IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION **Case No. 1041/07**

Reportable

In the matter between

MEMBER OF THE EXECUTIVE COUNCIL FOR

EDUCATION, EASTERN CAPE PROVINCE **First Applicant**

HEAD OF DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE **Second Applicant**

PHUMLA OLIVE NDABAMBI **Third Applicant**

and

QUEENSTOWN GIRLS' HIGH SCHOOL **Respondent**

JUDGMENT

Lawfulness of a public school's admission policy insofar as it related to disclosure of past conduct of a prospective learner at previous school for purposes of determining potential physical and mental danger to others at the school confirmed. Application of policy in particular circumstances not fair. Plea of lis alibi pendens dismissed where opposing papers not filed in first matter and different relief sought in second matter

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Froneman J.

Introduction

[1] The admission policy of Queenstown Girls' High School ('the school') states that the School Governing Board ('SGB') considers it duty bound to protect people at the school from physical and mental violence. The policy records that the SGB thus reserves the right to scrutinize the disciplinary and behavioural record of any learner applying for admission to the school in order to prevent the admission of someone whose conduct or behaviour might endanger this interest of the people at the school.

Part of the information required from applicants for admission is a certificate of conduct completed by the school where the learner is enrolled at the time when application for admission is made.

[2] In this application the applicants seek, firstly, a declaratory order that the school's admission policy relating to the relevance of the previous conduct of learners is inconsistent with the national admission policy ('the national policy') issued by the national Minister of Education under the National Education Policy Act ('NEPA')[1]; secondly, for the review and setting aside of the school's refusal to admit the third applicant's daughter to the school for 2007; and, thirdly, for an order directing the school to admit the child to the school as a learner. The present application was initiated in June 2007.

[3] Towards the end of 2006 the third applicant applied for the admission of her daughter to the school. As a result of problems arising from the requirement of a certificate of conduct from the school she was then attending, the child was eventually refused admission to the school. The third applicant was unhappy about this and sought intervention from the Eastern Cape Department of Education. Departmental officials sought to intervene and ordered the

[1] Act 27 of 1996.

head of the school to admit the child. He refused to do so. The result was that the child was enrolled at a school in the nearby town of Cathcart for 2007.

[4] In February 2007 the school brought an urgent application in the Bhisho High Court for an order reviewing and setting aside the conduct of the departmental officials as unlawful administrative action. The application was dismissed, but leave to appeal against the order was granted to the full bench of the Bhisho High Court. The appeal has not been heard and it will not be heard before the end of this year. For the sake of convenience I will refer to this process as 'the earlier proceedings'.

[5] The school contends, as a preliminary point, that the matter is pending in the earlier proceedings between the same parties, on the same issue and for the same relief (the defence of *lis pendens)* and that accordingly the present application should either be dismissed or stayed pending the outcome of the appeal in the earlier proceedings in the Bhisho High Court. In addition it contends that its admission policy is in any event lawful and consistent with the Constitution and applicable education legislation. Lastly it also disputes that its refusal to admit the child as a learner falls to be reviewed and set aside.

[6] Concisely summarized, the conclusion I have come to in regard to these issues is that this application should be determined on facts and issues that occurred or were clarified after those relied upon in the earlier proceedings, in relation to the particular relief sought in this application; that the disputed terms of the school's admission policy are lawful and consistent with the Constitution, national legislation and the national policy; but that the execution or implementation of that policy in relation to the third applicant's daughter was flawed.

[7] The rest of this judgment contains the detailed reasons of fact and law upon which I reached this conclusion.

The facts

[8] The SGB of the school determined and formulated the school's admission policy. The school forwarded the policy to the Education Department in April 2004, without receiving any objection or comment from the department.

[9] Clause 9.2(a) of the school's admission policy provides that:

> "The SGB considers itself to be in duty bound to protect the educators, learners, parents and non-educators of the school from physical or mental violence to the full extent of its power to do so and further, to foster the physical, mental and moral welfare of the learners. To this end, the SGB –
>
> (a) reserves the right to scrutinize the disciplinary and behavioural record of any prospective learner of the School and to take all steps within its power to prevent the admission of a learner whose conduct or behaviour may endanger the very interest the SGB considers itself to be in duty bound to protect …"

[10] Clause 1.3 of the policy also requires additional information, set out in a schedule to the policy, to be provided in an application for admission. This includes, in terms of clause 9 of the schedule:

> "A Certificate of Conduct completed by the school where the learner is presently enrolled."

[11] It is these two clauses which the applicants seek to be declared unlawful as being inconsistent with the national policy promulgated under section 3(4)(i) of NEPA.

[12] During 2006 the third applicant's daughter, Buhle, was a learner at Balmoral Junior School ('Balmoral'). Balmoral is regarded as a natural 'feeder' school for the school,

apparently in the sense that its learners usually proceed with their further education at the school. In August 2006 Buhle's parents applied for her admission as a grade 8 learner to the school on the standard application form for admission to the school.

[13] In terms of a long-standing (and apparently confidential) agreement between the principals of Balmoral and the school, the required certificate of conduct from Balmoral would not be completed by Balmoral if it is considered that the particular learner who applies for admission to the school has made herself guilty of questionable behaviour or conduct at Balmoral. The principal of the school would then, also in terms of long-standing practice, invite the parents of such a learner to an interview prior to making a decision on the application for admission to the school.

[14] In 2006 eighty-six learners of Balmoral applied for admission to the school. In respect of eleven of them the certificate of conduct was not completed, thus indicating to the head of the school that their behavioural record was suspect. In accordance with practice he then invited the parents of these eleven learners and the learners themselves for an interview. The parents, however, consulted an attorney who contacted the school's principal and accused him of unfair discrimination in holding the interviews only with these learners and their parents. As a result the school's principal cancelled the interviews.

[15] After further discussion between Balmoral's principal and the principal of the school a further eight learners received satisfactory conduct reports and were admitted to the school. Only Buhle and two other learners were not admitted to the school. The parents of the other two learners accepted the result, but the third applicant, Buhle's mother, did not.

[16] She went to see the school's principal and he explained to her that Buhle had not received a satisfactory conduct report. She then went to see the principal of Balmoral. The principal initially refused to report that Buhle's conduct was satisfactory, but later relented, called the third applicant back and made an entry on the required form to the effect that Buhle's conduct had been satisfactory. Armed with this the third applicant again approached the school's principal, but he informed her that there were no more vacancies, that all the successful applicants for grade 8 had already been placed, that approximately 100 applicants had to be turned away and that there were still many prospective learners on the school's waiting list, all with impeccable code of conduct records.

[17] Local departmental officials in Queenstown supported the school principal's decision, but the third applicant sought and obtained assistance higher up in the department. On 5 December 2006 the chief director of cluster 5 of the department ('the chief director') instructed the district director of the department in Queenstown in writing to ensure Buhle's admission to the school, and on 6 December 2006 the latter addressed a letter to the principal stating that he had to ensure the immediate implementation of the instruction concerning the admission of Buhle. The instruction was not followed. On 15 January 2007 the legal services division of the department addressed a letter to the schools' attorneys contending that the school's admission policy discriminated unfairly against Buhle, and again confirmed the instruction to arrange for her admission to the school. The principal did not comply with this instruction either.

[18] The result of this was that the school launched an urgent application in the Bhisho High Court in early 2007 for an order declaring the conduct of the department, in writing these letters and seeking to compel the school to admit Buhle as a learner, to be unlawful

administrative action and for setting it aside. That application was heard in February 2007 without the department filing any papers in opposition, but the application was nevertheless dismissed on 21 February 2007. Leave to appeal was granted and, as stated earlier, the appeal has not yet been heard.

[19] After judgment in the Bhisho High Court was given on 21 February 2007 the department took further steps to enforce the admission of Buhle to the school. On 26 February 2007 the chief director repeated the instruction in writing to the principal. On 1 March 2007 he also wrote to the acting district director recording that the school was apparently of the view that only the first applicant is entitled to give the instruction, but that the school should be informed that certain functions of the first applicant may be delegated to line function managers. In response the school requested, in a letter dated 14 March 2007, that, amongst other matters, the school should be furnished with a copy of the first applicant's delegation to the chief director "to deal with the appeal process as envisaged in the Act".

[20] On 28 March 2007 a letter from the office of the first applicant was written to the principal of the school in the following terms:

> "RE: ADMISSION OF BUHLE NDABAMBI
>
> The matter of the admission of Buhle Ndabambi to your school has been handled by the Chief Director for Cluster B whose responsibility it is to deal with policy implementation in his operational area which includes Queenstown.
>
> The parents of Buhle Ndabambi appealed to this office in January 2007 for their daughter to be admitted to your school. We have been constantly kept aware of developments around this matter and it is regrettable that the child has not yet been allowed into your school.
>
> By direction of the Honourable MEC for Education you are instructed to admit Buhle Ndabambi to your school.
>
> Kind regards."

[21] The school's response to these further instructions was consistent. It viewed them as unwarranted attempts to circumvent the judicial appeal process set in motion after the failed application in the Bhisho High Court. The opposing affidavit in the present application, deposed to by the chair of the school's governing body, elaborates on this in its response to this letter:

> "The letter purports to emanate from the First Applicant, but clearly bears Mr. Zibi's reference. The letter directs the Respondent's principal to admit Buhle to the School. It refers to a so-called appeal made in January 2007, some two months previously. This was the first intimation received from the First Applicant that such an appeal had been made to him. I reiterate my contention that I do not believe any such appeal was ever made to the First Applicant and that the contents of [the letter] is a tendentious attempt to meet the obvious hiatus and procedural flaw that no genuine appeal had been lodged in terms of Section 5(9) of the SASA"

[22] The present application was launched in June 2007. As mentioned above, Buhle was admitted to Cathcart High School in the beginning of 2007 and is presently still at school there. The fact of her admission to that school was not disclosed by the applicants in the earlier proceedings.

The law

[23] Section 29(1)(a) and (2) of the Bill of Rights in the Constitution provides that everyone has the right to a basic education in public educational institutions.[2] National policy for education is determined in terms of the provisions of NEPA.[3] The South African Schools Act

[2]Not relevant to this application is the right to receive instruction in the official language of choice at a public educational institution under section 29(2), or education at an independent educational institution under section 29(3).
[3]See note 1.

('SASA')[4], according to its long title, makes provisions for "a uniform system for the organization, governance and funding of schools".

[24] Section 3(4)(i) of NEPA provides that the national minister of education may determine national policy for "the admission of students to education institutions, which shall include the determination of the age of admission to schools". In turn section 5(5) of SASA provides that subject to its provisions and applicable provincial law[5] "the admission policy of a public school is determined by the governing body of such school". For present purposes the provisions of sections 5(1) and 5(2) of SASA are relevant too, namely that public school must admit learners and serve their educational requirements without unfairly discriminating in any way,[6] and that the governing body of a school may not administer any test related to the admission of a learner to a public school or direct or authorise the principal of the school or any other body to administer such a test.[7]

[25] The minister of education promulgated a national admissions policy for ordinary public schools (the national policy) in terms of section 3(4)(i) of NEPA in 1998.[8] Its purpose is to provide a framework to all provincial departments of education and governing bodies of public schools for developing the admission policy of the school[9] and expressly states that the admission policy of an ordinary public school must be consistent with the national policy.[10] The national policy must of course itself be in accordance with the Constitution and NEPA.[11]

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[4] Act 84 of 1996.
[5] It is common cause that no such provincial legislation is applicable to this matter.
[6] Section 5(1) of SASA.
[7] Section 5(2) of SASA.
[8] General Notice 2432 (Government Gazette 19377) of 19 October 1998.
[9] Clause 4 of the national policy.
[10] Clause 3 of the national policy.
[11] Section 3(1) of NEPA.

[26] It is clear that the national policy seeks to give particular content and expression to the enabling provisions of NEPA and SASA for the governance and professional management of public schools.[12] In terms of section 16(1) of SASA the governance of every public school is vested in its governing body, whilst, in terms of section 16(2) of SASA, the professional management of a public school must be undertaken by its principal under the authority of the head of the education department. The national policy mirrors the statutory division of labour between governance and management – between the making of policy by the governing body of a public school, and the execution of that policy by the principal under authority of the head of the education department.

[27] Clause 7 of the national policy repeats that the admission policy of a public school is determined by the governing body of the school in terms of section 5(5) of SASA. In terms of clause 6 the head of the education department is responsible for the administration of the admission of learners to a public school, but may delegate that responsibility to officials of the department. The administration of the admission of learners to a public school by the head of the department must thus, in principle, be done in accordance with that particular public school's admission policy.[13]

[28] The admission policy of a public school is, however, subject to a number of important constraints. Most importantly, it must be consistent with the Constitution.[14] This means, amongst other things, that it may not unfairly discriminate in any way against an applicant for admission.[15] The fact that everyone has a fundamental right to a basic education in public

[12] See, for example, the interpretation clause, clause 1, which incorporates the definition sections of these two Acts as part of the national policy.
[13] *Western Cape Minister of Education v Governing Body of Mikro Primary School* [2005] 3 All SA 436 (SCA); 2005(10) BCLR 973 (SCA), para. [5].
[14] Clause 7 of the national policy.
[15] Clause 9 of the national policy; section 5(1) of SASA.

educational institutions[16] also means that the admission of learners to public schools must take into account the need for all eligible learners of compulsory school going age to be accommodated in public schools. The head of the department of education and the governing body of a public school must thus co-ordinate in order to ensure the accommodation of eligible learners in public schools.[17]

[29] The admission policy of a public school must also be consistent with the provisions of SASA.[18] In the context of the present matter the prohibition of any test relating to the admission of a learner[19] may be relevant, as will be seen later in this judgment.

[30] The national policy provides for certain documentation to be provided by the parent of a learner who applies for admission to a public school. The information sought relates to proof of birth[20], health requirements[21] and, in the case of transfer by a leaner from one public school to another, information about the learner's previous educational standing or progress.[22] There is no specific provision in the national policy for information relating to the conduct or misconduct of a learner at the previous public school.

[31] The administration of admission of learners to a public school, in distinction to the formulation of the school's policy in regard thereto, is the responsibility of the head of the education department or that of the person to whom he has delegated that authority.[23] It is common cause on the papers that the practical administration of admission of learners to the

[16] Section 29(1) and (2) of the Constitution.
[17] Clause 8 of the national policy.
[18] Section 5(5) of SASA; clause 7 of the national policy.
[19] Section 5(2) of SASA.
[20] Clause 15 of the national policy.
[21] Clause 16.
[22] Clauses 17 and 18.
[23] Section 5(7) of SASA; clause 7 of the national policy.

school in this instance was the responsibility of the principal. Nowhere in the papers do the applicants state that the principal did not have the legal authority to do so.

[32] The administration of admissions to a public school must also be done in a manner which is consistent with the Constitution, and in particular with everyone's right to just administrative action.[24] The national policy is explicit that the administration of admissions must not unfairly discriminate in any way against an applicant for admission.[25]

[33] Section 5(8) of SASA provides that if an application for admission to a public school is refused, the head of the department must inform the parent in writing of the refusal and the reason therefor (presumably the principal of the school must do so, if duly delegated). An appeal against such a refusal lies to the Member of the Executive Council for education, in terms of the provisions of section 5(9) of SASA.

[34] A simplified summary of the practical application of the legal position as set out in paragraphs [23] to [33] above, is the following.

The admission policy of a public school is determined by the school's governing body. Such a policy must not be discriminatory and must give due weight to the fundamental right to education of all eligible learners at public schools. The principal of a public school, under the authority of the head of the department of education, is usually responsible for the administration of the admission of learners to the school in accordance with the school's admission policy. His or her application of the admission policy of the school must be administratively fair. Where a prospective learner's application for admission is refused, an appeal lies to the Member of the Executive Council for Education against such a refusal.

[24] Section 33 of the Constitution; and the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').
[25] Clause 9 of the national policy.

[35] It is against this background that the lawfulness of the school's admission policy and the principal's application of the policy in regard to Buhle, the third applicant's daughter need to be assessed. But before that point can be reached, it is necessary to deal with the legal requirements of *lis alibi pendens*, or 'another case pending', first.

[36] In order to succeed with its defence of *lis alibi pendens*, the school bears the onus of proving that the earlier proceedings were between the same parties, based on the same cause of action and in a court with equal competence. If those requirements are met the applicants need to show that the balance of equity and convenience favour the present application to proceed.[24]

Application of the law to the facts

Lis alibi pendens

[37] The earlier proceedings were between the same parties, but in those proceedings it was the school seeking certain relief, namely the review and setting aside of the departmental instructions (issued by the director and the legal services department on 5 and 6 December 2006 and 1 January 2007 respectively) to admit Buhle to the school. The applicants in the present application filed no papers in opposition in the earlier proceedings and did not themselves apply for any relief.

[24] Harms, *Civil Procedure in the Superior Courts,* A7.3, A-54.

In the present application the roles are reversed: the school is the respondent in a matter where the applicants seek declaratory relief in respect of the school's admission policy, as well as a review of the school's failure to comply with the first applicant's instruction on 28 March 2007 to admit Buhle to the school.

[38] Mr Mouton, counsel who appeared for the school, submitted that what matters is not form, but substance. And the substance in both this application and the earlier proceedings, he said, are the same: first, the legality of the school's admission policy and, second, the legality of the school's execution of that policy in its refusal to admit Buhle as a learner. In legal terms the argument is that the cause, or causes, of action underlying both matters are the same.

[39] The requirements for a defence of *lis alibi pendens* are the same as that for a defence of *res judicata*, except for the obvious difference that in the case of the former the stay or dismissal of the later proceedings is justified on the premise that a final decision on the same cause of action will be made in the first proceedings, whilst in the case of the latter that final decision has already been made in another court. But for that difference the principles of *res judicata* also find application where the *lis pendens* defence is raised.[25] What underlies Mr Mouton's 'substance not form' argument is what has become known as 'issue estoppel' - an imprecise term, but one that generally carries within it the notion that the defence of *res judicata* may be applicable even in a case where the form of relief sought in two cases may differ, but where the underlying legal or factual issue decided in the earlier case also disposes of the same issue in the later case.[26]

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[25] *Van As v Appollus en andere* 1993(1) SA 606(C) at 608J; *Richtersveld Community v Alexkor Ltd and another* 2000(1) SA 337(LCC), para [12].
[26] *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995(1)SA 653(A) at 666 and following.

[40] In *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [27] it was held that it is wrong to talk of a 'doctrine' of issue estoppel, but that it is a convenient and typifying description of instances where strict compliance with the requirements for *res judicata* is lacking because the same relief is not claimed in the two cases concerned, but where the defence may well be successful.[28] In that case, however, Botha JA also stressed caution in extending the defence to new factual situations:[29]

> "Elke saak moet volgens sy eie feite beslis word. Dit is ook nie doenlik om in abstrakte terme regsnoere te probeer formuleer wat op alle situasies van toepassing gemaak sou kan word nie. Byvoorbeeld, een van die feite in *Boshoff v Union Government*[30] was dat in die vorige saak vonnis by verstek verkry is. Uit 'n terloopse opmerking van Greenberg R op 351 blyk dit dat daardie feit nie namens die eiser opgehaal is in antwoord op die verweer van *res judicata* nie. In 'n toekomstige saak mag dit wel nodig word om te oorweeg of dit raadsaam is om in sulke omstandighede 'n uitgebreide aanwending van die verweer te erken."

[41] Those remarks are apposite to the present situation. In the earlier proceedings the urgent application brought by the school was adjudicated, not by default, but without the benefit of opposing papers having been filed on behalf of the education department and Buhle's parents. In the application before me all the parties have filed papers and I had the benefit of full argument by counsel representing the parties on the basis of what was disclosed in those papers (which included the papers filed in the earlier proceedings). Whilst not wishing to lay down a general rule about the kind of situation at stake here, or the case of judgment obtained by default referred to in the *Kommisaris van Binnelandse Inkomste v Absa Bank Bpk* case, it stands to reason that a full and comprehensive airing of all issues, factual or legal, in a later case may unearth or illuminate aspects that were not apparent in an earlier hearing where no such full disclosure of issues occurred. In my view this has happened here.

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[27] Note 26 above.

[28] At 670J – 671B.
[29] At 669I – 670A.
[30] 1932 TPD 345.

[42] The declaratory order sought by the applicants, namely to declare the school's admission policy unlawful as contrary to the national policy, raised the legal and factual issues in that regard as a primary concern in the present application. That was not the case in the earlier proceedings. Insofar as it was raised as an issue , it was, at best, done in an ambivalent way. It seems to me that the department's stance in the correspondence attached to the school's urgent application in the earlier proceedings[31] was to the effect that the school had unfairly discriminated against Buhle in the execution of its admission policy and not so much an attack on the content of the policy itself.

[43] In addition, the conduct that the school sought to review in the earlier proceedings was that of the chief director and the legal services division of the education department, not the conduct of the first applicant. The question of an appeal to the first applicant under section 5(9) of SASA did not arise in the earlier proceedings. It has been raised in the present application. The applicants contend that such an appeal was made by the third applicant to the first applicant and that the appeal was upheld, with the result that the further instruction to admit Buhle to the school was given by the first applicant to the principal of the school on 28 March 2007.

[44] In my judgment the defence of *lis pendens* can thus not succeed: firstly because the requirements for the defence have not, strictly, been met; and secondly, because the facts of the matter do not justify an extended application of the defence on the basis of 'issue estoppel' either.

[31] Pages 45 and 49 of the papers.

[45] Even if I am wrong in this conclusion, I still retain a judicial discretion whether to order the stay of the present proceedings on the basis of the *lis pendens* defence. What matters in the proper exercise of that discretion are considerations of convenience and equity.[32]

[46] The appeal to the full bench in the Bhisho High Court will not be heard this year. I was informed from the bar by Mr Bloem, counsel representing the applicants, that for all practical purposes it can be accepted that Buhle will finish this year's schooling at Cathcart High School, but that clarity is needed about the issues raised in this matter for the future as well. In my view it is in the interests of all concerned to have these issues resolved as soon as possible. It is perhaps time for all concerned to realize that the interests and future of a young child is at stake here, and that the apparent hardening of attitudes and stances on both sides caused by this dispute about her admission may not necessarily be in her best interest.

[47] On this alternative basis too, in the exercise of my discretion, I will not order a stay of these proceedings and will proceed to consider the merits of the application.

The legality of the relevant clauses of the school's admission policy.

[48] What the applicants seek to declare unlawful in the school's admission policy is the reservation of the right to scrutinize the disciplinary and behavioural record of any prospective learner and to prevent the admission of a learner whose conduct or behaviour may endanger the school's duty to protect anyone at the school from physical or mental violence.[33]

[49] The particular grounds for attacking the content of the school's admission policy in this regard were, unfortunately, in the founding papers, conflated with the grounds for attacking

[32] *Van As v Appollus*, note 25 above, at 610 E-G
[33] See paras. [9] and [10] for the wording of the clauses.

the execution of that policy in relation to Buhle. To the extent that these grounds can properly be distilled from the review part of the application they appear to be the following:

- the enabling legislation for the formulation of an admission policy by the governing body of a school does not expressly permit the behavioural record of a prospective learner to be taken into account in determining admission to a public school;
- the provisions of the national policy issued under NEPA do not expressly sanction the obtaining of information relating to the previous behavioural record of a prospective learner.

[50] Section 5(1) of SASA prohibits unfair discrimination in the admission of learners; section 5(2) prohibits the administering of a pre-admission test; section 5(3) contains particular prohibitions relating to payment of school fees, subscribing to a school's mission statement and contractual exclusion clauses for damages; and section 5(4) contains provisions as to the admission age of a learner. Section 5(5) provides that the admission policy of a public school, determined by the school's governing body, is subject to the provisions of SASA.

[51] In turn, the national policy issued under s. 3(4)(i) of NEPA, reiterates these provisions and makes provision for an admission application form containing information about birth certificates, proof of immunisation against diseases and transfer cards where a learner transfers from one public school to another.[34] The purpose of the transfer card is to enable the learner to be placed in a particular grade at the new public school.[35]

[34] Clauses 14 to 18 of the national policy.
[35] This is apparent from the provisions of clause 18 of the policy.

[52] It may be true that the provisions of SASA, NEPA and the national policy issued under section 3(4)(i) of NEPA do not expressly sanction reference to the behavioural record of prospective learners, but it is equally true that these instruments also do not expressly prohibit reference to learners' behaviour in a public school's admission policy. If reference to previous behaviour or conduct in the admission of learners to public schools is to be outlawed, its justification must lie elsewhere.

[53] The only substantial ground advanced in counsel's written heads of argument as a ground for the unlawfulness of the requirement that previous behaviour must be disclosed and may justify non-admission to the school was that of unfair discrimination. The proscription of unfair discrimination in SASA and the national policy are founded on the equality clause in the Bill of Rights, section 9 of the Constitution, which reads:

"9. EQUALITY

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[54] The requirement of disclosure of past conduct of prospective learners does not fall within any one of the listed grounds in section 9(3) of the Constitution. The requirement of

disclosure also applies equally to all prospective learners. On its own the requirement of disclosure of past conduct by prospective learners in the school's application forms does not appear to me to be discriminatory in nature at all. If there is any discrimination it will have to be found in the purpose for which this information is required under the school's admission policy.

[55] That purpose is explicitly stated to be the protection of learners, staff and employees at the school from physical and mental violence and to prevent the admission of a learner whose conduct or behaviour may endanger people at the school. The school's admission policy thus contemplates a differentiation in determining the admission of learners to the school between those learners whose conduct or behaviour may endanger people learning, teaching or working at the school, and those learners whose conduct or behaviour does not present any such danger. This differentiation is not based on any of the listed grounds in section 9(3), nor does it at first blush appear to me to be "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner" - one of the ways in which the unspecified grounds may be determined, as laid down by the Constitutional Court in *Harksen v Lane NO.*[37]

[56] But I may be wrong in that initial assessment of whether the differentiation amounts to discrimination on an unlisted ground affecting a learner's human dignity. Perhaps it may legitimately be argued that a potential propensity to violent behaviour on the part of a learner is a characteristic or attribute for which a learner cannot be held responsible at that young age and that, in the context of a right to basic education at public schools, reliance on that

[37] 1998(1) SA 300(CC), para. [47].

characteristic for exclusion from admission to a public school amounts to discrimination on an unlisted ground under section 9(3) of the Constitution. On an acceptance of that premise, the next step is then to determine whether the discrimination is fair or not.[38] The onus of establishing the unfairness of discrimination on an unlisted ground rests, in this case, on the applicants.[39] No factual grounds in this regard have been advanced by the applicants in the papers before me.

[57] The provision in the school's admission policy which seeks to prevent the admission of a leaner whose conduct or behaviour may endanger the safety of persons at the school must be read in the context of the policy as a whole. Clause 8 of the national policy provides that the head of the education department must co-ordinate with governing bodies to ensure that all eligible learners are suitably accommodated in public schools. Clause 1.7 of the school's admission policy acknowledges the school's obligation to ensure the suitable accommodation of all eligible learners and undertakes to give the education department constructive support in that endeavour. The school's admission policy also clearly acknowledges that its terms are subject to the Constitution and applicable education legislation and policy.

[58] Protection of its learners, teachers and other employees from forms of violence by others, including learners, is a legitimate societal interest which the school's admission policy seeks to protect. Individually, the learners, teachers and other employees at the school have the fundamental right to be protected from any form of violence.[40] It would be very strange indeed if the education authorities would be entitled to say to the governing bodies of public schools that they may not take measures to protect the people at their schools from the violence of others, or may not do so in their admission policies.

[38] Id., paras. [51 and [52].
[39] See section 9(5) of the Constitution.
[40] Section 12(1)(c) of the Constitution.

[59] What a governing body of a school may not legitimately seek to achieve through the formulation of its admission policy is to escape its obligation to assist the department in finding and giving suitable accommodation to eligible learners. There is nothing in the content of the school's admission policy which suggests that the school seeks to achieve such an ulterior purpose. During argument Mr Bloem, for the applicants, in my view correctly and properly conceded this point.

Review of the refusal to admit the learner to the school.

[60] The school's review application in the earlier proceedings was directed at the specific conduct of the chief director and legal services department as stated in correspondence emanating from those two sources. No conduct of the first applicant was brought under review in the earlier proceedings. The position is somewhat different in the present matter. It is common cause that the first applicant wrote a letter to the principal of the school on 28 March 2007 instructing him to admit Buhle following upon an appeal to his office in January 2007. This happened after the school's application in the earlier proceedings was adjudicated upon.

[61] Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council for Education in the Province.[41] The third applicant, the chief director and the first applicant have all declared, under oath, that an appeal was lodged with the first applicant, that it was considered, and that the letter dated 28 March 2007 conveyed the outcome of the appeal process to the principal of the school.

[41] Section 5(9) of SASA.

[62] In response the school has baldly denied that there was ever an appeal and has cast doubt on the legality of the appeal process, if indeed it had taken place. It has not applied to have the first applicant's instruction to the principal on 28 March 2007 reviewed and set aside. This is not a proper approach. In the absence of an application to review and set aside the instruction on the basis that it is unlawful by a body who has standing to do so, such as the school, the legality of the appeal process is simply not an issue on the papers before me.

[63] In my judgment that may in itself be sufficient reason to grant the second part of the relied sought by the applicants, namely the review and setting aside of the refusal to admit Buhle to the school after the instruction of 28 March 2007. But in practical terms that would be an unsatisfactory approach, because it will give no guidance to the parties about what was lawfully proper, and what was not, in the admission process leading up to the final decision in March 2007. In what follows I will set out what I consider to be the correct legal position in that regard.

[64] I have already found that the school's admission policy insofar as it seeks information about past behaviour or conduct of prospective learners is lawful and that it is also lawful to use that information for determining whether a prospective learner's past conduct or behaviour is of such a nature that it might present the danger of violence against other learners, teachers and staff at the school. In terms of the school's own admission policy it may not be used for other, ulterior purposes, and the assessment of past conduct of prospective learners must also be made in the context of the school's obligation, in co-operation with the department, to assist in the suitable accommodation of all eligible learners in public schools. Past misconduct or behaviour on its own does not make a learner ineligible

for admission to a public school, nor do the terms of the school's admission policy purport to achieve such a purpose.

[65] There is nothing on the papers to suggest that the principal or the school in executing the school's admission policy relating to information about past conduct or behaviour acted with any ulterior purpose. In my judgment mistakes were made, but they were made in good faith. The school has a proud reputation and it is common cause that the composition of its body of learners reflect the racial demographics of the people in its feeder area. It is a popular school and not only Buhle, but another 100 or so prospective learners with no problems of past misconduct, also had to be turned away for admission to the school in 2007.

[66] In order to make a proper determination or assessment of whether a prospective learner's past behaviour may endanger others at the school, the process leading up to that assessment must be procedurally fair, and the outcome or result of the process must be lawful and reasonable.[42] A fair administrative procedure depends on the circumstances of each case.[43]

[67] It appears to be common cause that as a matter of established practice learners at Balmoral were treated as having a legitimate expectation to be admitted as learners to the school. I emphasize this aspect, because what follows is premised on this fact and does not purport to lay down any general legal principles for admission policies of public schools.

[68] Because of this accepted legitimate expectation of Balmoral learners that they will be admitted to the school, fairness requires that when this expectation is jeopardized, the affected learner and her parents should be informed that their expectation of the learner's admission to

[42] Section 33 of the Constitution, to which the provisions of PAJA seek to give effect to.
[43] Section 3(2)(a) of PAJA.

the school may not be fulfilled. This means that they must be told what the reason is why the child may not be admitted to the school and they must be given an opportunity to make representations in regard thereto.[44]

[69] In terms of the school's legitimate admission policy it was thus quite proper for the principal of the school to expect a certificate of conduct from Balmoral to accompany Buhle's application for admission to the school. The effect of the certificate of conduct must, however, be clear not only to the principal of the school and Balmoral's head, but also to the prospective learner or, at least, her parents. They must be made aware that an unsatisfactory certificate of conduct from Balmoral may adversely affect the learner's chances of admission to the school. The certificate's significance or effect may not depend on a confidential understanding between the principals of the two school, because that would mean that the prospective learner and her parents may never know the reason for the possible non-admission of the learner to the school. To the extent that the practice relating to the content or effect of the certificate was to keep it confidential or secret between the two school principals, I consider that confidentiality or secrecy, in the circumstances of this case, to have been procedurally unfair. Buhle and her parents should have been told what the purpose of the certificate of conduct was.

[70] Perhaps that was what the principal of the school intended to do by inviting the affected eleven learners and their parents for an interview with him. If so, such a procedure would have been proper and fair: the learner and her parents would have been told that the unsatisfactory certificate of conduct might justify the learner's non-admission to the school for fear of endangering the safety of the others at the school, and the learner and her parents

[44] Section 3(2) of PAJA.

would have had an opportunity to refute that possibility, or make representations in regard thereto.

I have sympathy for the principal's conduct in relation to the interviews. He was correct and fair in his intention to hold the interviews with the affected learners and their parents. The complaint by the local attorney, acting on behalf of the affected group, that the holding of the interviews amounted to unfair discrimination was misguided and wrong. The principal should have gone ahead with the interviews and if any of the learners and parents then refused to attend, they would have had little or no ground to complain later about the procedural unfairness of the whole exercise. But the fact remains that this was not done.

[71] Once the interviews were over the principal would then have had to consider each application for admission on its own merits, having proper regard to the representations made to him about past conduct or behaviour by the prospective learner and her parents, as well as to all the other lawful and relevant factors relating to the admission of a prospective eligible learner to a public school. That is what the law requires of the principal and it is not the task or responsibility of a judge to tell him or her what decision should have been made. All that the law requires is a lawful and reasonable decision, not to prescribe what the decision should be.

[72] Nor, for that matter, is it the responsibility or function of other officials in the department to second-guess the principal's decision. If, in the administration of the school's admission policy, the head of department appoints the principal of the school to act under his authority in giving practical 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. The right to object to the refusal of admission of a learner is that of the parent of the learner, no-one else. In terms of section 5(9) the parent may lodge an appeal to the Member of the Executive Council for Education, who must then make a decision on the merits of the appeal. The appeal process, too, must be fair, providing the opportunity for all parties (parent, principal and governing body) to make a proper input so that the Member of the Executive Council is also in a position to give a lawful and reasonable decision.

[73] It should be clear, by now, that things went awry, at various stages, in Buhle's admission application. The 2007 school year has all but passed and an order for the review and setting aside of the decision to refuse her admission would serve no purpose at present. From what I have said, however, the decision to refuse Buhle admission to the school for 2007 was procedurally unfair to the extent that she and her parents were not made aware that her past conduct or behaviour at Balmoral Primary School might result in her non-admission to the school, and to the extent that they were not afforded an opportunity to make representations to the principal of the school in that regard. The validity of the appeal process, although rather suspect, is also not an issue for me to decide on the form of the application before me. Nevertheless, I hope that the order that I make will present an opportunity for all concerned to rectify matters in the whole admission process.

Costs

[74] The applicants have been unsuccessful in their quest to declare the school's admission policy unlawful, but have had some success in relation to the review relief they sought. I

consider it to be fair not to make any costs order (the effect of which is that each party will be liable for their own costs) especially in view of the fact that I consider the wrongful actions of the school principal to have been made in good faith, with no ulterior purpose.

The order.

[75] The order I make is as follows:

1. The application to declare the relevant clauses of the school policy unlawful is dismissed.
2. In the event of Buhle Ndabambi applying for admission to the school for 2008, it is ordered that such application be considered afresh, on the same basis as that of a prospective learner from Balmoral Primary School advancing to the school, and by having due regard to the contents of this judgment.

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J C FRONEMAN
JUDGE OF THE HIGH COURT