CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/09
[2009] ZACC 32

In the matter between:

HEAD OF DEPARTMENT: MPUMALANGA DEPARTMENT OF EDUCATION	First Applicant
MINISTER FOR EDUCATION	Second Applicant
and	
HOËRSKOOL ERMELO	First Respondent
SCHOOL GOVERNING BODY OF HOËRSKOOL ERMELO	Second Respondent
FEDERATION OF GOVERNING BODIES FOR SOUTH AFRICAN SCHOOLS (FEDSAS)	Amicus Curiae

Heard on : 20 August 2009

Decided on : 14 October 2009

JUDGMENT

MOSENEKE DCJ:

Introduction

[1]This case concerns the right to receive education in the official language of one's choice in a public educational institution. The issue emerges from a dispute between the Head of Department of Education of the province of Mpumalanga (HoD or first applicant) and a public high school in his area of jurisdiction known as Hoërskool Ermelo (the school) and its governing body, cited as the first and second respondents respectively. The dispute arises from the school's language policy, which stipulates Afrikaans as the only medium of instruction. The dispute requires us to answer the question whether the HoD may lawfully revoke the function of the governing body of a public school to determine its language policy and confer the function on an interim committee appointed by him. And, if so, whether the interim committee so appointed, in turn, lawfully determined a new language policy for the school.

[2]The case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners per class ratios in Ermelo reveal startling disparities which point to a vast difference of resources and of the quality of education. It is trite that education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage.

[3]The questions are presented in an application for leave to appeal to this Court. The HoD and the Minister for Education (Minister or second applicant) seek leave to

appeal against a decision of the Supreme Court of Appeal.[1] The decision upheld an appeal by the school and its governing body and set aside an order of the full bench of the North Gauteng High Court, Pretoria (High Court) which had ruled in favour of the HoD and the Minister that the interim committee had lawfully altered the language policy of the school.[2]

[4]The Federation of Governing Bodies for South African Schools (FEDSAS) has been admitted as amicus curiae. FEDSAS is a non-profit-making legal entity and a national representative organisation for school governing bodies. It describes its purpose as being to inform, mobilise, organise and develop school governing bodies to achieve and "uphold the highest recognised international educational standards." It has over 1 000 member schools throughout South Africa comprising a mix of primary and secondary public schools offering either a single medium of education in Afrikaans or English or a parallel medium of Afrikaans and English.

[5]The school is a member of FEDSAS. It is fair to characterise the submissions made by FEDSAS to this Court as being substantially similar to and supportive of the submissions of the school and the governing body on the process issues that arise. Like the school, FEDSAS supports the decision of the Supreme Court of Appeal which is the target of the present application for leave to appeal.

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[1] *Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others* 2009 (3) SA 422 (SCA).

[2] *High School Ermelo v Head of Department of Education, Mpumalanga and Others* Case No 3062/07, 17 October 2007, unreported.

Background

[6]Hoërskool Ermelo is now 93 years old. By all accounts it has an excellent and enviable academic record. We are told, by way of example, that for five years prior to the launch of these proceedings, the school had a 100% matric pass rate and in 2006 had 178 matric distinctions. It has always been an exclusively Afrikaans medium school. On behalf of the HoD and the Minister it was contended that the language policy of the school was determined 93 years ago and remained fixed as exclusively Afrikaans up to 2007 when it was changed by an interim committee appointed by the HoD. However, the evidence paints a somewhat different picture. On 25 January 2005 the school's governing body adopted an admission policy. The full text of the policy is part of the papers. Whilst it is so that there is no stand-alone document containing a language policy, it is clear that the admission policy deals with and commits the school to Afrikaans as its only medium of instruction.

[7]In 2007, the school had 44 educators and 32 classrooms and an enrolment of 685 learners. Thirty-one of the educators were appointed and paid by the Department of Education (Department) and the rest (23%) were appointed and paid by the school as it is entitled to do under the applicable statute.

[8]The Department is quick to point out that, comparatively, the school has excess capacity because the national ratio is 35 learners per classroom. On this basis 32

classrooms can accommodate 1 120 learners. At the present enrolment level at the school, the Department concludes, there must be at least 15 classrooms available for use by other learners.

[9]Over the years, the enrolment at the school has been dwindling, even though the population of the town of Ermelo is growing. The school is built to accommodate 1 200 learners. In the year 2000, it had an enrolment of 990 learners. By 2007, only 685 learners had enrolled. Of these, 589 were high school learners in grades 8 to 12. The remaining 96 were primary school learners in grades 1 to 7. The enrolment of learners in grades 1 to 7 was a private arrangement as the school was not a combined high school and according to the Department there was no official arrangement with it to admit primary school learners. The governing body explains that primary school pupils are enrolled for subjects offered only at the high school and nowhere else in Ermelo. The enrolment also included 34 black learners who have agreed to receive tuition in Afrikaans. From this, the school is quick to argue that its admission policy is non-racial because it does not discriminate on the ground of race.

[10]Besides the explanation relating to admitting primary school learners in a high school, the school has advanced two other accounts of the excess classroom capacity. First, they say that the school has more educators than classrooms. All the classrooms are occupied because every classroom has been allocated to at least one educator and therefore there are no spare classrooms. Second, the school concedes that many of its

classes are smaller than the national average of 35 learners per class but explains that it is so because its curriculum includes a wider choice of subjects than the national average. This means, according to the school, the school can accommodate more learners for instruction in Afrikaans as more learners can be accommodated in existing classes. However, it cannot accommodate a parallel stream of learners in English because it already uses all its classrooms. If the school were to accommodate an English stream it would have to cut down on the wider curriculum it now offers in Afrikaans and, in so doing, enlarge existing classes in order to free classrooms for use by the English stream learners.

[11]The picture would be incomplete if I were to omit the position that obtained in other schools in the immediate school circuit of Ermelo. In early 2007, the shortage of classrooms at the other schools in Ermelo and in the immediate area was a matter of grave concern to the Department, parents and learners. The other schools were filled to capacity. At Ligbron School, 20 classrooms were being used to accommodate 917 learners (giving an average classroom occupation of approximately 45 learners). At Ermelo Combined School, 463 learners were being accommodated in 14 classrooms (giving an average classroom occupation of about 33 learners). At Lindile School, 1 799 learners were being accommodated in 29 classrooms (giving an approximate average classroom occupation of 62 learners), and at Cebisa School, there were 19 classrooms to accommodate 926 learners (giving an average classroom occupation of around 48 learners). At Ithafa School, 1 677 learners were using 36

classrooms (giving an average classroom occupation of approximately 46 learners), and at Reggie Masuku School, there were 21 classrooms available to accommodate 804 learners (giving an approximate average classroom occupation of 38 learners).

[12]At the beginning of 2006, the Department approached the school requesting that it admit 27 grade 8 learners who could not be accommodated at any of the English medium schools in Ermelo because they were already full to capacity. The school refused to admit the learners and suggested to the Department that the learners be accommodated in two vacant buildings to be found in Ermelo. The Department did not accept the suggestion. In its assessment, neither of the buildings was suitable for setting up a school. It explains that the buildings will have to be acquired or rented and would require extensive renovations in order to make them suitable as classrooms. The Department adds that it could not justify the acquisition of the premises whilst there were classrooms available in existing public schools.

[13]Ultimately, the learners were enrolled at a neighbouring English medium school, but the school accommodated them in a converted laundry on its premises. The laundry was partitioned for use as classrooms. The Department provided and paid three educators who gave instruction in English. The laundry space provided to the learners was not to the liking of the Department. It later lodged a complaint with the South African Human Rights Commission that the school treated these learners as second-class citizens. The school then and now still denies the accusations that it ill-

treated and unfairly discriminated against the learners. For present purposes, the less said about this sorrowful spat over makeshift classrooms in a disused laundry the better.

[14]On 15 August 2006, the circuit manager of the Department, Mr Hlatshwayo, sent a letter to all school principals in Ermelo. In it he reminded them of the classroom space shortage experienced at the beginning of 2006 and invited suggestions on how grade 8 learners who chose to be taught in English in Ermelo could be housed in 2007. In his reply to the invitation, the principal of the school suggested that the Department establish a new English medium school at the Convent, a building which stood vacant and was seemingly available. The Department did not respond to the school's suggestion. It is however clear from the papers of the Department before this Court that it considered the Convent to be unsuitable for establishing a school because it was in a dilapidated state and because its location may expose learners to danger because of its closeness to a public road.

[15]On 26 October 2006 the HoD wrote to the school governing body reiterating his concern about the learners taught in English who were accommodated in the laundry at the school. He wrote that the school could accommodate these learners in proper classrooms because the school's learner-to-classroom ratio was only 23:1. He requested the school, citing section 20(1)(k) of the South African Schools Act[3] (Schools Act) to relocate the learners from the laundry to classrooms. On 8

[3] 84 of 1996.

November 2006, the chairperson of the school governing body wrote back to the HoD and refused to accede to the request. He took the stance that the request had no binding force of law and that the learners were at the school on a temporary arrangement inasmuch as the Department had earlier informed the school that the learners had already been placed in other schools for 2007.

[16]The academic year of 2007 commenced on Wednesday 10 January. The HoD invited the school principal and the chairperson of the governing body to a meeting on Tuesday 9 January 2007 to discuss the admission of learners. However, the HoD did not turn up for the meeting. In his stead, departmental officials were present who handed over a letter from the acting Regional Director addressed to the principal. The letter recorded that there were 113 learners, who choose to be taught in English who were expected to enrol for grade 8. It was, however, not possible to accommodate them in English medium schools in Ermelo because they were all full to capacity. The letter stated that if the school did not admit these learners, they would "receive no education at all in the year 2007" and that the principal was "instructed" to admit the learners to the school from the following day and that if he did not do so "disciplinary action" would be taken against him "without further notice".

[17]On the very same afternoon of 9 January 2007, the chairperson of the school governing body wrote back to the acting Regional Director and to the principal of the school. He instructed the principal to admit learners only in accordance with the

school's admission policy and that all grade 8 learners are welcome provided that they submit to the school's Afrikaans language policy. He conveyed to the acting Regional Director the same message that all learners were welcome to be admitted to the school but only if they submitted to tuition in Afrikaans.

[18]The following day, Wednesday 10 January 2007, 71 learners and their parents arrived at the school for enrolment. They were accompanied by officials from the Department. The principal interviewed 8 or so of the learners and their parents and in turn explained to them that each of the learners was eligible for admission only if he or she agreed to be taught in Afrikaans. After some altercation between the principal and the officials, the learners and their parents left the school. None of the learners was admitted to the school.

[19]The evidence records no further interaction between the HoD or the Department and the school until 25 January 2007.

[20]In the Department's papers, the HoD explains that within the Ermelo circuit, the school was the only high school not filled to capacity. Statistically, there should have been approximately 15 classrooms available to accommodate new grade 8 learners even if they did not meet the requirement of being Afrikaans-speaking or did not agree to be taught in Afrikaans. It was the Department's emphatic view that the school had excess classroom capacity and that it was not appropriate for it to refuse to

admit grade 8 learners who obviously needed to be admitted to a high school. The HoD formed the view that the school's governing body acted unreasonably in refusing, despite repeated requests, and given its excess classroom space, to alter its language policy in order to facilitate the admission of the stranded grade 8 pupils from the Ermelo neighbourhood.

[21]On Thursday 25 January 2007, departmental officials delivered two letters to the school. The one was a letter from the HoD to the governing body of the school and the other was a copy of the letter of appointment of members of an interim committee. The letter informed the school governing body that the HoD had decided to withdraw their function in determining the school's language policy with immediate effect in view of the current crisis and the urgent matter that there are about 113 learners who were stranded at home. The HoD purported to act in terms of sections 22(1) and (3)[4] and 25(1)[5] of the Schools Act. The letter further recorded that because the learners had to be accommodated immediately, the HoD had decided to appoint an interim committee for three months to perform the function in order to ensure that the stranded English learners were admitted to the school. The letter continued that the purpose could be achieved only by the adoption of a new language policy, which would include English as a medium of instruction.

[4] See the full text below at [63].

[5] See the full text below at [84].

[22]On the papers, there is a dispute whether the HoD informed the governing body of his decision to withdraw the function of determining the language policy before or only after the interim committee had been established. Given the conclusion I reach later, it is not necessary to resolve this. What is beyond dispute is that the HoD sought to do two things. He revoked the power of the governing body to set the language policy and conferred the power on an interim body, which instantly altered the policy to parallel medium in order to permit the admission of the stranded learners.

[23]The committee was appointed by the HoD from names recommended by officials of the Department. The appointees were drawn from principals of schools in Ermelo. The HoD convened a meeting of the interim committee around midday on 25 January 2007. Each committee member was given a letter of appointment. The letter recorded that the school's Afrikaans language policy had effectively prevented the 113 learners from being admitted to the school and that for that reason the school's governing body had been stripped of its power to determine its language policy. The letter explained that the HoD had decided to appoint the interim committee in terms of section 25 of the Schools Act, with immediate effect, to determine the language policy of the school. The letter requested the committee to ensure that the language policy determined by the interim committee would enable the learners to be admitted to the school as a matter of urgency.

[24]The very following day, on 26 January 2007, the officials of the Department accompanied by the parents and their children arrived at the school seeking to have their children enrolled. The parents and the officials alike appeared to the principal to be under the impression that the school's language policy had changed and that the learners who wanted to be taught in English were accordingly eligible for admission. Clearly, the news had travelled faster than the outcome of the deliberations of the interim committee. On this occasion again, the principal told them that he was not aware of any new language policy and that he could not, in the face of the school's exclusive language policy, admit the learners who sought to be taught in English.

[25]As will appear, on 29 January 2007 the school governing body as a matter of urgency launched an application to the High Court to set aside the decision of the HoD to withdraw the function of determining the language policy from the governing body. As matters turned out, the draft of the new language policy was finalised and adopted by the committee only on 29 January 2007.

[26]The amended language policy recorded that the languages of teaching at the school would be English and Afrikaans which the interim committee described as a "Parallel Medium" of instruction. In that way, it enabled the learners who chose to be taught in English to be admitted to the school. On the strength of the new language policy a small number of grade 8 learners were admitted to the school.

[27]It is common cause, however, that this decision was taken without consulting with the school governing body, the teaching staff, learners already admitted to the school or their parents. The members of the interim committee, being outsiders to the school, did not have the benefit of the views and concerns of all stakeholders, nor did they gather any information on the school's language policy other than that provided by the HoD in his letter of mandate.

In the High Court

[28]On 29 January 2007, the respondents applied to the High Court for an urgent interim order setting aside the decision of the HoD and restraining the interim committee from altering the school's medium of instruction. However, several interlocutory court processes were to precede the final hearing of the substantive application by the full bench on 2 September 2007.[6] In the substantive application, the respondents sought an order that the decision of the HoD to withdraw, on an

[6] Initially, the urgent application brought by the school and its governing body came before Legodi J on 29 January 2007. Then, the respondents sought, by way of urgency, an interim order that the appointment of the interim committee by the first applicant in terms of section 25 of the Schools Act to determine a new language policy for the school is unlawful and that it should be set aside. In the alternative, the school and the governing body sought an order that the operation of the language policy determined by the interim committee be suspended pending the outcome of the review to be brought by the applicants. The High Court struck the matter off the roll for the reason that the respondents had not complied with the time periods prescribed by the General Law Amendment Act 62 of 1955.

The respondents re-served and re-enrolled the application for hearing on 2 February 2007 before Prinsloo J, who granted the interim order. Subsequently, the Minister for Education and Mrs Ncane Elizabeth Masilela joined the proceedings as eighth and ninth respondents and thereafter applied for the rescission of the interim order granted by Prinsloo J on the ground that when the order was granted, the school had admitted eight learners to its grade 8 class to be taught in English. The admission was done as a result of the new language policy which had been determined by the interim committee. In short, the application for rescission was based on a misjoinder because none of the newly admitted learners or their parents had been joined to the proceedings that came before Prinsloo J.

The application for rescission of judgment was heard by a full bench of the High Court (per Ngoepe JP, Seriti J and Ranchod AJ). The full bench rescinded the order granted by Prinsloo J and after a further exchange of depositions the substantive application was set down for hearing on 4 September 2007.

urgent basis, the school governing body's function to determine the language policy and at the same time appointing an interim committee to determine the policy in accordance with the HoD's instructions be reviewed and set aside. In the alternative, the respondents sought an order to review and set aside the language policy determined by the interim committee.

[29]The full bench of the High Court dismissed the substantive application and refused leave to appeal to the Supreme Court of Appeal. That Court, however, later granted the applicants leave to appeal to it.

[30]The reasoning of the High Court was clearly inspired by the interpretation of sections 22 and 25 of the Schools Act that the Supreme Court of Appeal adopted in *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another*.[7] In that case, a unanimous Supreme Court of Appeal found that, in terms of section 22(1)[8] of the Schools Act, the HoD is entitled to revoke, and, in appropriate circumstances, on an urgent basis, any function of a school governing body, including the function to determine a school's language policy. The Supreme Court of Appeal further held in *Mikro School* that once a function of the governing body has been withdrawn, the provisions of section 25 of the Schools Act apply. This means that the governing body ceases to perform the function for the purposes of

[7] 2006 (1) SA 1 (SCA); 2005 (10) BCLR 973 (SCA) at para 38.

[8] See the full text of section 22(1) below at [63] and *Mikro School* n 7 above at paras 37-40.

section 25, such that the HoD is entitled to "appoint sufficient persons to perform all such functions for a period not exceeding three months".[9]

[31]Relying squarely on this reasoning, the High Court concluded that, on the facts of this case, the governing body had unreasonably refused to review its language policy, and in so doing prevented the admission of some 113 grade 8 learners who chose to be taught in English. Accordingly, the HoD was entitled to revoke the power to determine the language policy under section 22, and to confer the power on an interim committee in terms of section 25.

[32]The High Court found that whilst the admission crisis in 2006 and 2007 in Ermelo may have been caused, at least in part, by the HoD and the Department, the admission of learners to receive education at the beginning of 2007 was an urgent matter. It reasoned that, in any event, the learners who were entitled to receive education had nothing to do with the failure of the Department to provide classroom accommodation for them in time. The High Court concluded that the appointment of the interim committee was authorised by section 25 of the Schools Act and that the new language policy was set lawfully and was accordingly binding on the school and its governing body.

Supreme Court of Appeal

[9] See the full text of section 25 below at [84].

[33]On appeal, the Supreme Court of Appeal reversed the decision of the High Court. It characterised the dispute as solely about the rule of law, and not language policy. It made the following order:

> "1. The appeal is upheld.
> 2. The order of the court a quo is set aside and replaced by the following:
>
> 'a. The first respondent's decision to withdraw the function of the governing body of Hoërskool Ermelo to determine the language policy of the school is set aside.
>
> b. The first respondent's decision to appoint an interim committee to perform the function of the governing body to determine the language policy of Hoërskool Ermelo is set aside.
>
> c. The decision of the interim committee to amend the language policy of Hoërskool Ermelo from Afrikaans medium to parallel medium is set aside.
>
> d. Learners that have enrolled at Hoërskool Ermelo since 25 January 2007 in terms of parallel medium language policy shall be entitled to continue to be taught and write examinations in English until the completion of their school careers.
>
> e. The costs of the application are to be paid by the first and eighth respondents jointly and severally, the one paying, the other to be absolved.'
>
> 3. The costs of the appeal are to be paid by the first and eighth respondents jointly and severally, the one paying, the other to be absolved."

[34]In this case, the Supreme Court of Appeal found that the power to withdraw functions under section 22(1) and (3) of the Schools Act may be exercised only in relation to the functions allocated to a governing body in terms of section 21. Under that provision, the functions an HoD may allocate to a governing body, on its request,

are limited to the following: maintaining and improving school property, buildings and grounds;[10] determining the extra-mural curriculum of the school and choice of subject options;[11] purchasing text books and other educational materials or equipment;[12] paying for services to the school;[13] providing an adult basic education and training class or centre;[14] and other functions consistent with the Schools Act and any applicable provincial law.[15] The functions specified in section 21, the Court found, did not include the determination of language policy. That power is given to a governing body by section 6(2) of the Schools Act.[16]

[35]The Court concluded that the HoD had no power whatsoever to revoke the competence of the school to determine language policy, and that this power vests exclusively in the governing body. The Court[17] accordingly overruled the interpretation given to section 22 of the Schools Act in *Mikro School*, and found that the HoD had acted unlawfully. The Court further found that, even if the HoD had the power contended for under section 22, the exercise of the power was vitiated by procedural unfairness arising from the manner in which the committee had been appointed and the procedure it had followed in setting the revised language policy.

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[10] Section 21(1)(a).

[11] Section 21(1)(b).

[12] Section 21(1)(c).

[13] Section 21(1)(d).

[14] Section 21(1)(dA).

[15] Section 21(1)(e).

[16] *Hoërskool Ermelo* above n 1 at para 33.

[17] *Hoërskool Ermelo* above n 1 at para 30.

[36]The practical effect of the judgment of the Supreme Court of Appeal is that the parallel medium policy determined by the interim committee has been set aside, and that the single medium policy that preceded it has been restored. It however preserved the position of learners who have been admitted to the school under the parallel medium policy until they complete grade 12.

Issues

[37]It is necessary to dispose of some preliminary issues. These are, first, whether the dispute to be resolved raises a constitutional issue, and if it does, second, whether it is in the interests of justice to grant leave to appeal. Past these hurdles, and before resolving each of the crucial issues, I will set out the constitutional and legislative matrix which governs the dispute.

[38]I first pause to draw attention to the sharp difference between the parties on how to characterise the issues to be decided. The school and the governing body urged us to look at this case as being only about the principle of legality and the proper exercise of administrative power and not about the language policy of the school. The HoD and the Minister assumed a different stance. They contended that the core of the dispute is the appropriateness of the school's language policy which in effect has a disparate impact of excluding learners who choose to be taught in English. On the facts of this case, these are exclusively black learners.

[39]I agree that issues of legality and administrative justice do arise pointedly and call for resolution. It is, however, also true that the exclusive language policy arises just as sharply. In fact the substantive and underlying dispute between the parties is not merely procedural. It is also about the appropriateness of the governing body's inflexible stance on an exclusive medium of instruction. The HoD and the Minister argued that it is unreasonable for the school to preserve its Afrikaans-only language policy in the face of dwindling learner enrolment and increasing demand for high school instruction in English. On the other hand, the school complained that its language policy was altered in a manner that was procedurally unfair.

[40]In my view, it would be both unrealistic and unjust to look at only one of these two scrambled issues. Both are live disputes and both demand our resolution within the framework of values created by section 29(2) of the Constitution. Confronted with comparable issues, O'Regan J, in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*,[18] had the following to say:

> "This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or

[18] [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

> procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."[19]

[41]The following issues therefore arise for determination:

(a) Did the HoD have the power under section 22 to revoke the language policy the governing body adopted in terms of section 6(2) of the Schools Act?

(b) If so, did the HoD withdraw the function on reasonable grounds and in a procedurally fair manner?

(c) Did the HoD have the power to appoint an interim committee to decide a school language policy under section 25 of the Schools Act?

(d) If so, was the interim committee constituted in a procedurally fair and lawful manner?

(e) Did the interim committee carry out its mandate in a lawful and procedurally fair manner?

(f) What order, if any, would be just and equitable?

Constitutional issue

[42]The right to receive education in the official language of one's choice in a public educational institution where it is reasonably practical is located in section 29(2) of the Constitution.[20] In order to give effect to this right, the same provision imposes a duty on the state to consider all reasonable educational alternatives, including single medium institutions, taking into account what is equitable, practicable and addresses the results of past racially discriminatory laws and practices. The Schools Act is

[19] Id at para 1.

[20] See the full text below at [51].

legislation that seeks to give effect to this constitutional safeguard. It is thus self-evident that this case requires us to interpret and enforce constitutional provisions and also calls on us to construe legislation that gives content to constitutional guarantees.[21]

[43]It admits of no debate that the current case raises important constitutional issues allied to the right to receive education and the obligations of the state to ensure that the right is given effect to in public schools. The very interpretation of section 6(2) and of section 22 of the Schools Act in the light of the Constitution raises constitutional matters of considerable importance.

Is it in the interests of justice to grant leave?

[44]There can be no doubt that it is in the interests of justice to hear and determine the issues presented in the case. A proper understanding of language rights as an incident of the right to a basic education is self-evidently a matter of considerable private and public interest. Moreover, here we are confronted by live learners, supported by their parents, whose vital interest in receiving education, although they are not cited as parties to the dispute, is directly on the line. Also, here we are dealing with a live dispute between the school and its governing body, the executive government and the

[21] Section 167(7) of the Constitution provides:

> "A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

In *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 14-5, Ngcobo J, writing for a unanimous court, held that where the court has to decide on the proper interpretation and application of legislation that is enacted to give effect to a constitutional right, a constitutional issue will be raised. See further *Alexkor Ltd and Another v the Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23 and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at paras 30-1.

broader school community, all of whom harbour a deep interest in the language of instruction. I would, without hesitation, grant leave to appeal.

Constitutional and statutory matrix

[45]Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.

[46]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.

[47]In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular. This the Constitution does in a cluster of warranties. I cite only a handful. Section 1(a) entrenches respect for human dignity, achievement of equality and freedom.[22] Section 6(1) read with section 6(2)[23] warrants and widens the span of our official languages from a partisan pair to include nine indigenous languages which for long have jostled for space and equal worth. Sections 9(1) and (2) entitle everyone to formal and substantive equality.[24] Section 9(3) precludes and inhibits unfair discrimination on the grounds of, amongst others, race and language or social origin.[25] Section 31(1) promises a collective right to enjoy and use one's language and culture.[26] And even more importantly, section 29(1) entrenches the right

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[22] Section 1 of the Constitution states:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

[23] Section 6 of the Constitution states:

> "(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
>
> (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages."

[24] Section 9 of the Constitution states:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[25] Section 9(3) of the Constitution provides:

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

[26] Section 31(1) of the Constitution states:

to basic education and a right to further education which, through reasonable measures, the state must make progressively accessible and available to everyone.[27]

[48]Before I examine section 29(2) of the Constitution, it may be appropriate to echo and embrace the tribute Sachs J paid to minority language rights in general and to Afrikaans in particular in *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*:[28]

> "The fourth assumption is that the Afrikaans language is one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of a rich scientific and legal vocabulary and possibly the most creole or 'rainbow' of all South African tongues. Its protection and development is therefore the concern not only of its speakers but of the whole South African nation. In approaching the question of the future of the Afrikaans language, then, the issue should not be regarded as simply one of satisfying the self-centred wishes, legitimate or otherwise, of a particular group, but as a question of promoting the rich development of an integral part of the variegated South African national character contemplated by the Constitution. Stripped of its association with race and political dominance, cultural diversity becomes an enriching force which merits

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"Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

[27] Section 29(1) of the Constitution provides as follows:

"Everyone has the right—

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[28] [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC).

constitutional protection, thereby enabling the specific contribution of each to become part of the patrimony of the whole.

"At the same time, these assumptions have to be located in the context of three important considerations highlighted by the Constitution."[29] (Footnotes omitted.)

[49]Of course, vital parts of the "patrimony of the whole" are indigenous languages which, but for the provisions of section 6 of the Constitution, languished in obscurity and underdevelopment with the result that at high school level, none of these languages have acquired their legitimate roles as effective media of instruction and vehicles for expressing cultural identity.

[50]And that perhaps is the collateral irony of this case. Learners whose mother tongue is not English but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother tongue instruction is the foremost and the most effective medium of imparting education. Ample literature indicates that in Africa the former colonial languages have become the dominant medium of teaching.[30] Professor

[29] Id at paras 49-50. Sachs J noted that the first consideration is that ten or more other language communities may have similar claims for constitutional regard, some of which may be weaker than the claim made on behalf of Afrikaans and others may be stronger. The second consideration relates to equal access to education and the need to ensure that the inequalities in access to education that existed in the past are put to an end. The third consideration is the constitutional mandate to protect the rights of the child.

[30] See for example Nyar, "Regaining our Tongues: The Challenges of Writing in Indigenous Languages" available at http://www.ukzn.ac.za/CCS/default.asp?11,22,5,1274, accessed on 25 August 2009; Fabunmi and Segun Salawu, "Is Yorùbá an endangered language?" (2005) 14(3) *Nordic Journal of African Studies* 391; Alexander "Language, Class and power in post-apartheid South Africa" Harold Wolpe Memorial Lecture 27 October 2005, available at http://www.wolpetrust.org.za/dialogue2005/CT102005alexander_transcript.pdf, accessed on 25 August 2009; and Roy-Campbell "The State of African Languages and the Global Language Politics: Empowering African Languages in the Era of Globalisation" 36th Annual Conference on African Linguistics, 2006, available at http://www.lingref.com/cpp/acal/36/paper1401.pdf, accessed on 25 August 2009.

Kwessi Kwaa Prah describes this as the "language of instruction conundrum in Africa".[31] However, I need say no more about this irony because the matter does not arise for adjudication.

[51]For purposes of this case, the crucial provision is section 29(2) of the Constitution. It provides:

> "Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
>
> (a) equity;
>
> (b) practicability; and
>
> (c) the need to redress the results of past racially discriminatory laws and practices."

[52]The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice. That right, however, is internally modified because the choice is available only when it is "reasonably practicable". When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents

[31] Kwaa Prah "The Language of Instruction Conundrum in Africa" Centre for Advanced Studies of South African Society, Cape Town, available at http//:www.casas.co.za/Papers.aspx?NID=15, accessed on 25 August 2009.

make and the curriculum options offered. In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.[32]

[53]The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one's choice. It is an injunction on the state to consider all reasonable educational alternatives which are not limited to, but include, single medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices.[33]

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[32] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at paras 31-4; *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; Case No CCT 39/09, 8 October 2009, as yet unreported, at para 47.

[33] Woolman and Bishop "Education" in Woolman *et al Constitutional Law of South Africa* 2nd ed. Original Service: 07-06 (Juta & Co, Cape Town 2007) at Chapter 57.

[54]In contrast to other provisions in the Bill of Rights,[34] here the Constitution does not set the means by which these language protections must be realised. It is however clear that it confers on parliament and provincial legislatures concurrent law making competence to regulate education at all levels excluding tertiary education.[35] The sequel is the Schools Act. It was adopted in 1996 and took effect on 1 January 1997.

The Schools Act

[34] See sections 23(5) and (6), 9(4), 24(b), and 25(5) of the Constitution.

Section 23(5) states:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

Section 23(6) on the other hand provides:

> "National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

Section 9(4) provides:

> "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

Section 24(b) provides:

> "Everyone has the right—
>
> . . .
>
> (b) to have the environment protected, for the benefit of the present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Section 25(5) provides:

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

[35] See Part A of Schedule 4 which provides that "education at all levels, excluding tertiary education" is a functional area of concurrent legislative competence between the national and provincial government.

[55]The avowed purpose of the Schools Act is to give effect to the constitutional right to education. Its preamble records that the achievement of democracy has consigned to history the past system of education which was based on racial inequality and segregation and that the country requires a new national system for schools which will redress past injustices in the provision of education and will provide education of a progressively high quality for all learners. The new education system must lay a foundation for the development of all people's talents and capabilities and advance the democratic transformation of society and combat racism, sexism, unfair discrimination and the eradication of poverty. The preamble also expresses the intent to advance diverse cultures and languages and to uphold the rights of learners, parents and educators. It also makes plain that the statute aims at making parents and educators accept the responsibility for the organisation, governance and funding of schools in partnership with the state.[36]

[56]An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose

[36] The preamble to the Schools Act provides as follows:

> "WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and
>
> WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State; and
>
> WHEREAS it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa".

primary role is to set uniform norms and standards for public schools.[37] The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools[38] and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals.[39] Parents of the learners and members of the community in which the school is located are represented in the school governing body[40] which exercises defined autonomy over some of the domestic affairs of the school.[41]

[57]The power to determine a school's language policy vests in the governing body. Section 6(2) of the Schools Act provides that the governing body of a public school "may determine" the language policy of the school.[42] The legislation devolves the decision on the language of instruction onto the representatives of parents and the community in the governing body. It accords well with the design of the legislation that, in partnership with the state, parents and educators assume responsibility for the governance of schooling institutions. A governing body is democratically composed

[37] Sections 5(4)(c), 5A(1) and (2), 6(1), 6A(1), 8(3), 14(6), 16A(1)(b)(i), 20(11), 35 and 39(4), (7), (8) and (10). Sections 5A(1) and 16A(1)(b)(i) were introduced by the Educational Laws Amendment Act 31 of 2007 with effect from 31 December 2007 which predates the events that gave rise to the present dispute.

[38] Section 12(1) read with sections 3(3) and (4).

[39] Sections 16(3), 16A, 19(2) and 24(1)(j).

[40] Section 23(1) and (2).

[41] Sections 5(5), 6(2), 7, 8(1), 16(1) and 20(1). For an instructive discussion of the legal framework for admission policies and language policies at public schools see Woolman & Fleisch *The Constitution in the Classroom Law and Education in South Africa 1994 to 2008* (Pretoria University Press, Pretoria 2009) at Chapter 3.

[42] Section 6(2) provides:

> "The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law."

and is intended to function in a democratic manner.[43] Its primary function is to look after the interest of the school and its learners.[44] It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come with it.

[58]This does not, however, mean that the function to decide on a medium of instruction of a public school is absolute or is the exclusive preserve of the governing body. Nor does it mean that the only relevant consideration in setting a medium of tuition is the exclusive needs or interests of the school and its current learners or their parents.

[59]The power of the governing body to determine language policy is made, in so many words, "subject to the Constitution, [the Schools] Act and any applicable provincial law".[45] This qualifier is obviously superfluous in relation to the Constitution because all law is subservient to our basic law.[46] All that may be said is that the qualifier emphasises that the power to fashion a policy on the medium of instruction must be accorded contours that fit into the broader ethos of the

[43] Sections 18 and 18A.

[44] Sections 16(2) and 20(1)(a).

[45] Section 6(2) above n 42.

[46] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Constitution and cognate legislation. In addition, it seems plain that the power must be understood and exercised subject to the limitation or qualification the Schools Act itself imposes. In a rather unusual provision, the authority to fix a language policy is conferred by national legislation, but may be further qualified by "any applicable provincial law".[47]

[60]There are additional legislative modifiers. Firstly, the Minister may, again subject to the Constitution, by notice, determine norms and standards for language policy in public schools.[48] The Minister has in fact published the required norms and standards.[49] They are by definition general – they cannot relate to any particular

[47] Section 6(2) above n 42.

[48] Section 6(1) of the Schools Act states:

> "Subject to the Constitution and this Act, the Minister may, by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine norms and standards for language policy in public schools."

[49] The Norms and Standards for Language Policy in Public Schools (Government Gazette 18546, GN 383, 9 May 1997) published in terms of section 3(4)(m) of the National Education Policy Act 27 of 1996 and section 6(1) of the South African Schools Act, 1996. The aim of these norms are stated as follows:

> "(a) Recognising that diversity is a valuable asset, which the state is required to respect, the aim of these norms and standards is the promotion, fulfilment and development of the state's overarching language goals in school education in compliance with the Constitution, namely:
>
> (1) the protection, promotion, fulfilment and extension of the individual's language rights and the means of communication in education;
>
> (2) the facilitation of national and international communication through promotion of bi- or multilingualism through cost-efficient and effective mechanisms; and
>
> (3) to redress the neglect of the historically disadvantaged languages in school education."

Moreover, the Norms and Standards provide that the Rights and Duties of the School are as follows:

> "(1) Subject to any law dealing with language in education and the Constitutional rights of learners, in determining the language policy of the school, the governing body must stipulate how the school will promote multilingualism through using more than one language of learning and teaching, and/or by offering additional languages as fully-fledged subjects, and/or applying special immersion or language maintenance programmes, or through other means approved by the head of the provincial education department. (This does not apply to learners who are seriously challenged

school's language policy. Second, no form of racial discrimination may be practised in implementing a language policy.[50] Third, since 31 December 2007 (after the present dispute arose), a school's language policy must comply with the norms and standards for the provision of school facilities described by the Minister.[51]

[61]It is therefore clear that the determination of language policy in a public school is a power that in the first instance must be exercised by the governing body. The power must be exercised subject to the limitations that the Constitution and the Schools Act or any provincial law laid down. Even more importantly it must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress.

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with regard to language development, intellectual development, as determined by the provincial department of education.)

(2) Where there are less than 43 requests in Grade 1 to 6, or less than 35 requests in Grade 7 to 12 for instruction in a language in a given grade not already offered by a school in a particular school district, the head of the provincial department of education will determine how the needs of those learners will be met, taking into account—

(a) the duty of the state and the right of the learners in terms of the Constitution, including;

(b) the need to achieve equity;

(c) the need to redress the results of past racially discriminatory laws and practices;

(d) practicability; and

(e) the advice of the governing bodies and principals of the public schools concerned." (Footnote omitted.)

[50] Section 6(3) of the Schools Act provides:

"No form of racial discrimination may be practiced in implementing policy determined under this section."

[51] See section 5A (3) and (4) and also section 58C, (introduced by the Educational Laws Amendment Act 31 of 2007 with effect from 31 December 2007). This provision obviously predates the events that gave rise to the present dispute.

[62]The Supreme Court of Appeal took the stance that the power to determine language policy vests exclusively with the governing body and that the HoD has no power under section 22(1) and (3) of the Schools Act to relieve the governing body of this function under any circumstances.[52] The Court concluded that a language policy properly adopted by a governing body may be impugned only by way of judicial review.[53] It is to the correctness of this construction that I now turn.

Did the HoD have the power in terms of section 22 to withdraw the language policy determined by the school governing body in terms of section 6(2) of the Schools Act?

[63]The provisions of section 22(1) are terse but clear. They are "[t]he HoD may, on reasonable grounds, withdraw a function of a governing body". Section 22(2) sets out the procedural fairness requirements for the withdrawal of a function.[54] On the other hand, section 22(3) regulates procedural fairness requirements when the withdrawal of the function is "in cases of urgency". It provides that:

> "In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter—

[52] *Hoërskool Ermelo* (SCA) above n 1 at paras 22-30.

[53] Id at para 32.

[54] Section 22(2) provides:

> "The Head of Department may not take action under subsection (1) unless he or she has—
>
> (a) informed the governing body of his or her intention so to act and the reasons therefor;
>
> (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and
>
> (c) given due consideration to any such representations received."

(a) furnishes the governing body with reasons for his or her actions;

(b) gives the governing body a reasonable opportunity to make representations relating to such actions; and

(c) duly considers any such representations received."[55]

[64]Section 22(1) simply refers to "a function of a governing body". It does not qualify the function in any manner whatsoever. The HoD may withdraw a function only "on reasonable grounds". Again, the statute does not set any limitation beyond the requirement of reasonableness in withdrawing a function. I have explained earlier that, in *Mikro School*, the Supreme Court of Appeal held that the word "function" in section 22(1) embraces any function allocated to a governing body in terms of any provision of the Schools Act.[56] This means that any function of a governing body given to it by the statute may, in terms of section 22(1), be withdrawn from it. On this reasoning it follows that the HoD on reasonable grounds has the power to withdraw the language policy function conferred on the governing body by section 6.[57]

[65]However, confronted by the same issue in the present case, the Supreme Court of Appeal held that for the purposes of disposing of the dispute before the Court in *Mikro School*, it was not necessary to construe section 22(1) and that the interpretation there placed on section 22(1) was accordingly *obiter dictum*[58] and in any event wrong.

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[55] See section 22(3).

[56] *Mikro School* above n 7 at para 38.

[57] For the full text of section 6(2) see above n 42.

[58] *Hoërskool Ermelo* above n 1 at para 23. See *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA); 2009 (7) BCLR 712 (SCA) at para 101, where Cameron JA in a separate concurring judgment, but for different reasons stated that "[a]nything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (*obiter dictum*), and is not binding on subsequent courts."

[66]The Supreme Court of Appeal interpreted section 21 as closely related to and informing the meaning of section 22. It held that the power under section 22(1) to withdraw a function relates only to functions allocated to a governing body by the HoD under section 21.[59] That section, it will be remembered, provides for allocation of functions by the HoD to a governing body at its request. The Supreme Court of Appeal reasoned that the HoD may lawfully revoke only functions he has in this way allocated to a school, and that it would be untenable to construe section 22(1) as permitting an HoD to revoke a function which parliament through section 6(2) expressly reposed in a school governing body.[60]

[67]By restricting the power of the HoD to revoke a function of a governing body to allocated functions as listed in section 21, the Supreme Court of Appeal in effect found that the power to formulate a language policy located in section 6(2) is beyond the reach of the HoD. It took the view that once a governing body has decided on a language policy it may not be withdrawn at all by the HoD through the exercise of the power to withdraw conferred by section 22(1) or, for that matter, by anybody else except by a court on review.

[68]I see matters differently. The authority of the HoD to revoke a function conferred by section 22(1) is broad in the sense that it relates to any function of a governing

[59] *Hoërskool Ermelo* above n 1 at para 22.

[60] Id at paras 22-30.

body conferred by the Schools Act or by any other provincial law. Nothing in the text or indeed in the purpose or overall scheme of the Schools Act justifies limiting the power of the HoD to withdraw a function that the Schools Act permits to be performed by a governing body. The power to intervene and revoke a function is authorised by the statute itself provided it is done on reasonable grounds and in order to pursue a legitimate purpose.

[69]This conclusion follows from both a broad reading of the Schools Act's design and a close reading of its provisions. The word "function" appears in section 15, which provides that "[e]very public school is a juristic person, with legal capacity to perform its functions in terms of this Act." It also appears in section 16(1), which provides that subject to the Act "the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act."[61] These provisions suggest that the statute itself does not permit a fragmented approach to a governing body's "functions", but that a coherent approach should be adopted to understanding the meaning of the word wherever it appears.

[70]In contrast to this, the approach the Supreme Court of Appeal took to construing "function" in section 22 isolates that word where it occurs there, and accords it a special meaning, sundered from its meaning in section 20 and elsewhere in the statute.

[61] The word "function" appears as a noun in sections 11(2), 14(2)(a), 15, 16(1), 19(1)(a) and (b), 19(2), 20, 21, 22, 25, 58B(5)(b) and (c) and 58B(6) (section 58B having been introduced by section 11 of the Education Laws Amendment Act 31 of 2007 with effect from 31 December 2007).

This necessarily entails that "functions" in section 22 bears a materially different and more limited meaning from "functions" in sections 16, 20 and 25. There is in my view no warrant for such a narrow and particularistic approach. On the contrary, precepts of statutory interpretation suggest that the word "function" should have the same meaning wherever it occurs in the statute, since there is "a reasonable supposition, if not a presumption" that the "the same words in the same statute bear the same meaning" throughout the statute.[62]

[71]On this reasoning, the power to withdraw a function of a governing body in my view extends to all functions of a governing body envisaged in sections 20 and 21. While it is correct that the power to formulate a language policy under section 6(2) is not located within the functions expressly enumerated in sections 20 or 21, there is no reason not to regard that power as a function regulated uniformly by the statute in sections 16, 20, 21 and 25. It follows that there is no reason why the power to determine language policy should fall outside the reach of the power to revoke a governing body's "function" conferred on the HoD by section 22. The conclusion must follow that the approach to the meaning of "function" in *Mikro School* was correct. An HoD may on reasonable grounds withdraw a school's language policy.

[72]I should add that one of the reasons the Supreme Court of Appeal advanced for disavowing the approach in *Mikro School* to whether the language policy function

[62] See *Minister of Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) 395 (A) at 404D-E, endorsed in *More v Minister of Co-operation and Development and Another* 1986 (1) 102 (A) at 115C-D.

could be withdrawn under section 22 (and whether section 25 then applied – a point to which I later return) was the possibility that the HoD could abuse it.[63] In general, this does not seem to me to be the correct approach. The possibility that a statutory power may be abused – which is an ever-attendant risk – cannot determine the construction of the ambit of the power, especially since the law affords adequate remedies for official abuse of power. Moreover, in this instance, the statute requires the exercise of the power to be reasonable. The remedy is thus to correct the abuse, and not to attenuate the power through strained construction.

[73]Indeed, my conclusion does not entail that the HoD enjoys untrammelled power to rescind a function properly conferred on a governing body whether by him or by the Schools Act or any other law. The power to revoke will have to be exercised on reasonable grounds. In addition the HoD must, in revoking the function, observe meticulously the standard of procedural fairness required by section 22(2) and, in cases of urgency, by section 22(3).

[74]What would constitute reasonable grounds will have to be determined on a case by case basis. This will require full and due regard to all the circumstances that actuated the HoD to by-pass the governing body in relation to the specific power withdrawn. In this regard, a reviewing court will have to consider carefully the nature of the function, the purpose for which it is revoked in the light of the best interests of

[63] *Hoërskool Ermelo* above n 1 at para 27. Indeed this was the pivotal reason Brand JA cited in his concurring judgment at para 36.

actual and potential learners, the views of the governing body and the nature of the power sought to be withdrawn as well as the likely impact of the withdrawal on the well-being of the school, its learners, parents and educators. And all these factors would have to be weighed within the broad contextual framework of the Constitution.

[75]In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation.

[76]This conclusion is premised on the nuanced character of the constitutional imperative found in section 29(2) which whilst recognising the right to receive education in an official language or a language of one's choice, imposes a duty on the state to ensure effective access to the right to be taught in the language of one's choice.[64] This duty is coupled with the obligation on the state to ensure that there are enough school places for every child who lives in a province[65] and the duty to ensure that a public school must admit learners without unfairly discriminating in any way.[66]

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[64] For the full text of section 29(2) see [51] above.

[65] See section 3(3) of the Schools Act which provides:

> "Every member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2)."

[66] See section 5(1) of the Schools Act which provides:

> "A public school must admit learners and serve their educational requirements without unfairly discriminating in any way."

[77]These and other positive duties found in section 29 of the Constitution and in the Schools Act are inconsistent with an understanding of section 6(2) of the Schools Act which locates the right to determine language policy exclusively in the hands of the school governing body. Such an insular construction would in certain instances frustrate the right to be taught in the language of one's choice and therefore thwart the obvious transformative designs of section 29(2) of the Constitution.

[78]Put otherwise, the statute devolves power and decision-making on the school's medium of instruction to a school governing body. It would however be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice.[67] The Constitution itself enjoins the state to ensure effective access to the right to receive education in a medium of instruction of choice. The measures the state is required to take must evaluate what is reasonably achievable and must keep in mind the obvious need for historical redress.[68]

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[67] In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 29, Yacoob J, writing for the majority held that "[t]he exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution." See further *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 132.

[68] See section 29(2) of the Constitution. For the full text see [51] above.

[79]School governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body.[69] For that reason, the starting point of our understanding of the role of the governing body and of the state in relation to language rights in public education is section 29 of the Constitution. Section 6(2) must be construed in line with this constitutional warranty.

[80]It is correct, as counsel for the school emphasised, that section 20(1) compels a governing body to promote the best interests of the school and of all learners at the school.[70] Counsel also emphasised, rightly, that the statute places the governing body in a fiduciary relation to the school.[71] However, a school cannot be seen as a static and insular entity. Good leaders recognise that institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. The governing body of a public school must in addition 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.

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[69] Section 23(2) read with section 20 of the Schools Act.

[70] Section 20(1) of the Schools Act provides:

> "Subject to this Act, the governing body of a public school must—
>
> (a) 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."

[71] Section 16(2) provides: "A governing body stands in a position of trust towards the school."

[81]What is more, the governing body's extensive powers and duties do not mean that the HoD is precluded from intervening, on reasonable grounds, to ensure that the admission or language policy of a school pays adequate heed to section 29(2) of the Constitution. The requirements of the Constitution remain peremptory. In this regard, the state must consider all reasonable alternatives and must take into account what is fair, practicable and what ameliorates historical racial injustice.

If the HoD had the power to withdraw a function, did he do so on reasonable grounds and in a procedurally fair manner?

[82]There are two parts to the remaining inquiry. The first is whether the HoD acted reasonably, as required by section 22, and the second is whether his conduct in revoking the governing body's language function was procedurally fair. It may well be that in order for the exercise of the power to withdraw a language function to be reasonable, it must be exercised in a manner that affords the school governing body an opportunity to reconsider its position. The facts tend to show that in 2006 and 2007, numerous requests were directed to the school to admit learners who chose to be taught in English. The view of the HoD was that the school acted unreasonably and used the language policy to keep out learners who preferred to be taught in English, despite the fact that the school had excess classroom capacity. In the circumstances it may well be that the power to withdraw the language policy function arose. A key consideration in this regard was the need to provide the stranded learners with a school to attend.

[83]But it is not necessary to reach a firm conclusion in this regard. This is because the HoD's intervention was premised on the statement in *Mikro School*, that his withdrawal of the language policy power entitled him to invoke section 25. I therefore turn to consider whether the exercise of the section 22 power may have been contaminated by an incorrect application of the provisions of section 25.

Did the HoD have the power to appoint a committee to decide a school language policy under section 25 of the Schools Act?

[84]I think not. Section 25(1) provides:

> "If the Head of Department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of this Act or has failed to perform one or more of such functions, he or she must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months."

Section 25 regulates failure by a governing body to perform its functions. The jurisdictional requirements are that the governing body must have ceased or failed to perform one or more of its allocated functions. Only in that event is the HoD authorised to appoint other people to perform the functions, and for a period not exceeding 3 months.

[85]The power to withdraw a function under section 22(1) on reasonable grounds has no necessary connection with the power contemplated in section 25. I cannot endorse

the contrary conclusion reached in *Mikro School*. Section 25 operates to allow the appointed persons to take the place of an ineffective or dysfunctional governing body whilst arrangements are made for the election of another governing body. Therefore, the HoD incorrectly acted under section 25(1) in appointing the interim committee in circumstances where he had no such power. Section 25 is directed at the temporary shoring up of a malfunctioning governing body which must be replaced by a newly constituted governing body within a year.

[86]What is more, there are no grounds to indicate that the governing body had ceased to perform any function or failed to adopt a language policy.[72] On the contrary, the school prided itself on its robust and fully functioning governing body which had adopted an admission and language policy that it followed with considerable rigour and steadfastness. That the HoD did not like its language policy cannot be equated with the governing body having ceased to function or having failed to adopt one.

[87]The HoD, following legal advice, took the view that once he had withdrawn a function under section 22(1) he was, without more, entitled to appoint people to perform the function in terms of section 25(1). This conclusion was not correct. In this respect, I agree with the finding of the Supreme Court of Appeal in this matter[73] (rejecting the approach in *Mikro School*) that once a function is properly withdrawn in

[72] Section 25(1) of the Schools Act authorises the HoD to withdraw a function of a governing body only if he or she "determines on reasonable grounds that a governing body has ceased to perform functions allocated to it." (My emphasis.)

[73] *Hoërskool Ermelo* above n 1 at para 22.

terms of section 22(1); it vests in the HoD. He is entitled and duty bound to exercise it in furtherance of a specified goal permitted by the Schools Act. Here, the HoD conflated the powers given to him under sections 22(1) and 25(1) of the Schools Act. That is not permissible.

[88]The two provisions regulate two unrelated situations and may not be selectively or collectively applied to achieve a purpose not authorised by the statute. Section 22 regulates the withdrawal of a function, but only on reasonable grounds. Its purpose is to leave the governing body intact but to transfer the exercise of a specific function to the HoD for a remedial purpose. This means that the HoD must exercise the withdrawn function, but only for as long as, and in a manner that is necessary to achieve the remedial purpose. That explains why section 22(3) provides that the HoD may, for sufficient reason, reverse or suspend the withdrawal. In my view, it is a power which may be exercised only to ensure that the peremptory requirements of the Constitution and the applicable legislation are complied with.

[89]To the extent that the HoD incorrectly invoked the provisions of section 25, his recourse to section 22 was also contaminated. He therefore acted unlawfully and in breach of the constitutional principle of legality. Consequently, all conduct premised on the provisions of section 25 are of no legal force or effect. This means that the interim committee that the HoD had appointed was not lawfully constituted.

[90]This Court adopted a similar attitude in *Minister of Education v Harris*,[74] where it was confronted by the question whether a notice issued by the Minister for Education on the age requirements for the admission of learners was valid. The Court found that, in issuing the notice, the Minister had exceeded the power conferred on him by the statute and accordingly infringed the constitutional principle of legality. In that case too, the Minister had made it plain that he had deliberately chosen the provision of the statute concerned. That provision, however, did not give him the power he purported to exercise.

Did the committee carry out its mandate lawfully and in a procedurally fair manner?

[91]It matters not whether the interim committee carried out its mandate in a procedurally fair manner. It was appointed in circumstances where the HoD had no power to do so. Its appointment is a nullity in as much as its deliberations and decisions carry no legal consequences.

[92]I must add, for the sake of completeness only, that even if the HoD had the power to set up the committee under section 25, his conduct would not have satisfied the procedural fairness requirements. He did not hear out the governing body before concluding that it had ceased or failed to determine a language policy and that an interim committee should be appointed to exercise the function. The governing body had no part in identifying the members of the committee nor did they get the opportunity to make any submissions to it before it made the decision to alter the

[74] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

language policy. It follows that their determination of a new language policy is afflicted not only by the lack of power of the HoD to appoint it, but also by the procedural lapses I have alluded to.

What is the fate of the appeal and other appropriate relief?

[93]The appeal must fail, albeit it for reasons different from those advanced by the Supreme Court of Appeal. The principal conclusion I reach is that where reasonable grounds exist the HoD has the power under section 22(1) to withdraw the school governing body's function of determining the language policy under section 6(2). I part ways with the Supreme Court of Appeal at the point where it holds that the function conferred by section 6(2) to determine language policy is that of the school governing body alone, that the HoD has no power whatsoever to revoke that function and that his only remedy is a judicial review of the impugned language policy. The other principal finding I make is that even given the power to withdraw the language policy under section 22(1), the HoD unlawfully conflated the requirements of section 22(1) and of section 25 by withdrawing the function and at the same time establishing an interim committee under section 25. This misapprehension of his powers strikes at the heart of the lawfulness of the conduct of the interim committee and infects with unlawfulness also his recourse to section 22(1). Simply put, the HoD had no power to constitute the interim committee. In turn, the interim committee did not have the requisite power to fashion the new language policy for the school.

[94]It follows that the language policy the interim committee devised is void and has no legal consequences.

[95]The appeal accordingly falls to be dismissed. The agreed order entitling learners enrolled at the school since 25 January 2007 in terms of a parallel medium language policy to continue to be taught and to write examinations in English until the completion of their school careers must be affirmed. The facts of the case however call for the making of further orders that are just and equitable.

[96]The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.[75] Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it "may make any order that is just and equitable". The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.[76]

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[75] Section 172(1)(a) provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

[76] See in this regard *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 42.

[97]It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct.[77] This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders.[78] This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.

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[77] Compare *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 14; 2008 (2) SACR 421 (CC); 2008 (12) BCLR 1197 (CC). In *Sibiya and Others v Director of Public Prosecutions, Johannesburg High Court, and Others* [2005] ZACC 16; 2005 (5) SA 315 (CC); 2006 (2) BCLR 293 (CC), this Court made a supervisory order despite a finding that the impugned legislation relating to the substitution of death sentences was not unconstitutional.

[78] See, for example, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16, Case No CCT 22/08, 10 June 2009, as yet unreported; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC); *Nyathi v MEC for Department of Health, Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

[98]In the present matter, it is just and equitable to all concerned that the school governing body be directed to reconsider the school language policy in the light of the considerations set out in this judgment. These considerations are underpinned by an understanding of the power to determine language policy in terms of section 6(2) of the Schools Act as informed by the peremptory provisions of section 29(2) of the Constitution.

[99]There are at least two reasons why the governing body of the school must revisit its language policy. First, the school argued that it is entitled to determine a language policy having regard only to the interests of its learners and of the school in disregard of the interest of the community in which the school is located and the needs of other learners. That approach, as I have said before, is not consistent with the relevant provisions of the Constitution and the Schools Act. A school is obliged to exercise its power to select a language policy in a manner that takes on board the provisions of section 29(2) of the Constitution, section 6(2) of the Schools Act and the norms and standards prescribed by the Minister.

[100]Second, whilst it is so that the adoption of the language policy by the interim committee was unlawful, the underlying challenge in Ermelo relating to the scarcity of classroom places for learners who want to be taught in English remains and is likely to resurface in January 2010. At the very least, in reassessing its language policy, the school governing body must have regard to its dwindling enrolment numbers. It must

act, recognising that there is a great demand for the admission of grade 8 learners who prefer English as a medium of instruction.

[101]A further relevant consideration is that the Department bears a constitutional and statutory duty to provide basic education in an official language of choice to everyone, where it is reasonably practical and just. It is accordingly duty bound to take lawful steps to achieve this constitutional obligation.

[102]For these reasons, I will make an order that requires the school governing body and the school to report to this Court within a specified period of time on the reasonable steps it has taken in reviewing its language policy and on the outcome of the review process.

[103]I have earlier expressed dismay at the fact that the Department has not taken adequate steps to ensure that there are enough school places so that every child in the Ermelo circuit can attend school as required by sections 3(1) and (2) of the Schools Act.[79] Procuring enough school places implies proactive and timely steps by the Department. The steps should be taken well ahead of the beginning of an academic year. On all accounts, it is highly probable that there will be an increased demand for

[79] Section 3 provides:

> "(1) Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.
>
> (2) The Minister must, by notice in the Government Gazette, determine the ages of compulsory attendance at school for learners with special education needs".

grade 8 school places at the beginning of the year 2010. And in any event, I have already alluded to the unacceptably high level of crowding in high schools in Ermelo other than at Hoërskool Ermelo. Additional places at Hoërskool Ermelo will afford only partial alleviation.

[104]It is just and equitable to make an order requiring the HoD to file within a fixed period of time a report to this Court setting out the likely demand for grade 8 English places at the beginning of 2010 and setting out the steps that the Department has taken to satisfy this likely demand for an English or parallel medium high school in the circuit of Ermelo. The report must also provide information and statistics on the levels of enrolment in other high schools in the area in the light of the learner-to-class ratio norms set by the Minister for Education.

Costs

[105]This matter has raised important constitutional issues. The school and its governing body have been partially successful in relation to lawfulness. However, it must also be said that this is a case which calls for a concerted attempt to resolve the underlying dispute that flows directly from the exclusive language policy the governing body seeks to preserve. Even so, I find no cause why the school and its governing body should be deprived of a cost order favourable to them in circumstances where they have successfully resisted the appeal. I am minded to direct

that the first and second applicants pay the costs of the first and second respondents in this Court, which costs must include costs of two counsel.

Order

[106]In the event, the following order is made:

(1) The application for leave to appeal is granted.

(2) The appeal against the decision of the Supreme Court of Appeal fails.

(3) Paragraphs 2(a)-(e) and paragraph 3 of the order of the Supreme Court of Appeal are confirmed.

(4) The School Governing Body of Hoërskool Ermelo must—

(a) review and determine a language policy in terms of section 6(2) of the Schools Act and the Constitution;

(b) by not later than Monday 16 November 2009 lodge with this Court an affidavit setting out the process that was followed to review its language policy and a copy of the language policy.

(5) The Head of Department: Mpumalanga Department of Education must by not later than Monday 16 November 2009 lodge a report with this Court setting out the likely demand for grade 8 English places at the start of the school year in 2010 and setting out the steps that the Department has taken to satisfy this likely demand for an English or parallel medium high school in the circuit of Ermelo.

(6) The first and second applicants are directed to pay the costs of this application for leave to appeal including the costs of two counsel.

Langa CJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Moseneke DCJ.

For the First and Second Applicants:	Advocate BR Tokota SC, Advocate DT Skosana and Advocate ZZ Matebese instructed by the State Attorney, Johannesburg.
For the First and Second Respondents:	Advocate W Trengove SC and Advocate N Fourie instructed by Johan van der Wath Attorneys.
For the Amicus Curiae:	Advocate J du Toit SC instructed by Michael Randell Attorneys.