IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 161/2012

In the matter between

THE GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Appellant
RIVONIA PRIMARY SCHOOL	Second Appellant
and	
MEC FOR EDUCATION; GAUTENG PROVINCE	First Respondent
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Respondent
DISTRICT DIRECTOR: JOHANNESBURG EAST D9 – GAUTENG DEPARTMENT OF EDUCATION	Third Respondent
CELE : STHABILE	Fourth Respondent
MACKENZIE : AUBREY	Fifth Respondent
DRYSDALE : CAROL	Sixth Respondent
EQUAL EDUCATION and CENTRE FOR CHILD LAW	A*mici Curiae*

HEADS OF ARGUMENT OF THE AMICI CURIAE

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INTRODUCTION

1. On 24 July 2012, the Court admitted Equal Education (EE) and the Centre for Child Law (CCL) as *amici curiae* in this matter with the right to file heads of argument[1] and, subject to the discretion of the presiding judge, to make oral submissions.[2] EE and the CCL were both admitted and made written and oral submissions during the High Court proceedings. In view of their concordance of views on the central questions in this matter and in order to avoid a proliferation of *amici curiae*, the two organisations sought to participate jointly as amici curiae on appeal, advancing a single set of written and (if permitted) oral submissions.

2. Both EE and the CCL are committed to securing an equal and quality education for every child in South Africa.[3] EE and the CCL fight against the inequalities pervading our current educational system, in which a handful of schools previously reserved for white learners educate a small minority of learners with a disproportionate share of available resources while schools formerly reserved for black (mostly poor) learners struggle to use minimal resources to provide even a basic education for huge numbers of learners.

3. The relief sought by the appellants in this matter has the potential to undermine the government's power to ensure that all learners are accommodated in schools and to distribute educational resources equitably. This outcome would make it impossible for EE and CCL to achieve their missions.

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[1] The Court directed in para 2 of the order of 24 July 2012 that the heads of argument must be limited to 30 pages.

[2] Oral argument, if permitted, must be limited to 30 minutes in terms of para 5 of the order of 24 July 2012.

[3] The background, legal structure and objectives of EE and the CCL are more fully described in the founding affidavit of Yoliswa Dwane in support of their admission as *amici curiae*.

4. The *amici curiae* confine themselves to the central legal question underlying the appeal: to what extent does the South African Schools Act 84 of 1996 ("the Schools Act") vest in provincial governments the power to act in respect of admission of learners to public schools?

5. Accordingly, the *amici curiae* do *not* seek to take any particular position in respect of the lawfulness of the conduct of the appellants and of the first to third respondents in this matter in respect of the admission of the learner. In any event, the appellants abandoned the relief originally sought in respect of the learner.

6. The *amici curiae* also do not address submissions on the provincial legislation and regulations, or the provincial circulars and policy documents. They are concerned rather with the allocation of roles and responsibilities under the Schools Act.

7. The position adopted by the *amici curiae* is accordingly the following:

    7.1. Government at national and provincial levels does have the ultimate power to act in various ways to establish the capacity of public schools – including by consulting the admissions policies adopted by SGBs – in terms of the Schools Act and to house learners (particularly those subject to compulsory attendance). The powers include powers of a general, standard-setting nature at both national and provincial levels, as well as the power at a provincial level to act directly in response to a particular learner's application to a specific school.

    7.2. The powers at provincial level should ideally be exercised in accordance with a provincial policy relating to capacity, and subject to the norms and standards on capacity that are expected to be prescribed by the national Minister in terms of s 5A.

8. The *amici curiae* note that the respondents contend that the matter has become moot because of the promulgation of regulations in Gauteng that remove any doubt about the powers of the provincial government. EE and the CCL take the view that the question of mootness is primarily an issue between the parties. However, to the extent that the view of the *amici curiae* is sought, it is submitted that the appeal raises issues of the utmost public importance, notwithstanding the new Gauteng regulations, for the following reasons:

    8.1. In matters involving children, although the particular child's case may have been resolved, the courts have nevertheless found it to be in the interests of justice to decide the appeal where the issue is likely to arise again and will affect other children in the future.[4]

    8.2. The central legal question is the MEC's powers under national legislation that will not be affected by regulations in place in a single province. The regulations do not answer that question, which is an important question of law on which there is little authority and which is likely to arise again.[5]

9. We advance our submissions on the interpretation of the relevant provisions of the Schools Act as follows:

    9.1. First, we set out the principles of constitutional statutory interpretation, which we submit must inform this Court's approach in interpreting the Schools Act;

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[4] *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) at para 17.

[5] *Midi Television (Pty) Ltd t/a e.tv v Director of Public Prosecutions (Western Cape*) 2007 (5) SA 540 (SCA) at para 4.

9.2. Second, we discuss the importance and bearing of the constitutional rights to equality (section 9) and to a basic education (section 29) on the interpretation of the provisions of the Schools Act; and

9.3. Third, in light of these constitutional imperatives, we interpret the respective powers of the SGB, HoD and MEC under the Schools Act, as they pertain to the determination of enrolment capacity.

THE PRINCIPLES OF STATUTORY INTERPRETATION

10. Section 39(2) of the Constitution provides that "*[w]hen interpreting any legislation … every court ... must promote the spirit, purport and objects of the Bill of Rights.*" (emphasis added)

11. The basic application of s 39(2) was authoritatively laid down in ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others***.[6] Langa DCJ stressed that, because of s 39(2), "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be *reasonably ascribed* to the section."[7] (emphasis added) Making the same point in different language, the Court held that interpretations in terms of s 39(2) should not be "*unduly strained*".[8]

12. South African courts have, since 1994, gradually abandoned textualism and intentionalism and instead endorsed a contextual and purposive approach to statutory

[6] [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) ('*Hyundai*').

[7] Ibid at para 23.

[8] Ibid at para 24.

interpretation. This approach requires courts to "*have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous*."[9] The Constitution – and, by extension, statutes interpreted in terms of s 39(2) – "*must be understood as responding to our painful history and facilitating the transformation of our society so as to heal the divisions of the past, lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa*."[10] Furthermore, courts must pay "*close attention to the socio-economic and institutional context in which a provision under examination functions*."[11]

13. The s 39(2) duty is one in respect of which "*no court has a discretion*" and must "*always be borne in mind*" by the courts. Indeed, this is so even if a litigant has failed to rely on s 39(2).[12] There are two independent obligations that emerge from the Constitutional Court's jurisprudence in this regard.

14. The first obligation may conveniently be referred to as the "***Hyundai** obligation*".

    14.1. This is that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution.

    14.2. Thus, in Hyundai this Court held that:

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[9] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90 (Ngcobo J concurring) quoted with approval in *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) at para 37.

[10] *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 19.

[11] Ibid at para 20.

[12] *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) at paras 26 – 27.

> *"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*
>
> *… judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."*[13]

15. The second obligation may conveniently be referred to as the "***Wary** obligation*".

15.1. This is that if a provision is reasonably capable of two interpretations, s 39(2) requires the adoption of the interpretation that "better" promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.[14]

15.2. Thus, as the Constitutional Court explained in ***Fraser v Absa Bank***:

> *"Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights."*[15]

16. The effect of s 39(2) is that this Court must always seek to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values.

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[13] *Hyundai* at paras 22-23.

[14] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

[15] *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47.

17. This is subject only to the proviso that the relevant provision of the Bill must be "*reasonably capable*" of the interpretation concerned – that is the interpretation must not be "*unduly strained*".[16]

18. The primary rights involved in the present matter are the right to a basic education, guaranteed by s 29(1)(a) of the Constitution, and the right to equality entrenched in s 9. Accordingly, the statutory powers, rights and obligations of the appellants and the government respondents must be understood in the context of the constitutional commitment to substantive equality in s 9, and the constitutional guarantee of immediate access to a basic education in s 29(1).

THE IMPORTANCE AND BEARING OF SECTIONS 9 AND 29 OF THE CONSTITUTION ON THE INTERPRETATION OF THE SCHOOLS ACT

The right to basic education

19. Section 29(1)(a) of the Constitution provides that everyone has the right to a basic education.

20. The most important features of the right to basic education are the following:

    20.1. First, unlike the other socio-economic rights in the Constitution, it is "immediately realisable", not progressively realisable. It is also not subject to the "availability of resources" or to "reasonable legislative measures".[17]

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[16] *Hyundai* at para 24; *Wary* at paras 59-60 and 106-108.

[17] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 37.

20.2. Second, a basic education is not a relative good – s 29(1)(a) requires that *all* learners receive an education of adequate quality.

20.3. Third, transforming the current, unjust and unequal basic education system is not only about redressing past injustices, it is about breaking the cycle of poverty that reproduces the patterns of class and racial inequality generation after generation. The right to education is an empowerment right that enables to people to realise their potential and improves their conditions of living. As the Constitutional Court held in ***Hoërskool Ermelo***, "*education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage*."[18]

21. In ***Juma Musjid***, the Court emphasised the significance of the right to basic education in the overall constitutional scheme and focussed particularly on the question of access to school:

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

[18] *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) at para 2. See also *Juma Musjid* (above) at para 43.

everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."[19]

22. The same approach was taken by the UN Committee on Economic, Social and Cultural Rights (CESCR), which explained the position as follows:

> *"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."*[20]

23. In **General Comment 13** of the CESCR, the following "*interrelated and essential features*" of the education to be provided to all children were identified:

> *"(a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party….;*
> *(b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:*
> *Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds...;*
> *Physical accessibility - education has to be within safe physical reach …;*
> *Economic accessibility - education has to be affordable to all...*
> *(c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) …*
> *(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.*

24. The present case concerns the questions of "*availability*", "*accessibility*" and "*acceptability*".

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[19] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at paras 42 – 43.

[20] *United Nations Committee on Economic, Social and Cultural Rights General Comment No 13*.

The right to equality

25. The Constitution is committed to redressing the injustices of the past and creating a society that is not only formally equal, but substantively equal. Substantive equality requires positive action to redress current imbalances in the distribution of resources. In the words of Justice Ngcobo (as he then was):

> *[O]ur Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. … The effects of discrimination may continue indefinitely unless there is a commitment to end it.*[21]

26. The Constitutional Court has explicitly held that the Constitution "*enjoins us to dismantle*" all "*forms of social differentiation and systematic under-privilege, which still persist*" and to "*prevent the creation of new patterns of disadvantage*."[22]

27. The ***Van Heerden*** Court continued:

> "*Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.*"[23]

28. While many facets of South African society remain unequal, the inequality is particularly stark and tragic in the realm of basic education. Our society has yet to undo

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[21] *Bato Star* (above) at para 37; quoted with approval in *Minister of Finance and Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 26.

[22] *Van Heerden* (above) at para 27.

[23] Ibid at para 31. See also *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

the "painful legacy of our apartheid history"[24] that actively deprived black schools of resources, while lavishing resources on white schools. The Constitutional Court recently explained the root cause of continuing inequality in basic education:

> *"It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education."*[25]

29. It is with that understanding of ss 9 and 29(1) of the Constitution in mind, that we consider the proper interpretation of the Schools Act in the context of the specific issues to be determined.

THE SOUTH AFRICAN SCHOOLS ACT 84 OF 1996

30. The preamble to the Schools Act states that its purpose is to provide for a uniform system for the organization, governance and funding of schools. In ***Mpumalanga Department of Education v Hoërskool Ermelo*** the Constitutional Court recognised that the purpose of the Act is to give effect to the constitutional right to education.[26]

31. Section 2(1) of the Act provides that the Act applies to school education in South Africa.

32. The Act identifies four key role-players in the running of public schools:

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[24] *Ermelo* (above) at para 2.

[25] Ibid at para 46. See also *Juma Musjid* (above) at para 42.

[26] *Mpumalanga Department of Education v Hoërskool Ermelo* (above) at para 55

32.1. The Minister who is responsible for norms and standards;

32.2. The MEC who is responsible for establishing and providing schools;

32.3. The HoD who exercises executive authority over the school through the Principal; and

32.4. The SGB which exercises "defined autonomy"[27] over certain domestic affairs of the school.

33. The delineated roles and responsibilities of the four role-players can be seen in the provisions of the Schools Act dealt with below. The clear pattern is that the SGB exercises its delineated functions subject to various forms and degrees of oversight, supervision and intervention exercised by the HoD and the MEC in fulfilling their broadly stated functions.

Compulsory attendance

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

35. Crucially, s 3(3) places an obligation on the MEC to ensure that there are enough school places in the province so that every child can attend school within a reasonable distance from where they live.

[27] Ibid at para 56.

36. Section 3(4) provides that if the MEC cannot comply with his or her obligation under s 3(3) because of a lack of capacity existing at the date of commencement of the Act, he or she must take steps to remedy such lack of capacity as soon as possible and must report on an annual basis to the Minister on the progress achieved in doing so.

37. The Act places the obligation on the HOD to ensure compliance by learners with the requirement of compulsory attendance.[28] It also empowers the HoD to exempt a learner from compulsory attendance.[29] Section 12(1) of the Act places an obligation on the MEC to provide public schools for the education of learners out of funds appropriated for that purpose by the provincial legislature.

The SGB

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

39. In ***Hoërskool Ermelo***, the Constitutional Court described the primary function of the SGB as being to look after the interests of the school and its learners,[30] but it must manage the public resources entrusted to it in the interests of the broader community and in light of the values of the Constitution.[31] The Court further held that the SGB is

[28] Section 3(5)

[29] Section 4(1)

[30] *Ermelo* (above) at para 57

[31] Ibid at para 80.

meant to be a beacon of grassroots democracy in the local affairs of the learners and of the local community.[32]

40. Section 16(3) provides that, subject to the Act, the 'professional management' of a public school must be undertaken by the principal under the authority of the HoD.

41. Section 18 provides that a SGB must function in terms of a constitution and sets out the minimum conditions of a constitution.

42. Section 20 sets out the functions of SGBs, which include, among others, that it must:

    42.1. Promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;[33]

    42.2. Administer and control the school's property.[34] The Act however provides that in doing so, the SGB cannot hamper the implementation of a decision made by the MEC or HOD in terms of any law or policy.

    42.3. At the request of the HoD allow the reasonable use under fair conditions determined by the HoD of the facilities of the school for educational programmes not conducted by the school;[35]

    42.4. Discharge all other functions imposed upon the SGB by the Act[36] and as determined by the Minister or the MEC.[37]

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[32] Ibid at para 57

[33] Section 20(1)(a).

[34] Section 20(1)(g).

[35] Section 20(1)(k).

[36] Section 20(1)(l).

[37] Section 20(m).

43. Section 21 allows for the SGB to apply to the HoD for the allocation of further functions listed in that section.

44. Section 22 provides for the withdrawal of functions from governing bodies by the HoD. Section 22(1) provides that the HOD may, on reasonable grounds, withdraw a function of a governing body. In ***Mpumalanga Department of Education v Hoërskool Ermelo***, the Constitutional Court held that the power to withdraw extends to all functions of a governing body envisaged in s 20 and 21.[38] The Court found that the SGB's power to formulate the school's language policy could be withdrawn under s 22.

WHETHER THE SGB'S POWER TO DETERMINE THE SCHOOL'S ADMISSIONS POLICY INCLUDES THE POWER TO DETERMINE THE MAXIMUM CAPACITY OF THE SCHOOL

45. The appellants contend, on the strength of s 5(5), that the Schools Act does not confer any power on the MEC or the HOD to determine the admissions policy of a public school.[39] The appellants argue that the only remedies available to the MEC and the HOD in respect of unreasonable conduct by an SGB are judicial review or the withdrawal of functions from a school governing body.[40]

46. This contention regarding the SGB's power to determine capacity begs the following questions:

[38] *Ermelo* (above) at para 71.

[39] Appellants' heads of argument, pp 14-16 paras 42-46.

[40] Appellants' heads of argument, p 8 para 23.

46.1. Does the power to determine a school's admissions policy include the power to determine how many learners it will accommodate?

46.2. Even if the SGB did have the power to set out in its admissions policy how many learners a school could accommodate, would that bind the HoD and the MEC in the exercise of their powers under the Act?

Whether the SGB has the power to determine how many learners a school can accommodate

47. It is evident from an enquiry into the delineation of roles and functions under the Act that it envisages a clearly defined role for the SGB in the running of a public school. It is a role confined to focussing, in the words of the Constitutional Court in ***Hoërskool Ermelo***, on the "local affairs" of the school. The role is also one which is performed under and in conjunction with the national and provincial government departments.

48. Even within the context of admissions, while the SGB is empowered to determine a school's admissions policy, the application must be made in a manner determined by the HoD. An ultimate right of appeal to the MEC exists. The right of appeal to the MEC in respect of a decision refusing admission by definition applies to specific decisions in respect of individual learners.

49. The Act even goes so far as to empower the HoD to withdraw a function of the SGB.

50. In sharp contradistinction, the Schools Act places the obligation to realise the rights of learners on the MEC and the HoD:

50.1. It creates the obligation of compulsory attendance and requires the MEC to ensure that every learner in his or her province is accommodated in a public school;

50.2. It gives the HoD the right to decide whether or not to admit or to expel and then gives the relevant learners the right to appeal against those decisions to the MEC;

50.3. Even where the HoD decides to expel a learner, the Act obliges him or her to ensure that if the learner is subject to compulsory attendance, that he or she is accommodated in another public school.

51. This scheme of the Act is important to understanding s 5(5) and the impact of an admissions policy on the manner in which the HoD and the MEC carry out their functions under the Act.

The meaning of s 5(5) in the light of ss 3(3) and 3(4)

52. While s 5(5) empowers the SGB, subject to the Act and applicable provincial legislation, to determine the admission policy of a school, the exact meaning and content of that function is not spelt out in the Act. Significantly, notwithstanding their reliance on s 5(5), the appellants do not attempt to define what it encompasses.

53. From the provisions of the Act it is clear that the SGB's function is not an all-encompassing one since the Act has allocated certain admissions-related powers and functions to other role-players.

54. Section 5A(1)(b) of the Act, empowers the Minister, after consultation with the Council of Education Ministers, to prescribe by regulation minimum uniform norms and

standards for "capacity of a school in respect of the number of learners a school can admit".

55. According to s 5A(2) the norms and standards contemplated in subsection (1) must provide for, but not be limited to the following:

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

56. As the High Court correctly observed, it would provide significant guidance to both SGBs and provincial governments if the Minister were to promulgate norms and standards on school capacity.[41] Minimum norms and standards are key to ensuring 'quality' (or 'adequate', in the international law terminology) basic education can be realised by guaranteeing that effective schools are not rendered ineffective by stretching them beyond their capacity but also ensuring that better resourced schools cannot close their doors to learners while other schools are bursting at the seams.

57. Indeed, the legislative scheme is predicated on the existence of norms and standards on capacity. Recognising this, Mbha J directed that his findings regarding the need for norms and standards on capacity be drawn to the attention of the Minister as a "recommendation".[42] However, despite this, the Minister has not yet promulgated norms and standards on capacity. Once such norms and standards have been prescribed, s 58C(2) provides that the MEC "must ensure that the policy determined by a governing body in terms of sections 5(5) and 6 (2) complies with the norms and standards."

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[41] High Court judgment, para 63, Record: Vol 4, p 685.

[42] High Court judgment, para 105 (read with paras 60-63), p 702.

58. In addition, s 58C(6) provides that the Head of Department must

> "*(a) in accordance with the norms and standards contemplated in section 5A determine the minimum and maximum capacity of a public school in relation to the availability of classrooms and educators, as well as the curriculum programme of such school; and*
>
> *(b) in respect of each public school in the province, communicate such determination to the chairperson of the governing body and the principal, in writing, by not later than 30 September of each year.*"

59. It is therefore clear from the provisions of ss 5A and 58C of the Schools Act that in providing for the promulgation of norms and standards on capacity, the Act envisaged national government limiting the ambit of the power conferred on a SGB to adopt an admission policy. However, the Schools Act does not only confer powers on the national sphere of government in this regard.

60. These provisions must be read with the obligation on the MEC, contained in s 3(3) and (4) of the Act, to ensure that there are enough school places so that every child who lives in the province can attend school.

61. Section 3(3) imposes an obligation on the MEC to ensure that there is sufficient capacity so that each individual child in the province can attend a public school. Section 3(4) imposes an additional, remedial obligation on the MEC, if she is unable to comply with the obligation under s 3(3), to take steps to remedy such lack of capacity as soon as possible.

62. Sections 3(3) and (4) impose two types of obligation (and power) on the MEC:

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

taking similar steps. (The appellants accept that the provisions impose this obligation, but contend that ss 3(3) and (4) go no further.[43])

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

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

63. It is submitted that the powers of MECs under ss 3(3) and 3(4) should ideally be exercised in terms of policies adopted by provincial government in respect of the capacity of public schools. This will ensure that the first power to take steps at a systemic level is embodied in a carefully developed policy that sets out the objectives of the relevant provincial government in respect of capacity. The adoption of a policy will also guard against the arbitrary exercise of the second, remedial power to act in respect of individual learners who are threatened with exclusion from a public school due to capacity constraints.

[43] Appellants' heads of argument, paras 44-46.

Arguments made by the appellants

64. In argument, the appellants contend that ss 3(3) and (4) do "*not empower the [MEC] or her delegated officials to override the capacity determination of a SGB which has determined a school's maximum capacity in a constitutional and lawful manner*."[44] The appellants emphasise the first component of the obligation under ss 3(3) and (4) – to provide sufficient infrastructure so that there are enough school places for learners in the province – but contend that the obligation goes no further than this.[45] The appellants further contend that the power of SGBs under s 5(5) is insulated from the MEC's powers under ss 3(3) and 3(4).

65. The flaws in this argument are, however, the following:

65.1. The SGB's power under s 5(5) is expressly made subject to the Act.

65.2. The appellants have stopped short of defining what is understood by the term "admissions policy" and why it includes within its ambit the power to finally determine the maximum capacity of a school; and

65.3. To the extent that it is textually plausible to interpret ss 3(3) and (4) in the manner contended for by the appellants, a Court is obliged to choose an interpretation which best gives effect to the rights contained in the Bill of Rights.[46]

The interpretation of the Act which best gives effect to the rights contained in the Bill of Rights

66. The Court is enjoined by s 39(2) to adopt the interpretation of the provisions of the Schools Act which best gives effect to the rights to basic education and equality.

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[44] Appellants' heads of argument, p 15 para 42.

[45] Appellants' heads of argument, p 15 paras 43-45.

[46] *Wary Holdings* (above).

67. In the recent decision in ***Centre for Child Law & others v Minister of Basic Education & others***, the Grahamstown High Court (per Plasket J) applied this approach in interpreting provisions of the Schools Act and the Employment of Educators Act to determine whether government is obliged to determine a post establishment for non-educator staff at public schools. Although there is no explicit statutory obligation to do so, Plasket J (correctly) held that the only interpretation of the legislation consistent with the obligation to respect, protect, promote and fulfil the right in s 29(1)(a) was that government is obliged to determine a post establishment for non-educators.[47] The court's conclusion was based on an analysis of the legislative scheme overall and the impact on the basic education rights of learners if non-educator staff are not appointed.

68. A similar approach is required in the present matter. The provisions of the Schools Act must be interpreted as a whole, rather than focusing on s 5(5) in isolation as the appellants propose. In addition, it is necessary to ask which interpretation best promotes the right to basic education.

69. The inequality created by apartheid policies is clearly visible in Gauteng today. The affidavit of the first to third respondents demonstrates that traditionally white schools have systemically lower learner-to-class ratios than historically black schools. In most cases, formerly black schools support a larger number of students without the physical resources of privileged schools in traditionally white areas, or the ability to hire additional teachers.

70. Although all schools are now open to children of all races, the consequences of apartheid's forced removals and racially exclusive zoning mean that the majority of formerly white schools remain disproportionately white, while the majority of black

[47] At para 32.

schools continue to serve almost solely black children. As Deputy President Langa (as he then was) noted in ***Walker***, "[t]he effect of apartheid laws was that race and geography were inextricably linked".[48]

71. Rivonia Primary School is no exception to this pattern of continued racial disparity. It operates in a predominantly white area and continues to serve a disproportionately white group of children while maintaining the lowest learner-to-class ratio in the area. While the appellants' desire to offer the best possible education for its learners is laudable, the Constitution does not permit the interests of a few learners to override the right of all other learners in the area to receive a basic education.

72. Providing a basic education across the lines of race and class requires government intervention in the preliminary power of school governing bodies to determine admissions policies. If schools were able to determine their admissions policy, including the power to determine their capacity, and subject only to appeals in individual cases, privileged schools could use that power to fortify rather than dismantle existing inequalities. Schools such as the appellants could craft admissions policies that allow them to continue to offer a premium education to their learners, while ignoring the increased demand their action places on other schools in the area that are already operating with fewer resources and higher learner-to-class ratios.

73. Interpreting the Schools Act to deny government the ability to intervene to ensure an equitable distribution of learners across all schools in the areas prevents it from fulfilling its obligation under s 7(2) of the Constitution to "respect, protect, promote and fulfil" the rights to equality and to a basic education. Denying government the power to equalise schooling resources is a barrier to its attempts to "eradicate socially

[48] *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (CC) at para 32.

constructed barriers to equality and to root out systematic or institutionalised under-privilege".[49]

74. The problem is not confined to the admissions policies of traditionally privileged schools. What would happen if a large number of schools grouped together and decided to alter their admissions policies to reduce the number of learners they would accommodate? On the appellants' approach, the MEC would be powerless to intervene to ensure that "there are enough school places so that every child who lives in his or her province can attend school" as required by s 3(3) of the Schools Act. The MEC would simply have to accept that attempt to retard the movement towards substantive equality and deny children their right to a basic education. It is submitted that the Schools Act is capable of an interpretation that permits the MEC to exercise her powers to ensure equality and the achievement of a basic education for all.

75. The appellants cite three cases that they submit support their interpretation of the Schools Act to prevent government interference with a school governing body's determination of its admission policies.[50]

76. To the extent that these cases stand for the proposition that the MEC or the HoD must act within the boundaries of the powers afforded to them by national and provincial legislation and must follow the proper procedures, they are correct and uncontroversial. However, to the extent that the appellants read ***Mikro***, ***Queenstown*** and ***Welkom*** to imply a general principle against any role for government in managing admissions

[49] *Van Heerden* (above) at para 31.

[50] *Minister of Education, Western Cape and Others v Governing Body Mikro Primary School and Another* 2006 (1) SA 1 (SCA); *Queenstown Girls High School v MEC, Department of Education, Eastern Cape and Others* 2009 (5) SA 183 (CK); *Welkom High School and Another v Head, Department of Education, Free State Province, and Another Case* 2011 (4) SA 531 (FB). The *Welkom* matter is presently on appeal to the Supreme Court of Appeal.

policies outside of individual appeals or to contend for the pre-emptive right for governing bodies to determine their capacity, they are mistaken.

77. The argument about the appropriate role of the government in determining admissions policies must be addressed in light of the Constitutional Court's decision in ***Ermelo***. Moseneke DCJ held that SGBs must determine their language policy – and by logical extension, also their admissions policy – with regard to the broader social context in which they operate:

> "*The governing body of a public school must … recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.*"[51]

78. While the power to determine an admissions policy vests "in the first instance" in SGBs, that power "must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone" that we have described above.[52]

79. The ***Ermelo*** Court also emphasised the vital role of government in regulating the language (and admissions) policies of schools. Permitting the power to rest exclusively with school governing bodies would be "inconsistent" with the state's duty to ensure that there are enough school places for every child who lives in a province (s 3(3) of the Schools Act) and its duty to ensure that a public school must admit learners without unfairly discriminating in any way (s 5(1) of the Schools Act).[53]

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[51] *Ermelo* (above) at para 80.

[52] Ibid at para 61.

[53] Ibid at para 76.

80. To translate the Constitutional Court's comments on language policy in ***Ermelo*** to the context of admission policies, the appellants' "*insular construction of s 5(5) would in certain instances frustrate the right to [a basic education] and therefore thwart the obvious transformative designs of section [29(1)] of the Constitution*."[54]

81. We accordingly contend that s 5(5) does not and should not be interpreted to include the unqualified power to determine a school's maximum capacity.

82. We stress again that the SGB does not have interests separate or at odds with the Department. Both must be committed to offering a basic education to *all* children in the area, not only those children who happen to be enrolled at the school. In the words of the Constitutional Court in ***Laerskool Generaal Hendrik Schoeman***: SGBs are "*part of the state apparatus designed to secure the provision of the right to education under the Bill of Rights*."[55]

83. In circumstances in which capacity limits threaten to prevent one or more children from attending a public school within a province, the MEC – quite apart from his obligation to take positive steps to increase overall capacity – has the power under s 3(4) to intervene in relation to one or more schools to ensure that children threatened with being deprived of access be accommodated. In those circumstances, this power is not ultimately subject to the contents of any admission policy adopted by a school governing body, as this would render it impossible for the MEC to discharge this obligation.

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[54] Ibid at para 77.

[55] *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 200 (10) BCLR 1040 (CC) at para 3.

84. This power exists in addition to the HoD's power under s 22 of the Schools Act to remove the function of an SGB to determine its admissions policy. The s 22 power permits the HoD to take over the function of determining the school's admissions policy. The MEC's power under ss 3(3) and 3(4) does not permit her to take over the determination of the admissions policy. It does permit her to establish the policy basis upon which questions of school capacity should be determined by SGBs, and to take remedial steps to ensure that every learner is accommodated in a manner that maintains a fair allocation of educational resources in the province.

85. The principle of legality which underpins our Constitution requires that the power of the HoD and the MEC to intervene to ensure access to a public school must be exercised lawfully and appropriately in the context of the specific factual scenario and applicable provincial laws.

CONCLUSION

86. For the reasons set out above, we submit that the appellants have not made out a case that s 5(5) includes the power finally to determine a school's maximum capacity or that an admissions policy binds the MEC and HoD.

87. The amended relief sought in prayers 1 to 3 at paragraph 47.2 of the appellants' heads of argument is inconsistent with, and fails to acknowledge, the power of the MEC in terms of ss 3(3) and 3(4) to take remedial steps to ensure that no child is prevented from accessing a public school due to capacity constraints. The relief sought would insulate an SGB's admissions policy from the powers of the MEC to take such steps and would

accordingly be inconsistent with the provisions of the Schools Act. In addition, such an order would fail to give effect to the rights to basic education and equality.

88. It is submitted that it is necessary to prevent the arbitrary exercise of the MEC's powers which may, amongst other concerns, impact negatively on the quality of education. In order to achieve this, and to best promote equitable access to education, MECs should adopt policies in respect of capacity of public schools.

89. The national Minister of Basic Education should, without delay, also promulgate norms and standards on capacity in terms of s 5A read with s 58C(6). The legislative scheme of the Schools Act envisages that such norms and standards must be promulgated in order to provide much-needed guidance to SGBs and provincial authorities. Indeed the dispute in this matter may never have arisen had norms and standards been promulgated.

90. The appeal ought therefore to be dismissed.

Steven Budlender
Jason Brickhill
Counsel for the *amici curiae*
(Equal Education and the Centre for Child Law)

Chambers, Johannesburg
17 August 2012

LIST OF AUTHORITIES

Legislation

1. Constitution of the Republic of South Africa, 1996

2. South African Schools Act 84 of 1996

Case law

1. *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC)

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

3. *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (CC)

4. *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC)

5. *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC)

6. *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC)

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

8. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC)

9. *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 200 (10) BCLR 1040 (CC)

10. *Midi Television (Pty) Ltd t/a e.tv v Director of Public Prosecutions (Western Cape*) 2007 (5) SA 540 (SCA)

11. *Minister of Education, Western Cape and Others v Governing Body Mikro Primary School and Another 2006 (1) SA 1 (SCA)*

12. *Minister of Finance and Other v Van Heerden [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC)*

13. *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC)

14. *Queenstown Girls High School v MEC, Department of Education, Eastern Cape and Others* 2009 (5) SA 183 (CK)

15. *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC)

16. *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC)

17. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC)

18. *Welkom High School and Another v Head, Department of Education, Free State Province, and Another Case* 2011 (4) SA 531 (FB)

International law instruments

- United Nations Committee on Economic, Social and Cultural Rights General Comment No 13

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 161/2012

In the matter between

THE GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Appellant
RIVONIA PRIMARY SCHOOL	Second Appellant
and	
MEC FOR EDUCATION; GAUTENG PROVINCE	First Respondent
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Respondent
DISTRICT DIRECTOR: JOHANNESBURG EAST D9 – GAUTENG DEPARTMENT OF EDUCATION	Third Respondent
CELE : STHABILE	Fourth Respondent
MACKENZIE : AUBREY	Fifth Respondent
DRYSDALE : CAROL	Sixth Respondent
EQUAL EDUCATION and CENTRE FOR CHILD LAW	A*mici Curiae*

AMICI CURIAE'S PRACTICE NOTE

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1) Name and number of matter

As above.

2) The nature of the application

This is an appeal against the decision of Mbha J in the South Gauteng High Court. The High Court dismissed an application in which the appellants sought declaratory relief and an order setting aside a decision taken by the Second Respondent ("the HoD") instructing the Principal of Rivonia Primary School to enrol a learner in Grade 1. The appellants also sought an order interdicting the MEC and officials of the Gauteng Department of Education from interfering with the governance of the school or compelling it to admit learners other than in compliance with its admissions policy.

3) Concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests

Leave to appeal to this Court was granted by the High Court.

4) Concise definition of the question of any constitutional question arising

The constitutional question that arises is the interpretation, in terms of s 39(2) of the Constitution, of ss 3(3) and (4) and 5(5) of the South African Schools Act 84 of 1996 in relation to the powers of School Governing Bodies and the MEC and HoD in relation to admissions to public schools and the determination of enrolment capacity.

5) The issues succinctly stated

The central issue on appeal is whether, properly interpreted in terms of s 39(2) of the Constitution, the provisions of the Schools Act:

(a) Confer on an SGB the power finally to determine enrolment capacity in a manner that binds the MEC and HoD when they exercise their powers under the Schools Act; and

(b) The extent of the MEC's power under ss 3(3) and (4) of the Schools Act in the face of an admissions policy adopted by an SGB in terms of s 5(5) which purports to determine the capacity of a public school.

6) Estimate of the duration of the argument

One day (including half an hour for the *amicus curiae*)

7) If more than one day is required for argument, the reasons for the request

Not applicable.

8) Which portions or pages of the record are in a language other than English

None of the papers.

9) List reflecting those parts of the record that, in the opinion of counsel, are necessary for the determination of the application

The portions of the record identified by the appellants (with the agreement of the respondents).

10) A summary of the argument, not exceeding 100 words

i. Government at national and provincial levels does have the ultimate power to act in various ways to establish the capacity of public schools – including by consulting the admissions policies adopted by SGBs – in terms of the Schools Act and to house learners (particularly those subject to compulsory attendance). The powers include powers of a general, standard-setting nature at both national and provincial levels, as well as the power at a provincial level to act in response to a particular learner's application to a specific school.

ii. The powers at provincial level should ideally be exercised in accordance with a provincial policy relating to capacity, and subject to the norms and standards on capacity that are expected to be prescribed by the national Minister in terms of s 5A.

11) If a core bundle is not appropriate for the appeal, the reasons for the conclusion

N/a

12) Due and timeous compliance with rule 8(8) and (9)

Not applicable to the *amici curiae*.

These heads of argument are accompanied by a certificate signed by Counsel to the effect that Rules 10 and 10A have been complied with. Due to the nature of the matter, no chronology table has been lodged.

Steven Budlender

Jason Brickhill
Counsel for the *amicui curiae*
Chambers, Johannesburg
17 August 2012

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 161/2012

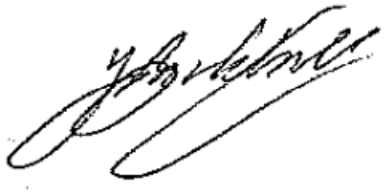
In the matter between

THE GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Appellant
RIVONIA PRIMARY SCHOOL	Second Appellant
and	
MEC FOR EDUCATION; GAUTENG PROVINCE	First Respondent
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Respondent
DISTRICT DIRECTOR: JOHANNESBURG EAST D9 – GAUTENG DEPARTMENT OF EDUCATION	Third Respondent
CELE : STHABILE	Fourth Respondent
MACKENZIE : AUBREY	Fifth Respondent
DRYSDALE : CAROL	Sixth Respondent
EQUAL EDUCATION and CENTRE FOR CHILD LAW	A*mici Curiae*

CERTIFICATE IN TERMS OF RULES 10 AND 10A

We hereby certify that Rules 10 and 10A(a) of the Supreme Court of Appeal Rules have been complied with.

DATED AT JOHANNESBURG ON 17 August 2012.



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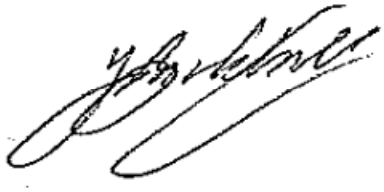
FOR Steven Budlender



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Jason Brickhill