IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 135/2012

In the matter between:

MEC FOR EDUCATION: GAUTENG PROVINCE	First Applicant
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Applicant
DISTRICT DIRECTOR: JOHANNESBURG EAST DG – GAUTENG DEPARTMENT OF EDUCATION	Third Applicant

and

THE GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Respondent
RIVONIA PRIMARY SCHOOL	Second Respondent
SC	Third Respondent
MACKENZIE, AUBREY	Fourth Respondent
DRYSDALE, CAROL	Fifth Respondent
EQUAL EDUCATION & CENTRE FOR CHILD LAW	Amici curiae

WRITTEN SUBMISSIONS ON BEHALF OF
EQUAL EDUCATION AND THE CENTRE FOR CHILD LAW
(AMICI CURIAE)

CONTENTS

INTRODUCTION 3

INTERPRETIVE CONTEXT – INEQUALITY IN EDUCATION 8

Interpretation in terms of section 39(2) – purpose and context 8

The SCA's failure to consider the socio-economic context 9

The contextual factors relevant to interpreting the SA Schools Act 14

The difficulties caused by the SCA's interpretation 16

NATIONAL AND PROVINCIAL GOVERNMENT AND SGBS ALL HAVE ROLES TO PLAY IN DETERMINING SCHOOL CAPACITY 18

The common interests to be served by SGBs and government 18

The powers of national government, SGBs and provincial government 21

STRIKING AN APPROPRIATE BALANCE 26

The admissions policy of the SGB must be the starting point 26

Constraints on the 'override' power of provincial government 30

CONCLUSION 33

INTRODUCTION

1 The Centre for Child Law (CCL) and Equal Education (EE) were admitted as amici curiae (separately) in the High Court. The CCL obtained an order in that court that the identity of the child in this matter not be made public. Both the CCL and EE made submissions regarding the powers of the parties in respect of admissions. 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 have participated jointly as amici curiae on appeal in the Supreme Court of Appeal (SCA) and in this Court, jointly represented by the Legal Resources Centre.

2 Both EE and the CCL are committed to securing an equal and quality education for every child in South Africa.[1] EE and the CCL fight – not against government, school governing bodies ("SGBs") or any particular role-player – but 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

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

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 decision of the SCA in this matter has the potential to undermine the government's duty 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.

4 The amici curiae do not seek to take any particular position in respect of the lawfulness of the conduct of the parties in this matter in respect of the admission of the learner. In any event, the respondents abandoned the relief originally sought in respect of the learner.

5 The amici curiae also do not address submissions on the provincial legislation and regulations, or the provincial circulars and policy documents. These instruments vary from province to province and time to time. EE and CCL are concerned rather with determining more durable principles regarding the allocation of roles and responsibilities under the South African Schools Act 84 of 1996

("the SA Schools Act").

6 The amici curiae confine themselves to the central legal question underlying the appeal: To what extent does the SA Schools Act vest in government and SGBs the power to act in respect of admission of learners to public schools and to determine the capacity of public schools?

7 In approaching this question, however, EE and the CCL adopt a different perspective to those of the parties. Whereas both sets of principal parties[2] focus primarily on the respective *powers* of SGBs and government, EE and CCL seek to approach the question from the perspective of the *effect on children* seeking admission at public schools. In this regard, there are two important points of departure for the amici curiae.

8 First, from the point of view of EE and the CCL, the present matter goes far beyond the interests of the specific child whose admission gave rise to this litigation.

8.1 The parties to the litigation have in any event agreed that the

[2] In these written submissions, we refer to "the applicants" and refer to the first and second respondents as "Rivonia Primary" or "the respondents".

child will remain at the school, whatever the outcome of the litigation.

8.2 Rather, EE and CCL contend that what is critically at stake in this matter is the relationship between the powers of SGBs, on the one hand, and provincial Departments of Education, on the other, with regard to the admission of learners.

8.3 In determining these powers, it is necessary to consider the broader socio-economic context, in particular the legacy of inequality in education, which threatens the constitutional rights to equality and to a basic education. The SCA erred in consciously excluding this context from consideration.

8.4 The amici curiae accordingly make submissions on the context that must inform the interpretation of the legal provisions in issue in this matter.

9 Second, what is necessary in this regard is an interpretation of the relevant legislation and the Constitution which produces an appropriate balance between the powers of SGBs and provincial Departments of Education.

9.1 This appropriate balance is not achieved by permitting such Departments little or no power to override the admission decisions of an SGB, which appears to be the implication of the SCA judgment and the argument advanced by Rivonia Primary before this Court.

9.2 This appropriate balance is also not achieved by allowing such Departments to freely and with little constraint override the admission decisions of an SGB, which might appear to be the implications of the argument advanced by the MEC before this Court.

9.3 A zero-sum result in favour of either of the sets of principal parties does not fit with the constitutional or statutory scheme and would impact detrimentally on children seeking access to public schooling.

INTERPRETIVE CONTEXT – INEQUALITY IN EDUCATION

Interpretation in terms of section 39(2) – purpose and context

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 section 39(2) was authoritatively laid down in ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others***.[3] Langa DCJ expressed the basic principle that "*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*."[4]

12 In a line of decisions since ***Hyundai***, this Court has adopted a contextual and purposive approach to statutory interpretation, which expressly requires courts to "*have regard to the context in which the words occur, even where the words to be construed are clear and*

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3 *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) ("*Hyundai*").

4 Ibid at para 23.

unambiguous."[5]

13 The context is <u>not</u> limited – as the SCA approached it – merely to textual context. The Constitution – and, by extension, statutes interpreted in terms of section 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*."[6] This Court has emphasised that courts must pay "*close attention to the socio-economic and institutional context in which a provision under examination functions*."[7]

<u>The SCA's failure to consider the socio-economic context</u>

14 The SCA rejected the submissions of the amici curiae regarding context and adopted a de-contextualised approach that is inconsistent with the requirements of the Constitution when

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5 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 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* 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) at para 37.

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

7 Ibid at para 20.

interpreting legislation, especially legislation that engages constitutional rights. The SCA's de-contextualised approach is apparent from the following:

14.1 The SCA began by noting that Rivonia Primary "*happens*" to be "*a school located in an affluent, historically white suburb, where a little more than half of the learners were white"* but held that these facts were not *"relevant"* to the appeal.[8]

14.2 In considering the arguments advanced by the amici curiae regarding the interpretation of sections 3(3) and 3(4) of the SA Schools Act, the SCA purported to adopt both a "*plain reading*" of the provisions and a "*contextual reading*".[9] However, the "*contextual*" reading is limited to the other provisions of the SA Schools Act.[10]

14.3 The SCA then employed certain of the facts of the <u>specific case</u> – having earlier held that the factual position of Rivonia

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8 SCA judgment Vol 8 p 735 para 1.

9 SCA judgment Vol 8 p 747 paras 43 and 44.

10 The respondents contend for the same approach to statutory interpretation as that adopted by the SCA, arguing that the SA Schools Act must be interpreted having regard to all its provisions, but excluding from consideration the broader socio-economic context. Respondents' written submissions, p 7 paras 7-8.

Primary was not relevant – to hold that the reliance on sections 3(3) and 3(4) was "*misplaced*" because the child was not faced with the problem that she would not be able to attend a school as she had already been admitted to another school. The SCA held that, on the specific facts of the case, the child's rights to a basic education and to equality were not threatened.[11] In other words, the SCA adopted the facts of this case as the context against which to interpret the legislation, excluding the broader socio-economic context.

14.4 Finally, the SCA characterised the arguments of the applicants regarding the legacy of inequality in education as "the ugly spectre of race", holding that there was no evidence of direct racial discrimination against the specific child.[12] The SCA accordingly took a narrow view of equality and considered only the portion of the right to equality that prohibits (direct) unfair discrimination on grounds of race. The SCA erred in this respect. As the majority of this Court held in ***Van Heerden***,

> "*our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and*

[11] SCA judgment Vol 8 p 748 para 46.

[12] SCA judgment Vol 8 p 750 paras 52-54.

> *abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.*"[13]

15 As the majority explained in ***Van Heerden***, our Constitution embraces a "*conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment*".[14]

16 It is not necessary to establish that Rivonia Primary has unfairly discriminated against learners in order to contend that laws applicable to the school should be interpreted so as best to address the systemic inequality in education. To the extent that schools that are in a relatively better position may perceive this approach to impose an unfair burden, it is a burden that the Constitution requires, as Sachs J observed in his separate concurring judgment in ***Van Heerden***:

> "*For as long as the huge disparities created by past discrimination exist, the constitutional vision of a non-racial*

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[13] *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) at para 25. See also para 22, where Moseneke J (as he then was) held:

> "*Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.*"

[14] *Van Heerden* at para 26.

> *and a non-sexist society which reflects and celebrates our diversity in all ways, can never be achieved. Thus, though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings.*"[15]

17 Moreover, this context of inequality is particularly acute in the education environment. O'Regan J recognised this in her partially dissenting judgment in ***MEC for Education: KwaZulu-Natal v Pillay.*** She stressed that, although the position of black children in the post-apartheid period has "*improved somewhat*", the "*pattern of disadvantage engraved on our education system by apartheid has not been erased*".[16] O'Regan J observed that "*although the law no longer compels racially separate institutions, social realities by and large still do*."[17]

18 Nowhere in its judgment does the SCA acknowledge the socio-economic context beyond the facts of the immediate case. To the contrary, the SCA expressly *excludes* the broader context from consideration. On the SCA's approach, the rights to a basic

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[15] *Van Heerden* at para 145.

[16] *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para 123.

[17] Ibid at para 124.

education and equality are irrelevant to the matter unless the specific facts reveal that a child was denied access to a public school because of her race.

The contextual factors relevant to interpreting the SA Schools Act

19 EE and the CCL therefore contend that a proper interpretation of the relevant provisions of the Constitution and the relevant provisions of SA Schools Act must accordingly take account of, among others, the following considerations and legal principles:

19.1 The duty of all courts to interpret all legislation in a manner that "*best*" promotes the spirit, purport and objects of the Bill of Rights, provided that this does not produce an interpretation that is unduly strained;[18]

19.2 The right of access to a basic education enshrined by section 29(1)(a) of the Constitution, which right is "*immediately*" realisable and not subject to the "*availability of resources*" or to "*reasonable legislative measures*" and which right is critical to

[18] *Hyundai* at paras 22-26; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

the achievement of human dignity and equality;[19]

19.3 The need for government to have the ability to intervene, in appropriate circumstances and subject to the various constraints that we outline below, in order to ensure an equitable distribution of learners across all schools. This is necessary for government to fulfil its obligation under section 7(2) of the Constitution to "*respect, protect, promote and fulfil*" the rights to equality and a basic education;

19.4 South Africa has yet to undo the painful legacy of our apartheid history in which white public schools enjoyed the resources lavished by government and relatively affluent white communities, while black public schools were doubly deprived by deliberately inadequate government funding and the relatively impoverished conditions of black communities;[20]

19.5 The constitutional imperative to transform the current unequal basic education system is therefore aimed both at redressing

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

[20] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*, 2010 (2) SA 415 (CC) ("*Ermelo*") at paras 2 and 46.

past injustices and breaking the cycle of poverty that reproduces the patterns of class and racial inequality generation after generation.

The difficulties caused by the SCA's interpretation

20 It may be that the SCA was correct to express unhappiness about the conduct of the government officials in this case. However, even if that is so, the legal principles and interpretations adopted by the SCA in its judgment have the potential to undermine the government's power to equitably distribute educational resources and to ensure a public school place for every South African learner.

21 This is especially the case given that the judgment of the SCA turns primarily on the interpretation of the SA Schools Act, which applies to all nine provincial education departments.

22 In light of the broader context we have already outlined, the SCA judgment gives rise to a variety of practical difficulties:

22.1 If individual schools were able almost entirely to determine their own capacities, better resourced schools could use that power to fortify existing inequalities.

22.2 What would happen if a large number of such schools grouped together and decided to alter their admissions policies to reduce the number of children they would accommodate, in the name of upholding their own learners' rights to education? On the approach of the SCA, it appears that the MEC would be largely powerless to intervene save by building further schools. Whilst building further schools is a crucial power and duty of an MEC, it should not be the only recourse, particularly in the short-term.

22.3 Similarly, even assuming there has been no change of stance by the schools, what is the position if the MEC were to find at the commencement of a school year that there are given children in a specific area who simply cannot be accommodated by any of the schools in the area according to their admissions policies? This scenario would be more acute in a rural context where schools are spaced significantly apart. Such a situation could arise due to an unexpected increase in the number of children presenting themselves for registration in Grade 1 or for some other reason. Whatever the reason, it cannot be that the MEC is prevented from assisting those children.

22.4 These are not merely theoretical concerns. The problems and intense debates about how to accommodate learners occur at the beginning of every school year in various parts of the country.

23 At the same time, the amici curiae are acutely mindful of the fact that providing proper education for all learners cannot be achieved only by accommodating learners in existing schools. There is a statutory and constitutional duty on the state to provide additional educational facilities where this is necessary, albeit that doing so may take some time.

NATIONAL AND PROVINCIAL GOVERNMENT AND SGBS ALL HAVE ROLES TO PLAY IN DETERMINING SCHOOL CAPACITY

The common interests to be served by SGBs and government

24 The contextual approach outlined above requires that the provisions of the SA Schools Act must be interpreted as a whole, rather than focusing on section 5(5) in isolation. In addition, it is necessary to ask which interpretation best promotes the rights to a basic education and equality in a context of systemic inequality in access to public schooling.

25 SGBs play a key role as part of the state apparatus designed to secure the provision of the right to education under the Bill of Rights.[21] However, while an SGB is primarily tasked with looking after the interests of the school and its own learners, it must also manage the public resources entrusted to it in the interests of the broader community and in light of the values of the Constitution.[22]

26 It is thus submitted that school capacity is a matter in respect of which government in the national and provincial spheres and SGBs all have roles to play. Initially, both sets of principal parties asserted exclusive powers in relation to school capacity. However, the principal parties have both partially softened their initial positions during the course of the litigation:

26.1 The applicants now accept that admissions policies adopted by SGBs can deal with capacity, though that policy cannot inflexibly bind a provincial department.[23]

26.2 Rivonia Primary now expressly accepts that its admissions

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[21] *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at para 3.

[22] *Ermelo* at paras 57, 61 and 80.

[23] Applicants' written submissions, p 12 para 18 and p 19 para 25.4.

policy must be applied in a flexible manner,[24] and appears to accept a narrow form of appeal (in terms of Regulation 13 of the previous Gauteng Regulations), provided that such decision is "*in accordance with the admissions policy*".[25]

27 However, both sets of parties still contest the primary or decisive power to decide when a school is full and whether it should admit a child.

28 The amici curiae stress that the SGB does not have interests separate or at odds with the government. 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 this 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*."[26]

29 In order to serve this common set of interests, the SA Schools Act confers powers in respect of capacity of public schools on national

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[24] Respondents' written submissions p 35 para 51.

[25] Respondents' written submissions p 31 para 43 and p 35 para 50.

[26] *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at para 3.

government, provincial government and SGBs.

The powers of national government, SGBs and provincial government

30 It is important to bear in minds that there are three role-players with powers and duties in respect of admissions and capacity issues.

31 First, government at the national level has the ultimate power and duty to establish the enrolment capacity of public schools by prescribing norms and standards in terms of section 5A(1)(b) of the SA Schools Act.

31.1 The fact that the Minister for Basic Education has not exercised the power to make such norms and standards is a matter for great regret. Recognising this, when this matter was before the High Court 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*".[27] The concerns motivating Mbha J were entirely well-founded.

31.2 The Minister's failure to make such norms and standards,

[27] High Court judgment, Vol 7 p 702 para 105 (read with paras 60-63).

however, certainly does not, however, disable the Provincial Education Departments from themselves dealing with questions of admission and capacity. To the extent that Rivonia Primary contends otherwise, it is incorrect.

32 Second, an SGB has its own autonomous power to adopt an admissions policy, in terms of section 5(5) of the SA Schools Act. The power to do so includes the power of the SGB to make a determination of the capacity of that school.

32.1 It is clear that an admissions policy may address capacity from section 5A(1)(b), which provides for the Minister to prescribe norms and standards for "*capacity of a school in respect of the number of learners it can admit*" and section 5A(4), which requires an SGB to review any policy adopted in terms of section 5(5) to ensure that it complies with the norms and standards made by the Minister.

32.2 In addition, it is appropriate that an SGB should make the initial determination of capacity because it is in the best position to do so, given its knowledge of its own resources. However, although legally obliged to take into account

systemic capacity needs beyond its own school and learners, an SGB is not well-placed to know what the capacity needs are in its district or province.

33 Third, government at the provincial level also has significant powers in relation to admissions to and the capacity of public schools.

33.1 The powers include powers of a general, standard-setting nature, such as section 58C(6) of the SA Schools Act, as well as the power to act directly in response to a particular learner's application to a specific school.

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

33.3 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 section 3(3), to take steps to remedy such lack of capacity as soon as possible.

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

33.4.1 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 respondents appear to accept that the provisions impose this obligation, but contend that sections 3(3) and 3(4) go no further.[28])

33.4.2 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.

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[28] Respondents' written submissions, p 20 para 26 (referring to the obligation of the MEC to report on steps taken to increase capacity); p 25 para 34 (referring to the obligation of the Department to employ resources appropriately); p 36 para 53 (referring to the obligation of the Department to spend its infrastructure budget).

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

33.5 It is submitted that the powers of MECs under sections 3(3) and 3(4) should ideally be exercised in terms of regulations made or 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 <u>government</u> in respect of capacity. The making of regulations or 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.

33.6 However, the absence of such regulations or policies cannot mean that the provincial government is disabled from acting regarding admissions and capacity where this is what the circumstances demand.

34 In the next section we make submissions on how these powers are reconciled and an appropriate balance is struck.

STRIKING AN APPROPRIATE BALANCE

The admissions policy of the SGB must be the starting point

35 While an SGB may make the initial determination of capacity in its admissions policy, the SGB admissions policy and determination of capacity is not binding on the relevant Head of Department (HoD) or MEC. It also cannot be applied rigidly and inflexibly by any party concerned, including both public schools and government actors.[29] Rather, the policy and determination of school capacity is the

[29] See the authorities cited in the applicants' written submissions, p 13 fn 23. See also C Hoexter *Administrative Law in South Africa* (2 ed) 318-322.

starting point for the consideration of whether to admit given learners.

36 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*."[30]

37 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, including the right to education, that we have described above.[31]

38 The Court in ***Ermelo*** 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

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

[31] Ibid at para 61.

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).[32]

39 To translate this Court's comments on language policy in ***Ermelo*** to the context of admission policies, the respondents' "*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*."[33]

40 The amici curiae accordingly contend that section 5(5) does not and should not be interpreted to include the unqualified power to determine a school's maximum capacity.

41 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 (by building schools and increasing

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[32] Ibid at para 76.

[33] Ibid at para 77.

infrastructure) – has the power under section 3(4) to intervene in relation to one or more schools to ensure that children threatened with being deprived of access are accommodated. In those circumstances, this power is not ultimately subject to the contents of any admissions policy adopted by a school governing body, as this would render it impossible for the MEC to discharge this obligation.

42 This power exists in addition to the HoD's power under section 22 of the SA Schools Act to remove the function of an SGB to determine its admissions policy. The section 22 power permits the HoD to take over the function of determining the school's admissions policy. The MEC's power under sections 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.

43 Accordingly, the relevant MEC/HOD may override an SGB's admissions policy and determination of capacity and direct that further learners be admitted into the school. While this power

derives in the first place from sections 3(3) and 3(4) of the SA Schools Act, individual provinces may also make regulations (as Gauteng has done) and adopt policies to guide the exercise of this power and ensure that it is exercised in a fair and non-arbitrary manner.

Constraints on the 'override' power of provincial government

44 However, in order for the 'override' power to strike an appropriate balance between provincial education departments and SGBs, it is critical that it be subject to various constraints.

45 The amici curiae submit that, in interpreting the relevant statutory provisions in light of the context and relevant constitutional provisions, this Court should clarify that the following constraints exist in this regard:

45.1 The SGB's admission policy and determination of capacity must form the starting point for the enquiry of the MEC/HoD.

45.2 The MEC/HoD may only depart from the SGB's admission policy and determination of capacity in a procedurally fair manner, meaning that the SGB must be afforded an adequate

opportunity to make representations and reasons must be provided for any such departure.

45.3 The MEC/HoD must act lawfully and comply with whatever regulations are applicable in a province to govern the exercise of the power.

45.4 The MEC/HoD may only depart from the SGB’s admission policy and determination of capacity where there is good cause to do so.

45.5 In determining what constitutes good cause, MEC/HoD must have regard to all relevant considerations, including:

45.5.1 The number of learners having to be placed at the school;

45.5.2 Whether the learners seeking placement are on the A waiting list or the B waiting list of the school and, if not, the reasons for this;

45.5.3 The alternatives for placement of the learners;

45.5.4 The relative capacity constraints of other schools in the areas in which the learners live or in which their parents work;

45.5.5 The cost implications for the school concerned of the placement of the learners; and

45.5.6 The extra facilities that may be required at the school concerned due to the placement of learners, including additional teachers, classrooms, toilets and so on.

46 In the event that the placement of children by the MEC/HoD at the school is over and above the SGB's determined capacity and will produce additional costs or require additional resources which the school cannot reasonably be expected to accommodate within its existing budget, the MEC/HoD must make available those resources.

46.1 This is necessary so as not to undermine the obligation of an SGB in terms of section 36(1) of the SA Schools Act to "*take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the*

school'. Where SGBs have taken steps to supplement resources and improve their facilities, such efforts should be complemented, not undermined, when provincial departments act to increase the demand on the schools' resources.

46.2 Where a provincial government places additional children at a school, it may be necessary to couple the exercise of that power with the provision of additional educators on the post establishment of the school and providing additional infrastructure.

47 At the same time, this Court should make clear that providing proper education for all learners cannot be achieved only by accommodating learners in existing schools. There is a statutory and constitutional duty on the state to provide additional educational facilities where this is necessary, albeit that doing so may take some time.

CONCLUSION

48 In summary, the amici curiae make the following submissions:

48.1 The SCA erred in interpreting the provisions of the SA Schools

Act without having regard to the socio-economic context, in particular the systemic inequality that persists in public education in South Africa.

48.2 Interpreted so as best to promote the rights to equality and to a basic education, the SA Schools Act confers powers in respect of admission to, and capacity of, public schools on SGBs and on government in the national and provincial spheres.

48.3 Government and SGBs serve common interests in this regard – the interests of all children seeking access to public schooling. They should strive to exercise their powers in a co-operative and constructive spirit.

48.4 The Minister has the power to make norms and standards on capacity and, in order to facilitate the implementation of the SA Schools Act and to fulfil the right to a basic education, she should make such norms and standards. In the absence of norms and standards, however, SGBs and provincial government nevertheless have powers in relation to the determination of school capacity.

48.5 The starting point is the power of an SGB to adopt an admissions policy that includes an initial determination of capacity in terms of section 5(5).

48.6 However, when an SGB has determined the capacity of a school at a certain figure in an admissions policy, that determination is not binding on either the SGB or government. Provincial government has the power – in terms of sections 3(3) and 3(4) of the SA Schools Act and any applicable provincial regulations – to intervene to admit children in excess of the initial capacity determination of the SGB.

48.7 However, the provincial government must act lawfully, reasonably and procedurally fairly in intervening in this manner, and do so only where there is good cause to depart from the SGB's policy. We have outlined above the considerations that must be taken into account in this regard.

48.8 In the event that the placement of children by the MEC/HoD at the school is over and above the SGB's determined capacity and will produce additional costs or require additional resources which the school cannot reasonably be expected to

accommodate within its existing budget, the MEC/HoD must make available those resources.

49 It is therefore respectfully submitted this Court should uphold the appeal against the decision of the SCA and, in doing so, provide guidance to provincial governments and SGBs regarding an appropriate balance between their respective powers.

50 The amici curiae do not seek an order as to costs.

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18 April 2013

LIST OF AUTHORITIES

Legislation

South African Schools Act 84 of 1996

Case law

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

2. *Centre for Child Law and Others v Minister of Basic Education and Others* [2012] 4 All SA 35 (ECG)

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

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

5. *Governing Body of the Juma Musjid Primary School & Others v. Essay N.O.* 2011 (8) BCLR 761 (CC)

6. *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*; 2010 (2) SA 415 (CC)

7. *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)

8. *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC)

9. *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC)

10. *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC)

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

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

Academic authorities

C Hoexter *Administrative Law in South Africa* (2 ed, 2012)