering affidavit that the second respondent and deponent of the answering affidavit has herself embarked on an exercise to determine property the

capacity of Overvaal and other schools in the district in particular those who share feeder zones."

For their case that there are 22 classrooms the respondents rely on minutes of a meeting recording that Ms Maloi the second respondent's predecessor once visited the school and counted 22 classrooms. There is no affidavit by Ms Maloi. In the light of the department's own certification by Mr Esbend this suggestion is clearly wrong. The allegation by the respondents that the school would still have capacity to accommodate 55 English learners even if there are 17 classrooms and the arbitrary suggested use of a standard of 40 learners per class are compellingly dealt with in reply.

As to the offer by the respondents that they will send one English educator along with the 55 English learners the applicants respond as follows in reply:

"29.1. Again the provision of an English educator does not resolve the capacity problem as there is no additional classrooms available for this purpose. In any event I fail to understand how one additional English educator could be used to accommodate 55 learners in one class. That in itself would exceed the department's own norm of 40. It is further inconceivable how one English educator would be able to educate grade eight learners in all nine learning areas for grade eight. This is just an illustration of the irrationality and unreasonableness of the department's approach especially considering that other schools who share the same feeder zone with Overvaal such as Phoenix and to some extent

also General Smuts have capacity.

29.2. I further need to point out that the appointment of any educator in terms of Section 20 (1) (i) of the Act, of the Schools Act has to be recommended by the governing body before such appointment. This statutory requirement is simply not considered."

As to the demand for classrooms and laboratories to be converted on short notice over the holiday period the following is said in reply:

"52.1. I deny that the conversions were unauthorised as previously stated and that it is in the interest of the school and its existing learners to convert the specialised rooms to ordinary classrooms. That would destroy to some extent the curriculum pertaining to specialised subjects, which curriculum the department is aware of and was approved.

52.2. Even if this was theoretically possible it certainly cannot be implemented immediately as from 2018. The irrationality and unreasonableness is so patent that it requires no further motivation."

Over the years the school's admission policy it seems was determined by the SGB and received as the circumstances and numbers changed. In the founding affidavit it is stated that in May 2017 the school also appointed independent consultants to determine and advise the school on the number of learners the school can accommodate considering its existing infrastructure and facilities and considering various laws and regulations that have to be taken into account.

Such laws included the infrastructure norms and standards and national building regulations and laws pertaining to occupational, health and safety. It included also a risk assessment and report from a fire consultant. The consultants namely X-Factor Safety Consultants whose report forms part of the founding papers found and stated in the report that the school can only accommodate 598 learners and even the current enrolment level in 2017 of 612 learners poses a risk of overpopulation which held certain concomitant safety risks. The conclusion of the experts is formulated as follows at the end of a lengthy and detailed report:

"According to the national minimum uniform norms and standards for school infrastructures the school can accommodate approximately 598 students. The current number of students is 612 and this is one of the reasons that the school has a very high risk when it comes to traffic accommodation and fire risk (evacuation of children)" and the conclusion reads as follows:

"Taking into consideration that the school currently accommodates 612 high school children the total space needed for this children we highly recommend that no more children must be enrolled or allowed. Furthermore if you take the risks involved in overpopulation in the school it would be in the best interest of the school and the students not to overpopulate the school. Our professional opinion of the specific school is to keep the numbers as it is considering the growth over the next few years."

The admission policy itself compiled by the school is a detailed

affair. Extracts appear from the founding papers. These are some of the explanatory notes:

"1. The SGB has made a contribution to the advantage of the learners have brought about class sizes of approximately 30 square metres for effective education and not to raise school capacity.

2. In regard to the national curriculum statement on hospitality studies January 2008 a hospitality studies class should not hold more than 20 learners.

3. With regard to occupational safety there should not be more than 24 learners in a laboratory at a time.

4. Toilets and basins are already over utilised.

5. Currently there are no opportunities for expansion of the grounds nor are there any available funds from the SGB.

6. Sports fields have only enough space for 650 spectators (one person per square metre see table 2 attached).

7. There are two educators on the roaming time table in other words they do not have classes."

For present purposes the (reviewed) admission policy of the school was first submitted in March 2015 to the department and thereafter again in July 2015, on 3 March and 8 April 2016 and on 28 February 2017. Throughout this period no response was received from the department and no difficulties were raised with policy. The school applied the policy in 2015, 2016 and 2017 for purposes of the admission of learners together with the admission regulations.

The first time that a response was received from the department in which it commented in detail on several clauses of the policy was by way of a letter dated 26 October 2017 received on 31 October 2017. The letter of 26 October 2017 was received after the stipulated admission period and written by the first respondent. He states at the outset that the admission policy of the school "does not comply with the applicable law". The letter contains many references to many subjects such as for example the admission of non-South African citizens which subjects do not appear to be directly relevant for present purposes and did not receive a great deal of attention in the papers.

What is perhaps closer to home for purposes of deciding the present dispute is what is stated in paragraph 26. "Clause 18 of the admission policy provides that the SGB has determined that the school's maximum capacity for learner admission is 610 for the entire school, 31 learners per class and 122 learners per grade. However the norms and standards of the learner/teacher ratio is one in 40 therefore the abovementioned learner number per class is *prima facie* proof that the school is under utilising its classroom capacity and thus can enrol more learners. The department reserves the right to verify the school's learner capacity."

On the weight of the evidence the right to verify the school's learner capacity was never exercised in any meaningful way. It is also useful to refer to the conclusion and the remarks in the letter of the first respondent: "38. The content of Schedule B of the admission policy insofar as it relates to the learner enrolment capacity is noted. Please

be advised that the department reserves the right to confirm the school's infrastructure capacity and utilisation.

39. In view of the above it is advised that Hoërskool Overvaal and/or the school governing body of Hoërskool Overvaal cannot use the proposed admission policy for placement of learners for the 2018 academic year.

40. You are further advised to review the school's proposed admission policy and ensure that it complies with the applicable law and then resubmit it for certification once all of the abovementioned concerns and or issues have been addressed."

As mentioned there is no compelling evidence that "the right to confirm the school's infrastructure capacity utilisation" was ever exercised this in the light of the details as to capacity appearing from the reviewed admission policy and the report of the independent experts. There was also no warning of an intention to force the school to place 55 new English learners on short notice. Only the request to review the proposed admission policy and resubmit it for certification.

In the found affidavit the following is said about the letter of 26 October (H5 to the founding affidavit) received by the SGB on 31 October:

"25.18. The effect of this is that despite the fact that the department did not make the effort to verify the school's capacity as stated in its admission policy it rejects it and demands that the school enrols a number of additional learners which would substantially exceed its learner capacity. He has no factual basis to reject the

school's determination of its capacity. Such conduct is highly unreasonable and against the spirit of cooperation and the partnership model which the Schools Act requires.

25.19. The HOD also did not make any effort to determine the objective enrolment capacity of the school as he is required to do in terms of Section 8 of the admission regulations.

25.20. He erroneously uses the infrastructure norms and standards in terms of Section 5 (A) (2) (a) of the Schools Act which only provides for the maximum of learners of 40 per class and has nothing to do with capacity or learners/educator ratio as envisaged by Section 5 (A) (1) (b) read with Section 5 (A) (2) (b) of the Schools Act."

In answer to the letter of 26 October the chairperson of the SGB wrote a lengthy letter, H6 to the founding affidavit on 15 November 2011 dealing in compelling fashion with what was said on 26 October in H5 and concluding with an appeal that it was not in the interest of learners to increase the learner intake beyond what had already been determined through the normal admission process and or to introduce English as a mode of instruction. There was no answer to the chairperson's letter of 15 November.

Then out of the blue although there had been earlier meetings notably in 2016 and early 2017 when officials of the department suggested conversion to dual medium infrastructure came the written instruction of 5 December 2017 from the second respondent to the school principal in the following terms. I quote part of this short letter;

1. “Attached please receive the list of learners who have applied to and qualify for placement at Overvaal Secondary School in 2018.
2. You are kindly instructed to allocate space for them in the school as they are in the catchment area around the school and qualify for the right to education in the nearest school from their place of residence.”

It should be mentioned that there are also minutes of a meeting of 4 December between the officials of the department including the second respondent and the school principle Mr Rabie, fifth respondent which emerged for the first time as an annexure to the answering affidavit. Although the date for placement is not mentioned there is a suggestion that two English classes were to be introduced to the school.

Reservations expressed by the principal are minuted but the second respondent according to the minutes “encouraged the principal to do right and discouraged him from resigning”. She asked the principal to be strong and he must “commit to fighting for transformation”.

Attached to the replying affidavit one finds a summary by Principal Rabie of what transpired as far as he was concerned at the 4 December meeting. I quote a few extracts representing parts of his version of exchanges between him and the second respondent which I trust fairly reflect the gist of the exchanges.

1. “ Ek het ook gesê dat ons getransformeer het, net nie op taal van onderrig nie. Sy het gesê ons kan sê wat ons wil. Mense sien dit nie as transformasie nie.

2. Ek het ook gesê dat die onderwyser by Overvaal se moedertaal Afrikaans is en dat hulle hulleself beter kan uitdruk in Afrikaans, moedertaal onderrig bly die beste en ek wens alle kinders kan onderrig word in hulle moedertaal. Ek het gesê dat parallel medium werk in graad agt en nege maar sodra jy vakkie kies moet jy dubbel medium gaan. Die Direkteur het my gevra of het ons 'n studie gemaak van dubbel medium en ons kan kyk na Drie Riviere.
3. Sy het my gevra of ek dink daar is 'n behoefte deur Engelse leerders om Overvaal by te woon. Ek het geantwoord dit kan so wees.
4. Ek het dit aan hulle gestel dat Mnr. Botha van Phoenix gesê het hy kort leerders en dat hy my geskakel het in die verband.
5. Ek het ook gesê dat hy aan my verduidelik het dat Falcon Ridge, Sonland Park, Arcon Park en Duncanville sy voedingsarea is. Hulle het my nie geantwoord nie.
6. Die Direkteur het aan my gevra hoe sal ek voel as die skool begin en Overvaal is op die voorblad van die koerante, wat gaan ek maak as daar massa aksie in die strate voor die skool is, as die MEC die skool besoek, as my gesin gedreig word.
7. Ek het ook gesê dat ek kan bedank waarop sy gesê het dat ek dit nie moet doen nie en 'n sterk leier moet wees.
8. Sy het ook gesê dat dit nie 'n goeie ding is nie [audio faulty].”

It is minuted that the meeting then adjourned and continued on the 5 December between Mr Rabie and some officials evidently led by Ms

Matlare, another senior official who also attended the 4 December meeting and apologised for the absence of the second respondent. I quote a few extracts listing exchanges between Mr Rabie and Ms Matlare.

1. “Me. Matlare vra my of ek toe gedink het oor die saak. Ek sê aan haar dat dit die heel beste vir Overvaal sal wees om 'n Afrikaanse skool te bly.
2. Sy sê dat ek hulle verkeerd verstaan. Ek sê nee, ek verstaan duidelik, hulle wil hê ek moet sê dat ek hulle sal ondersteun om 55 leerders te plaas. Ek sê dat hulle vir my die naamlys moet gee sodat ek dit met die beheerliggaam bespreek.
3. Sy sê ek moet die beheerliggaam uitlos waarop ek antwoord ek kan nie, my beheerliggaam is 'n aktiewe beheerliggaam wat oor sekere sake beheer vat en leiding gee en dat hulle my sal hof toe vat as ek teen beleid optree. Ek moet die saak met hulle bespreek.
4. Sy sê dat hulle van distrikskantoor sal bel om vir die ouers te sê dat hulle toegelaat word tot die skool. Ek het gesê dit kan nie gebeur nie. Ek moet eers met die beheerliggaam praat en hulle toestemming kry.
5. Sy sê toe dat ek die 28 leerders moes gevat het aan die begin en dat sy namens die departement 'n brief sou skryf aan die ouers van die Engelse leerders om te sê dat dit nie haalbaar is nie omdat die departement nie die nodige finansies en hulpbronne het om hulle by Overvaal te plaas nie. Die Direkteur het toe vir

my 'n brief gegee en 'n naamlys."

On 7 December the attorney of record of the applicants wrote a letter in answer to the 5 December instruction. It was addressed to the first respondent HOD and signed and copied to others including the second respondent Mr Rabie and the principals of Phoenix and General Smuts High Schools. It is a letter dealing comprehensively with the 5 December instruction and also the 15 November which was never replied to.

Mention is made of the instruction of 5 December to place an additional 55 learners over and above the 142 learners already placed and that there is no physical space for more learners distinguishing this case from the well-known case of *The Head of Department Mpumalanga Department of Education v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC).*

Mention is made of many unanswered letters and the tendency of the respondent to ignore valid requests and suggestions from the applicants. The respondents are reminded of the positive duty placed on both the SGB and the department to engage with one another as laid down in *MEC for Education Gauteng Province v Governing Body Rivonia Primary School and Others 2013 (6) SA 582 (CC).*

It is suggested that where some of the regulations had not been properly applied and for other reasons mentioned the decision to place the additional learners could be illegal. The respondents were urged to reconsider the placement as there was in any case no space for extra learners and to consult with the neighbouring English school principals

who had indicated that they had ample space.

The respondents were urged to reply by 14 December failing which the applicants would have no choice but to follow the undesirable route of approaching this court for urgent relief. There was no answer. This application was then launched and served on 20 December and set down for last Tuesday 9 January. So much for the chronological sequence of events and developments in relation thereto.

I turn to the questions of the language policy and legality. The urgent review launched by the applicants is not only based on the review grounds laid down in Section 6 of Paja but also on the principal of legality, which means broadly that an administrator exercising or purporting to exercise certain powers must do so only within the ambit of the powers vested in him or her or lawfully conferred upon him or her. See *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) at 399 (c) to (e).*

As to the decision of the second respondent to force the single medium Afrikaans school to place at short notice and against compelling evidence that it is full to capacity 55 English grade eight pupils the following is pointed out in the replying affidavit.

> "14.1. Furthermore the second respondent makes no mention and has clearly not considered not the general norms and standards that are applicable to a language policy and which have been made in terms of Section 6 (1) of the Schools Act by the Minister of Basic Education (fourth respondent). These norms and

standards were promulgated in November 1997 and published in the Government Gazette. They are applicable to language rights and admission of learners.

14.2. Section (B) (2) thereof states that a learner must choose the language policy of teaching upon application for admission to a particular school.

14.3. Section (B) (3) then states: 'Where a school uses the language of learning and teaching chosen by the learner and where there is place available in the relevant grade the school must admit the learner.' (My note: The adverse in my view must also be true that where a school uses the language of learning and teaching not chosen by the learner the school is not compelled to admit the learner).

15.1. Therefore although the applicants have no intention to overemphasise language policy as a single medium language policy at the expense of other factors such as capacity of the school and the capacity of a neighbouring school language remains a relevant factor to be taken into account for purposes of admission and cannot simply be ignored.

15.2. The department cannot negate this aspect and cannot ride [indistinct] over the language policy of the school in the manner in which the department seeks to do in this case by merely instructing the principal of the school to admit further English speaking learners thereby forcing the school to change to and implement a parallel medium policy.

15.3. Furthermore the initial numbers of 136 learners to be admitted during the admission period were in the admission process finalised on the basis that they were approved by the department and also accepted by the school after complying with all criteria including choice of language and accordance with the law and guidelines for admission.

15.4. Incorrectly numbered 13.2. The balance making up the number of 142 was as a result of some initial unsuccessful applicants who were disapproved by the department and who successfully appealed and / or objected or where initial disapprovals by the department were rectified by the department. The school has no power or means to place learners on the system disapproved by the department. It can only accept learners approved by the department. There were also material inconsistencies in the administration process by the department as alluded to in the letter of FEDSAS dated 28 July 2017, Annexure H10."

I add that this letter was also not [inaudible]. I add that the deponent to the replying affidavit which is the first applicant also submits that the accusations by the second respondent of lack of transformation is self-destructive in the sense that where the school does not want to exceed its current capacity it also affects the accommodation of Afrikaans speaking learners in future if the growing demand continues which he expects will be the case.

The department is also fully aware that the school has a number of

black learners whose choice of language for education has been to be in Afrikaans, who have been admitted in the past and have also been admitted for purposes of 2018. In this regard the deponent refers to a particular example where after the initial application period and during the stage when the successful and unsuccessful applicants had to be determined the admission of an Afrikaans speaking black learner Rehabetswa Bopape who went to school at the Handhawer Primary School in Vereeniging (an Afrikaans/English duel medium primary school) to Overvaal was initially disapproved by the department. Her parent Mr Jeffrey Bopape had to submit an objection in terms of the admission regulations during September 2017. A copy of this is attached to the replying affidavit. The appeal was successful and young Bopape was placed with Overvaal.

Over and above this learner there are in total eight black learners whose choice of language is Afrikaans who form part of the 142 learners that were finally placed for admission with Overvaal. Moreover the school through the first applicant chairperson makes it clear on more than one occasion in the papers that in a situation where an Afrikaans school has enough capacity and neighbouring schools have none an attitude of cooperation for the greater good may be called for but the opposite on the overwhelming evidence analysed earlier applies in this case.

It is also noteworthy that the prescribed application for admission to a public school forming part of the admission regulations makes specific provision for the language preferences of the learner to be

recorded as well as the language of learning and teaching at the particular school. This one assumes must flow from the norms and standards for language policy promulgated by the Minister in terms of Section 6 (1) of the Act to which I have referred. In result I cannot with respect accept the argument offered on behalf of the respondent that language is irrelevant for purposes of deciding whether or not a school can be forced to accept learners seeking tuition in a language different from the one offered at the school.

For all these reasons I have come to the conclusion that the decision of the second respondent of 5 December offends against the principle of legality. In this regard it is also useful to bear the provisions of Section 18 (A) of the Gauteng Act in mind which I have already quoted. It appears from the papers that the language policy was duly submitted to and received by the department in the spirit of Section 18 (A) (2). The same as it happens applies to the admission policy as already illustrated earlier.

However there was no compliance whatsoever with the provisions of Section 18 (A) (3) requiring the member of the executive council (third respondent) if he feels that the language policy of a school is non-compliant to direct that such compliance be brought about after consultation with the SGB. Nothing of the kind happened. There was certainly no authority for the District Director second respondent not even mentioned in Section 18 (A) to unilaterally override the school's language policy.

I add that the failure by the Head of Department the first

respondent to determine the objective entry level learner enrolment capacity of the school (as he is implored in peremptory language to do by Regulation 8 of the Admission Regulations) in the face of compelling evidence by the school and experts engaged by it that the school is operating beyond its capacity fortifies the conclusion that the second respondent who is not even mentioned in Regulation 8 exceeded her powers in conflict with the doctrine of legality by unilaterally overriding the language policy of the school.

Counsel for the applicants referred me to some authorities where the Constitutional Court and the Supreme Court of Appeal (SCA) according to counsel "did not approve unfair and unprocedural conduct pertaining to policies even if those policies may infringe the constitution".

The *Ermelo case Supra* 2010 (2) SA 415 (CC), *HOD Department of Education Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) and the *Mikro Primary School* case [2005] 3 SA 436 (SCA). In Ermelo at 445 (c) to 445 (b) one finds authority for the proposition that where the HOD did not like the language policy of the school he had to act within the confines of the statute and the law and when he failed to do so he acted unlawfully and in breach of the constitutional principle of legality. See also the Welkom case at paragraph [72].

I turn to a different subject namely a serious dispute as to whether or not the 55 learners forming the subject of this case are all indeed still in need of being placed at the school or other schools for that matter. It

is alleged in the founding affidavit that after the 5 December instruction the following was established from the department's system by an official of the school Ms Nagel "as far as these 55 applications are concerned which places the accuracy of the list in doubt".

The following is said in the founding affidavit on this subject:

"26.2.1. The following was then established from the department's system as far as these 55 applications are concerned which places the accuracy of the list in doubt:

1. Nine applications were disapproved by the district due to no documentation.
2. 26 were accepted at another school.
3. Eight English speaking applicants were approved by the district for placement at Overvaal.
4. Three were placed by the department on the list of English learners although they were accepted by the school as Afrikaans speaking learners.
5. One applicant was transferred from another school.
6. One was a late application.
7. Seven applicants could not be located on the system under the name of Overvaal."

In the answering affidavit only the following is said in this regard:

"Contents herein are denied as they lack factual validity. The department submits that the 55 learners are learners who are not placed at any school and the District Director acted in accordance with her powers in terms of Regulation 5 (8) of the Gauteng Admission Policy to

place the learners at Overvaal."

Finally I revisit the dramatic "sting in the tail development of 11 January" already referred to when the respondents applied to file fresh affidavits by the two principals of Phoenix and General Smuts to the effect that what they had stated in their affidavit of two days earlier was after all wrong and that they had since discovered that their schools were in fact full.

I have recorded the contents of the original affidavits of the two principals which they deposed to on 8 January explaining in much detail that their schools have ample capacity to receive more grade eight English learners and supplying figures and other details.

The affidavit of the second respondent which I called for to support an application for the late filing of new evidence and the reasons therefor was received as part of the record for consideration as Exhibit A pages one to 28. This includes the "new" affidavits of the two principals. The opposing affidavit filed by the applicants in terms of my ruling was received for consideration with annexures as Exhibit B pages one to 28.

The second respondent says inter alia the following in her affidavit:

"3. I received applicant's replying affidavit on 9 January 2018 to which some further confirmatory affidavits purportedly from sixth and seventh respondents are annexed. The affidavits are attached Annexure H19.1 and H19.2 of the replying affidavit.

4. The allegations contained therein are to the effect that the respective schools still have space to accommodate more learners.

5. I realise that the information contained in those affidavits are not true and correct as per the admissions statistics of the department.

6. I then contacted both principals and showed them that the printout of the admissions statistics of both high schools (being the sixth and seventh respondent) and they realised that they mistakenly said that there schools still have space.

7. I then requested them to make affidavits to reflect the correct status of their schools. These new affidavits are in line with the attached statistical admission reports printed out of the two respective schools in comparison to the capacity of Overvaal dated 8 January 2018 marked AF6.

8. I therefore annex the two new affidavits of the principals respectively as Annexures AF7 and AF8.

AF6 is a two page affair containing three “windows”, one for each of the three schools. The documents are in very fine print containing only one line of data purporting to reflect essentially the number of learners (presumably grade eight although I do not see such a reference) “accepted” “rejected”, “accepted at another school” and “total”.

The Overvaal window shows that the school accepted 162 learners. This is 20 more than the 142 applications officially processed and admitted. The origin of the other 20 appears to be something of a mystery. If there are an extra 20 learners somewhere in the pipeline that would clearly compromise the school’s capacity even further.

The reference to 115 “accepted at another school” is also unexplained. The total of 277 is the [indistinct] of the 162 purported accepted and the 117 purported “accepted at another school”. The relevance of the second figure if the learners went to another school is not clear. It may however be a reference to learners accepted at another school for placing at Overvaal.

The Phoenix window reflects 244 accepted. 225 “accepted at another school” and a total of 471. The two figures do not add up to 471 and as in the case of Overvaal the relevance of the second figure is neither understood nor explained by speculated by me to mean it may be pupils or learners placed at another school for this particular school Phoenix.

The General Smuts window reflects the three figures as 276,422 and 723 respectively. The figures also do not add up, neither are they explained. There is also a vast unexplained discrepancy between the figures mentioned by the two principals in their detailed 8 January affidavits and what one sees on these three windows.

For example in his affidavit the General Smuts principal talks about only 215 (confirmed) and 87 (possible) grade eights for this year making it 302 and he says last year they had 337, which figure is undisputed and it is in line with what he says in his affidavit that they have been gradually losing learners, something which is also undisputed. Now miraculously the window shows a figure of twice as much namely 723 or 798 if the first two figures are added up. I find this unconvincing and inherently improbable.

The same applies to Phoenix where the principal in his January 8 affidavit says they have 125 grade eight learners registered and can take up to 240. Now the window shows almost four times the 125 at 471. I have the same reservations about this especially where the undisputed evidence of the same principle in his first affidavit is that by 15 November they only had 56 pupils on their admission list and now they expect only about 740 learners for all five grades, eight to 12 to arrive on the first day. In a word I find it inherently improbable that these highly qualified experienced school principals would make such a vast mistake when making an affidavit and without having checked the statistics in advance.

I now quote the "new" affidavit of the Phoenix principal which he made a day after the first one and after he was spoken to by the second respondent. The document is handwritten and not clearly legible in all respect.

"I AB ID … hereby mention that following statement is written and no duress.

I hereby wish to state that when I wrote the ? Statement I had not verified the enrolment statistics on the computer or on the system.

The number I gave was an estimation before the admission stats were verified. After I verified the stats in the system I discovered we have to take 203 applications with verified documents. The 203 were part of the 471 applicants who had applied at the school. 41 was not accepted reason they not submit verified documents. It is therefore clear I had made a mistake that I said there was still space at the

school."

The "new" affidavit by the General Smuts principal also handwritten and to an extent illegible reads as follows: "I Principal of General Smuts mistakenly indicated that my school was not full. My statement was not based on the actual capacity determined by amount of closed mortar and brick classes in my school added to 29. The school has an additional 13 prefabricated asbestos classes which were erected to accommodate learners over the years and ten mobile classrooms. We also converted this other specialist rooms by erecting dry-walls to create the classes from one. The school was originally built for 1 200 learners but currently has 550 and 115. We have late application to process for 201 for 2018. I hereby withdraw the letter which was written by me on 9 January 2018 indicating that my school is able to accommodate more learners."

The respondents, also, irregularly, attached affidavits, handwritten, by a so called cluster leader and a circuit manager containing references to mobile or prefab classrooms. This is an abuse because no explanation is offered for the failure to present this evidence as part of the opposing affidavits especially after details of the evidence of the two principals appear from the founding affidavit.

I was also not informed from the bar when there was an application to admit two new affidavits by the principals that these added documents would be introduced in the bundle to be considered. In my view these two affidavits do not take the matter further in any case, neither do they mention any figures. The same remarks apply in

respect of a 16 page bundle of finely printed multi-coloured statistics said to explain "how the 55 interested learners came about". There is again no explanation for not offering this infrastructure as part of the answering affidavit. This is an abuse and should not be tolerated.

In any event the applicant's breakdown of the destiny of the 55 offloaded from the respondent's own system was contained in the founding affidavit and only met with the bare denial. This mountain of information accordingly takes the matter no further, neither was it explained how it should be analysed or understood.

I now turn to the main and highly disturbing feature of this whole "new affidavit" exercise. After receiving the new and differing affidavits from the respondents on 9 January the first applicant deposed to a comprehensive affidavit on Friday 12 January, today being Monday the 14th. Here are some extracts from this affidavit.

"13. After the matter stood down on 9 January 2018 to Thursday 11 January 2018 and after returning to counsel's chambers (and after the replying affidavit was handed up in court) I sent a Whatsapp message to a few people including Mr M the General Smuts principal to inform them that the matter had stood down until Thursday. He and Mr B the Phoenix principal was following the matter with interest as nobody had up to that stage communicated about the matter with them except me. I referred to the screenshot of the exchange of Whatsapp messages below. Here is the contents of the Whatsapp exchanges forming part of this affidavit by the first respondent."

For explanatory purpose I will say who says what. First applicant

chairperson: Hi KM ons saak is uitgestel na Donderdag 10:00. Kyk maar na News 24 en Eye Witness News. Mr M: Ek is by die Direkteur se kantoor. Sy het my ontbied. First applicant chair person: "Laat weet ons asseblief as daar enige intimidasie is. Behou asseblief jou onafhanklikheid en dring aan op aparte regsverteenwoordiging indien hulle jou in 'n blik wil druk. Ons dink sy gaan jou probeer dwing om die verklaring terug te trek. Mr M: Ek is uit. Hulle wil my *fire* omdat ek 'n vals *statement* gemaak het oor my skool nie vol is nie. Volgens my klaskamers moet ek net 1 200 leerders hê en ek het 1 515. Hulle gooi my met die boek so ek het 'n nuwe *statement* gegee. Jammer maar my pensioen en alles is op die spel."

The first applicant then continues with his affidavit as follows:

"15. As is evidence from the messages above Mr M was summoned to the office of the District Director and was threatened with dismissal. It can also be deduced based on the messages that Mr M out of fear of losing his pension succumbed to the pressure and signed a further affidavit. What is noticeable from the bottom line of the messages is that Mr M entered the offices approximately 11h29 and almost two hours later (13h25) left the offices. I am deeply concerned about the change in version in his affidavit that has now been produced after he was called to the offices of the department. It appears that he was placed under duress.

16. With the presence of possible intimidation apparent to me with regards to Mr M I sent a Whatsapp message to Mr B advising him

to tread with caution. I also tried phoning Mr B.

17. Mr B sent me a Whatsapp message at 16h45 on the same date (9 January 2018) confirming that he too was summoned to district office. At 18h36 on the said date I had a telephonic discussion with Mr B in which he confirmed (telephonically) that he was summoned to the District Director's office. He said that he was one; threatened with dismissal. Two; that he was accused of being a racist. Three; that he was accused of not looking after the interest of his school and four; how does he dare help an Afrikaans school. At this point according to him he expressly stated that he was all in favour of getting more English learners, it would be to the benefit of his school.

18. It was also conveyed to Mr B according to him at the meeting that he is not to divulge any statistics of his school and that he is not a spokesperson for the department.

19. In the light of the developments he apologised for his revised statements and wished us well in the case.

20. These are obviously very troubling revelations made by him regarding the conduct of officials of the department."

In as much as these communications may amount to hearsay in particular when the applicant says what Mr Botha told him I exercise my discretion in terms of Section 3 of the Hearsay Amendment Act 45 of 1998. I declare the evidence as duly admitted. This is obviously in the interest of justice.

The first applicant goes on in his affidavit to deal with the fact that

his attorney then wrote a letter to his opponent the state attorney expressing shock and dismay at what appears to be a case of defeating the ends of justice and calling for an explanation. The last paragraph of this letter which is part of Exhibit B reads as follows:

"We as officers of the court and our clients reserve the right to bring this to the attention of the court if this attempt at defeating the ends of justice is further pursued in court during the hearing of the matter." There was no answer to this letter and as is now evidence the respondents continued to pursue this matter.

The deponent proceeded to deal with the further irregular new matter, the inherent probabilities and correctly asked for it to be struck out. I have already dealt with it to some extent and for the sake of brevity will say no more about it, but to add that the chairperson first applicant made compelling submissions on the probabilities these records relied upon now for additional numbers of pupils can easily be amended and tampered with.

I conclude on this disturbing topic by observing that the uncompromising and biased approach exhibited by the respondents can also be gleamed from Mr Rabie's comments on the meetings of 4 and 5 December. It also saddens me to refer to the following unsolicited remarks by the second respondent who played the leading role in respect of these occurrences in the answering affidavit.

"4.6. If one is to look at the heart of the application it has nothing to do with capacity of the school but the admission of English learners at the school. It is unbelievable and / or unfortunate that even until

today in this constitutional democracy we still have a society that sees nothing wrong with a language that was used as a tool of segregation and discrimination during apartheid which 90 percent of South African bemoan; a language whose legacy is sorrow and tears to the majority of whom it was not their mother tongue. Today in this constitutional democracy we still fight the same separatist language exacerbated by denial of transformation by certain sectors of society. This is not acceptable."

She expressed the same sentiments on more than one occasion I the answering affidavit. It is regrettably difficult to see how one can realistically expect any measure of objectivity or fair play towards the embattled minority group and their language by a senior official intimately involved in these proceedings who is prepared to disclose her obvious bias in the answering affidavit. In my view there are clear signs of an attempt by the second respondent to defeat the ends of justice for the reasons mentioned and I respectfully suggest that some senior peers of hers may consider investigating her conduct.

I turn to my conclusions.

1. On the overwhelming weight of the evidence and for all the reasons mentioned I find that on the probabilities the school has no capacity to receive the 55 English learners let alone to do so on such short notice and to convert to a double medium school.
2. On the overwhelming probabilities Phoenix and General Smuts English medium schools have enough capacity to accommodate the 55 English learners (or what is left of them given the

undisputed breakdown offloaded about them from the respondent's own system).

3. The second respondent and perhaps also the HOD and the MEC acted in conflict with the constitutional principle of legality and for that reason irrespective of whether there was capacity or not the 5 December decision was unlawful and forced to be set aside on review and ancillary relief to be mentioned in the order should also be granted.

4. Through your conduct the second respondent caused a number of review grounds listed in Section 6 of Paja and fully relied upon in the founding affidavit to be applicable in to found a Paja review as also prayed for so that the review for that reason too ought to be granted. I mentioned some of the grounds mentioned in the founding affidavit:

1. The failure by the first and second respondents to have regard to Section 5 (10) (b) of the Admission Regulations and failure to have regard to the capacity of the school to accommodate further learners relative to the capacity of other schools constitute grounds for review in terms of Section 6 (2) (b) of Paja in that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

2. Alternatively it constitutes a ground for review in terms of Section 6 (2) (e) of Paja in that the action was taken for a reason not authorised by the empowering provision and irrelevant considerations were taken into account and relevant

considerations were not considered namely the relative capacity of neighbouring schools to accommodate learners and to disregard the capacity determination of the school and the language policy determined by the SGB which renders the action reviewable in terms of Section 6 (2) (e) (iii) of Paja.

3. The conduct also amounts to reviewable action in terms of Section 6 (2) (f) of Paja in that the action contravenes the law or was not authorised by the empowering provision or not rationally connected to the purpose for which it was taken.

4. In all the circumstances the actions and exercise of power are unreasonable considering Section 6 (2) (h) of Paja.

There are others which I consider unnecessary to mention. There are also the well-known grounds of bias and irrational conduct.

5. The costs should follow the result. This is an appropriate case to make a punitive cost order. As argued before me on Friday evening by counsel for the applicants there is no reason particularly in this case to see to it that the applicants being the school and the school governing body are out of pocket. They have to sparingly use their funds in the interest of the children and not for litigation if they can help it.

By contrast the respondents as is the case in many other matters in this country involving state litigants have the convenience and the luxury to litigate at will at the expense of the tax-payer. The way in which the respondent chose to

litigate for example by not answering letters and *bona fide* submissions and suggestions made to them to unreasonably apply undue pressure on fellow organs of state which relationship between the organs of state has per the constitutional imperative demands cooperation and reasonableness and lastly but not the least the manner in which the new affidavit were obtained from the two principals.

In result and for the reasons mentioned the review application ought to be upheld with costs. I did not include in my proposed order all the ancillary relief sought by the applicants but I make the following order.

1. The instruction issued by the District Director Sedibeng East District (second respondent) on 5 December 2017 to the principal of the second applicant Mr S Rabie (fifth respondent) to place further learners for enrolment with the second applicant for the 2018 intake is set aside.
2. The placing of any additional entry phase learners over and above the final list of 142 learners placed for enrolment with the second applicant by the first respondent or the second respondent on the electronic platform is set aside.
3. The first and second respondents are ordered to pay the costs of the applicants on the scale between attorney and client jointly and severally, the one paying, the other to be absolved.

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