



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

REPORTABLE

CASE NO.: 7271/2024

In the matter between: -

EQUAL EDUCATION	First Applicant
KUNGAZO MPHETSHULWA	Second Applicant
NCUMISA STOFIE	Third Applicant
NOMBONISO QUVILE	Fourth Applicant
NOMZAMO JULIA MACI	Fifth Applicant
XOLISWA FELICIA MAKUPULA	Sixth Applicant

and

HEAD OF DEPARTMENT: WC EDUCATION DEPARTMENT	First Respondent
DIRECTOR: METRO EAST EDUCATION DISTRICT	Second Respondent
MEMBER OF EXECUTIVE COUNCIL: WESTERN CAPE EDUCATION DEPARTMENT	Third Respondent

Coram: MANTAME J et DOLAMO J and MOOSA AJ

Heard: 24 April 2025

Delivered: 28 November 2025

Summary: application – declaratory relief in terms of Section 172 of the Constitution– Section 29 (1) (a) of the Constitution– right to basic education – administrative law - failure to plan for late placements constitutes a violation of sections 9, 10, 28, 29(1)(a) and 33(1) of the Constitution – WCED to develop a management plan for late placements. Circulars 0037 of 2022 and/or Circular 0037 of 2023 lapsed and thereof order refused – Clause 13 of the WCED policy declared unconstitutional - WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools WCED in violation of the sections 9 (1) and (3) of the Constitution and constitutes an unfair discrimination– to the extent it excludes late applicants, extremely late applicants and transfer requests. The WCED in consultation with stakeholders and the general public to amend the Admission Policy – Court is precluded from making policy for WCED – Policy making resides in the domain of the executive power in the provincial government– separation of powers – the Standard Operating Procedure – no legal status – remains a circular or guideline that gives effect to the Admission Policy.

ORDER

Having heard Counsel for the Applicants and the Respondents, it is ordered that:

1. It is declared that the first, second and third respondents' failure to plan for late placement applications in, but not limited to, the Metro East Education District for the 2024 academic year constitutes a violation of sections 9, 10, 28, 29(1)(a) and 33(1) of the Constitution;
 - 1.1 The respondents are ordered to develop a management plan for late applications, extremely late applications and transfer requests in consultation with the stakeholders and the general public within six (6) months of the date of this order.
2. It is declared that Clause 13 of the WCED's Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools (WCED Admission Policy), constitutes a violation of sections 10, 28(2), 29(1)(a) and 33(1) of the Constitution, to the extent that it excludes and fails to address certain category of applicants, and in this instance permits **late applicants** to proceed unmanaged properly.
3. **Extremely late applicants, and transfer request applicants** are not dealt with in the policy. The policy should be amended to include late applicants, extremely late applicants and transfer requests applicants who remain unplaced for an indefinite period of each academic year and the WCED should provide clarity on the process that these applicants must follow to secure their placement in relation to the timeline within which these applicants will be placed in a school; and / or provide the name and designation of the relevant WCED official who is responsible for ensuring the placement of late applicants, extremely

late applicants, and learners seeking transfers to a school for basic education in the Western Cape.

4. Circulars 0037 of 2022 and Circular 0037 of 2023 have lapsed and, accordingly, the declaratory order that was sought by the applicants is refused.
5. It is declared that Clause 13 of the WCED Admission Policy, to the extent that it unfairly discriminates against late applicants on the basis of race, poverty level, place of birth, and social origin, and thereby constitutes a violation of sections 9(1) and 9(3) of the Constitution, is set aside.
6. The respondents are ordered to amend the WCED Admission Policy in a manner that takes into consideration the three categories of applicants mentioned in paragraphs 2 and 3 in bold in consultation with the stakeholders and general public within six (6) months of the date of this order;
 - 6.1 The declaration of invalidity of Clause 13 of the WCED Admission Policy is suspended for six (6) months, pending the finalisation of the amended provisions of the WCED Admissions Policy.
7. Prayers 5 and 6 of the Amended Notice of Motion are refused.

8. The respondents are ordered to pay applicants costs of two Counsel on Scale B (junior Counsel) and Scale C (senior Counsel) respectively.

JUDGMENT

MANTAME J (DOLAMO J concurring)

Introduction

[1] The right to basic education has recently occupied a spotlight in this Court. Due to the fact that a panel of judges who initially heard the matter could not agree on certain findings and orders, a third judge was added to constitute a full court and break a deadlock without a need for a rehearing of the matter. The latter judge had to consider the matter after the record of proceedings and a full transcript of proceedings was placed before him. It is for these reasons that there was a delay in handing down the judgment.

[2] The applicants identified certain shortcomings emanating from the manner in which the late placements in schools in the Western Cape, but not limited to, the Metro East Education District (MEED), for the 2024 academic year were handled by the respondents (WCED). The MEED include areas such as Khayelitsha, Kraaifontein, Kuils River and Strand. Most markedly black students in the MEED

were left unplaced. This resulted in an urgent application in which (Part A) served before Nuku J on 17 May 2024. In that Court, a judgment and order were issued directing first to third respondents to place all learners across all grades in a public school within the MEED for the 2024 academic year¹. Part B was postponed to the semi-urgent roll, and it served before us as a result thereof.

The parties

[3] The first to sixth applicants (the applicants) were represented by Mr T. Ngcukaitobi SC who was assisted by Messrs L. Zikalala & N. Soekoe. The first to fourth respondents (the respondents) opposed this application and were represented by Mr E. De Villiers-Jansen SC who was assisted by Ms A. Christians. The Minister of Basic Education who was cited as the fifth respondent did not participate in these proceedings.

Background

[4] Before this court, the applicants seek numerous declarators, *first* that the first, second, and third respondents' failure to plan for late placement applications in, but not limited to, the Metro East Education District for the 2024 academic year constitutes a violation of sections 9², 10³, 28⁴, 29(1)(a)⁵ and 33(1)⁶ of the

¹ *Equal Education and Others v Head of Department Western Cape Education Department and Others* (7271/2024) [2024] ZAWCHC 189 (24 July 2024)

² Section 9 **'Equality'**. — (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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

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

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

Constitution. *Second*, that the WCED's Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools (the Admission Policy), as well as, to the extent necessary, its Circular 0037 of 2022 and/or Circular 0037 of 2023, constitute a violation of sections 10, 28(2), 29(1)(a) and 33(1) of the Constitution, and should be set aside, to the extent that they permit late applicants to remain unplaced for an indefinite period of each academic year by providing no clarity on the process that late applicants must follow to secure their placement, the timeline within which late applicants will be placed in a school, or the relevant WCED official who is responsible for ensuring the placement of late applicants. *Third*, that the WCED Admission Policy, as well as, to the extent necessary, its Circular 0037 of 2022 and/or Circular 0037 of 2023, unfairly discriminate against late applicants on the basis of race, poverty level, place of birth and social origin, and thereby constitute a violation of sections 9(1) and 9(3) of the Constitution and should be set aside.

³ Section 10: '**Human dignity.** — Everyone has inherent dignity and the right to have their dignity respected and protected.'

⁴ Section 28: '**Children.**— (1) Every child has the right— (a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that— (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be— (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict. (2) A child's best interests are of paramount importance in every matter concerning the child. ...'

⁵ Section 29: '**Education.** — (1) Everyone has the right – (a) to a basic education, including adult basic education; ...'

⁶ Section 33: '**Just administrative action.** — (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. ...'

Fourth, a mandatory and declaratory relief that the WCED amend its admission policy so that it contains a clear and detailed plan for dealing with late applicants across all grades (including what the WCED classifies as ‘late applications’, ‘extremely late applications’ and late ‘transfer requests’) to mitigate the yearly occurrence of unplaced late applicants missing out on school at the beginning of each academic year, and to share the plan with the applicants and the Court within 60 days of the date of this Order.

[5] The plan to be developed must contain, at a minimum: (i) the steps that a late applicant must follow to lodge an application; (ii) the officials responsible for placing late applicants, including the responsibilities of schools that are approached directly; (iii) the period within which a late applicant can expect to be placed after making an application or seeking a placement; (iv) the process that must be followed if a late applicant does not have the required documentation; (v) the remedial support available to late applicants who are not placed within the period referred to in (iii) above; (vi) a mechanism for recording which areas the late applications come from in order to inform planning for late applicants. (v), the first, second and third respondents to set up pop-up / temporary admission application stations for the 2025 academic year or carry out a comparable intervention to assist late applicants in the first quarter of 2025 in areas, including but not limited to the Metro East Education District, known for having extremely high numbers of late applicants.

[6] Although the application was argued in its entirety, at the conclusion of the proceedings it became apparent that only three prayers were pursued with vigour,

that is (i) that the first, second and third respondents' failure to plan for late placement applications in, but not limited to, the Metro East Education District for the 2024 academic year constitutes a violation of sections 9, 10, 28, 29(1)(a) and 33(1) of the Constitution (*Prayer 2 of the Amended Notice of Motion*); (ii) that the WCED's Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools (the Admission Policy), as well, to the extent necessary, its Circular 0037 of 2022 and/or Circular 0037 of 2023, constitute a violation of sections 10, 28(2), 29(1)(a) and 33(1) of the Constitution, and should be set aside, to the extent that they permit late applicants to remain unplaced for an indefinite period of each academic year by providing no clarity on the process that late applicants must follow to secure their placement, the timeline within which late applicants will be placed in a school, or the relevant WCED official who is responsible for ensuring the placement of late applicants (*Prayer 3 of the Amended Notice of Motion*); and(iii) that the WCED Admission Policy, as well as, to the extent necessary, its Circular 0037 of 2022 and/or Circular 0037 of 2023, unfairly discriminate against late applicants on the basis of race, poverty level, place of birth and social origin, and thereby constitute a violation of sections 9(1) and 9(3) of the Constitution and should be set aside (*Prayer 4 of the Amended Notice of Motion*) .

[7] The respondents acknowledged that indeed every individual possesses an inherent right to basic education that is immediately realisable and is not contingent upon available resources.

[8] In its opposition of this application, the respondents asserted that the WCED has not failed to plan for late applications. The respondents pointed out that such

right cannot be considered in isolation. In fact, it was stated that the applicants' complaints are based on the perceived deficiencies of an inadequate admission process, which results in late applicant learners not being placed in a public school within a reasonable timeframe, which they argue constitutes a violation of constitutional rights. However, these criticisms, as alleged, cannot be sustained. The applicants' contentions are premised upon an unwarranted and disingenuous construction of the admission policy and circulars, the respondents submitted.

Factual Matrix

[9] The applicants contended that at the beginning of each academic year, the first applicant is inundated with pleas for assistance from desperate parents and/or caregivers, and learners who are unable to secure placement in schools in the Western Cape, particularly in the MEED. The affected learners originated from families within the Western Cape, Eastern Cape, and /or other provinces, and settled within the catchment area of the MEED. Although the WCED contends that 'late' or 'extremely late' applications are unprecedented, the claim is not borne out by the historical context of this problem. If anything, the scale of the problem has become worse over time as migration to the Western Cape Province continues to grow.

[10] The historical existence of the problem, appears from a media statement which was released by the then Provincial Minister of Education Mr Donald Grant dated 6 February 2014, in which the subject of learner migration to the Western Cape was under the heading: **Late enrolment from other provinces and countries**. It was said:

‘While the system itself has been growing year on year, we have also seen a flow of new enrolments each year (2010-2014) from other provinces and countries. Inward migration has seen 131 834 additional new enrolments within the system since 2010’⁷

[11] Under the heading: **Late enrolments from the Eastern Cape**, it was said:

‘At the start of every school year, learners arrive unexpectedly from the Eastern Cape seeking enrolment in Western Cape schools. This puts pressure on our education officials to assist with the placement of these late learners but also disrupts teaching and learning time and the flow of the curriculum in the classroom.’⁸

[12] The media statement further detailed that over a period of four (4) school days (Thursday 30 January 2014 - 5 February 2014), the WCED placed an additional 1 571 learners in schools from the Eastern Cape alone. The WCED was acutely aware that its strongest feeder were learners from the Eastern Cape. Further, it was aware that the most prevalent ‘hotspots’, for internal migrants from the Eastern Cape were those areas in the MEED, such as Khayelitsha and Kraaifontein that are occupied by black people. The MEED catchment area is widely known to be occupied by low-income group, unemployed and the most vulnerable people. The WCED noted an average annual increase in its school going population of 20 000 learners per year. Despite the challenges posed by the migration to these ‘hotspots’, the WCED reiterated its commitment to place all learners in schools.

[13] The applicants contends that ten (10) years have passed since the 16 February 2014 statement. However, there has been no improvement, instead the

⁷ FA, Annexure “ND 10” p142

⁸ FA, Annexure “ND 10” p143

situation has regressed. The WCED's obligation to provide good quality education to these learners has seemingly been forgotten.⁹

[14] In 2021, seven years after noting the trend and demographic 'hotspots' for the late applicant learners, the WCED reported to the Standing Committee on Education in parliament that it would place approximately 650 unplaced learners in the MEED by May 2021 (five months into the academic year). This presentation revealed that approximately 90% of the cases of unplaced learners emanated in the MEED. The learners were largely absent from school for close to two academic terms which constitute nearly half of the academic year. This increased the amount of learning time lost by the unplaced learners. Again, in the statement made on 16 February 2014, the then Provincial Minister of Education indicated that the issue of extremely late placements could not be resolved within a matter of days, it took months for learners to be placed, and the situation deteriorated even further.

[15] In 2021, the first applicant and the Equal Education Law Centre encountered a group of 23 learners who despite the first applicant's efforts in bringing the matter to the attention of the District, the HOD, and the MEC for Education in the Western Cape, remained unplaced and out of school for the entire 2021 academic year.

[16] The problem spilled over to the 2022 academic year. The efforts of the first applicant and Equal Education Law Centre yielded nominal success. As a result thereof, it was obliged to launch an urgent application against the WCED for placement of the learners. Since 2022, this Court has issued various court orders

⁹ FA, Annexure "ND 10 p 145

compelling WCED to comply with its constitutional and statutory obligations to place learners who submitted their applications outside of the ordinary admission cycle and extremely late. On 03 June 2022, an order was issued for the WCED and Director MEED to take all reasonable steps necessary to place learners whose names appear in Annexure A, as well as those who remain unplaced and whose names do not appear on Annexure A and who may become known to the first applicant and Equal Education Law Centre, in schools for the 2022 academic year. This resulted in 221 learners being placed in schools during the 2022 academic year.

[17] On 17 May 2024, Nuku J was faced with another urgent application (Part A of this application), which resulted in the granting of a *mandamus* compelling the WCED to place 14 known learners and others similarly placed. In its judgment¹⁰ the Court was critical of the WCED's lackadaisical attitude regarding late and extremely late applicant learners and noting that the WCED "*misconceive[s] the extent of [its] responsibilities when it comes to giving effect to the right to basic education*". It emphasised that the WCED cannot just "*sit back and wait*" without being proactive in the fulfilment of its constitutional responsibilities.

[18] The respondents denied the existence of a systemic problem in the management of late and extremely late applications of learners. Its admission policy, it was said, deals adequately with late applications and extremely late applications as well as the procedure to be followed. For instance, such learners are required to report to the WCED district office nearest to their place of residence to enquire about a school where vacancies exist. District offices are directed to assist parents to

¹⁰ *Ibid* para [1] above (Judgment para 54)

place learners whenever district intervention in the admission process is required. The respondents recognised that extremely late applications are unpredictable and often require the department to deploy additional resources to schools (such as mobile classes) once it is able to identify where the demand for places is greatest. These challenges, unfortunately, lead to unavoidable delays in placement. While no time frames are set in the admissions policy in respect of extremely late applications, there is no indication that any applicant learner has experienced an unreasonable delay. The alleged experiences of the individual applicants in this matter are not indicative of a broader problem but instead point to “parents and caregivers who failed to adhere to the procedure determined by the department”, so said the respondents.

[19] The first applicant stated that the respondents consistently refused to comply with their requests. As early as October 2020, the first applicant and Equal Education Law Centre alerted the WCED to the likelihood that 2021 would present issues of non-placement of learners and requested detailed plans to address the problem. The WCED did not provide a plan. Consequently, as stated above by May 2021, the WCED still had hundreds of learners that were awaiting placement in the MEED.

[20] In March 2021, the first applicant and the Equal Education Law Centre called on the then Provincial Minister for Education, Ms Debbie Schaffer, to resolve the ongoing learner crisis and fulfil her responsibility to develop long-term sustainable solutions to the problem. No enduring solutions were put in place.

[21] In May 2023, the first applicant proposed that admission pop-up stations should be opened within the MEED for the 2024 online late application process, ideally located near Khayelitsha Mall or at Isivivana Centre, where most parents go when they have basic education-related challenges. These stations were to be accessible around November/December 2023 and January 2024 for purpose of considering late applications. The applicants stated that this request was made in order to circumvent the annual crisis of unplaced learners in the Western Cape, particularly within the MEED. The WCED did not provide a substantive response to this proposal.

[22] Further, in December 2023, the first applicant forwarded correspondence ahead of the admission crisis, again asking WCED to take proactive measures to anticipate the admission crisis in the MEED and to develop a mechanism, such as admission pop-up stations, strategically located in all the 'hotspot' areas for the processing of late applications for the period 08 January 2024 to 02 February 2024. The WCED responded by referring to its existing system, stating that the learners should report to their nearest district office, and indicated that it was confident that its usual system would adequately meet the demand should there be any late applications to be dealt with.

Issues

[23] Despite the application being argued in its entirety, it manifestly became apparent that there are three (3) remaining issues for determination before this Court. These are whether (i) the first, second and third respondents' failure to plan

for late placement applications in, but not limited to, the Metro East Education District for the 2024 academic year constitutes a violation of sections 9, 10, 28, 29(1)(a) and 33(1) of the Constitution; (ii) the WCED's Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools (the Admission Policy), as well as, to the extent necessary, its Circular 0037 of 2022 and/or Circular 0037 of 2023, constitute a violation of sections 10, 28(2), 29(1)(a) and 33(1) of the Constitution, and should be set aside, to the extent that they permit late applicants to remain unplaced for an indefinite period of each academic year by providing no clarity on the process that late applicants must follow to secure their placement; the timeline within which late applicants will be placed in a school; or the relevant WCED official who is responsible for ensuring the placement of late applicants; and (iii) the WCED Admission Policy, as well as, to the extent necessary, its Circular 0037 of 2022 and/or Circular 0037 of 2023, unfairly discriminate against late applicants on the basis of race, poverty level, place of birth and social origin; and thereby constitute a violation of sections 9(1) and 9(3) of the Constitution and should be set aside.

Submissions

Right to basic education

[24] Notwithstanding other stipulated rights, central to the applicants' submissions the applicant asserted that this application is prefaced on Section 29 (1) (a) of the Constitution. The purpose of this right as described in domestic legislation, policies, international covenants and legal commentaries are several-fold. Amongst others, the right to education is essential for:

- 24.1 the full development of the human personality and the individual's sense of dignity;
- 24.2 the realisation of substantive equality and equal opportunity, as education constitutes the primary vehicle by which economically and socially marginalised persons can lift themselves out of poverty and obtain the means to participate meaningfully in society; and
- 24.3 the enjoyment of democratic participation and meaningful citizenship.

[25] It was contended that government fulfils its obligations to provide basic education primarily through government-run public schools. In this context, access to the right to a basic education means that learners must be afforded a place in a school and receive remedial support for any period that they were denied a tuition place. Thus, our courts have pronounced some important features that are germane for the determination of this matter.

[26] *First feature: The right is immediately realisable.* The Constitutional Court in *Governing Body of the Juma Musjid Primary School and Others v Essay and Others (Juma Musjid)* explained that, unlike other socio-economic rights, the right to basic education has no internal limitation requiring that it be “progressively realised” within “available resources” and it is not subject to “reasonable legislative measures”.¹¹

Rather, the right is immediately realisable.¹²

[27] It was contended that the implications of the immediate realisable right principle are as follows:

¹¹ *Governing Body of the Juma Musjid Primary School and Others v Essay and Others (Centre for Child Law and Another as Amici Curiae)* (CCT 29/10); [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011); *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) at para 30

¹² *Juma Musjid* at para 37

- 27.1 *First*, state actors (like WCED) must take “all reasonable measures to realise the right to basic education with immediate effect” as stated by Goosen J in *Madzodzo*¹³;
- 27.2 The right is not subject to the standard of reasonableness review, which is the approach adopted to evaluate whether or not there has been a violation of one of the qualified socio-economic rights. With immediately realisable rights, the test is whether the right has been fulfilled not whether the state has taken reasonable measures to fulfil it.
- 27.3 *Second*, the right to basic education may only be limited in terms of a law of general application, which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- 27.4 In this case, WCED does not rely on any law of general application. It relied on PAJA and /or Section 12 (3) of the South African Schools Act 84 of 1996 (SASA) as its law of general application, but neither imposes a limitation.

[28] *The second feature: The right is directly enforceable in respect of each right bearer.* In support of this contention, reference was made to *Minister of Basic Education v Basic Education for All*¹⁴, where the SCA confirmed this feature in the context of the delivery of textbooks and citing the judgment of Tuchten J as follows: ‘The delivery of textbooks to certain learners but not other cannot constitute fulfilment of the right. Section 29 (1) (a) confers the right of a basic education to everyone. If there is one learner who is not timeously provided with her textbooks, her right has been infringed. It is of no moment at this level of the inquiry that all the other learners have been given their books.’¹⁵

¹³ *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM)

¹⁴ *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015) at para 30

¹⁵ *Ibid* at para 30

[29] *The third feature: In implementing this right the state must take reasonable and effective positive measures to ensure fulfilment.*

29.1 It was asserted that Section 7 (2) of the Constitution places a duty on the state to “*respect, protect, promote and fulfil the rights in the Bill of Rights.*” In other words, not only does the government have a duty not to interfere with the right to basic education, but it also has the duty to take positive measures to ensure that the right is fulfilled where it is not already enjoyed.

29.2 In *Glenister v The President of the Republic of South Africa*, the Constitutional Court held that where constitutional rights are threatened or infringed, Section 7 (2) of the Constitution gives rise to an obligation to take specific positive measures that are reasonable and effective. Thus, the Court held that Section 7 (2) casts a special duty upon the state. It requires the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’ It is incontestable that corruption undermines the rights in the Bill of Rights and imperils democracy. To combat it requires an integrated and comprehensive response. The state’s obligation to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms.’¹⁶

29.3 This principle was expounded by the Constitutional Court in *Qwelane v South African Human Rights Commission and Another* as follows:

‘The Equality Act in general, and the impugned section in particular, must be understood in the context of the obligation imposed on the state in terms of s 7 (2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. This is an obligation that emanates from the transformative objective of our Constitution. The ambit of this obligation is both positive and negative. It requires of the state not only to refrain from infringing on

¹⁶ *Glenister v The President of the Republic of South Africa* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) paras 105-112, 157

fundamental rights, but also to take positive steps to ensure that these rights are realised. We must be cognisant of the requirement that measures taken in terms of s 7 (2) must be ‘reasonable and effective’¹⁷.

[30] *The fourth feature: The needs of the most vulnerable must be provided for.*

30.1 State policies and practice will not be defensible if they do not accommodate the particular needs of the poor. In *Bluewaters*¹⁸, this Court defined “vulnerable individuals or groups” as “those people who are not in a position within our society to protect themselves.”

30.2 In *Grootboom*, the Constitutional Court held that “the poor are particularly vulnerable, and their needs require special attention”. As a result, government programmes must be flexible, must make appropriate provision for attention to crisis that may crop up, and must not exclude a significant segment of society¹⁹.

30.3 In *TAC*, the Constitutional Court quoted the above insert from *Grootboom* containing the above-mentioned dictum and found that the state’s rigid and restrictive policy on Nevirapine was unreasonable in light of children’s immediate right to basic healthcare services in section 28 (1) (c) of the Constitution, because it excluded a group of particularly vulnerable people.²⁰

30.4 This principle was said to be reflected in international law.²¹

¹⁷ *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR (CC) (31 July 2021) para 51

¹⁸ *City of Cape Town v All those adult males and females whose names are set out in Annexure “HS1” to affidavit and who reside at Bluewaters Site B and C, Lukannon Drive, Strandfontein Western Cape, and Others* (5083/09) [2010] ZAWCHC 32 (24 February 2010)

¹⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 at para 43 (4 October 2000)

²⁰ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 CC at para 6

²¹ For an analysis of relevant case law, See S Rosa & M Dutschke (2006) “*Child Rights at the Core: A commentary on the use of international law in South African court cases on children’s socio- economic rights*” A Project 28 Working Paper, Children’s Institute, UCT at page 27

30.4.1 The United Nations Convention on the Rights of the Child (UNCRC) states in its preamble that “[...] there are children living in exceptionally difficult conditions, and such children need special consideration...”²²

30.4.2 The Committee on the Rights of the Child (the Committee) has also consistently underlined the need to give special attention to disadvantaged and vulnerable groups of children²³. For example, the Committee states that regardless of the economic situation of the country, States are required to take all possible measures to realise the rights of children, “paying special attention to the most disadvantaged groups”²⁴.

30.4.3 States are required to actively identify individual children and groups of children who may need special measures to enable the realisation of their rights.

[31] The respondents agreed with the principle espoused in *Juma Masjid*, recognising that access to a school is an important component of the right and a necessary condition for the realisation of the right.²⁵ First and foremost, in realising this right, the respondents stated access and admission to public school is governed by the SASA. Section 2 (2) requires that the MEC and the head of department are required to exercise the powers conferred upon them by SASA, after taking into account any applicable national policy. According to section 3 (1) of the National Education Policy Act 27 of 1996 (the Policy Act) requires the National Minister to determine the national education policy in accordance with the provisions of the Constitution and that Act. The provincial departments have no similar mandate,

²² UNCRC Preamble

²³ R Hodgkin & P Newell ‘*Non-discrimination*’ in R Hodgkin et al (eds) Implementation Handbook for the Convention on the Rights of the Child (1998) 19-35, 19.

²⁴ Committee on the Rights of the Child General Comment 5: *General measures of implementation of the Convention on the Rights of the Child* (2003) at para 8.

²⁵ *Juma Masjid* para 43.

however the WCED policy mirrors that of the national policy to a considerable degree.

[32] Section 3 (1) of the SASA deals with compulsory attendance of learners, stipulating that every parent is required to ensure that each learner under their care attends school starting from the first school day of the year in which the learner turns seven (7) years old, continuing until the last school day of the year in which the learner turns fifteen (15) years old or completes the ninth grade, whichever comes first.²⁶ Section 3 (3) deals with the compulsory school-going age and the MEC has to ensure that sufficient school spaces are available in the provinces so that such learners can attend school. Should the MEC, for whatever reason, fails to comply with its obligations as stated above, Section 3 (4) requires him or her to take steps to remedy the lack of capacity 'as soon as possible' and that he/she provides an annual report to the Minister of Education on the progress achieved in this regard.

[33] Section 5 (7) of SASA provides that an application for the admission of a learner to a public school must be submitted to the education department in a manner determined by the Head of Department. Section 5 (8) states that if an application in terms of Section 5 (7) is refused, then the Head of Department must inform the parent in writing of such refusal and the reasons thereof. If such a process fails, Section 5 (9) provides for a right of appeal to the MEC if the learner or a parent of a learner has been refused admission to a public school. In addition, Section 12

²⁶ As amended from 24 December 2024, Section 3 (1) reads as follows:

'Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend school, starting from grade R on the first day of the year in which such learner reaches the age of six years and not leaving school until the last day of the year in which such learner reaches the age of 15 years or will complete grade nine whichever comes first.'

(1) requires the MEC to provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.

[34] Notwithstanding the legislated compulsory school-going age by SASA, the respondents recognised that the ambit of “*basic education*” was described by Khampepe J in *Moko v Acting Principal of Malusi Secondary School and Others*²⁷ as follows:

‘In my view, school education culminating in the “nationally recognised qualification” of the National Senior Certificate is basic education under section 29 (1) (a). This includes Grade 12 and the matric examinations.’

[35] In the later amendment (Basic Education Amendment Act 32 of 2024) of SASA from 24 December 2024, the following definition was added in Section 1 (1) of SASA:

‘**basic education**’ includes grade R to grade 12, as evidenced in the National Curriculum Statement.’

[36] This Court recognises that the parties are *ad idem* regarding the provision of a basic right to education for a learner. However, this portion of the parties’ submissions must be incorporated into this judgment as it constitutes part of the basis upon which further complaints by the applicants emanates. In other words, despite the WCED recognising the importance of this right, has it managed to timeously secure a school place for every learner in the province in every start of an

²⁷ *Moko v Acting Principal of Malusi Secondary School and Others* (CCT 297/20) [2020] ZACC 30; 2021 (3) SA 323 (CC); 2021 (4) BCLR 420 (CC); (2022) 43 ILJ 2269 (CC) (28 December 2020)

academic year without delays in pursuance of its constitutional and statutory responsibility.

[37] To mention the latest occurrence, the uncontroverted finding by Nuku J in Part A was that:

[34] To sum up, 14 learners remained unplaced at the date when the first respondent deposed to the answering affidavit. Three of these learners are listed in annexure “A” to the notice of motion. Of the remaining eleven, 6 had submitted their applications after 29 April 2024 and the respondents did not provide the date/s by when the remaining 5 learners submitted their applications. This, notwithstanding, the first respondent concluded his answering affidavit by stating that: ‘In the circumstances, based on the updated information provided in this affidavit, no factual basis exists for an order in terms of prayer 2 of the notice of motion.’ It will be recalled that prayer 2 of the notice of motion is about the mandamus directing the first to third respondents to place all unplaced learners (those included in annexure “A” to the notice of motion as well as those similarly placed as those listed in annexure “A” to the notice of motion) within 10 days from the date of the order.’

[38] The applicants indicated that this issue is encountered by both children and parents at the beginning of every academic year. The applicants made reference to a 2014 media statement that was made by the then Provincial Minister of Education Mr Donald Grant which in itself acknowledged the problem that was already in existence in 2010. In our view, this is systemic existential problem which the WCED does not deem important to prioritise and resolve. In fact, it has attempted to deal with it when the problem presents itself – on case-by-case basis, as it explained in its

answering affidavit and as already reflected in the aforementioned paragraph of Nuku J's judgment.

[39] Given that the WCED has indicated its admission policy mirrors that of the National Department, one must consider whether it has successfully addressed the issues faced or put differently, the existential problems at the provincial level.

The Admission Policy

[40] As specified above, the provincial government derives its admission policy from the Policy Act, which enabled the gazetting of the Admission Policy for Ordinary Public Schools on 19 October 1998 (the National Admission Policy). The national admission policy provides that the head of department of a provincial education department is responsible for overseeing the admission of learners to public schools and may delegate this responsibility to the relevant district director²⁸, hence the respondents kept on directing inquiries of the unplaced learners to the district director. The head of department is tasked with the obligation of co-ordinating the provision of schools and managing the admissions of learners to ordinary public schools with governing bodies, ensuring that all eligible learners are accommodated in terms of the SASA²⁹. Of particular importance, the national admission policy required the admission policy of a public school and the administration of admissions by an education department not to unfairly discriminate against any applicant for admission.³⁰

²⁸ National Admission Policy, para 6

²⁹ National Admission Policy, para 8

³⁰ National Admission Policy, para 9

[41] During the hearing of this application, this Court was informed that the WCED admission policy is currently under review. In keeping with the prescripts and / or requirements of the national admission policy, the WCED has developed a Central Education Management System (CEMIS) registration system to facilitate the registration of learners and to track all learners who enter the school system. The WCED adopted its policy in 2010, and since then, the general admissions processes are based on the departments' experiences over the years and advancements in technology. The operational aspects of the admissions processes are supplemented by way of circulars that are issued by the head of department each year.

[42] In these proceedings, the applicants have requested that this Court declare WCED admission policy, Circular 0037 of 2022 and /or Circular 0037 of 2023 unconstitutional as they violate sections 10, 28(2), 29(1)(a) and 33(1) of the Constitution. The applicants identified numerous deficiencies in the WCED admission policies. It was stated that the circulars only apply to learners who applied for admission to a school in the year preceding the year in which they wish to begin studies at the assigned school. As a result, many learners who submit their applications only at the beginning of a school year, find themselves excluded from these policies and circulars.

[43] In addition, it was contended that the WCED relies on unwritten or unspecified components of the admission policy. *First*, it was noted that the WCED's response to "the extremely late applications" is vague. On the other hand, it agrees that it is not catered for in its policy. Nevertheless, when the learners, parents, or their caregivers

presents themselves at the district office as directed, the district officials who have access to online system will advise them about the available places at various schools. The unwritten policy of the WCED indicates that the district office does not participate in helping these learners access different schools. The parents, learners and caregivers are given the information and must individually approach the school to find placement. The procedure becomes so onerous that they have to approach dozens of schools before they secure placement. The probability is that learners, parents, and caregivers will face a financial strain due to travel and additional informational resources they lack, resulting in a stressful and challenging experience. The district officials as per the unspecified policy intervene when there is no school available in that district or when assistance is required. It is not clear what type of assistance is meant and the ambit of this discretion to be exercised by the district officials is undefined.

[44] *Second*, that learners may be refused access to education in public schools purely because they lack official documentation. This position was fully established by our courts some five years ago.³¹ The assertion that the WCED places learners without documentation is contradicted by the judgment of Nuku J³² in Part A. *Third*, with regard to the transfer request from one school to another (grades 2-7 and 9-12), the WCED unwritten policy is that parents must ensure that they have secured a place for the learner at another school before transferring a learner from one school to another. The policy makes no exceptions to urgent or exceptional circumstances.

³¹ *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECHGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019)

³² Nuku J Judgment paras 53, 54 & 55

Fourth, only in the WCED's letter dated 1 March 2024, was it explained to the applicants that new placement applications are divided into three (3) categories:

44.1 *On time placement applications* – are received during the month-long admissions window in March and April each year. As of 15 February 2024, placement was said to be in progress for 25 of these applicants.

44.2 *Late placement applications* – are received after the month-long admissions window closes, but before the end of the year. As of 15 February 2024, placement was said to be in progress for 133 of these applicants.

44.3 *Extremely late placement applications* – are received after the 1 January 2024 for the school year in which they are applying, with many only arriving after the school year has already started. WCED said it received 3 579 extremely late placement applications for the school year so far.

[45] Further, the steps to be followed for on-time applicants are outlined as comprising of two-phased admission process and set out in the WCED Admission Policy read with circular related to 2024 admissions and circular 0037/2022. With regard to late applications no such process is set out in the policy. The applicants asserted that until they received the said correspondence, they would not have known which category they fell under as different procedures and protections applied to them. Similarly placed learners are unaware of these categories.

[46] To the extent that the admission policy and Circulars 0037/2022 and 0037/2023 unfairly discriminates against late applications based on race, poverty levels, place of birth and social origin, thereby constituting a violation of sections

9(1), and 9 (3) of the Constitution, the Court should set them aside, the applicants said.

[47] The respondents maintained that with regard to the late applications, their policy states that at the commencement of the school year, or during the year, learners should report to the nearest WCED district office to enquire about a school where vacancies exist. District offices shall assist parents to place learners whenever district intervention in the admission process is required. The respondents submitted that these circulars (0037/2022 and 0037/2023) outline the process for admission applications and transfer requests received during the year preceding each academic year. The circulars do not deal with late applications submitted during the relevant academic year. Therefore, the respondents said, the constitutional challenge is inappropriate.

[48] However, with regard to transfer requests received during the academic year, the admission policy requires that a learner who wishes to transfer from a WCED school (public and independent) to another WCED public school must obtain and present an original school transfer letter from the principal of the school from which the learner intends to transfer. A transfer letter should stipulate *inter alia* the school and grade from which the learner intends to transfer. It constitutes a record of the transferor school that the learner will not be attending that school and enables the transferee school to place the learner in the appropriate grade.

[49] The admission policy with regard to the production of compulsory documents was said to be a mirror of the national admission policy. Both policies provide that all

the applicable compulsory original documentation must accompany an application for admission. To the extent that the provisions of the national policy dealing with compulsory documentation were considered in *Centre for Child Law*³³, where the Court held it is unconstitutional to deny children access to education in public schools purely because they lack identification documents. Consequently, the Minister of Basic Education issued DBE Circular 1 of 2020. This circular directed all schools to comply with the judgment, pending the finalisation of an amended national admissions policy for public schools. Similarly, in 2021, the WCED followed suit and issued a similar circular, WCED Circular 0053/2021. The WCED admission policy read with Circular 0053/2021 explains the admissions and transfer processes. The admission process, it was said, was designed in such a way that the head of department and the department's role in the placement of learners is a remedial one. The result of this oversight role is that appeals to the MEC in terms of Section 5 (9) of SASA will seldom arise.

[50] The respondent denied that Circular 0053/2021 was intended solely for the purposes as was suggested by the applicants, that it was meant for schools only. Despite this be the case, it was pointed out that this circular was addressed to Deputy Directors-General, Chief Directors, Directors (Head Office and District Offices), Circuit Managers, Principals and Chairpersons of governing bodies.

[51] There is merit in the criticism by the applicants that the admission policy lacks sufficient clarity, *inter alia* concerning extremely late applications for purposes of Section 33 (1) of the Constitution. However, to the extent that the applicants contend

³³ (2840/2017) [2019] ZAECHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 20

that there is no clarity whatsoever on the process, that submission is weakened by the reality that there are parents who successfully submit their applications each year and do so in a timely manner. For instance, in the first 10 days of January 2024 the department received 609 new extremely late applications for placement for Grade 1 and Grade 8. As of 16 February 2024, the number of extremely late applications increased to 3 579 for Grade 1 and Grade 8 for the 2024 school year, of which 3 208 had been placed by that date. For the whole of 2024, the number of extremely late applications and relocation transfers were 6 747. These figures do not signify an entirely unclear or uncertain application process, nor does it point to systemic delays in the entire process and finalisation of extremely late applications. For this reason, the WCED was proud of its achievements. However, the reality is that only parents and learners who are within the province comply with the application process timeously. Those who arrive in the province at the start of the academic year inadvertently would not comply with the currently set application process in the admission policy as they are not catered for.

[52] The applicants pointed out glaring deficiencies in the WCED policies and requested the Court to grant a mandatory and declaratory relief, directing WCED to amend its admission policy. They seek a clear and detailed plan for addressing late applicants across all grades and proposed specific elements that the plan should include. The respondents disputed the applicants' entitlement to the relief they seek. However, they do not deny that some of the measures suggested by the applicants are reasonable and worthy of consideration.

[53] To this end, it was said that the department adopted a responsive approach to this litigation and issued a standard operating procedure (SOP/ Circular 0000/2024) in respect of late, extremely late applications and transfer requests. The SOP addressed head on the complaints in respect of prayers 2,3,4,5.1 to 5.5 of the Amended Notice of Motion, which are central to the applicant's case. The applicant persists unreasonably with the application.

The SOP

[54] To the extent that the SOP was referred at length in these proceedings by the respondents, attention should be paid to this document. The WCED stated that, when the SOP was still in a draft form, it invited the first applicant to comment but did not take up such invitation. The applicant asserted that the WCED developed the SOP to appease them. Pointedly, it developed and modelled the SOP to patch up the deficiencies identified by the applicants. As no legal status was put to this SOP, it remains a guiding document and is not binding upon the applicants. In any event, this document was developed when this application was still in progress.

Analysis

[55] Central to this application is the structural and systemic problems identified by the applicants with the WCED's handling of late applications, extremely late applications, and transfer requests. The WCED seems not to treat these complaints with the utmost care and importance they deserve. The WCED simply point its fingers at the caregivers who failed to follow the procedure determined by the department. Of concern and / or after the fact, the WCED abruptly developed the SOP that it contemplated would put the reasons for this application to an end. In

fact, it failed dismally to accept that there might be urgent or emergency reasons resulting in the late applications.

[56] WCED did not afford itself an opportunity to investigate the underlying cause of this systemic problem before responding with the SOP. Fundamental hereto is the fact that black people have been socialised (since apartheid era) to regard / see January as the month during which employment opportunities in big cities or urban areas arise and companies employ skilled and semi – skilled people in their establishments. This phenomenon result in, black people migrating to urban areas in search of improved job prospects. When a family takes such a decision, it follows that children mostly of school going age will migrate with their parent[s]. Notwithstanding, there are numerous reasons for unplanned migration such as death, gender-based violence and so on. In this socio-economic context, the WCED historical data reveals a trend where extremely late applications are more common in specific ‘hotspots’, such as MEED.

[57] At the commencement of his argument, the respondents Counsel remarked that this case seems to have resolved itself since the SOP has come into operation on 2 December 2024 and has addressed the applicants’ complaints. The applicants have not challenged the SOP. The respondents submitted that in *Glenister v President of South Africa*,³⁴ it was held that there are many ways in which the State can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the State takes, as long as they fall within the range of possible conduct that a

³⁴ *Glenister v President of RSA* 2011 (3) SA 347 (CC) at para 189-191

reasonable decision- maker in the circumstances may adopt. A range of possible measures is therefore open to the State, all of which will align with the duty the Constitution imposes, so long as the measures taken are reasonable. This Court does not take issue with these submissions. However, the measures that were taken by the WCED appear to be superficial and aimed at dismissing applicants' complaints as self-created. That might not be the case. For instance, a learner or a parent who is three days in the Western Province and only arrived in January might not be expected to know all the current prescripts governing admissions that were put in place in the previous year that are contained in different circulars. Without a doubt, they would arrive after the proverbial boat has sailed. The SOP does not at all come closer to address the underlying causes and the lack of adequate or quick interventions and solutions to the problems facing learners and caregivers. As the respondents put it-the SOP addressed the complaints as set out in paragraph 5 of the Amended Notice of Motion. A circular (in the form of an SOP) cannot be tailor made for a specific problem. [Upon investigation, for instance the outcome might be far greater than paragraph 5 of the Amended Notice of Motion.] A streamlined process is warranted.

[58] Understanding the causes of migration, tracking the trends, identifying the 'hotspots', anticipating the numbers after due consideration is had to the numbers of previous years will greatly assist the WCED in their development of an accurate mechanism and plan to deal with the late and extremely late applications. The WCED would not benefit from ignoring the clear issue it seems intent on managing through its own ineffective processes and procedures, (the most recent being the SOP). This Court has to point out that even if the WCED admission policy could

mirror that of the national admission policy, the undeniable fact is that the Western Cape challenges differ considerably with those of the national government and /or other provinces for that matter. The WCED has to be innovative in dealing with its problems. In fact, partnering with the applicants rather than being at odds with each other would prove beneficial to all parties. The applicants have their feet on the ground and know perfectly well where the shoe pinches.

[59] In fact, this Court is constrained to agree with the applicants that the WCED does not fulfil any of the provisions of the Bill of Rights in the manner set out in *Glenister*. The SOP fails to meet any meaningful criteria set out by the applicant in catering for their needs.

[60] In *Ahmed v Minister of Home Affairs*³⁵ the Constitution Court considered the legal status of a directive such as the SOP and held as follows:

‘[41] The nature and status of a directive is unclear. A directive is an official policy document, which guides government departments on how to apply legislation. According to Baxter, directives belong to a “body of rules which are of great practical importance” and which constitute “instructions issued without clear statutory authority to guide the conduct of officials in the exercise of their powers.” Baxter refers to departmental circulars and directives as “administrative quasi-legislation” which are neither legislation nor subordinate legislation. This does not necessarily mean that a directive is unenforceable or that it has no legal status. Where it appears that an Act has anticipated the creation of a directive, a court will be more willing to find that it has legal authority and is enforceable. The fact that directives are not promulgated and there is uncertainty as to their legal status, may lead to a situation where an official or body relies on a directive that is not aligned to applicable law.

³⁵ *Ahmed And Others v Minister of Home Affairs and Another* 2019 (1) SA 1 at 13 para 41

[42] The nature of policy directives differs. They may be statutorily required, in which case their lawfulness is assessed against the empowering legislation seen through a constitutional lens. In other cases, the application of the statutory policy in individual instances may be challenged on the grounds of the infringement of certain fundamental rights, like the right to equality. ... Lastly, the policy may not be expressly required by legislation but be an internal document that regulates the implementation and application of statutory powers granted to functionaries.' (footnotes omitted)

[61] In this case, a question was posed as to whether the contents of a directive can be directly challenged like legislation through a legality review, or if only its application in specific cases can be contested through an administrative review. It was said that the directive was issued by department officials and in practice, employees of the Department, and its agent VFS Global, believed that they were bound by the terms of the directive. The directive when considered in isolation could be said to constitute an exercise of public power which is reviewable be it under PAJA or the principle of legality. However, the Constitutional Court did not deem it necessary to make a pronouncement on the status of a directive or a pronouncement whether the review thereof should take place under PAJA or the principle of legality, as the distinction was never raised by the parties involved.

[62] In *Mzalisi v Ochogwu*³⁶, the Supreme Court of Appeal, quoting from *Ahmed*, confirmed the above principle that, according to Baxter, departmental circulars and directives constitute administrative quasi-legislation, which are neither legislation nor subordinate legislation. At a practical level, directives and circulars essentially serve

³⁶ *Mzalisi v Ochogwu* 2020 (3) SA 83 (SCA) at para 16

the same purpose, which is to give effect to governmental policy and guide officials charged with the duty of implementing and executing governmental policy.

[Emphasis Added]

[63] In addition, based on the submissions provided by the respondents in this regard, it appears that the purpose of the SOP's coming into effect was to render the entire application nugatory and /or superfluous. The contention by the respondents suggests that the applicants were expected to conform to their demands. Most unfortunately, it appears that the SOP was shoved in the face of the applicants while litigation on the issues complained about was on-going, still alive and had not run its course. In fact, the SOP was meant to erase the applicants' complaints about the WCED's deficiencies in their policies.

[64] The applicants are indeed correct in their assertions that the WCED did not establish an adequate plan to address or resolve the ongoing systemic issues of late, extremely late applications and transfer requests. A well-structured plan will not only promote transparency and accountability but will also provide the department with insights into the budget and additional resources needed each year to address the issues effectively.

[65] The respondents submitted that their admission policy is under review. In essence, their delay in the finalisation of this policy was meant to create an assumption or an impression that no admission policy exists. Again, this was another stratagem to render the declaration of invalidity of the admission policy as outmoded. The fact that the SOP was said to clarify the WCED Policy for the

Management of Admission and Registration of Learners at Ordinary Public Schools and the same admission policy was referred to by all parties in these proceedings without any objection affirms that the impugned admission policy is currently fully operational.

[66] The status of the SOP was again put to question. It was said that the SOP was a circular which was intended to guide stakeholders to manage late applications for admissions in the Western Cape. It clarifies the WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools, addressing concerns about potential restrictive conditions on the right to basic education as outlined in Section 29 (1) of the Constitution. In other words, the SOP does not have independent legal status, other than that of an administrative quasi-legislation. It is this Court's considered view that the WCED in its abrupt creation of SOP in a manner consistent with the relief sought by the applicant, by implication admitted unequivocal that its existing admission policy is unconstitutional in that its provisions dealing with applicant's complaints is deficient in that it does not cater for an immediately realisable right to basic education. In other words, it trumps the provisions of the right to basic education and therefore not fit for purpose. In the circumstances, the respondents have failed to fulfil their obligations under Section 7 (2)³⁷ of the Constitution with regards to the rights of learners in Section 29 (1) (a) the fundamental right to basic education and Section 28 (2) which deals with the rights of children in general.

³⁷ Section 7 (2) reads: 'The state must respect, protect, promote and fulfill the rights in the Bill of Rights

[67] Although the respondents seemed to understand and, in their view, remedied the defects in the admission policy by introducing the SOP, it was apparent during the hearing that, the unfair discrimination cannot be put squarely on Clause 13 of the Admission Policy that deals with the registration process (late applications). Even then, no proper procedure is put in place to guide the late applicants. The SOP failed to address some of the applicant's concerns in the other parts of the policy. As pointed above, much criticism was directed on the policy's failure to address the challenges encountered by over-aged and disabled learners that were not adequately catered for in the policy. In our view, Clause 13 outlines a process or procedure which adversely affects late applicants from disadvantaged and poor background. It therefore renders this provision unconstitutional on the grounds of unfair discrimination. Although Clause 13 is the only available provision on which the unconstitutionality is underpinned, the policy remains deficient as it excluded other categories of applicants (extremely late applicants and transfer requests). As a policy is a functional document it would be fair and just to issue a practical order that would address the systemic problems as already pointed out. The respondents have mentioned in passing that the policy is under review since 2021. Surely, they themselves identified some shortcomings in the policy hence a need for its overhaul. Plainly the reconsideration of the admission policy is a major exercise that both parties are keen on achieving. However, it should be clear that the finding of this Court is not grounded on the pending review of the policy. As stated in this judgment, a policy formulation requires a consultative process. In other words, given the multitude of complaints by the applicants, a reconsideration of the entire policy would greatly assist all the stakeholders and the public in general. Nevertheless, for

purposes of this application, it follows that Clause 13 of the admission policy should be declared unconstitutional to the extent competent and specified in the order.

[68] It is undisputed that the WCED has failed to plan adequately for late applications; the admission policy permitted late applicants to remain unplaced for an indefinite period of time of each year (one applicant was not placed until August 2024); by providing no clarity on the process that late applicants must follow to secure their placement³⁸, no timeline within which late applicants will be placed in a school or reference to a relevant WCED official (Head Office or District Office) who is responsible for ensuring the placement of late applicants, points to the violation of the constitutional rights of applicants as pointed out in the Prayer 2 , 3 and 4 of the Amended Notice of Motion. It might be that Clause 13 of the Admission Policy was not specifically pleaded in the amended notice of motion. Evidently, the amended notice of motion was not elegantly drafted. However, at the hearing of this matter, it was agreed and understood that Clause 13 of the Admission Policy deals with late applications and therefore was the impugned provision of the policy. In our view, a contention that Clause 13 cannot be declared unconstitutional on the basis that it was not pleaded is pedantic. A Court is not for the rules, the rules are for the Court. The principle emphasizes that Court rules are meant to facilitate justice and the efficient functioning of the judicial system. The Courts especially in public interest matters, are not meant to be rigid, inflexible and overly technical. It is trite that the High Court has an inherent power to manage its own process in order to achieve speedy resolution of disputes.³⁹ The Court cannot penalise the applicants in a

³⁸ *Dawood v Minister of Home Affairs* (CCT 35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 para [47] – The doctrine of the rule of law embraces the notion that for the law to rule, rules must be articulated in a clear and accessible manner.

³⁹ See Section 172 of the Constitution.

manner that hinders the attainment of justice. It follows therefore that Clause 13 is the only provision in the admission policy that deals inadequately with late applications and therefore it falls to be declared unconstitutional to the extent that it excludes and fails to address certain category of applicants.

[69] During the hearing, the applicant's Counsel argued that Prayer 4 of the Amended Notice of Motion should be read generously to include unfair discrimination on the grounds of age (over-age applicants) and disability (physical disability) as this class of persons are not included in the admission policy as well as Circulars 0037/2022 and 0037/2023. Although the applicant's submission has merit, unfortunately it was supposed to amend its Prayer 4 to reflect as such. Counsel for the applicants did not even attempt to move for an amendment from the bar. In fact, Counsel for the respondent was correct in his assertion that it is impermissible to read the notice of motion generously.

[70] The respondents are entitled to know in advance what case they are to meet at the hearing of the application. This much is clear from *Director of Hospital Services v Mistry*⁴⁰ 1979 (1) SA 626 (A) at 635H where it was held:

'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and has been said in many other cases: "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the

⁴⁰ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H

allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.’

[71] With regard to Circular 0037/2022, it was submitted that it lapsed on 31 December 2023, while Circular 0037/2023 lapsed on 31 December 2024. Essentially, both circulars have run its determinate existence. It was conceded at the hearing of this application, that these circulars are no longer in existence, and a declaration of unconstitutionality is incompetent. In other words, a declaration of invalidity would be tantamount to flogging a dead horse.

[72] The respondents challenged the level at which the applicants elevated the admission policy. In our view, this assertion does not assist the respondent’s case. While it is correct as a matter of law, as contended by the respondent’s Counsel that the admission policy is not by itself law and cannot trump legislation,⁴¹ its importance thereof cannot be over-emphasised. Section 5 (7) of SASA expressly vests the responsibility to determine the manner in which applications for admission must be made. The applicants did not make submissions suggesting that policies are superior to legislation. The importance of context cannot be overstated. In our understanding, a policy is a functional document. As such it ought to contain a set of plans or guidelines that outline how a specific issue or problem should be addressed, often through an action plan. Based on its case, the WCED seems to comprehend that this policy should be drafted and /or reviewed by the department alone. Without a doubt the development of an admission policy should involve the views, perspectives, debates, discussions and /or compromise of different stakeholders and

⁴¹ *Equal Education v Provincial Minister of Education Western Cape Province and Others* (12880/2019; (4566/2019) ZAWCHC 166; [2023] 3 All SA 698 (WCC) (17 July 2023) at 155

general public if it has to achieve its intended goal or outcome. Public participation is firmly rooted in our model of participatory democracy.⁴² As it was specified in *Mogale*, the category of people involved in this case is the same. So, their participation in the school admission policy-making and / or policy- revision process is most crucial as it would benefit members of the larger community. In our view, an admission policy has to explore and reach a potential solution as it has a direct impact on the lives of the low income, unemployed and marginalised black people in the MEED. It is crucial that stakeholders are taken into account and listened to, as this would enable the department to understand exactly how resources should be allocated and how the systemic issue can be addressed or eliminated. In addition to being duty-bound to provide meaningful opportunities for public participation, the state actors involved in this application are also obliged “to take measures to ensure that people have the ability to take advantage of the opportunities provided”.⁴³ It is for this reason that this Court should order the respondents to take the necessary steps that would allow for meaningful public participation in the development of a plan for late applications, extremely late applications, transfer process.

[73] In essence, this Court finds that the applicants were justified in questioning the legal status of the SOP. Despite the applicant’s observance that it does not have a legal standing and it is simply a guideline; they pointed out some glaring shortcomings with it. For instance, they pointed out that no provision, or inadequate

⁴² *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC); 2023 (6) SA 58 (CC) (30 May 2023) at paras 33 – 37. At para [46] it was stated: ‘This case is about the significance of participatory democracy for millions of South Africans who for the most part live away from centres of power, in rural areas and in some of the poorest parts of the country. These are people who have the least access to power, wealth and influence. This case is about their ability to participate in the making of law that governs virtually every aspect of their daily lives, including access to land, basic services and rights to the benefits of the land upon which they live.’

⁴³ *Ibid* at para 34

provision was made for learners with disabilities, and it did not deal with over-age learners, it did not oblige the department to do anything, it does not permit online applications, it does not clarify any procedural rights for late and extremely late applicant learners. From the applicants' perspective, WCED has raised the possibility of reviewing its admissions policy since 2021. This review seems to be an unending process. The applicant correctly pointed out that the creation of the SOP demonstrated that within the WCED's operational discretion it can provide prompt procedural safeguards required in the application process to maintain the rights of late and extremely late applicants without incurring any significant budgetary implications or delays. Before the SOP came into effect, there was no designated timeframe for late applicants regarding when they could anticipate placement. Since the SOP came into effect, it stated that every effort will be made to finalise late applications within 21 days. It does not specify what would happen if the 21-day period is not fulfilled. The SOP permits a blanket transfer, however, the actual procedures provided for to allow for these transfers is not clear. The applicants stated that the respondents cannot, at their own peril, decide to issue the SOP to address the applicants' complaints as and when they please. When the applicants raised their complaints, they attacked the constitutionality of the policies and asked the Court to issue an order that the policy be amended along the mentioned specific lines within 60 days. The applicants did not request for the implementation of the SOP.

[74] As correctly pointed out by the applicants, the SOP, when properly construed, is a non-binding guide that does not have legal force or effect. It does not confer

rights nor impose duties, nor does it cure the defects that precipitated in this application.

[75] With regard to the mandatory and declaratory order sought in Prayer 5, the applicants essential asked the Court to involve itself in the policy making process. In our view, the Court should not engage itself in the business of policy making by directing the executive branch of provincial power as to what the contents of an amended admission policy should entail. Doing so would be tantamount to the Court entering the domain of the executive and / or usurping the power of the executive. If the Court were to agree with the applicant's contention in this regard, it would without a doubt cross the line in breach of the doctrine of separation of powers – See *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal*⁴⁴. In *Somali Association of South Africa and Other v Refugee Appeal Board and Others*⁴⁵, the Supreme Court of Appeal held that:

‘It must also be emphasised that courts adhere to the doctrine of the separation of powers and are cautious not to trespass onto the terrain of other arms of state, not least of all because the administrative functionaries and bodies vested with the power to make decisions are expected to have the experience and specialist knowledge pertaining to their areas of operation, and the necessary resources to enable them to perform their functions and execute their duties. It is only in exceptional cases that a court will exercise a power of substitution and will only do so when it is in as good a position as an administrator to make such a decision, and the decision by the administrator is a foregone conclusion.’

⁴⁴ *Premier, Mpumalanga and Another v Executive Committee of State-aided Schools, Eastern Transvaal*⁴⁴ 1999 (2) SA 91 (CC) para [41]

⁴⁵ *Somali Association of South Africa and Others v Refugee Appeal Board and Others* 2022 (3) SA 166 (SCA) at para [93]

[76] In this instance, the Court does not hold the same advantage as an administrator in reaching such a decision, and it is evident that the outcome or decision at hand is not predeterminable.

[77] In *Walele v The City of Cape Town*⁴⁶, the Constitutional Court confirmed the principle that:

‘All decision makers who are entrusted with the authority to make administrative decisions by any statute are required to do so in a manner that is consistent with PAJA’.

[78] Further, Section 33 (1) of the Constitution as pointed out by the applicants guarantees everyone the right to administrative action that is lawful, reasonable, and procedurally fair. This means that government decisions and actions must be conducted in a way that is legal, makes sense, and allows people to be heard before a decision is made. The administrative action that resides with WCED must give effect to the process of admission that is clear, coherent, and consistent with PAJA. As correctly put, the procedure that lacks clarity is procedurally unfair and unreasonable.

[79] With regard to Prayer 6, it was not pursued at the hearing as it was established that was taken care of in an order granted by Goliath AJP on 15 November 2024. The pop-up admission stations were ordered to be set up in Khayelitsha Mall, Somerset Crossing, Eerste Rivier (Bloekombos) Bloch Centre and Kuils River on;

79.1 16, 23, and 30 November 2024;

⁴⁶ *Azeem Hassan Walele v The City of Cape Town* (CCT 64/07) 2008 ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 CC at para [57] (13 June 2008)

79.2 11, 18 and 25 January 2025;

79.3 01 February 2025.

[80] The time aforementioned has completely run its cause. The order if it were to be granted would be academic.

Conclusion

[81] In conclusion, the applicants have demonstrated that their constitutional rights were tempered with, in the sense that the respondents conceded in the SOP that it was meant to clarify the admission policy and that might be perceived as imposing restrictive conditions on the right to basic education as contemplated in Section 29 (1) (a) of the Constitution. In fact, that is not a perception, the applicant has successfully proved the violation of Section 29 (1) (a) of the Constitution hence the respondents opted to rather shield itself with the SOP without waiting for the proceedings to finalise and the Court pronouncement on this issue. Likewise, Nkomo J has pronounced on the learners right to basic education in his judgment that was handed down in part A.⁴⁷ This Court can only emphasise that if due regard is had on the authorities aforementioned, this right is of paramount importance as it is immediately realisable and does not depend on the available resources. As this right concerns the needs of the most vulnerable, it must be provided. The WCED in implementing this right must ensure that it take reasonable and effective positive measures to ensure its fulfilment. In fact, the respondents should ensure that this right is directly enforced in respect of each learner.

⁴⁷ Judgment para 54

[82] With regard to the right to equality – Section 9 (1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9 (3) states that 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. *The Equality Act*⁴⁸ defines “equality” to include the full and equal enjoyment of rights and freedoms as contemplated in the constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes and defines “discrimination” as any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. [Emphasis added]

[83] It is common cause that the WCED when it considers learner’s placement applications and planning for the admission cycle, its admission policy differentiated between applicants that applied during its admission window and those who applied outside of it. WCED claims that it has robust awareness campaigns or programmes that ensures that there are no late applicants. This Court does not at all downplay the effort that is put by the respondents in its own way in addressing the systemic problem. Nevertheless, these campaigns have not proven to be effective, as the department faces a crisis of late applicants each year. Nonetheless, it

⁴⁸ Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

acknowledged that late applications can be unpredictable. The recurring trend is that all these applications emanate from black and disadvantaged communities. *The Social Justice Coalition v Minister of Police*⁴⁹, the Constitutional Court affirmed the judgment of the Equality Court that declared the South African Police Services allocation of policing resources to different areas unfairly discriminated against resident of Black Township on the basis of race and poverty. This judgment established that poverty as an analogous ground to those listed in the Constitution, because “the manifestation of poverty, its systemic nature, and the effect it has on human dignity and the equal enjoyment of rights and freedoms justified its recognition as a ground of discrimination. The same scenario finds application in this matter.

[84] While the level of legal protection afforded to applicants and the treatment they receive is differentiated on the basis of time they applied, it is an undeniable truth that the group of late applicants is disproportionately black, poor and mostly from the rural areas such as the Eastern Cape. The uncontroverted fact is that the differentiation leads to unfair discrimination on the basis of race, poverty, place of birth and social origin. Section 9 (3) appreciates that the list is not exhaustive, and it recognized that “the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds”. If the applicants would have interpreted this section employing the principles in *Endumeni*⁵⁰, Prayer 4 of the notice of motion would have been read to include reference to the subsection (3) that states: “the state may not unfairly discriminate directly or indirectly against anyone on one or

⁴⁹ *The Social Justice Coalition v Minister of Police* (CCT 121/21) [2011] ZACC 27; 2022 (10) BCLR 1267 (CC) (19 July 2022) at paras 26-27

⁵⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

more grounds". One or more grounds in this instance would have included unfair discrimination on the grounds of age (over-age) and disability.

[85] Clearly, the WCED's conduct and its policies violates the test of unfair discrimination as set out by the Constitutional Court in *Harksen v Lane*⁵¹. In *Minister of Basic Education v Basic Education for All*,⁵² the SCA found that the non-delivery of textbooks to poor learners in rural Limpopo is a violation of right to equality on the grounds of race and poverty. The SCA further acknowledged that the learners affected by the non-delivery of textbooks are from poor communities, attending no-fee schools, which are the poorest schools, and "mostly, if not exclusively" Black learners living in rural areas⁵³.

[86] Section 10 provides the right to human dignity. It states that everyone has inherent dignity and the right to have their dignity respected and protected. In *Section 27 and Others v Minister of Education and Another* ⁵⁴, the Court held without the ability to participate fully in schooling and without access to quality basic education, a child's underlying and inherent value as a human being is undermined.

⁵¹ *Harksen v Lane NO and Others* (CCT 9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997 at para [50]

⁵² *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015) at para 5, Clause 3 of the order

⁵³ *Ibid* para 3.

⁵⁴ *Section 27 and Others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012) at para 53 (Clause 3 of the order & para 5.

In *Khula Community Development Project v The Head of Department, Eastern Cape*⁵⁵ the delivery of textbooks and stationery judgment, the Court held that:

‘Basic education provides the key mechanism through which society can be transformed and continued structural equality can be addressed. Basic education is most certainly a necessary condition for protection, promotion, and fulfilment of the right to dignity and equality of every child.’

[87] It appears that twenty-eight years down the line, the state continues to violate its citizens right to dignity and by extension, the right to equality and basic education. In *President of the Republic of South Africa v Hugo*, the Constitutional Court⁵⁶ had this to say:

‘The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged group. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inequalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked. In *Egan v Canada* L’Heureux – Dub J^s analysed the purpose of section 15 of the Canadian Charter (which entrenches the right of equality) as follows:

“41. The court has recognised that inherent human dignity is at the heart of individual rights in a free democratic society: *Big M Drug Mart Ltd* [(1985) **13 CRR 64** at p. 97... (per Dickson J) (as he then was). More than any other right in the

⁵⁵ *Khula Community Development Project v The Head of Department, Eastern Cape* (Eastern Cape Division of the High Court, Makhanda) Unreported Case No 611/2022 at para 49.

⁵⁶ *President of the Republic of South Africa v Hugo* (CCT 11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1) (18 April 1997).

Charter, s. 15 gives effect to the notion Equality, as that concept is enshrined as a fundamental human right within s. 15 of the *Charter* means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinction that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise fundamental human dignity".

[88] In this current era, long after the advent of democracy, it seems there has been little or no change in the way individuals perceive their fellow citizens. Such stereotypical mannerism is engrained in the spirit of classism, disdain, disparagement, and disrespect. Judging from the slow wheels of change, it appears that it will require additional time to ensure that other segments of the community are treated with the respect they deserve. Government departments are made up of individuals, and a real change of mindset is essential to reconstruct the society the Constitutional Court once observed is deeply rooted in an egalitarian past. The society at large and the people who serve the government, must learn to cultivate a sense of pride and treat themselves with dignity, that will enable them to extend or translate that same dignity to the wider community.

[89] As stated above in this judgment, this Court deemed it fit to set out all the aforementioned subsections of section 28, as the High Court is the upper guardian of all minors. For, instance, Section 28 (2) of the Constitution makes it clear that the best interests of children "are of paramount importance in every matter concerning

the children". That applies to education too.⁵⁷ This provision is both a constitutional principle and a self-standing right.⁵⁸ It requires children's interests to be afforded the 'highest value'⁵⁹ and entrenches a substantive right, a procedural right, and a fundamental interpretative principle⁶⁰.

[90] In this regard, the Constitutional Court stated that Section 28 (2) imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28 (2) provides a benchmark for the treatment and the protection of children.⁶¹ The WCED must ensure that it treats the late applications in the same manner and on equal footing with those of other applicants who fall within the usually cut off period for applications. A learner who is not placed at the start of academic year and has to watch his or her peers attend school every day, such exclusion will inadvertently cause long time psychological damage to a child's psyche who yearns to go to school. The needs and interests affecting a child should receive due consideration as they are of paramount importance.

⁵⁷ *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, The Department of Education, Free State Province v Harmony High School and Another* (CCT 103/12) [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013 at para 129)

⁵⁸ *J v National Director of Public Prosecutions and Another* (CCT 114/13) [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 CC (6 May 2014)

⁵⁹ *S v M (Centre for Child Law as Amicus Curiae)* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) (26 September 2007) at para 42

⁶⁰ *AB and Another v Pridwin Preparatory School and Others* (CCT 294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) (19 June 2020)

⁶¹ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) (1 April 2009) at paras 73-74.

[91] For these reasons this Court is satisfied that the applicants have made a proper case for the relief sought in accordance with Section 172 of the Constitution. Therefore, Prayers 2, Prayer 3 and 4 should be granted in part, and Prayer 5 and 6 be refused.

[92] As a result thereof, the following order is granted:

92.1. It is declared that the first, second and third respondents' failure to plan for late placement applications in, but not limited to, the Metro East Education District for the 2024 academic year constitutes a violation of sections 9, 10, 28, 29(1)(a) and 33(1) of the Constitution;

92.1.1 The respondents are ordered to develop a management plan for late applications, extremely late applications and transfer requests in consultation with the stakeholders and the general public within six (6) months of the date of this order.

92.2. It is declared that Clause 13 of the WCED's Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools (WCED Admission Policy), constitutes a violation of sections 10, 28(2), 29(1)(a) and 33(1) of the Constitution, to the extent that it excludes and fails to address certain category of applicants, and in this instance permits **late applicants** to proceed unmanaged properly.

92.3. **Extremely late applicants, and transfer request applicants** are not dealt with in the policy. The policy should be amended to include late applicants, extremely late applicants and transfer requests applicants who remain unplaced for an indefinite period of each academic year

and the WCED should provide clarity on the process that these applicants must follow to secure their placement in relation to the timeline within which these applicants will be placed in a school; and / or provide the name and designation of the relevant WCED official who is responsible for ensuring the placement of late applicants, extremely late applicants, and learners seeking transfers to a school for basic education in the Western Cape.

92.4. Circulars 0037 of 2022 and Circular 0037 of 2023 have lapsed and, accordingly, the declaratory order that was sought by the applicants is refused.

92.5. It is declared that Clause 13 of the WCED Admission Policy, to the extent that it unfairly discriminates against late applicants on the basis of race, poverty level, place of birth, and social origin, and thereby constitutes a violation of sections 9(1) and 9(3) of the Constitution, is set aside.

92.6. The respondents are ordered to amend the WCED Admission Policy in a manner that takes into consideration the three categories of applicants mentioned in paragraphs 92.2 and 92.3 in bold in consultation with the stakeholders and general public within six (6) months of the date of this order;

92.6.1 The declaration of invalidity of Clause 13 of the WCED Admission Policy is suspended for six (6) months, pending the

finalisation of the amended provisions of the WCED Admission Policy.

92.7. Prayers 5 and 6 of the Amended Notice of Motion are refused.

92.8. The respondents are ordered to pay applicants costs of two Counsel on Scale B (junior Counsel) and Scale C (senior Counsel) respectively.

B P MANTAME

JUDGE OF THE HIGH COURT

I agree, it is so ordered

M J DOLAMO

DISSENTING JUDGMENT

MOOSA, AJ (Minority)

[93] This case is brought for the benefit of aspirant basic education learners who mainly migrate from rural South Africa to the Western Cape with their parents or guardians in search of greener pastures. This case highlights their plight to immediately access basic education, a right entrenched in s 29(1) of the Constitution.

[94] Our former President, the late Mr Nelson Mandela, usefully explained the transformative ethos and spirit of this fundamental right in the following terms:⁶²

⁶² Quoted with approval in *Equal Education v Provincial Minister for Education: Western Cape Province and Others* [2023] 3 All SA 698 (WCC).

‘Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine and that a child of a farmworker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.’

[95] Against this backdrop, I had the pleasure of reading the judgment penned by Mantame J (“the main judgment”). I readily embrace the factual and legal background set out therein. For the most part, I agree with the orders granted by my Sister, including the reasons underpinning them. I part ways with my Sister on the order framed in paragraph 92.5 of the main judgment (and the reasons for it). There she deals with clause 13 of the Western Cape Education Department (“WCED”) Admission Policy. Clause 13 reads:

‘Learners, who apply after October for admission in the following year, shall be accommodated where school places exist, but not necessarily at the nearest school to the learner’s place of residence or the school of choice.

Learners who require admission to a WCED school at the commencement of the new school year, or during the year, shall report to the WCED education district office nearest to their place of residence to enquire about a school where vacancies exist. District offices shall assist parents to place learners whenever district intervention in the admission process is required.’

[96] Clause 13 provides a procedure which is aimed at ensuring that aspirant learners enjoy the benefits of the right to a basic education even in circumstances where their application for a placement is received out of time. Clause 13 applies to basic education learners regardless of their level of affluence or poverty, and irrespective of their race, ethnicity, class, or origin. Put differently, clause 13 does not differentiate between late applicants on any prohibited ground listed in s 9(3) of the Constitution.⁶³

⁶³ Section 9 ‘**Equality**. — (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. ...

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

[97] Despite this, the main judgment itself, and the order at paragraph 92.5 thereof specifically, declares clause 13 to be in violation of ss 9(3) and (5) of the Constitution. Clause 13 is declared to be invalid to the extent that it unfairly discriminates against late applicants, extremely late applicants, and transfer request applicants on the basis of their race, poverty level, place of birth, and social origin. Paragraph 92.6 of the main judgment suspends this declaration of invalidity for a period of six (6) months, pending an appropriate amendment being made to the WCED Admission Policy.

[98] My reasons for dissenting from the declaration of invalidity referred to in the preceding paragraph are self-evident from my analysis and discussion in this judgment.

[99] First, in paragraph 92.2 of the main judgment, clause 13 of the WCED Admission Policy is declared unconstitutional on the basis that it violates various rights entrenched in the Constitution, namely, s 10 (human dignity), s 28(2) (childrens' rights), s 29(1) (basic education rights), and 33(1) (just administrative action rights). I endorse that declaration. The main judgment then issues an order in paragraph 92.6 where just and equitable relief is awarded as envisioned by s 172(1)(b) of the Constitution. I endorse that outcome too.

[100] As a result of the declaration in paragraph 92.2 of the main judgment, it became unnecessary, in my view, to declare clause 13 of the WCED Admission Policy unconstitutional in paragraph 92.5 on the basis that it violates s 9 of the Constitution.

[101] Secondly, and more significantly, I am not persuaded that a proper case was made for the relief granted in paragraph 92.5 of the main judgment. My reasons for this view are expounded below.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.' (my italics added for emphasis)

[102] The Applicants' case that the equality clause was violated has its genesis in prayer 4 of their amended Notice of Motion. There, the Applicants seek the following relief:

'Declaring that the WCED Admission Policy, as well as, to the extent necessary, its Circular 0037 of 2022 and/or Circular 0037 of 2023, unfairly discriminate against late applicants on the basis of race, poverty level, place of birth and social origin, and thereby constitute a violation of sections 9(1) and 9(3) of the Constitution and are set aside.'

[103] Prayer 4 of the Applicants' amended Notice of Motion is not a model of drafting clarity. No specific provision in the WCED Admission Policy is identified as the subject of the intended discrimination challenge. As appears from paras [21] to [24] below, the same deficiency appears in the Applicants' founding and supplementary founding papers.

[104] In these circumstances, the Applicants' amended prayer 4 read with its founding papers viewed in their totality are drafted with such vagueness and imprecision that the Respondents are left to imagine which provision in the impugned WCED Admission Policy is challenged on grounds rooted in s 9(3) of the Constitution. On this basis alone, the declaration of invalidity should, in my view, be refused.

[105] It is a trite legal principle that an applicant must make its case in the founding papers. This was not done in relation to the claim based on alleged unfair discrimination. As pointed out in the main judgment (see paras [69] to [70] thereof), a respondent is entitled to know in advance what case it has to meet.⁶⁴ This is a salutary legal principle.

[106] An applicant can also not expect a court to scour through an impugned legal instrument comprising multiple provisions dealing with a variety of subject matter, as is the position with the WCED Admission Policy, and then divine which provision(s) an applicant had in mind for its constitutional challenge rooted in the equality clause.

⁶⁴ See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H.

A court cannot winkle such detail from the contextual crevices of an impugned legal instrument. The challenged provision must be identified in the pleadings, as read with the notice of motion. This is lacking in this case.

[107] The heads of argument filed by the Applicants' counsel follows the pleadings in a similar vein. It too failed to identify any specific provision which is argued to be unconstitutional on the basis of unfair discrimination. I addressed this aspect with Adv T. Ngcukaitobi SC, the Applicants' counsel. He conceded that the Applicants' papers are deficient by not identifying a specific provision which is the subject of its constitutional challenge. However, he argued that this Court should focus its attention on clause 13.

[108] To that end, Applicants' counsel submitted that clause 13 of the WCED Admission Policy causes indirect (not direct) discrimination on the grounds of race, and/or poverty level, and/or ethnicity, and/or place of social origin. He submitted that the indirect discrimination is unfair as envisaged by s 9(3) of the Constitution. He argued further that the Respondents do not attempt to justify the indirect unfair discrimination ensuing from the operation of clause 13. On this basis, Applicants' counsel advanced his thesis that the Applicants' challenge grounded in s 9 of the Constitution should succeed. I disagree.

[109] The contention that clause 13 of the WCED Admission Policy causes indirect discrimination on the grounds of race, and/or poverty level, and/or ethnicity, and/or place of social origin was raised for the first time at the hearing, and then only in response to a question from the Bench. This argument was not advanced in the heads of argument; nor was this case pleaded in the founding papers.

[110] Consequently, I agree with the Respondents' counsel, Adv E. De Villiers-Jansen SC, that the Applicants have not made out a proper case for the relief sought in prayer 4 of the amended Notice of Motion. As such, I would refuse the relief sought therein.

[111] The main judgment is silent on how clause 13 of the WCED Admission Policy unfairly discriminates in an *indirect* way against late applicants, extremely late

applicants, and transfer request applicants. This is rendered more problematic by reason that the main judgment holds that clause 13 of the WCED Admission Policy does not make provision for the latter two categories of aspirant learners and should, therefore, be amended to cater for them. See the order in paragraph 92.3 of the main judgment.

[112] The main judgment does not declare clause 13 to be in violation of the equality clause on the basis that it fails to cater for the needs of extremely late applicants and transfer request applicants. The Applicants also did not allege a violation on this basis.

[113] The foundation for the relief sought by the Applicants in their amended prayer 4 is stated in the First Applicant's Supplementary Affidavit as follows:

'Prayer 4: The WCED Admission Policy violates sections 9(1) and 9(3) of the Constitution

96. The WCED Admission Policy affords inferior protection to late applicants, especially those late applicants that it deems 'extremely late applicants' or 'transfer applicants'.
97. My founding affidavit attached numerous annexures which demonstrate that late applicants in the Western Cape are disproportionately Black, poor and newly resident in the Western Cape having migrated from rural Eastern Cape.
98. This already vulnerable demographic is made even more vulnerable by experiencing the disadvantage of poorer substantive and procedural protections when applying for admission to a school.
99. The WCED Admission Policy, and to the extent that it is given meaning by the 2022 Circular and/or the 2023 Circular, unfairly discriminates against late applicants on the basis of race, poverty level, place of birth and social origin, and thereby constitutes a violation of sections 9(1) and 9(3) of the Constitution.'

[114] To understand these quoted extracts better, they are to be read in conjunction with the contents of the First Applicant's Supplementary Affidavit which deals with the basis for the Applicants' averment that the rights of learners to equality in s 9 of the Constitution are violated. In that context, the following averments are instructive:

'89.1 **The right to equality as contained in section 9 of the Constitution.** I have demonstrated that late applicants are afforded fewer substantive and procedural safeguards than on-time applicants.

89.2 While the WCED's conduct constitutes direct discrimination on the basis of time of application, arguably a rational ground for discrimination, it leads to indirect discrimination on the basis of race, class and social origin.'

[115] These paragraphs make it clear that the Applicants' case for unfair discrimination is based on alleged 'fewer substantive and procedural safeguards' for late applicants as compared with on-time applicants. The alleged substantive and procedural deficiencies are those already dealt with and upheld in the main judgment, which I support, in relation to the challenge stemming from prayer 3 of the Applicants' amended Notice of Motion. See, for e.g., paragraphs [6], [91], and [92.2] of the main judgment.

[116] The case made out in the Applicants' founding papers, duly supplemented, does not, in my view, support a finding that clause 13 of the WCED Admission Policy indirectly discriminates against late applicants, extremely late applicants, and/or transfer request applicants in an unfair manner on the grounds of race, and/or poverty level, and/or ethnicity, and/or place of social origin.

[117] The main judgment does not engage the argument that the alleged unfair discrimination is *indirect*. Indeed, paragraph [84] of the main judgment appears to suggest that the unfair discrimination is direct. This is contrary to the case made out at the hearing.

[118] Conceptually, indirect discrimination would exist when there is differential treatment of persons (such as, basic education learners), whether by reason of a law, a policy, conduct or practice, in circumstances where the differential treatment

seems innocent or neutral, but its impact (i.e. effect) is discriminatory.⁶⁵ When adjudicating a constitutional challenge against a provision in any law or policy which is alleged to be discriminatory, it is important to establish a constitutional defect in the provision itself which is under attack, rather than in its practical application.⁶⁶

[119] In *S v Jordan supra*, the apex court adjudicated whether s 20(1)(aA) of the *Sexual Offences Act 23 of 1957* was unfairly discriminatory against women sex workers. As part of the basis for the frontal challenge in that case, the applicant relied on certain police and prosecutorial practices which, so the argument proceeded, demonstrated gender-based unfair discrimination.

[120] In rejecting that contention as a basis for declaring s 20(1)(aA) unconstitutional, the majority held (at para 19):

‘In contending that section 20(1)(aA) discriminates unfairly against women, reliance was also placed upon the practice of the police and the prosecutors. It was contended that in practice only prostitutes are prosecuted and that customers are not. ... What happens in practice may therefore point to a flaw in the application of the law but it does not establish a constitutional defect in it. Even if the practice of the police and the prosecutors is to target the “merchants” and not the “customers” that is not relevant to the issue before us in the present case concerning section 20(1)(aA) of the Act, which is whether the order of the High Court declaring the section to be inconsistent with the Constitution should be confirmed.’

[121] Based on the foregoing, for the Applicants to succeed in their discrimination-based challenge against clause 13, it is necessary that they demonstrate that the black letter of its provisions (not clause 13’s implementation) contains a constitutional defect of the kind envisioned by s 9(3) of the Constitution. The Applicants failed to do so. Their focus has been on the practical application of clause 13, rather than on its provisions.

⁶⁵ See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 22. Also, see D van der Linde ‘Poverty as a ground of indirect discrimination in the allocation of police resources – a discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC)’ 2020 (23) *PELJ* 33 at para 2.2.

⁶⁶ *S v Jordan* 2002 (6) SA 242 (CC) para 19.

[122] It is a settled principle of our constitutional jurisprudence that to find discrimination, a court must ascertain whether, viewed objectively, there is evidence of differentiation on one or more of the grounds specified in s 9(3) of the Constitution; or on a ground not specified therein but which is analogous to any ground listed there.⁶⁷

[123] In this regard, paragraph [84] of the main judgment is instructive. There the majority holds that clause 13 of the WCED Admission Policy differentiates between aspirant learners 'on the basis of time they applied' for a placement in a school. The time and the timing of an application for a school placement is not a prohibited ground listed in s 9(3) of the Constitution. Nor is time analogous to any ground listed in s 9(3) thereof.

[124] The majority judgment is silent on the constitutional basis on which the time and timing of an application for a school placement qualifies as an unlisted ground for differentiation which amounts to discrimination. No authority is cited on this vital aspect in the main judgment, and I have been unable to find any, despite diligent research.

[125] As regards when an unlisted ground may qualify as a basis for finding discrimination, the apex court, in *Harksen v Lane supra*, held (at para 46):

'There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.'

[126] In my view, based on this test, in the context of the WCED Admission Policy, the time and lateness of the timing of an application for a school placement does not qualify as differentiation tantamount to discrimination for purposes of s 9(3) in the Constitution.

⁶⁷ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paras 46 - 47.

[127] The WCED Admission Policy sets a time period for the filing of school placement applications in each calendar year. There is nothing extraordinary, let alone discriminatory, in setting timelines for the filing of such applications. This is common place in everyday life and in all sorts of settings, both in public and private administration. In practice, some applicants will comply with prescribed timelines, and others will not.

[128] Clause 13 of the WCED Admission Policy regulates the position, albeit somewhat imperfectly, that would apply to basic education learners whose applications for a school placement are filed late by parents, guardians, caregivers, or others responsible for the well-being of a learner. Therefore, clause 13 creates a framework for dealing with a practical reality that routinely arises on the ground (so to speak).

[129] Viewed in this light, clause 13 does not differentiate by creating two categories of learners, namely, those whose placement applications are timeous and those whose are late. Rather, the existence of these classifications arises as a result of an incontrovertible fact, namely, some school placement applications are filed on time, and others are not.

[130] Even if clause 13 of the WCED Admission Policy can be said to differentiate on the basis of the time or the lateness of the timing of an application for a school placement, then that would, in and of itself, not render clause 13 to be constitutionally offensive. This is because not all differentiation is discriminatory, or unfair. Indeed, good and effective governance in modern democratic societies necessitate some level of differentiation and classification among people.⁶⁸ Therefore, the criteria that serves as the dividing line to separate legitimate differentiation from constitutionally impermissible differentiation is that the latter involves unfair discrimination in a constitutional sense, while the former does not.⁶⁹

⁶⁸ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) paras 24 - 26.
⁶⁹ *Prinsloo supra* paras 17, 23.

[131] The majority holds, at paragraph [84] of the main judgment, that 'it is an undeniable truth that the group of late applicants is disproportionately black, poor and mostly from the rural areas such as the Eastern Cape'. The majority holds further that the 'uncontroverted fact is that the differentiation leads to unfair discrimination on the basis of race, poverty, place of birth and social origin'. With respect, this reasoning is flawed.

[132] I agree that the evidence in the pleadings reveals that late applicants who are not placed timeously by the WCED in a basic education school is disproportionately Black and poor learners who originate from rural South Africa, mainly from the Eastern Cape. However, this is not by the design of the admission policy; nor is this the result of a defect in clause 13 of the WCED Admission Policy.

[133] The disproportionate impact on black and poor learners originating from rural South Africa stems from the fact that the annual migration to the Western Cape comprises largely, if not exclusively, poor, Black persons who originate from rural areas, mainly in the Eastern Cape. They seek a better future in the Western Cape. It is this fact, and not any constitutional defect in the design or formulation of clause 13, which results in Black, poor learners mainly from rural areas being disproportionately impacted by clause 13.

[134] Consequently, clause 13 of the WCED Admission Policy does not discriminate, let alone unfairly so, on the basis of race, poverty, place of birth, and social origin.

[135] Even if I am wrong and clause 13 does discriminate, then that would not render its provisions to be unconstitutional. That finding would merely trigger the second leg of the test outlined in *Harksen v Lane supra* para 42. That leg entails a court enquiring into whether a rational connection exists between the differentiation and a legitimate governmental purpose which the differentiation is designed to achieve or advance.

[136] If such constitutional justification exists, then the differentiation would not qualify as unfair discrimination. Put differently, the differentiation would qualify as fair discrimination.

[137] The main judgment fails to conduct the inquiry comprising the second leg of the *Harksen* test. In paras [4] and [36] above, I sketch the overall purpose sought to be achieved by clause 13 of the WCED Admission Policy whose provisions are quoted in para [3] above. Clause 13 is self-evidently designed to avoid a lacuna in the policy which would exist if no provision is made for how late applications will be dealt with in practice.

[138] Although clause 13 is imperfect in its formulation as to its ambit, there can be no doubt that a rational connection exists between its provisions and the purpose sought to be achieved thereby. The main judgment does not hold otherwise.

[139] For all these reasons, I dissent in relation to the order granted in paragraph 92.5 of the main judgment and the reasons advanced in support thereof.

[140] Consequently, I would not have granted the declaratory relief contained in paragraph 92.5 of the main judgment.

F. MOOSA
Acting Judge of the High Court

Appearances

For applicant: Adv T. Ngcukaitobi SC (assisted by Advs L. Zikalala & N. Soekoe)

Instructed by: Equal Education Law Centre

(first to sixth applicants)

For respondents: Adv. E. De Villiers-Jansen SC (assisted by Adv A. Christians)

(first to fourth respondents)

Instructed by: Office of the State Attorney, Cape Town.