CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 103/12
[2013] ZACC 25

In the matter between:

HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, FREE STATE PROVINCE	Applicant
and	
WELKOM HIGH SCHOOL	First Respondent
GOVERNING BODY OF WELKOM HIGH SCHOOL	Second Respondent
and in the matter between	
HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, FREE STATE PROVINCE	Applicant
and	
HARMONY HIGH SCHOOL	First Respondent
GOVERNING BODY OF HARMONY HIGH SCHOOL	Second Respondent
and	
EQUAL EDUCATION	First Amicus Curiae
CENTRE FOR CHILD LAW	Second Amicus Curiae

Heard on : 5 March 2013

Decided on : 10 July 2013

JUDGMENT

KHAMPEPE J (Moseneke DCJ and Van der Westhuizen J concurring):

Introduction

[1] State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.[1] On the one hand this case requires us to answer the question of whether the Head of a Provincial Department of Education has the power lawfully to instruct the principal of a public school to ignore a policy promulgated by the school's governing body when he or she (the Head of Department) is of the opinion that that policy is unconstitutional. On the other hand it deals with rights that must be observed when formulating and implementing pregnancy policies for learners, and the manner in which those rights are protected.

[2] The respondents sought interdictory relief from the Free State High Court, Bloemfontein (High Court) under case numbers 5714/2010 (the Welkom case) and

[1] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 68; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 613; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148; and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.

5715/2010 (the Harmony case). The High Court heard the Welkom case and the Harmony case together and granted the relief sought in both cases. The matters went on appeal to the Supreme Court of Appeal and the award of the interdict was, in both cases, upheld by that Court, albeit subject to certain limitations not imposed by the High Court. This case now comes before us by way of an application for leave to appeal against the judgment and order handed down by the Supreme Court of Appeal.

The parties

[3] The applicant is the Head of the Department of Education in the Free State Province (Free State HOD).

[4] In the Welkom case the first respondent is Welkom High School (Welkom), which is a public school, and the second respondent is the Governing Body of Welkom (Welkom governing body). In the Harmony case the first respondent is Harmony High School (Harmony), which is also a public school, and the second respondent is the Governing Body of Harmony (Harmony governing body).[2]

[5] Equal Education and the Centre for Child Law were admitted as first amicus curiae and second amicus curiae respectively.

[2] For ease of reference I shall refer to Welkom, Welkom governing body, Harmony and Harmony governing body collectively as "the respondent schools".

Overview

[6] In 2008 and 2009 respectively, the Welkom governing body and the Harmony governing body adopted pregnancy policies for their respective schools that provide for the automatic exclusion of any learner from school in the event of her falling pregnant.

[7] Below I find that these policies prima facie violate constitutional rights and thus order that they be reviewed in the light of the considerations set out in this judgment. Further, I order the respondent schools to engage meaningfully with the Free State HOD in the process of revising their pregnancy policies and to furnish copies of the revised policies to this Court. Notwithstanding these findings I conclude that, in the circumstances of this case, the conduct of the Free State HOD was invalid insofar as he failed to adhere to the prescripts of the South African Schools Act[3] when seeking to address the content of the pregnancy policies. But before addressing either the Free State HOD's power to instruct principals to ignore their governing bodies' policies or the problems relating to the substance of those policies, a more detailed outline of the facts is necessary.

Facts particular to the Harmony case

[8] In October 2009, a 16-year old learner in grade 10 at Harmony (the Harmony learner) fell pregnant. She continued attending classes and passed her grade-10

[3] 84 of 1996 (Schools Act).

examinations. The following year she returned for grade 11 and attended classes for the first and second terms. During the winter school holidays in 2010 she gave birth. She then returned to school for the third and part of the fourth school terms. In October 2010, only a month before final examinations and in accordance with Harmony's pregnancy policy, the learner and her mother were instructed that she (the learner) would not be admitted to school for the remainder of 2010 and should return only in January 2011. The practical effect of this decision, had it been carried out fully, would have been to prevent the Harmony learner from writing her year-end examinations and to force her to repeat grade 11.

[9] On or about 12 October 2010 the mother of the Harmony learner approached the Department of Education in the Free State Province (Provincial Department) for assistance. On 13 October 2010 two departmental officials, Dr Liphapang and Mrs Lioma, wrote to Harmony's principal and requested that the Harmony learner's case be reviewed. To their letter the officials annexed the Provincial Department's "Management and Governance Circular No. 18 of 2010" (2010 Circular). While the 2010 Circular indicates that "[t]he Department does not condone learner pregnancy", it emphasises that learners may not be expelled on the basis of their pregnancy, that learner pregnancy policies and interventions should be "rehabilitative and supportive" rather than "punitive" and that learners should be encouraged to return to school as soon as possible after giving birth.

[10] The Harmony governing body decided not to review the Harmony learner's exclusion from school as it was of the view that its learner pregnancy policy had been properly applied to her case.

[11] On 26 October 2010 officials from the Provincial Department met with the Harmony governing body and the principal. At the meeting it was concluded that the governing body should convene to reconsider the Harmony learner's exclusion from school. However, on 28 October 2010, prior to the governing body convening, Harmony's principal received a letter from the Free State HOD that goes to the heart of the dispute presently before this Court. Although the initial provisions of the letter are framed in somewhat qualified terms, the final paragraph contains an unequivocal instruction:

> "You are . . . instructed to allow the [Harmony] learner back at school with immediate effect and to put in place measures to help the learner catch up with any work she might have missed whilst still at home."

[12] Following the Free State HOD's instruction, two meetings took place that are relevant for present purposes. First, on 2 November 2010 the Harmony governing body held a special meeting and decided, notwithstanding the Free State HOD's instruction to the principal, that the Harmony learner should not be readmitted during 2010. A letter was sent to the Free State HOD on 3 November 2010 communicating this outcome. At the instance of the school, a second meeting took place between members of the

Harmony governing body and officials from the Provincial Department (though the Free State HOD himself was not in attendance) on 4 November 2010. The parties discussed the Harmony learner's situation but were unable to reach agreement on the appropriate solution. It was concluded that the matter would be referred to the Free State HOD and the Member of the Executive Council responsible for the Provincial Department.

[13] The Federation of Governing Bodies of South African Schools (FEDSAS), a national organisation representing school governing bodies, attempted to schedule a third meeting between the Harmony governing body and the Free State HOD on 16 November 2010. Harmony alleges that the meeting was requested to discuss, amongst other things, the Harmony learner's situation, whereas the Free State HOD contends that it was purely to discuss "general issues". In any event, the meeting never took place.

[14] After the Free State HOD refused to rescind his instruction to the Harmony principal, the school approached the High Court for interdictory relief. The Harmony respondents were – and remain – of the opinion that the Free State HOD had no power to issue the abovementioned instruction. This notwithstanding, the school decided to readmit the Harmony learner during 2010, pending the outcome of the High Court proceedings. The Harmony learner completed her grade-11 examinations successfully and was a grade-12 learner at the time that the application was heard by the High Court.

Facts particular to the Welkom case

[15] In 2010 a learner in grade 9 at Welkom, aged around 15- or 16-years old at the time[4] (the Welkom learner), fell pregnant. She continued attending school until the principal, in accordance with the school's pregnancy policy, instructed her mother that she had to leave school on 16 September 2010 and remain at home until the end of the first term of 2011. This instruction followed consultations between the principal, the Welkom learner and her mother which took place on 15 and 16 September 2010. The effect of the principal's instruction, had it been carried out, would have been to prevent the Welkom learner from completing her grade-9 year and to force her to repeat that year in 2011.

[16] On the day the instruction was communicated to the Welkom learner's mother, her uncle dispatched a written request to the Minister of Basic Education (Minister), asking that she intervene "immediately . . . prior to [the dispute regarding the Welkom learner's exclusion from school] becoming a legal battle". It is not apparent whether there was any response from or intervention by the Minister.

[17] The Welkom learner's family also sought the assistance of the South African Human Rights Commission[5] (HRC) in their efforts to gain her readmission to Welkom prior to the second term of 2011. The HRC subsequently wrote to Welkom, indicating

[4] There was a discrepancy between the parties regarding the Welkom learner's age.

[5] An institution established in terms of Chapter 9 of the Constitution to promote human-rights objectives.

that it had received a complaint relating to the Welkom learner's exclusion from the school and requesting a response. The HRC noted that expelling or suspending a learner on the basis of her pregnancy amounts to a violation of that learner's constitutional right to education. It is not apparent whether Welkom ever responded to the HRC.

[18] Sometime during October 2010 the Welkom governing body received the 2010 Circular.[6] On 11 October 2010 the Welkom governing body called a special meeting to consider the import thereof. Notwithstanding the contents of the Circular, the governing body elected to uphold its decision to enforce the school's pregnancy policy in relation to the Welkom learner.

[19] On 28 October 2010, three days after the Welkom learner had given birth, the principal of Welkom received a letter from the Free State HOD regarding the Welkom learner's exclusion from the school, reflecting almost the exact contents of the letter received by the Harmony principal on the same date. The Welkom principal was thus also "instructed to allow the [Welkom] learner back at school with immediate effect".

[20] It would seem that a director from the Provincial Department, responsible for the district in which Welkom is situated, met with the chairman of the Welkom governing body during the first half of October 2010 and insisted that the school's decision regarding the Welkom learner be revisited, to no avail. Welkom intended to participate

[6] See [9] above where the 2010 Circular is discussed.

in the meeting organised by FEDSAS with the Free State HOD to be held on 16 November 2010. Welkom also alleges that the meeting was requested to discuss, amongst other things, the Welkom learner's situation, while the Free State HOD contends that it was purely to discuss "general issues". As stated above, the meeting never took place.

[21] The Welkom respondents were – and remain – of the opinion that the Free State HOD had no power to instruct the principal in the manner in which he did. The school accordingly instituted the application for urgent interdictory relief in the High Court. It nevertheless decided to readmit the Welkom learner pending the outcome of the High Court proceedings. The learner returned to school on 1 November 2010 and completed her grade-9 examinations successfully.

The High Court

[22] Before the High Court, the respondents requested the following relief in their respective notices of motion: first, an order declaring that the Free State HOD does not have the authority to instruct or compel a school principal to act in a manner contrary to a policy of the school governing body and, in particular, the school's pregnancy policies; second, an order declaring that the decisions to exclude the learners from school in accordance with the policies be implemented forthwith; and last, an interdict restraining the Free State HOD from taking any action in contravention of the pregnancy policies.

[23] The High Court, per Rampai J, found that the Free State HOD did not have the legal authority to act as he did and that his instructions to the principals violated the principle of legality. The High Court held that the Free State HOD's only available remedy would have been to call on the governing bodies to change their policies and, in the event that they refused to do so, to apply to the courts for appropriate relief.

[24] The High Court therefore made an order stating in relevant part that—

a. the Free State HOD does not have the authority to instruct or compel the school principals to act in a manner contrary to an adopted policy of the school governing bodies and, more specifically, to take any action in contravention of or contrary to the learner pregnancy policies;

b. the decisions of the respondent schools to exclude the two learners were valid in law;

c. the Free State HOD is restrained from taking any action directly or indirectly calculated to defy, contravene, subvert or in any manner to undermine the decisions by the respondent schools taken in terms of their learner pregnancy policies; and

d. the two learners concerned shall be entitled to attend school until the completion of their school careers.

The Supreme Court of Appeal

[25] The Supreme Court of Appeal broadly agreed with the High Court that the Free State HOD did not have the authority to instruct the school principals to act contrary to policies adopted by the respondent governing bodies. Furthermore, the Court was of the opinion that the content of the pregnancy policies had not been properly challenged, and therefore that it was unnecessary to consider the constitutionality of those policies. The Court amended the High Court order to eliminate the declaration that the decisions to exclude the two learners were "valid in law" in order to ensure that there was no risk of an unintended declaration of the constitutionality of the policies. In this regard, the Supreme Court of Appeal explained:

> "[T]hat part of the [High Court] order declaring the decisions of the governing bodies 'valid in law' presupposes that the decision cannot be assailed on any legal grounds. I doubt that the learned judge intended to go that far. He must have intended . . . that the decisions are valid until set aside."[7]

[26] The Court therefore issued the following order:

> "In each case, for as long as the pregnancy policy remains in force, the [Free State HOD] is interdicted and restrained from directing the school principal to act in a manner contrary to the policy adopted by the school governing body."

[7] Supreme Court of Appeal judgment at para 28.

Issues

[27] As with all applications of this nature, our concern must initially focus on whether leave to appeal ought to be granted. If it is concluded that leave ought to be granted, there are two material issues for determination.

[28] First, does the Head of a Provincial Education Department (HOD) have the power to instruct principals of public schools to ignore policies adopted by the governing bodies of those schools, in the light of his powers under the Schools Act, his authority as the principals' employer or his responsibilities under section 7(2) of the Constitution?

[29] Second, in what manner and to what extent may this Court address the concerns raised regarding the unconstitutionality of the pregnancy policies?

Submissions

[30] The arguments presented by counsel for the parties and the amici were most helpful and this Court is indebted to them. It is not, however, my intention to traverse each of the many contentions put forward. I shall limit myself instead to dealing with those arguments that are strictly necessary for the proper determination of this matter.

Leave to appeal

[31] Leave to appeal is granted where the dispute raises a constitutional issue and where it is in the interests of justice to do so.[8]

[32] The present matter clearly raises constitutional issues in that it relates to the proper exercise of public power by organs of state and the steps that members of the Executive may lawfully take in order to protect fundamental rights. In addition, it implicates the constitutional rights to education,[9] human dignity,[10] privacy,[11] bodily and psychological integrity[12] and equal protection and benefit of the law,[13] as well as the prohibition against unfair discrimination.[14]

[33] The manner in which public schools regulate learner pregnancies, and the manner in which members of the Executive exercise their supervisory authority to ensure that

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[8] Section 167(3)(b) read with section 167(6) of the Constitution. See also *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*) at paras 37 and 42-4.

[9] Section 29(1) of the Constitution provides:

> "Everyone has the right—
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[10] Section 10 of the Constitution.

[11] Id section 14.

[12] Id section 12(2).

[13] Id section 9(1).

[14] Section 9(3) of the Constitution states:

> "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."

public schools act lawfully and appropriately, are self-evidently matters of great import. On the one hand, the rights of pregnant learners to freedom from unfair discrimination and to receive education must be respected, protected, promoted and fulfilled.[15] On the other hand, interactions between organs of state when discharging their obligations under the Bill of Rights must take place in accordance with the provisions of the Constitution and the relevant legislative framework. The facts of this case give rise to a complex interplay between these two highly important sets of constitutional considerations, which interplay should be authoritatively determined, at least to the extent relevant for present purposes, by this Court. It is thus in the interests of justice for this matter to be heard. I therefore grant leave to appeal.

The scheme of powers in relation to public schools

[34] The entrenchment of the right to education as a fundamental right of all people in South Africa represents a remarkable and ambitious break with the past, occurring as it does in the wake of the apartheid regime's policy of racially-segregated, disproportionately-resourced schooling and the very real legacy of that noxious system with which we are still faced today.

[35] The unfortunate reality of our education system was alluded to by this Court in *Hoërskool Ermelo*:

[15] Section 7(2) of the Constitution.

> "Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us."[16]

[36] Given this legacy, the state's obligations to ensure that the right to education is meaningfully realised for the people of South Africa are great indeed. The primary statute setting out these obligations is the Schools Act.[17] That Act contains various provisions governing the relationships between the Minister, Members of Provincial Executive Councils responsible for education (MECs), HODs, principals and the governing bodies of public schools. It makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HOD and MEC, and the Minister. Its provisions are carefully crafted to strike a balance between the duties of these various partners in ensuring an effective education system.

[37] Section 16 of the Schools Act is entitled "Governance and professional management of public schools" and delineates the general roles played by the different statutory partners. It provides in relevant part:

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[16] *Hoërskool Ermelo* above n 8 at para 45. See also *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*) at paras 121-3.

[17] *Hoërskool Ermelo* above n 8 at para 55. The Preamble to the Schools Act states that the statute's purpose is to provide for a uniform system for the "organisation, governance and funding of schools".

> "(1) Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act.
>
> . . .
>
> (3) Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department."

[38] The Act does not define "governance" or "professional management", but lists specific governance functions of school governing bodies in section 20(1), as well as certain functions and responsibilities of public-school principals in section 16A.

[39] A principal must, in discharging his or her professional management duties, amongst other things, implement educational programmes and curriculum activities,[18] manage educators and support staff,[19] perform functions that are delegated to him or her by the HOD under whose authority he falls[20] and implement policy and legislation.[21] In contrast, a school governing body's governance functions include promoting the school's best interests and striving to ensure the provision of quality education to all learners at the school,[22] developing a mission statement for the school,[23] adopting a code of conduct for learners[24] and administering school property (subject to certain constraints).[25]

[18] Section 16A(2)(a)(i) of the Schools Act.

[19] Id section 16A(2)(a)(ii).

[20] Id section 16A(2)(a)(iv).

[21] Id section 16A(2)(a)(vi).

[22] Id section 20(1)(a).

[40] Although a principal is a member of the school governing body, he or she occupies that position as a representative of the HOD.[26] This is reiterated in section 16A(3), which reads as follows:

> "The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with—
>
> (a) instructions of the Head of Department;
>
> (b) legislation or policy;
>
> (c) an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or
>
> (d) a provision of the Employment of Educators Act, 1998 (Act No. 76 of 1998), and the Personnel Administration Measures determined in terms thereof."

[41] In addition to section 16A's general delineation of a principal's duties, each provision of the Schools Act dealing with a specific aspect of school governance or administration provides further guidance on the roles and responsibilities of the relevant actors. I shall discuss these in some detail below as it is important to gain a nuanced understanding of the roles prescribed by the Schools Act for the various officials and entities.

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[23] Id section 20(1)(c).

[24] Id section 20(1)(d).

[25] Id section 20(1)(g).

[26] Id section 16A(1)(a).

[42] Sections 3 and 4 of the Schools Act prescribe compulsory school attendance, and make provision for exemption therefrom, for children from the age of seven until such time as they reach the ninth grade or their fifteenth year. It is the responsibility of the MEC in each province to ensure that there are enough schools in the province to accommodate all children who are subject to compulsory attendance[27] and the responsibility of the relevant HOD to monitor, regulate and enforce compulsory attendance.[28] The Act further provides that "any . . . person [other than a learner's parent] who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school, is guilty of an offence".[29]

[43] Section 5 of the Schools Act empowers a school governing body to determine a public school's admission policy,[30] subject to certain express stipulations aimed at preventing the imposition of unfair admission requirements[31] and further subject to regulations prescribed by the Minister.[32] An HOD, in turn, is empowered to administer the admissions process, with appeals against admission refusals lying to the MEC in the province.[33]

[27] Id section 3(3).

[28] Id sections 3(5) and 4.

[29] Id section 3(6)(b).

[30] Id section 5(5).

[31] Id section 5(1)-(3).

[32] Id section 5(4)(c).

[33] Id section 5(6)-(9).

[44] Sections 6 and 6B deal with language policies in public schools, empowering school governing bodies to determine the policies, subject to the applicable provisions of the Constitution, the Schools Act, relevant provincial legislation and any norms and standards promulgated by the Minister.[34]

[45] Section 8 of the Schools Act empowers school governing bodies, pursuant to a consultative process involving learners, their parents and educators, to adopt codes of conduct, subject to guidelines which may be published by the Minister and which, if duly published, must be considered in the process of adopting such codes.[35]

[46] Section 9 goes on to regulate the suspension and expulsion of learners from public schools, and grants school governing bodies only limited powers in this regard. As a precautionary measure, a governing body may suspend a learner for up to seven days, pending his or her disciplinary hearing, or such longer time as an HOD authorises.[36] The governing body may, in the event of the learner having committed serious misconduct, impose a disciplinary sanction of up to seven days of (further) suspension.[37] Only an HOD may decide to expel a learner,[38] although a governing body may extend the learner's period of suspension for up to 14 days pending an HOD's determination of

[34] Id section 6(1) and (2) and section 6B.

[35] Id section 8(1) and (3).

[36] Id section 9(1), (1A) and (1B).

[37] Id section 9(1C)(a).

[38] Id section 9(2)(a).

whether expulsion is appropriate.[39] While a governing body may recommend a learner's expulsion to an HOD, the latter is not bound by such recommendation and a governing body is bound to implement whatever sanction the relevant HOD deems appropriate in the circumstances.[40]

[47] Finally, sections 22 and 25 regulate situations where an HOD's supervisory authority manifests in the form of a direct intervention in a public school's affairs.[41]

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[39] Id section 9(1E).

[40] Id section 9(1C)(b) and (8)-(10).

[41] The sections read as follows:

> "**22 Withdrawal of functions from governing bodies**
>
> (1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body.
>
> (2) The Head of Department may not take action under subsection (1) unless he or she has—
>
> (a) informed the governing body of his or her intention so to act and the reasons therefor;
>
> (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and
>
> (c) given due consideration to any such representations received.
>
> (3) In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter—
>
> (a) furnishes the governing body with reasons for his or her actions;
>
> (b) gives the governing body a reasonable opportunity to make representations relating to such actions; and
>
> (c) duly considers any such representations received.
>
> (4) The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3).
>
> (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.
>
> . . .

Section 22 thus empowers an HOD, on reasonable grounds, to withdraw any function exercised by a school governing body, subject to certain procedural fairness requirements.[42] In the event of an urgent need to withdraw a school governing body's function, compliance with the procedural fairness requirements may be delayed until after the withdrawal has occurred, provided that the governing body is given sufficient opportunity at a later stage to make the appropriate representations to the relevant HOD.[43] An HOD's powers of withdrawal under section 22 are broad, and extend to "any function" conferred on a school governing body.[44] Once an HOD withdraws a particular function, that function vests in his or her office and he or she is "duty-bound to exercise it in furtherance of a specified goal permitted by the Schools Act."[45] It goes without saying that these broad powers must be exercised in strict compliance with the requirements of the Schools Act.

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25 Failure by governing body to perform functions

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

(2) The Head of Department may extend the period referred to in subsection (1), by further periods not exceeding three months each, but the total period may not exceed one year.

(3) If a governing body has ceased to perform its functions, the Head of Department must ensure that a governing body is elected in terms of this Act within a year after the appointment of persons contemplated in subsection (1).

(4) If a governing body fails to perform any of its functions, the persons contemplated in subsection (1) must build the necessary capacity within the period of their appointment to ensure that the governing body performs its functions."

[42] Id section 22(1) and (2).

[43] Id section 22(3).

[44] *Hoërskool Ermelo* above n 8 at paras 68 and 71.

[45] Id at para 87.

[48] Section 25, on the other hand, empowers an HOD to intervene where a school governing body has become dysfunctional – where the governing body has "ceased to perform functions allocated to it in terms of [the Schools Act] or has failed to perform one or more of such functions".[46] Thus section 22 regulates the situation where a school governing body has purported to exercise its functions, but has done so in a manner warranting intervention, whereas section 25 obtains where a school governing body has failed to perform its functions, in whole or in part.[47]

[49] Under the Schools Act, two things are perspicuous. First, public schools are run by a partnership involving the state, parents of learners and members of the community in which the school is located. Each partner represents a particular set of relevant interests and bears corresponding rights and obligations in the provision of education services to learners. Second, the interactions between the partners – the checks, balances and accountability mechanisms – are closely regulated by the Act. Parliament has elected to legislate on this issue in a fair amount of detail in order to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the Executive and the Judiciary. The nature of the statutory partnership for the running of public schools was succinctly summarised in *Hoërskool Ermelo* as follows:

[46] Section 25(1) of the Schools Act.

[47] See the discussion of the two sections in *Hoërskool Ermelo* above n 8 at paras 84-8.

> "An overarching design of the [Schools Act] is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school."[48] (Footnotes omitted.)

[50] The Schools Act must, of course, be read in conjunction with other applicable legislation. In this regard the Employment of Educators Act[49] is relevant. The Educators Act provides that an HOD is the employer of public-school educators who are appointed to provincial departmental posts, including principals.[50]

[51] That is the statutory framework relevant for purposes of this case. The Free State HOD argues that he was entitled to issue the instructions to the principals of Welkom and Harmony on the basis of his statutory powers. I now turn to consider this contention.

Was the Free State HOD entitled to intervene in the manner in which he did in the light of his powers under the Schools Act?

[52] The Free State HOD's arguments may be summarised as follows. First, school governing bodies have powers that are expressly limited by the Schools Act, and those

[48] Id at para 56.

[49] 76 of 1998 (Educators Act).

[50] Id section 3(1)(b), read with the definition of "employer" in section 1.

powers do not include the power to adopt a pregnancy policy. A governing body does not have that power by virtue of its competence to determine admission policy, as a pregnancy policy applies only after a learner has already been admitted to the school and therefore cannot constitute part of a public school's admission policy. A governing body further does not have the power to adopt a pregnancy policy by virtue of its authority to determine the school's code of conduct, because codes of conduct only deal with disciplinary issues and pregnancy may not be treated as a species of misconduct.

[53] Second, school governing bodies do not have the power to adopt pregnancy policies that compulsorily exclude pregnant learners from school for the remaining portion of the year following the birth of their children. Only an HOD may expel a learner, suspend him or her for a lengthy amount of time or exempt that learner from compulsory school attendance.

[54] Third, an HOD's status as the official responsible for executive control over public schools and as the employer of public-school principals takes primacy over any obligations that principals may have to assist school governing bodies. Accordingly, an HOD is entitled to instruct principals under his authority to ignore or act in contravention of policies adopted by school governing bodies.

[55] The respondents, in turn, rely on governing bodies' general responsibility for governance issues and, in particular, on their powers to adopt a code of conduct in terms

of section 8 of the Schools Act. These powers and responsibilities, the respondents contend, authorise governing bodies to adopt pregnancy policies for their respective schools.

[56] I shall deal with each of the Free State HOD's arguments in turn.

[57] Does the Schools Act authorise governing bodies to adopt pregnancy policies for public schools? I believe that this question must be answered in the affirmative.

[58] Section 8 of the Schools Act regulates codes of conduct. Neither section 8 nor any other provision of the Act explicitly or precisely defines what constitutes a "code of conduct". The Schools Act does, however, stipulate that such a code "must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process."[51]

[59] Codes of conduct should, of course, deal with discipline in schools. Thus section 8(5) to (9) of the Schools Act, which prescribes certain mandatory content for codes of conduct (as well as relevant procedures to be followed by schools when implementing particular provisions of a code), refers only to disciplinary issues. This limited prescription would appear to support the Free State HOD's construction of the Schools Act. That, however, is not the end of the matter. The phrases "disciplined and

[51] Section 8(2).

purposeful school environment" and "improvement and maintenance of the quality of the learning process" found in section 8(2) are sufficiently broad to accommodate more than just disciplinary policies. Pregnancy should not be construed as a species of misconduct and, accordingly, may not be treated as an instance of ill-discipline or as meriting punishment. However, the non-disciplinary nature of pregnancy does not preclude the governing body from being able to formulate policies dealing with pregnancy. This is so especially when section 8 of the Schools Act is considered in the light of the governing body's overall responsibility for the governance of the school and its general fiduciary obligation to ensure that the school environment appropriately accommodates learners' needs.

[60] As with "code of conduct", the Schools Act does not define "governance" except insofar as it provides for particular governance functions in sections 5, 6, 8, 20 and 21. The Oxford English Dictionary defines "governance" as, amongst other things, "[t]he action or manner of governing", "[c]ontrolling, directing or regulating influence" and "[t]he manner in which something is governed or regulated; method of management, system of regulations."[52]

[61] In *Hoërskool Ermelo* this Court explained that "governance" in the context of the Schools Act entails that "in partnership with the State, parents and educators assume responsibility for the governance of schooling institutions. . . . [A governing body's]

[52] *The Oxford English Dictionary* 2 ed (Oxford University Press, Oxford 1989).

primary function is to look after the interest of the school and its learners."[53] The Court went on to hold that "[s]chool governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body."[54]

[62] "Governance" in the context of the Schools Act should also be understood in contrast to "professional management", the two being distinct categories of responsibilities set out in the statute. As is evident from section 16A(2)(a), the professional management of a public school consists largely of the running of the daily affairs of a school by directing teachers, support staff and the use of learning materials, as well as the implementation of relevant programmes, policies and laws.[55]

[63] To my mind, therefore, a governing body is akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations, in order to guide the daily management of the school and to ensure an appropriate environment for the realisation of the right to education. By contrast, a principal's authority is more executive and administrative in nature, being responsible (under the authority of the HOD) for the implementation of applicable policies (whether

[53] *Hoërskool Ermelo* above n 8 at para 57 (footnote omitted).

[54] Id at para 79 (footnote omitted).

[55] See [37]-[40] above for a discussion of sections 16 and 16A of the Schools Act.

promulgated by governing bodies or the Minister, as the case may be) and the running of the school on a day-to-day basis. It is this understanding of a governing body's governance obligations which must inform our interpretation of the Schools Act.[56]

[64] In creating an appropriate school environment for learners, a governing body may seek to include stipulations within its code of conduct regarding, for example, the exemption of pregnant learners from otherwise mandatory sporting activities, the exemption of pregnant learners from the ordinary consequences of absenteeism, medical services to be made available to pregnant learners and the related procedures in procuring these services, counselling services to be made available to pregnant learners, the presence of learners' babies on the school campus and procedures regarding maternity leave.

[65] While we should refrain from purporting to use subordinate legislation and similar instruments to interpret primary legislation,[57] I think it is instructive that the various policy documents issued by the Department of Basic Education and its provincial counterpart in this matter are all predicated upon the promulgation of a pregnancy policy

[56] Of course, this characterisation is neither cast in stone nor fully descriptive of all rights and obligations of the relevant partners. The Schools Act makes it clear that, in certain circumstances, governing bodies perform administrative functions (for example, their role in relation to disciplining learners) while, in other circumstances, government officials may provide policy guidance (for example, in relation to the determination of national norms and standards for school funding).

[57] See, for example, *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 62 and *Rossouw and Another v Firstrand Bank Ltd* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) at paras 24-7.

falling within a governing body's governance responsibilities.[58] For example, the 2010 Circular states that it is "imperative that all schools should have a policy on the prevention and management of learner pregnancy" and goes on to stipulate certain principles that should be given effect to by schools "*when drawing up* such policies" (emphasis added).

[66] This position, of course, makes sense. While the powers of governing bodies are limited to "defined autonomy over some of the domestic affairs of the school",[59] no other partner in the statutory scheme for the running of public schools is empowered, or is as well-placed as a school governing body, to formulate a pregnancy policy for a particular school (at least as a matter of first instance). In other words, this is consistent with the Schools Act's objective of ensuring democratic governance within the public school system.

[67] Any policy promulgated by the Minister could only be general in nature and would have to be particularised by school governing bodies in order to provide a systematic set

[58] See the "Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners" published by the Minister under GN 776 in *Government Gazette* 18900 of 15 May 1998 (1998 Guidelines). The 1998 Guidelines state that the purpose of a code of conduct is to "promote positive discipline, self-discipline and exemplary conduct, as learners learn by observation and experience" and that a code should "clarify and promote the roles and responsibilities of various stakeholders in the creation of a proper learning environment in schools." Item 3.9 of the Guidelines goes on to state that "[a] learner who falls pregnant may not be prevented from attending school. A pregnant girl may be referred to a hospital school for pregnant girls." See also the 2007 "Measures for the Prevention and Management of Learner Pregnancy" (2007 Measures). It would seem that the 2007 Measures were not published by the National Department of Basic Education in the Government Gazette, but were nevertheless circulated to public schools. The 2007 Measures suggest "management interventions" of a general nature, indicating an intention that individual schools should adopt policies that are appropriate for their particular circumstances.

[59] *Hoërskool Ermelo* above n 8 at para 56.

of rules and norms that are accommodating of a particular school's circumstances. For example, girls-only and co-educational schools may have different requirements with regard to pregnancy policies. Well-resourced public schools would be able to provide more extensive counselling and medical services for pregnant learners such that it would be unfair, unreasonable and impractical for a national policy to expect all schools to adhere to exactly the same standards and provide exactly the same forms of assistance. Particularisation with due regard to considerations of this sort could only fall within a school governing body's governance function.

[68] Under the Schools Act the Minister has a discretion to determine guidelines regarding the content of codes of conduct, which must be considered by a governing body when adopting a code of conduct.[60] The Minister duly promulgated the 1998 Guidelines,[61] which reserve for school governing bodies the formulation and adoption of codes of conduct, including rules and norms regarding learner pregnancies. The Schools Act does not grant the HOD any powers of policy-making for particular schools or any powers to establish binding pregnancy policies that must be implemented by public schools (as a matter of first instance). Indeed, counsel for the Free State HOD conceded during argument that the Provincial Department has no power to formulate a pregnancy policy for a particular school.

[60] Section 8(3) of the Schools Act.

[61] See above n 58.

[69] Further, during the hearing when asked about the correct remedy, counsel for the Free State HOD argued that the pregnancy policies could be corrected by merely deleting a few of the most offensive clauses (those clauses that make the policies inflexible). This approach in relation to remedy seems to accept that school governing bodies do have the power to promulgate a pregnancy policy. It is premised on the notion that a pregnancy policy with the offensive provisions removed would be entirely valid, notwithstanding the fact that the policy as a whole was formulated and adopted by the respondent governing bodies. However, any piecemeal remedy of this sort would be completely unfounded if school governing bodies did not have the power to promulgate pregnancy policies at all (as the Free State HOD contends), since any such "remedied policy" would still be ultra vires.

[70] To my mind it is therefore clear that neither the Minister nor the Provincial Department is empowered or ideally suited to adopt a pregnancy policy for a particular public school. And, in the light of the foregoing, I am of the opinion that the Welkom and Harmony governing bodies were empowered, pursuant to their governance responsibilities and their authority to adopt codes of conduct, to adopt pregnancy policies for their respective schools. Accordingly, it is not open to the Free State HOD to claim that he was entitled to instruct the principals as he did because the pregnancy policies were not properly authorised acts and therefore could not lawfully restrain his conduct.

[71] Having disposed of the Free State HOD's argument in relation to a governing body's general power and competence to adopt a pregnancy policy, I turn to his second contention. Does the Schools Act authorise governing bodies to adopt pregnancy policies that have exclusionary effects, that are premised on rigid application and that do not take sufficient account of constitutional rights? This question must be answered in the negative. The powers of governing bodies must be exercised subject to the limitations laid down by the Constitution and the Schools Act.[62] No governing body may adopt and enforce a policy that undermines, amongst others, the fundamental rights of pregnant learners to freedom from unfair discrimination and to receive an education. This is an issue with which I shall deal more fully below.

[72] However, we are presently concerned with determining whether the Courts below were correct to grant the interdictory relief restraining the Free State HOD from conducting himself in a particular manner in relation to the respondent schools. We therefore need to determine what the Schools Act empowers an HOD to do when faced with policies adopted by school governing bodies that prima facie (on the basis of the HOD's analysis) offend the Constitution and the Schools Act. For just as school governing bodies are obliged to act in accordance with the Schools Act, so is an HOD. And for the reasons set out more fully below, I am of the opinion that the Schools Act does *not* empower an HOD to act as if policies adopted by a school governing body do not exist. Rather, the Act obliges the HOD to engage in a comprehensive consultative

[62] *Hoërskool Ermelo* above n 8 at paras 80-1.

process with the relevant governing body regarding the particular policies and then, if there are reasonable grounds for doing so, to take over the performance of the particular governance or policy-formulation function in terms of section 22,[63] in order to give effect to the relevant constitutional rights and the objectives of the Schools Act. Of course, the other avenue always open to an HOD is to approach the courts for appropriate relief, for instance to obtain an urgent interdict in respect of the application of the policies or to have the policies reviewed and set aside.

[73] In *Hoërskool Ermelo* this Court was faced with a situation where a school governing body had exercised a power – the power to determine language policy – pursuant to one of its statutory functions, but had done so in a manner which the HOD in that case thought unlawful and unreasonable. In order to address the problematic policy, the HOD elected to appoint an interim committee to discharge what had been the governing body's language-policy-formulation function.[64] The Court noted that while language policy formulation falls to school governing bodies as a matter of first instance, such formulation must be done in accordance with the prescripts of the Constitution and the Schools Act.[65] In this regard, the Court emphasised the importance of departmental supervision in ensuring that school governing bodies observe the requirements of the law. The Court stated:

[63] The content of this section is set out in full in n 41 above.

[64] *Hoërskool Ermelo* above n 8 at paras 20-1 and 31.

[65] Id at para 61.

> "[The Schools Act] devolves power and decision-making on the school's medium of instruction to a school governing body. It would, however, be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice."[66] (Footnote omitted.)

[74] Nevertheless, this Court unanimously decided that, although an HOD has supervisory authority over the exercise by a governing body of its policy-making governance functions, that supervisory authority may only be exercised pursuant to the mechanisms provided for by the Schools Act. In other words, the legality constraints imposed by the Constitution and the Schools Act apply not only to school governing bodies exercising their policy-making functions, but also to departmental officials seeking to ensure that policies enforced in schools are consistent with the relevant constitutional and statutory framework.

[75] Thus, even though this Court was of the opinion that the school governing body had exercised its policy-formulation function in a manner "not consistent with the relevant provisions of the Constitution and the Schools Act",[67] it was constrained to dismiss the appeal and to conclude that the relevant HOD had conducted himself unlawfully:

[66] Id at para 78.

[67] Id at para 99.

> "[M]y conclusion does not entail that the [HOD] enjoys untrammelled power to rescind a function properly conferred on a governing body whether by him or by the Schools Act or any other law. The power to revoke will have to be exercised on reasonable grounds. In addition the [HOD] must, in revoking the function, observe meticulously the standard of procedural fairness required by section 22(2). . . . [Even though the HOD is empowered to withdraw a function in accordance with section 22 of the Schools Act, in the circumstances of this case the HOD] unlawfully conflated the requirements of section 22(1) and of section 25 by withdrawing the function and at the same time establishing an interim committee under section 25. This misapprehension of his powers strikes at the heart of the lawfulness of the conduct of the interim committee and infects with unlawfulness also his recourse to section 22(1). Simply put, the [HOD] had no power to constitute the interim committee."[68]

[76] We are bound by the decision in *Hoërskool Ermelo* unless it is "clearly wrong",[69] and I do not think it can be said that the decision is clearly wrong. On the contrary, that judgment correctly balances the importance of the accountability checks imposed by the Schools Act with considerations of legality and respect for the sensitivity of the partnership between the Minister, Provincial Education Departments, public schools and school governing bodies. In other words, that judgment asserts both the Executive's obligation to ensure that the requirements of the Constitution and the Schools Act are adhered to and its duty to conduct itself in a lawful manner that respects the powers that Parliament has seen fit to apportion between various organs of state. We are thus bound by the decision in *Hoërskool Ermelo* to conclude that, in addressing his concerns regarding the content of the pregnancy policies, the Free State HOD was obliged to act in

[68] Id at paras 73 and 93.

[69] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 28.

accordance with the relevant provisions of the Schools Act or to approach the courts for appropriate relief.

[77] If the Free State HOD had decided to intervene pursuant to section 22 of the Schools Act, he could only have done so after consultation with the respondent schools and on the basis of a reasonable belief that he should take over the governing bodies' function of formulating pregnancy policies. In the event of urgency, the consultation process could have been delayed and the power of withdrawal exercised with immediate effect. No other statutory provision empowers a direct departmental intervention in a public school's affairs when a governing body has exercised its policy-making functions incorrectly. However, in argument before this Court no reliance was placed on that provision and, indeed, none could have been because at no stage did the Free State HOD observe the consultation requirements in either section 22(2) or in section 22(3) and at no stage did he purport to withdraw the policy-making function from the governing bodies pursuant to section 22(1) (notwithstanding the fact that this function was clearly referred to as falling within the ambit of the governing bodies' powers in the 2010 Circular).[70]

[78] Insisting on compliance with section 22, in addition to being a requirement of legality and being necessary to respect the sensitive scheme of powers established by the Schools Act, makes sense from the point of view of protecting vulnerable learners. It avoids ad hoc interventions and ensures that all learners are protected if a governing body

[70] See paragraph 3 of the 2010 Circular as referred to in [9] above.

has acted unreasonably or unconstitutionally. This it does by empowering an HOD to assume the particular policy-making function and to override, on a general level, earlier problematic policies.

[79] It cannot be denied that the Free State HOD exercises executive control over the respondent schools. However, for the reasons that follow, this executive authority does not entitle him to superimpose his own policies and countermand those of the school by fiat, simply because he is of the opinion that the latter are unconstitutional.

[80] First, as set out above, the Schools Act does not grant an HOD the power to formulate pregnancy policies for particular schools (at least prior to a section 22 intervention process). However, as established in *Mikro,*[71] when the Free State HOD instructed the principals to ignore the existing pregnancy policies he usurped the power to formulate those policies, a power he did not have.

[81] Second, the Schools Act also very clearly grants HODs supervisory authority in relation to the exercise of certain governance and policy-making functions of school governing bodies.[72] In addition to the powers set out in section 22, only an HOD (or the relevant MEC, on appeal) may decide to give effect to a governing body's

[71] *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* [2005] ZASCA 66; 2006 (1) SA 1 (SCA) (*Mikro*) at para 43.

[72] See the discussion of this issue in *Hoërskool Ermelo* above n 8 at paras 63-81.

recommendation that a learner be expelled;[73] an HOD must approve the allocation of any additional functions to a governing body;[74] and an HOD must appoint persons to fulfil a governing body's functions where he or she reasonably determines that the governing body has ceased or failed to perform those functions.[75] But, in the present case, the Free State HOD did not purport to rely on any of these statutory powers. Indeed, in circumstances that seem most appropriate for the exercise of his powers in terms of section 22, he elected not to withdraw the governing bodies' function to formulate pregnancy policies and to substitute them with his own policies. Instead, he instructed the principals of Welkom and Harmony to ignore the extant school policies. However wide the scope of his supervisory authority may be, the Schools Act in no way contemplates this sort of power for the HOD.

[82] Third, while the Schools Act does not empower a governing body to expel a learner or to suspend him or her for a lengthy period of time, these considerations cannot be decisive in this matter. The primary determining factor is that nowhere does the Schools Act authorise an HOD to ignore extant policies or to undertake policy-formulation and governance functions for a public school without having gone through a process in terms of section 22 or section 25. The Schools Act very clearly prescribes mechanisms available to an HOD when he or she believes a governing body to have

[73] Section 9(1C) of the Schools Act, read with subsections (2) and (4).

[74] Id section 21(1)-(3).

[75] Id section 25(1).

conducted itself unreasonably or unlawfully. In the circumstances of this case, however, the Free State HOD eschewed any reliance on these mechanisms. I fail to comprehend how an HOD's ultimate responsibility for expelling a learner and for granting an exemption from compulsory attendance may be construed (as argued by the Free State HOD) as authorising his or her assumption of a governing body's governance functions without recourse to section 22 or without approaching a court for appropriate relief.

Was the Free State HOD entitled to intervene in the manner in which he did in the light of section 7(2) of the Constitution?

[83] The Free State HOD, supported by the first amicus, argues that he was empowered to instruct the principals to ignore the pregnancy policies in order to counteract what he believed to be their unconstitutional content, particularly in the light of his obligations under section 7(2) of the Constitution.

[84] Section 7(2) provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." Importantly, the obligation to protect the rights in the Bill of Rights goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right.[76] This Court has held that in some circumstances the Constitution imposes a positive obligation on the "[s]tate and its organs to provide appropriate

[76] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister*) at para 105.

protection to everyone through laws and structures designed to afford such protection."[77] The point is well-captured by Nugent JA in *Van Duivenboden*:

> "While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the State has a positive constitutional duty to act in the protection of the rights in the Bill of Rights."[78] (Footnote omitted.)

[85] It is axiomatic that section 7(2) places an obligation on the HOD, as an organ of state, to protect the rights of learners. The question is how the HOD must exercise this obligation and, plainly, this obligation must be discharged in a constitutionally-compliant manner. Section 7(2) must thus not be construed in isolation, and must be read with the other provisions of the Constitution itself.[79] In particular, the obligation to "protect" must be read in the light of section 1(c) of the Constitution, which states that "[t]he Republic of South Africa is one, sovereign, democratic state founded on . . . the rule of law." The state's obligations must thus be discharged in accordance with the rule of law.

[86] The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.[80] Accordingly, section 7(2) and the rule of law

[77] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44.

[78] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 20.

[79] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 10.

[80] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at paras 17-8. See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex*

demand that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help. I pause to emphasise that this Court has consistently and unanimously held that the rule of law does not authorise self-help.[81]

[87] This interpretation is fortified by the fact that the obligations in section 7(2) fall on "the state", which not only includes the Executive, but Parliament as well. Indeed, this Court has expressly stated that Parliament, when enacting legislation, must give effect to the obligations imposed by section 7(2).[82] It follows that where Parliament has done so by providing an organ of state with internal remedies in order to protect the rights in the Bill of Rights, these remedies may not simply be disregarded. This is particularly so in relation to legislation such as the Schools Act, where the sensitive scheme of powers enacted by Parliament needs to be respected. This would accord with the doctrine of separation of powers, as the Legislature's prerogative to frame a particular legislative scheme cannot be usurped or disrupted by the Executive unless such laws are set aside by a court. In this way, the state can promote and safeguard individual rights whilst still adhering to the rule of law.

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parte President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 90-4, where the President could not revoke his own objectively irrational decision. Rather, he was obliged to have recourse either to Parliament or to the courts.

[81] *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1; 2013 (2) SA 613 (CC); 2013 (3) BCLR 271 (CC) at para 14 and *Chief Lesapo* above n 80 at paras 17-8.

[82] *Glenister* above n 76 at para 190.

[88] Therefore, even if one were to hold that there may plausibly be instances in which an organ of state may resort to self-help in order to protect the rights in the Bill of Rights, this could never be countenanced where internal remedies are available. Given the effective internal remedies that were available to the Free State HOD, the present matter was clearly not one of these instances.[83]

[89] During oral argument counsel for the Free State HOD was questioned about his client's failure employ the available statutory remedy in order to address the perceived problems with the pregnancy policies. In response he merely stated that reliance on section 22 would have been "too drastic" in the circumstances of this case. I fail to see how relying on section 22 would be too drastic where the Free State HOD took the view that the pregnancy policies were clearly unconstitutional.

[90] In sum, it is so that the learners and their parents approached the Free State HOD when they felt that their rights and the rights of their children respectively were violated. It is also true that the Free State HOD also owed them a duty of protection under section 7(2) and was obliged to take steps to protect them. But it cannot be the case that section 7(2) means that he was entitled to do anything he wished in order to achieve the purported objective of addressing the unconstitutionality of the policies. The Schools Act offered the Free State HOD clear remedies to deal with the exact problem with which he was faced. In the event that he formed a view that the section-22 procedure would be

[83] I therefore refrain from expressing any view on this issue.

inappropriate, he could also have moved a court to have the allegedly unlawful policies set aside. These remedies are reasonable and effective,[84] and he was obliged to use them. What is evident is that the Free State HOD was not entitled to ignore these means of addressing the unconstitutionality of the policies.

The employer-employee relationship

[91] Does the Free State HOD's status as the employer of every public-school principal within a province entitle him to issue instructions requiring the latter to ignore, contravene or override policies duly adopted by the relevant school governing body? I am of the view that this question, too, must be answered in the negative.

[92] Public-school principals are employees of the relevant HOD.[85] On this basis the Free State HOD argues that: (a) an HOD exercises executive control over public schools through principals by virtue of the employment relationship; (b) this employment relationship is of prime importance and may not be undercut by a principal's obligations to assist governing bodies; and (c) a public-sector employer does not require judicial authorisation to instruct his or her employees to act in a constitutional manner.

[93] I accept that an HOD may give instructions to his employees. It could not be otherwise. This is buttressed by the statutory injunction that any assistance provided by a

[84] *Glenister* above n 76 at para 189.

[85] Section 3(1)(b) of the Educators Act.

principal to the governing body of his or her school "may not be in conflict with instructions of the [HOD]".[86] But it is a trite principle of labour law that an employer is only entitled to issue lawful instructions.[87] In the circumstances of this case, we must therefore determine whether the Free State HOD had the power to give the particular instruction, if we are to conclude that the instruction was lawfully issued. Any instruction that contravenes the scheme of powers established by the Schools Act is unlawful and should not be issued. The notion that the Schools Act entitles an HOD to issue an unlawful instruction need only be stated to be rejected. Put differently, the argument that the Free State HOD was empowered to interfere as he did by virtue of his status as employer misses the point.

[94] The Schools Act, read with section 7(2) of the Constitution or by itself, either empowers the Free State HOD to act as he did or does not. If it does empower him to do so, then the argument based on the Free State HOD's status as the employer of the principals does not advance his case and is merely a red herring. The proper enquiry ought to centre on whether the Free State HOD was empowered by the Schools Act or the Constitution to instruct the principals to ignore the pregnancy policies, and not on the employment relationship itself.

[86] Section 16A(3)(a) of the Schools Act.

[87] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61E-F.

[95] Moreover, it is a mischaracterisation to describe the Free State HOD's conduct as the mere issuing of instructions to employees to act in accordance with the Constitution. First, that instruction amounted to an imposition of a different policy on the respondent schools in circumstances where the Free State HOD was not entitled to make this imposition, for the reasons already set out above.[88] Second, it was not the Free State HOD's place to engage in a constitutionality review of the respondent schools' policies and then to instruct his employees to ignore these policies simply because he believed that they do not pass muster. As noted above, in these circumstances an HOD's options are limited by the rule of law to exercising his or her powers in terms of section 22 of the Schools Act or instituting judicial review proceedings, and rightly so.

[96] The Free State HOD contends that an interpretation of the statutory scheme that does not allow him to issue an instruction to principals to ignore a school governing body's policy may render him susceptible to delictual liability. This is so, according to the HOD, because he would be unable to stop a public-school principal, his employee, from committing a delict, for which he (the Free State HOD) may in turn be held vicariously liable. This argument does not hold water.

[97] If an HOD is concerned that a principal under his or her authority is about to commit a delict, he or she may take steps to interdict such conduct. If an HOD is reasonably concerned that a principal under his or her authority is enforcing an unlawful

[88] See the application of *Mikro* above n 71 in [80] above.

policy in a manner that may give rise to delictual liability, he or she may withdraw the function in terms of which that policy was formulated and impose a new policy that will avoid the commission of a delict by his or her employees. Insisting that the HOD observe the strictures of the Schools Act in no way hamstrings him or her in the management of problematic employees.

Section 16A(3)(a) of the Schools Act

[98] At first blush, it may appear that the above interpretation of the Schools Act – that an HOD may not instruct a public-school principal to ignore policies duly adopted by a governing body pursuant to its governance functions – negates the injunction in section 16A(3)(a) that, in assisting the governing body, a principal may not contravene the instructions of the relevant HOD. However, that is not the case.

[99] The target of section 16A(3)(a) is a principal's conduct. It instructs a principal how to act when faced with conflicting instructions from the relevant governing body and the HOD. The principal must comply with the HOD's instruction. Crucially, section 16A(3)(a) does not give any additional power to the HOD that is not granted in terms of other provisions of the Schools Act.

[100] The question in this case is whether the Free State HOD had the power to act as he did, not whether the principals of Welkom and Harmony were required to follow the

instruction of the HOD. The two questions are distinct. An analogy is instructive to illustrate a similar distinction.

[101] The defence of superior orders is, in certain circumstances, available to a subordinate where, amongst other things, the instruction by a superior was unlawful. The defence renders the conduct of the subordinate lawful even though the superior official may not have had the power to give the instruction. The fact that the defence of obedience to superior orders is available to the subordinate in order to justify the subordinate's conduct does *not* indicate that the conduct of the superior official was justified or lawful. That is, it does not follow from the fact that the subordinate may, in some circumstances, be permitted lawfully to follow an unlawful instruction that the instruction itself becomes lawful.[89]

[102] Similarly, the fact that section 16A(3)(a) instructs a principal, when faced with a conflict, to follow an instruction from an HOD rather than an instruction from the relevant school governing body (even if the instruction turns out to be unlawful) does not render the HOD's instruction lawful.

[103] In addition, any argument that section 16A(3)(a) grants an implied veto power to of an HOD in relation to school governing bodies must fail when having regard to the purpose and structure of powers in the Schools Act. Assuming that section 16A(3)(a) did

[89] See, for example, *S v Mostert* [2005] ZAKZHC 27 at 6 and *S v Banda and Others* 1990 (3) SA 466 (BG) at 494.

give rise to such a veto power, the Schools Act does not lay down any procedural steps that would need to be followed by an HOD in order lawfully to make use of that power. It would be an unlimited discretionary power. This interpretation would be most peculiar given the careful arrangement of powers in the Schools Act and the detailed steps that need to be followed when the HOD employs his section-22 powers, for example. The HOD could simply negate the procedural duties expected of him in terms of section 22 by merely issuing an instruction to the principal. This cannot be so.

[104] But what, then, is the practical application of section 16A(3)(a)? *Hoërskool Ermelo* is a prime example. In *Hoërskool Ermelo*, the HOD did not follow the provisions of section 25 of the Schools Act correctly. The eventual result was that the HOD's conduct was found to be unlawful. However, at the time of the dispute the HOD argued that his conduct was lawful and the governing body argued the opposite. Section 16A(3)(a) instructs the principal to favour the view of the HOD regardless of whether the HOD is, in fact, correct. The instruction to the principal means that, on the ground, there is certainty about which view should be followed until any dispute is resolved. The provision thus ensures that the principal knows what to do, without in any way validating otherwise unlawful conduct of the HOD.[90]

[90] There are numerous examples in the Schools Act where an HOD and school governing body interact, and the principal is bound to follow the HOD even if the school governing body is of a different opinion on the issue. For instance, a possible dispute between the school governing body and the HOD regarding: the suspension or termination of a member of the school governing body by the HOD for an alleged breach of the governing body's code of conduct (section 18A(5)); the ability of an educator or principal to discharge his job properly (section 20(1)(eA)); school property (section 20(1)(g)); the allocation of additional functions to the school governing body (section 21(2)); and exemptions from school fees (section 40(2)).

Conclusion regarding the HOD's conduct

[105] At this stage it may be helpful to summarise my conclusions thus far. It is my opinion that the Welkom and Harmony governing bodies were empowered, pursuant to their responsibility for governance and codes of conduct at their respective schools, to adopt pregnancy policies. That being the case, the Free State HOD was obliged to address his concerns with the pregnancy policies pursuant to his powers under the Schools Act. He did not do so, but instead purported to usurp an effective power of policy formulation that he did not have. He acted unlawfully, and the Courts below were therefore correct to grant and uphold the interdictory relief sought by the schools. Neither section 7(2) of the Constitution nor the Free State HOD's status as employer of the principals affects this in any way. At all times the HOD was obliged by the rule of law and the carefully crafted partnership imposed by the Schools Act to adhere to the mechanisms provided for in the statute. Otherwise, he was obliged to approach a court in order to have the allegedly unconstitutional policies set aside. There is no doubt that the rights of pregnant learners to freedom from unfair discrimination and to receive education must be protected, promoted and fulfilled. But this must be done lawfully.

[106] None of this should be read or understood to mean that the governing bodies were entitled to adopt and impose the pregnancy policies that they did. It is this concern to which I now turn.

Should this Court consider the constitutionality of the pregnancy policies?

[107] Although the Free State HOD's conduct in ignoring the respondent schools' pregnancy policies was entirely inappropriate and undermined the carefully structured scheme of powers of the Schools Act, a finding in that regard does not address the underlying dispute. The respondents contend that the constitutionality of the pregnancy policies is not properly before this Court and have therefore made no submissions in respect thereof. From what is before us it is apparent that there are serious objective concerns regarding the unconstitutionality of the pregnancy policies, and this Court would be remiss if it failed to deal with those concerns. As per *Hoërskool Ermelo*, in terms of section 172(1)(b) of the Constitution this Court has the power to order any just and equitable remedy "that would place substance above mere form by identifying the actual underlying dispute between the parties".[91]

[108] While sections 8(1) and 172 of the Constitution do not impose an obligation on courts to consider any and all constitutional matters irrespective of the manner in which those matters have been pleaded or arisen, it is well-established in our case law that this Court has the discretion under section 172(1)(b) to provide a just and equitable order even where the outcome of a constitutional dispute is not contingent upon the constitutional invalidity of legislation or conduct.[92] This Court has, pursuant to its

[91] *Hoërskool Ermelo* above n 8 at para 97.

[92] Id.

powers under section 172(1)(b) of the Constitution, granted relief on the basis of claims that were not raised (directly, fully or at all) by the parties.[93]

[109] Section 172(1)(b) by no means suggests that this Court has unlimited discretion to hear any constitutional issue related to a case brought before it. A variety of considerations must be taken into account[94] and, as with any discretionary power, the discretion to issue an equitable order under section 172(1)(b) must be exercised with caution and in a judicial manner, to ensure that justice is served.

The pregnancy policies

[110] A reading of the pregnancy policies adopted by the respondent schools and a consideration of the effects of the application of those policies to the affected learners give rise to serious concerns regarding the constitutionality of the policies. As already noted, the respondent schools have declined to make submissions on the constitutionality of the pregnancy policies, asserting that the issue has not properly been placed before this Court. We are therefore ill-placed at present to make a conclusive determination on the substantive content of the policies. We may, however, invoke section 172(1)(b) to issue

[93] See, for example, *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) at para 48 and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) (*DPP v Minister of Justice*) at paras 41-3.

[94] See, for example, *Hoërskool Ermelo* above n 8 at para 101; *DPP v Minister of Justice* above n 93 at paras 64-5 and 67; and *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 45.

a just and equitable order. It is for the purposes of considering the invocation of this section that I engage in the following analysis of the pregnancy policies.

[111] In terms of the policies, learners who fall pregnant may not be readmitted to school in the year in which they give birth and must effectively repeat up to an entire year of school. For example, a student at Welkom who gave birth in December 2012 may be prevented from returning to school until January 2014 – more than a year after delivery of her newborn. The Free State HOD and the amici assert that the policies violate the learners' constitutional rights to equality,[95] basic education,[96] human dignity,[97] privacy[98] and bodily and psychological integrity.[99] They further contend that the policies are overly rigid and therefore do not allow the schools to take into account the best interests of the child as prescribed by section 28(2) of the Constitution when making a decision regarding learner pregnancy.

[112] On the basis of what is before us, I am of the opinion that the policies prima facie violate the forementioned rights, for the reasons set out below.

[95] Section 9(3) of the Constitution.

[96] Id section 29(1).

[97] Id section 10.

[98] Id section 14.

[99] Id section 12(2).

[113] First, the policies differentiate between learners on the basis of pregnancy. Because the differentiation is made on the basis of a ground listed in section 9(3) of the Constitution, it is both discrimination[100] and presumptively unfair.[101] Furthermore, the policies differentiate between male learners and female learners. A male learner at Welkom may only be given a "leave of absence" for paternity purposes if the pregnant learner can *prove* that he is the father of the unborn baby. What the exact standard of proof required by the Welkom school authorities is unclear, but it is apparent that this policy operates more onerously against female learners. At Harmony the differentiation is even more severe in that only pregnant learners (or learners who have given birth) are required to leave school – male learners who are equally responsible for the pregnancy are permitted to continue their education without interruption and the policy contains no provisions regarding a "leave of absence" for paternity purposes. For similar reasons, therefore, the policies lead to presumptively unfair discrimination on the basis of sex.

[114] Second, the policies limit pregnant learners' fundamental right to basic education in terms of section 29 of the Constitution by requiring them to repeat up to an entire year of schooling. Although in theory they are entitled to return to school and therefore to complete their education, many learners simply cannot afford to add an extra year to their studies. Moreover, statistics from Harmony indicate that two-thirds of the learners subject to the pregnancy policies before 2010 never returned to complete their secondary-

[100] See *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 46.

[101] Section 9(5) of the Constitution.

school education. The policies thus have drastic effects on learners' ability to complete their schooling.

[115] Third, the policies prima facie violate learners' rights to human dignity,[102] privacy[103] and bodily and psychological integrity[104] by obliging them to report to the school authorities when they believe they are pregnant. In addition, all other learners are required to report to school authorities when they suspect that a fellow learner is pregnant. The policies thus have the effect of stigmatising pregnant learners for being pregnant and creating an atmosphere in which pregnant learners feel the need to hide their pregnancies rather than seek help from school authorities for medical, emotional and other support.

[116] Fourth, by operating inflexibly, the policies may violate section 28(2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child.[105] The policies require that pregnant learners must leave school for the remainder of the year in which they give birth without regard to the health of the learner, the point in the school year at which she gives birth, arrangements she has made for appropriate care for her newborn, the wishes of the learner and her

[102] Id section 10.

[103] Id section 14.

[104] Id section 12(2).

[105] See *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at paras 24 and 64.

parents or her capacity to remain in school. The policies are designed in such a way as to give the school governing bodies and principals no opportunity to consider the best interests of pregnant learners.

[117] The particular facts surrounding the Harmony learner adequately demonstrate the danger of the inflexibility of these policies. Upon falling pregnant, the Harmony learner made arrangements for the care of her newborn child. She returned to school shortly after giving birth and was able to complete her third term of school successfully. Only three months *after* the birth of her child was the Harmony learner asked to leave school due to her pregnancy. The enforcement of the pregnancy policy in these circumstances does not seem to be rationally related to the "maintenance of the quality of the learning process" – the statutorily defined purpose of a code of conduct.

[118] I am accordingly of the opinion that the content of the pregnancy policies must be addressed by this Court. I have reached this conclusion very much alive to the fact that the respondent schools have not presented argument in justification of the policies. This is addressed in paragraphs 3 and 4 of the order that I grant.

[119] The considerations in favour of granting such an order in this case can be characterised as follows: the rights of children are implicated and section 28(2) of the Constitution requires that their best interests be of paramount importance in deciding the

appropriate relief;[106] if relief is not granted in this matter, there may be potentially far-reaching effects on children who are not party to these proceedings, who might never independently challenge these or similar policies; and there is a need for clarity on what the Constitution and the Schools Act do and do not allow with regard to the content of pregnancy policies in schools. As there is at present confusion with regard to the content of pregnancy policies in schools, it will be necessary for the governing bodies and the Free State HOD to engage meaningfully in order to provide clarity on this issue.

[120] In crafting an order, I also take into account the failure of the parties to engage effectively and to consult with one another on the dispute currently before this Court. In my view, the parties have made only superficial attempts at cooperation, as is evident from a consideration of the interaction between Harmony and the Provincial Department. After the 2 November 2010 special meeting of the Harmony governing body, a letter sent to the HOD by the governing body stated that "[i]f this case is not resolved, we are prepared to take this case to the media." Any progress that could have been made between the parties must surely have been undermined by this overtly aggressive communication. At the 4 November 2010 meeting, at which the HOD himself was not present, the parties were unable to "find each other". And a third attempted meeting, this time initiated by a third party, FEDSAS, did not even take place.

[106] Section 28(2) and the best interests of the child standard were considered by this Court in *DPP v Minister of Justice* when it decided to confirm the invalidity of statutory provisions found invalid by a High Court, even though the Court simultaneously held that the High Court had improperly considered the constitutionality of the provisions. See *DPP v Minister of Justice* above n 93 at paras 64-5.

[121] Cooperative governance is a foundational tenet of our constitutional order and has been incorporated into the Schools Act through the provisions of section 22. It is incumbent upon HODs and governing bodies to act as partners in the pursuit of the objects of the Schools Act. In *Schoonbee and Others v MEC for Education, Mpumalanga and Another*, the cooperative mandate contained within the Schools Act was described as follows:

> "Having read the Act again it seems to me that the new education regime introduced by the Schools Act, which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders, and there are four major stakeholders – the State, the parents, educators and learners – enter into a partnership in order to advance specified objectives around schooling and education. It was intended, it appears, to be a migration from a system where schools are entirely dependent on the largesse of the State to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents."[107]

[122] In her dissent in *Pillay*, O'Regan J emphasised the importance of partnership within the school structure and the effect such cooperation may have on dispute resolution more generally in our country:

> "It needs to be emphasised, however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success. Where possible processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy. By and large school rules should be

[107] 2002 (4) SA 877 (TPD) at 883E-G.

> observed until an exemption has been granted. In this way, schools will model for learners the way in which disputes in our broader society should be resolved, and they will play an important role in realising the vision of the Preamble to our Constitution: a country that is united in its diversity in which all citizens are recognised as being worthy of equal respect."[108]

[123] The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and that has been concretised in the Schools Act as an organising principle for the provision of access to education. Neither can we ignore the vital role played by school governing bodies, which function as a "beacon of grassroots democracy"[109] in ensuring a democratically run school and allowing for input from all interested parties.

[124] Given the nature of the partnership that the Schools Act has created, the relationship between public school governing bodies and the state should be informed by close cooperation, a cooperation which recognises the partners' distinct but inter-related functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith. The goals of providing high-quality education

[108] *Pillay* above n 16 at para 185.

[109] See *Hoërskool Ermelo* above n 8 at para 57 where this Court states:

> "A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it." (Footnotes omitted.)

to all learners and developing their talents and capabilities are connected to the organisation and governance of education. It is therefore essential for the effective functioning of a public school that the stakeholders respect the separation between governance and professional management, as enshrined in the Schools Act.

[125] I therefore find it apposite to grant an order that respects the scheme of powers of the Schools Act and the principle of cooperative governance. Mindful of the fact that the respondents have not made submissions justifying the constitutionality of the policies, I believe it appropriate for this Court to refrain from making a declaration of invalidity thereof. Instead, invoking section 172(1)(b) of the Constitution, I find it appropriate to order the school governing bodies to review their pregnancy policies in the light of this judgment. As a democratically constituted body representative of the interests of the school community, the school governing bodies are in the best position to fashion policies that take into account the needs of their particular schools. It is just and equitable further to order the respondent schools to report back to this Court on reasonable steps they have taken to review the pregnancy policies. In addition, given the importance of cooperation in the scheme of the Schools Act, I find it appropriate to order meaningful engagement between the parties in order to give effect to the remedy granted in this case.

[126] If a further dispute arises between the Free State HOD and the governing bodies over the content of the revised policies, I strongly encourage the parties to engage in

consultation and employ the tools provided by the Schools Act for resolving disputes before resorting to further litigation.

Costs

[127] This matter has raised important constitutional issues in a dispute between organs of state. The respondents have been successful in relation to the issue of the unlawfulness of the Free State HOD's conduct. While this is so, the pregnancy policies seem to have violated the various fundamental rights of learners referred to above.[110] I therefore find that this is a case where each party should pay its own costs.

Order

[128] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal against the decision of the Supreme Court of Appeal is dismissed.
3. The school governing bodies of Welkom High School and Harmony High School must—
    a. review their current pregnancy policies in the light of this judgment; and

[110] See [113] – [116] above.

b. by no later than 10 October 2013, lodge with this Court affidavits setting out the processes that have been followed to review the pregnancy policies and furnish copies of the revised pregnancy policies.

4. The applicant and respondents must engage meaningfully with each other in order to give effect to the order in paragraph 3 above.
5. There is no order as to costs.

FRONEMAN J AND SKWEYIYA J (Moseneke DCJ and Van der Westhuizen J concurring):

[129] We concur in the order made in the main judgment of Khampepe J. It is salutary to remember that although, formally, this case is a dispute between the school governing bodies[111] and the HOD, their respective functions are to serve the needs of children in education. Section 28(2) of the Constitution makes it clear that the best interests of children "are of paramount importance in every matter" concerning children.[112] That applies to education too.

[111] The school governing bodies of both Welkom High School and Harmony High School.

[112] Section 28 reads: "A child's best interests are of paramount importance in every matter concerning the child."

[130] This Court in *Ermelo*[113] observed that when deciding constitutional matters, courts have an "ample and flexible remedial jurisdiction . . . [which] permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements".[114] Cases involving children are pre-eminently of the kind where one must scratch the surface to get to the real substance below. In *Ermelo* that was done. There is no reason in this case not to do the same.

[131] What is the actual underlying dispute here? It is quite simple, really: how best should the special needs of pregnant learners be accommodated at public schools?

[132] Sensibly, the immediate needs of the two learners who fell pregnant were properly catered for by allowing them to continue their studies. The accommodation achieved in that regard should have been a pointer to how the dispute should have been resolved in the first place, and also how future difficulties of the same kind should be avoided and resolved. Instead, the parties lost patience with each other and rushed to court. The focus then turned into a power play: who has the final say over the conduct of the principals of the schools? Lost in translation was that the best interests of the children at

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

[114] Id at para 97.

the schools were of paramount importance and that the powers of the school governing bodies and HOD were subservient to the children's needs.

[133] The school governing bodies assert that they have the right to make pregnancy policies and that the school principal must give effect to those policies. The HOD denies that the school governing bodies have the competence to make pregnancy policies and asserts that he has the authority, as the employer of the principals, to instruct them not to give effect to the policy when its application will infringe learners' fundamental rights protected under the Bill of Rights. The problem with these contrasting assertions is, however, that they speak past each other.

[134] It is apparent from the papers that the school governing bodies' pregnancy policies potentially infringed the learners' rights to equality and basic education by excluding them from attending school. Equally obvious is that there needs to be a policy on how pregnant learners' needs should practically be accommodated at school level. An approach which places the learners' best interests as the starting point must contextualise the present dispute within the parties' duties to engage and co-operate, looking forward to a bigger picture in order to understand how their interactions may best serve the learners' interests in the future.

[135] For the reasons set out below, we consider that there is a constitutional obligation on the partners in education to engage in good faith with each other on matters of

education before turning to courts. In the present case they should have done so and that may well have prevented this long journey through the courts. But we recognise that things have now developed to the extent that further clarity is needed.

[136] For that reason we support and endorse the approach and outcome in the main judgment. We believe that even on the approach suggested in the judgment of Zondo J the HOD had an obligation to engage in good faith with the school governing bodies and the principal before issuing the instructions he did. The engagement order in the main judgment is also, in our view, quite compatible with Zondo J's judgment.

Good faith engagement

The Constitution

[137] The importance of participation in decisions affecting the rights and interests of people is a general theme that runs throughout the Constitution. Its effect is felt in many diverse institutions and processes.

[138] Participation in the parliamentary process was emphasised in *Doctors for Life*.[115] The judgment recognises the indigenous roots of participation:

> "The idea of allowing the public to participate in the conduct of public affairs is not a new concept. In this country, the traditional means of public participation is

[115] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

> imbizo/lekgotla/bosberaad. This is a participatory consultation process that was, and still is, followed within the African communities. It is used as a forum to discuss issues affecting the community. This traditional method of public participation, a tradition which is widely used by the government, is both a practical and symbolic part of our democratic processes. It is a form of participatory democracy."[116]

The judgment then continues to link the participatory and representative elements of our democracy together:

> "In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people."[117]

This notion of participatory democracy was again used and applied in both judgments in *Matatiele*[118] and *Ambrosini*[119] in deciding matters relating to parliamentary processes.

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[116] Id at para 101.

[117] Id at para 115.

[118] *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* [2006] ZACC 12; 2007 (1) BCLR 47 (CC).

[119] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) (*Ambrosini*).

[139] This understanding of the inherent value of participation and engagement also underlies many of the decisions of this Court.[120] Many provisions of the Constitution require the substantive involvement and engagement of people in decisions that may affect their lives.[121] This Court has recognised this in relation to political decision-making,[122] access to information,[123] just administrative action,[124] freedom of expression,[125] freedom of association,[126] socio-economic rights,[127] adequate housing[128] and protection from arbitrary eviction or demolition of homes under the Constitution.[129]

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[120] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC) at para 43.

[121] For a critical discussion see Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12(1) *African Human Rights Law Journal* 1.

[122] *Doctors for Life* above n 115 at para 55 and *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 65.

[123] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 27-9.

[124] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at para 113.

[125] *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others,* Amici Curiae*)* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 141 and *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 21.

[126] *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 66.

[127] *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9; 2012 (9) BCLR 951 (CC) (*Blue Moonlight 2*); *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight 1*); *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another,* Amici Curiae*)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others (Agri SA and Others,* Amici Curiae*)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*); and *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*).

[128] Id.

[129] Id.

And in the field of labour dispute resolution there is clear recognition of the notion of good faith consultation in order to arrive at agreement.[130] What is thus clear is that participation and engagement are central to our constitutional project, a reflection of our "negotiated revolution".[131]

[140] This emphasis on participation and engagement finds particular recognition in the Constitution's provisions on co-operative government. Section 40(1) establishes the principle that in the Republic of South Africa, government is constituted as national, provincial and local spheres of government which are "distinctive, interdependent and interrelated". Of particular relevance to the present case, however, is that the principles of co-operative government and inter-governmental relations are also extended to all organs of state within each sphere of government in section 41. In relevant part it reads:

> "Principles of co-operative government and inter-governmental relations:
>
> (1) All spheres of government and all organs of state within each sphere must—
>
> (h) co-operate with one another in mutual trust and good faith by—
>
> (i) fostering friendly relations;
>
> (ii) assisting and supporting one another;
>
> (iii) informing one another of, and consulting one another on, matters of common interest;
>
> (iv) co-ordinating their actions and legislation with one another;
>
> (v) adhering to agreed procedures; and
>
> (vi) avoiding legal proceedings against one another."

[130] Section 189 of the Labour Relations Act 66 of 1995 and *National Union of Metalworkers of South Africa and Others v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; [2005] 3 All SA 318 (SCA).

[131] *Mashavha v President of the Republic of South Africa and Others* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) at para 20.

[141] The school governing bodies and HOD are organs of state.[132] In terms of section 41(1)(h) they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions, and avoiding legal proceedings against one another.

[142] In *Mikro Primary School*[133] the Supreme Court of Appeal found the provisions of section 41 of the Constitution inapplicable to disputes involving school governing bodies on the ground that a school governing body is not subject to executive control as far as the determination of language and admission policy was concerned:

> "In the *Independent Electoral Commission* case the Constitutional Court held that the Independent Electoral Commission, although not subject to national executive control, was an organ of state: but that the fact that it was a State structure and that it had to perform its functions in accordance with national legislation did not mean that it fell within the national sphere of government. Because it was not subject to national executive control it stood outside government and was not an organ of state within the national sphere of government. A dispute with the Commission did not qualify as an intergovernmental dispute: an intergovernmental dispute was 'a dispute between parties that [were] part of government in the sense of being either a sphere of government or an organ of State within a sphere of government'.

[132] *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2005] ZASCA 66; 2006 (1) SA 1 (SCA) (*Mikro Primary School*) at para 20.

[133] Id.

> The first respondent is, in so far as the determination of a language and admission policy is concerned, not subject to executive control at the national, provincial or local level and can therefore, like the Electoral Commission, in so far as the performance of those functions is concerned, not be said to form part of any sphere of government. For the same reason its dispute with the first and second appellants in respect of the language and admission policy determined by it, is not an intergovernmental dispute as contemplated in section 41(3) of the Constitution. The argument based on section 41 of the Constitution was therefore correctly rejected by the court *a quo*."[134]

[143] This reasoning, that the school governing bodies were independent of executive control, was rejected in *Ermelo*. The Court said:

> "These and other positive duties found in section 29 of the Constitution and in the Schools Act are inconsistent with an understanding of section 6(2) of the Schools Act which locates the right to determine language policy exclusively in the hands of the school governing body. Such an insular construction would in certain instances frustrate the right to be taught in the language of one's choice and therefore thwart the obvious transformative designs of section 29(2) of the Constitution.
>
> Put otherwise, the statute devolves power and decision-making on the school's medium of instruction to a school governing body. It would however be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice. The Constitution itself enjoins the state to ensure effective access to the right to receive education in a medium of instruction of choice. The measures the state is required to take must evaluate what is reasonably achievable and must keep in mind the obvious need for historical redress. School governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body. For that reason, the starting point of our understanding of the role of the governing body

[134] Id at paras 21-2.

> and of the state in relation to language rights in public education is section 29 of the Constitution. Section 6(2) must be construed in line with this constitutional warranty.
>
> . . .
>
> What is more, the governing body's extensive powers and duties do not mean that the HoD is precluded from intervening, on reasonable grounds, to ensure that the admission or language policy of a school pays adequate heed to section 29(2) of the Constitution. The requirements of the Constitution remain peremptory. In this regard, the state must consider all reasonable alternatives and must take into account what is fair, practicable and what ameliorates historical racial injustice."[135]

[144] Similarly, the dispute in this case is not about the existence of executive control over pregnancy policy, but about who may exercise and in what manner the control should be exercised. Both the main judgment and Zondo J's judgment acknowledge this, although they differ on the location of policy-making power and extent of control. Education governance and management is thus pre-eminently an area where the constitutional principles of co-operative government must apply.

Co-operative governance in education legislation

[145] The Minister of Basic Education (Minister) must determine National Education Policy in accordance with the provisions of the Constitution and the National Education Policy Act[136] (Policy Act). That includes policy in relation to the control and discipline of learners at educational institutions.[137] The Minister may also, in terms of the South

[135] *Ermelo* above n 113 at paras 77-8 and 81.

[136] 27 of 1996. See section 3(1).

[137] Id section 3(4)(n).

African Schools Act[138] (Schools Act), determine guidelines for the consideration of a school governing body in adopting a code of conduct for learners. The policies and guidelines must be determined by the Minister in consultation with various bodies.[139] The Policy Act creates channels of communication between the national and provincial education departments, including provincial HODs, to facilitate the development of a national education system in accordance with the objectives and principles provided for in the Policy Act, to share information and views on national education, to co-ordinate administrative action on matters of mutual interest and to advise the national department on matters relating to various aspects of the Policy Act.[140]

[146] The Schools Act seeks, among other objects, to provide for a uniform system for the organisation and governance of schools.[141] Its provisions are dealt with in the main judgment and need not be repeated here.

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[138] 84 of 1996. See section 8(3).

[139] Section 5(1) of the Policy Act and section 8(3) of the Schools Act.

[140] Section 10(2) of the Policy Act.

[141] The Preamble to the Schools Act provides:

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

[147] These provisions reinforce the provisions of the Constitution that engagement, participation and co-operation is the required general norm and that co-operative governance requires recognition of the distinctiveness, interdependence and interrelation of the different functionaries involved in the co-operative effort.

Authoritative precedent: Ermelo

[148] In *Ermelo* this Court was confronted for the first time with a dispute about the making and application of policy in schools. The case concerned language policy, but in the course of his reasoning Moseneke DCJ summarised the governance and management structure in the Schools Act as follows:

> "An overarching design of the [Schools Act] is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school."[142] (Footnotes omitted.)

[149] Despite confirming that the school governing body had the power to determine language policy, the Court held that this power was not unfettered:

[142] *Ermelo* above n 113 at para 56.

> "It is therefore clear that the determination of language policy in a public school is a power that in the first instance must be exercised by the governing body. The power must be exercised subject to the limitations that the Constitution and the Schools Act or any provincial law laid down. Even more importantly, it must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."[143]

[150] Similarly, despite finding that the HOD may rescind a function properly conferred on the school governing body, the judgment makes it clear that the HOD is also constrained in the exercise of that power:

> "Indeed, my conclusion does not entail that the HoD enjoys untrammelled power to rescind a function properly conferred on a governing body whether by him or by the Schools Act or any other law. The power to revoke will have to be exercised on reasonable grounds. In addition the HoD must, in revoking the function, observe meticulously the standard of procedural fairness required by section 22(2) and, in cases of urgency, by section 22(3).
>
> What would constitute reasonable grounds will have to be determined on a case by case basis. This will require full and due regard to all the circumstances that actuated the HoD to bypass the governing body in relation to the specific power withdrawn.
>
> In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation."[144]

[143] Id at para 61.

[144] Id at paras 73-5.

[151] It was after reaching these conclusions that the Court sought to identify the "actual underlying dispute" in order to fashion an appropriate just and equitable remedy.[145] The value of this was explained:

> "In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution."[146] (Footnote omitted.)

An order was then made requiring both the school governing body and HOD to report back on the respective deficiencies in their earlier approaches to the dispute.[147]

[152] The Constitution and applicable legislation thus require the partners in the governance and management of schools to engage with one another in mutual trust and good faith on all material matters relating to that endeavour. *Ermelo* recognised and re-affirmed the principle of co-operation in the running of schools and authoritatively

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[145] See [130] above.

[146] *Ermelo* above n 113 at para 97.

[147] The order in *Ermelo* provides in relevant part:

> "4. The school governing body of Hoërskool Ermelo must—
>
> 1. review and determine a language policy in terms of section 6(2) of the Schools Act and the Constitution;
>
> 2. by not later than Monday 16 November 2009 lodge with this Court an affidavit setting out the process that was followed to review its language policy and a copy of the language policy.
>
> 5. The Head of Department: Mpumalanga Department of Education must by not later than Monday 16 November 2009 lodge a report with this Court setting out the likely demand for grade 8 English places at the start of the school year in 2010 and setting out the steps that the Department has taken to satisfy this likely demand for an English or parallel-medium high school in the circuit of Ermelo."

determined the dispute relating to language policy in the factual context that confronted it. The Court nevertheless went further in its remedial order, after identifying what it considered to be the actual underlying dispute, and fashioned a supervisory order aimed at curing the underlying deficiencies in the respective approaches of the school governing body and HOD.

[153] The question now is what course needs to be followed in order to remedy the underlying problem here, namely how best to deal with the needs of pregnant learners in schools.[148] Two aspects of that problem are crucial: (1) determining who is entitled to make policy in respect of pregnant learners; and (2) ensuring that the content of the policy and its application do not infringe upon the fundamental rights of pregnant learners. But these issues cannot be considered without locating them in the particular factual context of the two cases with which we are dealing.

Confusion, misunderstanding and lack of trust

[154] The two school governing bodies determined their pregnancy policies at the end of 2008 and start of 2009. They contend that their policies accord with the Measures for the Prevention and Management of Learner Pregnancy (Measures) issued by the National Department of Education in 2007. The Measures contain a clause that reads:

[148] In this judgment where reference is made to "pregnant learners" this includes learners who have given birth but are still affected by the pregnancy policies as a result of their pregnancy.

> "No learner should be re-admitted in the same year that they left school due to a pregnancy."

The school governing bodies aver that they only became aware of the contrary stance of the HOD after the disputes about the two learners erupted in October 2010 when in correspondence a circular compiled by the HOD (HOD Circular) was forwarded to them.

[155] How the HOD Circular came into being illustrates the confusion that surrounded the issue of pregnancy policies. It is best described in the words of the HOD:

> "The Measures relied upon by applicants created confusion throughout South Africa and this caused many a debate and also correspondence between my Department and the National Department: Basic Education. I attach hereto a letter received from the National Department: Basic Education . . . The contents thereof are clear and the instructions issued necessitated my further action".

The "further action" consisted in the preparation of the HOD Circular in April 2010. As noted earlier, the school governing bodies allege that they only gained knowledge of the HOD Circular after the dispute concerning the two learners had come into the open in October 2010.

[156] The HOD Circular reads in relevant part:

> "This circular serves to reiterate the policy of the Department that learners cannot be expelled from school due to pregnancy. It is therefore imperative that all schools should have a policy on the prevention and management of learner pregnancy.

When drawing up such policies the following should be emphasised:

- It must be understood that the Constitution is the supreme law in South Africa and that any law, including school policies that are inconsistent with the Constitution are invalid and the obligations imposed by the Constitution must be fulfilled.
- The Department does not condone learner pregnancy and therefore encourages all learners to abstain from engaging in sexual relationships until they complete their studies. However, in the event that the learner falls pregnant, the Department promotes continued access to education for boys and girls.
- Management and educators at schools need to understand that each case of a pregnant learner is unique and therefore the school and parents or guardians of the affected learner need to discuss and agree on a suitable plan that takes into account the wellness of the affected learner. The intention should be to keep the learner at school for as long as it is medically possible with the support of parents or guardians, and where a learner must be out of school there must be provision for academic support.
- The measures are not intended to be punitive but to be rehabilitative and supportive of the pregnant learner and protect the rights of the unborn child.
- Furthermore, after the learners have given birth they should be encouraged to return to school as soon as they can, so that they can complete their education, and also be protected from falling pregnant again.
- Each case needs to be resolved quickly to avoid secondary victimisation of the affected learner and parents or guardians.

The learner must be made aware that after childbirth the rights of the newly born must be protected, and she should be able to demonstrate to the school that proper arrangements have been made for care and safety of the child." (Emphasis removed.)

[157] What is important to note from the contents of the HOD Circular is that: (1) it asserts that the policy it reiterates is the policy of the provincial Department of Education; (2) it regards it as imperative that all schools should have a policy on the prevention and

management of learner pregnancy; and (3) it accepts that pregnant learners may have to be absent from school for some time. There is no reference in the HOD Circular to any national policy or guidelines in relation to pregnant learners at all.

[158] But the national department had issued guidelines. On 15 May 1998 the "Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners" (Guidelines) were promulgated.[149] In the introduction it states in relevant part:

> "1.1 Section 8 of the South African Schools Act provides that a governing body of a public school must adopt a Code of Conduct. The Code of Conduct must aim at establishing a disciplined and purposeful environment to facilitate effective education and learning in schools.
>
> 1.2 This document sets out guidelines for consideration by governing bodies of public schools in adopting a Code of Conduct for learners to ensure that there is order and discipline in schools.
>
> 1.3 The Code of Conduct must be subject to the Constitution of the Republic of South Africa, 1996, the South African Schools Act, 1996 and provincial legislation. It must reflect the constitutional democracy, human rights and transparent communication which underpin South African society."

In paragraph 3.9 it deals succinctly with pregnant learners:

> "A learner who falls pregnant may not be prevented from attending school. A pregnant girl may be referred to a hospital school for pregnant girls."

[149] General Notice 776 in *Government Gazette* 18900 of 15 May 1998.

[159] These facts show that until the dispute about the two learners came to the fore towards the end of 2010 there was confusion at both national and provincial spheres of government about who was entitled to determine policy for pregnant learners and what the content of that policy should be. It is also apparent that channels of communication between the various role players were not, to put it mildly, very effective. It was thus a situation that cried out for good faith engagement, based on mutual trust, to find common ground and seek a solution to the problem. That opportunity arose when the plight of the two learners became known in late 2010. But the opposite happened.

[160] Instead of approaching the situation in a spirit of co-operation and engagement, both the school governing bodies and the HOD dug in their heels. The HOD issued his instruction to the principals; the school governing bodies responded with defiance and resorted to litigation. Confusion and misunderstanding turned to mistrust. As noted earlier,[150] the underlying issue of how the needs of pregnant learners should be dealt with turned into a dispute about whether the HOD can instruct principals to disregard a school governing body's policy.

[161] There is no doubt that the principles of co-operative governance and management were ignored and brushed aside. What is to be done about it?

[150] See [132] above.

[162] The explicit provisions of section 41(1)(h)(vi) of the Constitution appears to require a form of exhaustion of internal remedies before organs of state within a sphere of government should turn to the courts.[151] In appropriate cases the courts may well be entitled to ensure compliance with the section's provisions in constitutional disputes in the exercise of their just and equitable remedial power in terms of section 172(1)(b) of the Constitution.

[163] In our view, it seems feasible that, as found in the main judgment, school governing bodies have the power (and indeed are well-positioned) to make policies that concern the prevention and management of pregnancy at schools.[152] The present policies adopted by the school governing bodies, however, went beyond prevention and management to compulsorily exclude pregnant learners without the consent of the learner or the determination of the decision to exclude by the HOD.

[164] For the reasons set out in the main judgment,[153] the exclusionary aspects of the pregnancy policies are, however, on their face inconsistent with the Constitution. The question of what the HOD can do in their wake has been placed before this Court. As described above, the HOD was obliged to seek engagement and co-operation in good faith with the school governing bodies before pursuing litigious or confrontational means.

[151] *National Gambling Board v Premier, KwaZulu-Natal and Others* [2001] ZACC 8; 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 36.

[152] See [65] above.

[153] See [109] – [116] above.

The provincial department's initial efforts to engage with the school governing bodies through the requests from department officials to reconsider the students' exclusions and their making available the HOD Circular are well received in this respect. However, the fact that the HOD issued the instructions to either school's principal prior to the convening of the school governing body of Harmony which had been planned is an indication of bad faith. The failure of the parties to reach a consensus in meetings after the instructions were issued also indicates bad faith in the co-operative efforts of both parties.

[165] Some efforts were made by the HOD before issuing the instructions but these were insufficient in the light of the demands of co-operative engagement and the importance of the rights of the learners. So too was the stubborn behaviour of the school governing bodies inadequate, particularly following the issuing of the instructions. Both parties' behaviour therefore fails to meet the requirements of co-operative engagement. In our view, had the HOD pursued these lines of co-operation diligently and in good faith, the instructions would not have been necessary.

[166] What must be emphasised is that timeous planning and sustained communication between the parties are the most powerful barriers against these types of disputes arising and the learners' interests being compromised in the process. Where a crisis requiring immediate redress arises, the duty to engage, co-operate and communicate in good faith

does not dissolve. Any short-term remedial action taken in the interim to secure the learners' rights must, however, be done in a lawful manner.

Conclusion

[167] As noted earlier, we support the main judgment's reasons for finding the pregnancy policies to be prima facie unconstitutional. In the ordered review of the pregnancy policies, which we also support, the school governing bodies and the provincial department ought to keep in mind their duties to engage as we have described above. And in reporting back to this Court on any progress made, the learners' best interests should lie at the heart of any solutions reached.

ZONDO J (Mogoeng CJ, Jafta J and Nkabinde J concurring):

Introduction

[168] The questions confronting us in this matter are whether:

(a) a governing body of a public school (school governing body) as contemplated in section 16(1) of the South African Schools Act[154] (Schools Act) has power to make a policy in respect of a school which is inconsistent with provisions of an Act of Parliament or the Constitution;[155]

[154] 84 of 1996.

[155] Unless the context indicates the contrary, reference to the Constitution in this judgment is a reference to the Constitution of the Republic of South Africa, 1996.

(b) in a case where a school governing body has made a policy that is inconsistent with an Act or the Constitution, it is the policy of the school governing body or the Act or the Constitution which prevails in the absence of or pending the obtaining of any order of court; and

(c) the Head: Department of Education, Free State Province (HOD, Free State, or Free State HOD) has power to instruct the principal of a school not to implement a learner pregnancy policy adopted by the school governing body of the school where implementing the policy will be inconsistent with an Act or the Constitution.

[169] The Free State High Court, Bloemfontein (High Court) and the Supreme Court of Appeal found that it was unnecessary to answer the first question but in effect answered the second question by saying that, in the case of a conflict between the policy of a school governing body and an Act or the Constitution, the school governing body's policy prevails over an Act or the Constitution until an order of court setting it aside has been obtained. Both the High Court and the Supreme Court of Appeal answered the third question in the negative.

[170] Khampepe J's judgment (main judgment), which I have had the opportunity of reading, seems to take the view that, until the function of making a learner pregnancy policy is revoked from the school governing body, the school governing body's policy prevails over an Act and the Constitution in so far as it is inconsistent with such Act or

the Constitution. The mere withdrawal of the function would leave the policy intact. I, therefore, assume that the main judgment means that a Head: Department of Education (HOD) must not only withdraw the function of the school governing body but must also withdraw the policy as well. It, therefore, seems to me that what the main judgment means is that, until the school governing body's policy is withdrawn or amended, it prevails over an Act or the Constitution wherever they are in conflict.

[171] My answer to the first question is an emphatic no. My answer to the second question is that a policy cannot, as a matter of law, prevail over an Act or the Constitution when there is a conflict between it, on the one hand, and, an Act or the Constitution, on the other. Accordingly, my answer is that in such a case the Act or the Constitution prevails. My answer to the third question is that the HOD, Free State, has power to instruct a school principal not to carry out or implement a policy of the school governing body when the policy is inconsistent with an Act or the Constitution.

The combined matters: Welkom High School and Harmony High School

[172] These matters concern certain learners at Welkom High School and Harmony High School in Welkom, Free State, who fell pregnant and were excluded from school in terms of learner pregnancy policies that were applied by the school governing bodies of the schools. The facts surrounding the exclusion of the learners from both schools and the issues in both matters are materially similar. For that reason I propose to deal only with the Welkom High School matter and not to refer to the matter relating to Harmony High

School because the conclusion I reach in the Welkom High School matter will apply with equal force to the Harmony High School matter. In the end, I shall make orders in respect of both the Welkom High School matter and the Harmony High School matter. I, therefore, proceed to deal only with the Welkom High School matter.

[173] The main judgment concludes that there is a constitutional issue in this matter, that leave to appeal should be granted but that the appeal should be dismissed. While I agree that there is a constitutional issue and that leave to appeal should be granted, I am unable to agree that the appeal should be dismissed. In my view the appeal should be upheld and the decisions of both the High Court and the Supreme Court of Appeal should be set aside and replaced with an order dismissing the application. I explain below the reasons and approach that have led me to this conclusion.

Background

[174] The facts of this case are set out comprehensively in the main judgment. For this reason I do not propose to set out any facts save to the limited extent necessary for a proper understanding of my approach and reasons. I highlight below some of the facts.

[175] In November 2008 the school governing body of Welkom High School adopted a policy on the "Management of Learner Pregnancy" (learner pregnancy policy) which took effect from 1 January 2009.

[176] Some of the features of the learner pregnancy policy are:

(a) "A learner that is pregnant or has reason to believe that she may be pregnant, needs to immediately inform a member of staff, preferably a senior female, who has been appointed by the principal. Learner should be informed who to consult."

(b) "If a learner or any member has a suspicion that another learner may be pregnant, this should also be brought to the attention of the appointed member of staff."

(c) "In the year that the learner's child is born, the learner may not return to Welkom High School. This is applicable to all learners, regardless of the following:

(i) The month the baby is born in, whether it is January, June or October. This means that a matriculant who falls pregnant and delivers her baby in June will not be allowed to write the matric final exams. If a learner delivers a baby in December, she will only be allowed to return to school in the second January following the birth, i.e. if the baby is born in December 2008, the learner may only return in January 2010.

(ii) The grade of the learner will be irrelevant, in other words matriculants will not enjoy preferential treatment because it is their final year at school.

(iii) The age of the learner will be irrelevant, which means that if the learner, after the leave of absence is too old to attend school at a secondary school level, recommendations for adult education will be made."

(d) "It is further important to note that it will be the responsibility of the learner to keep up to date with the school work, and educators will assist only if they see that the said learner is doing her part."

(e) "[I]f a pregnant learner can prove that the father of the unborn baby is attending Welkom High School, he, too, will be given leave of absence of one year to assume his parental duties."

(f) "This management policy does not suspend or expel a learner, but ensures that learners take responsibility for their actions and make informed choices."

[177] In 2010, NMD,[156] a 15 year old and Grade 9 learner at Welkom High School fell pregnant. On 16 September the principal addressed a letter to her mother, Mrs D.[157] In the letter the principal made, among others, the points that—

(a) because of NMD's pregnancy "the school has to apply the pregnancy policy as stipulated by the School Governing Body";

[156] I have chosen not to use the full name of the learner in order to protect her identity.

[157] Also for the purpose of protecting the learner's identity, I have chosen not to give her mother's surname.

(b) "[t]he learner will have her education *interrupted* at Welkom High School and *take a leave of absence* for the period of 16 September 2010 till the start of the second term in 2011. She will continue with Gr. 9 in 2011" (emphasis added); and

(c) "[t]he learner is not expelled from the school in any way. The measures allow the learner to give her full attention to her baby."

[178] In the founding affidavit Mr Radebe, who deposed to the school governing body's founding affidavit, purports to advance the school governing body's authority for its decision to send NMD on this "leave of absence" as a result of her pregnancy. He, inter alia, says:

> "This decision was taken in the discretion of the Welkom High [school governing body] *inter alia* in view of [NMD]'s advanced stage of pregnancy and upon the authority as provided for in the [Schools Act] dealing with the admission of Learners. It was also a major contributory factor that no Educator at Welkom High is duly trained to deal with any complication(s) of pregnancy, such as an unexpected early birth or any other complications."

[179] A few days thereafter, Mr MD,[158] an uncle of NMD's, addressed a letter to the Minister of Basic Education (Minister), the MEC[159] for Education in the Free State

[158] For the purpose of protecting the learner's identity, I have also chosen not to give NMD's uncle's full name.

[159] This is an abbreviation for Member of the Executive Council. See section 125(1) and (2) and section 132 of the Constitution.

Province and the Human Rights Commission. In the letter Mr MD appealed to the Minister of Basic Education in the following terms:

> "It is with a grave sense of sadness and disbelief that I am compelled to request your intervention and assistance as the head of the Basic Education Department of the Republic of South Africa. A school which falls under your mandate both as a school within the republic and by virtue of it being a public school, has elected to both disregard national education policy and *the supreme law of our country namely; the Constitution of the Republic of South Africa*". (Emphasis added.)

[180] Mr MD went on to point out in the letter that Welkom High School had "expelled my niece ([NMD] 14 years old) on the basis of her having fallen pregnant." He said that "[t]his is not only *a discriminatory act on their part as defined by international law but is in contravention of the clear and unambiguous directive of the Constitution in relation to an individual's right to education*." (Emphasis added.) He referred to section 29(1)(a) of the Constitution which guarantees everyone the right to a basic education.[160] He said that the school had "elected to expel the child with utter disregard for the law" "even after having been reminded of this by our family."

[181] Mr MD pleaded with the Minister "to intervene effective immediately in this matter prior to it becoming a legal battle, for without such intervention and the learner being allowed to return to class, the invariable result will be as such. It is worth noting that our sole objective as a family is simply to see the child back in class without any

[160] Section 29(1)(a) of the Constitution reads as follows: "Everyone has the right to a basic education, including adult basic education".

further delay." He concluded his letter by threatening "legal action by Monday the latest, if we do not receive any contact from yourself prior to then, that being Monday the 20th of September 2010."

[182] The principal was contacted by Mrs B Kitching from the provincial Department of Education about the matter. He wrote to her and explained the school's position. The principal also received circular 18/2010 from the provincial Department of Education (circular). It was addressed to, among others, principals and "SGB chairpersons". The circular is called: "MANAGEMENT AND GOVERNANCE CIRCULAR NO 18 OF 2010". It was issued and signed by the Superintendant-General[161] (SG): R S Malope on 26 April 2010. It dealt with the prevention and management of learner pregnancy in schools.

[183] In the circular the Superintendant-General stated that the Measures for the Prevention and Management of Learner Pregnancy in Schools (Measures), which had been issued by the National Department of Education in 2007, had caused confusion. He said that the circular was intended to make clear what the Free State HOD's stance was on how schools should handle incidents of learner pregnancies. The SG, inter alia, said in the circular: "This circular serves to reiterate the policy of the Department that learners cannot be expelled from school due to pregnancy. It is therefore imperative that all schools should have a policy on the prevention and management of learner pregnancy".

[161] It is understood that this title is sometimes used for the Head of Department or Director-General.

In another part of the circular the SG pointed out that "in the event that the learner falls pregnant, the Department promotes continued access to education for boys and girls."

[184] Later in the circular the SG pointed out that "[t]he intention should be to keep the learner at school for as long as it is medically possible with the support of parents or guardians, and where a learner must be out of school there must be provision for academic support." He also pointed out that the measures were not meant "to be punitive but to be rehabilitative and supportive of the pregnant learner and protect the rights of the unborn child." The SG also said:

> "Furthermore, after the learners have given birth, they should be encouraged to return to school as soon as they can so that they can complete their education, and also be protected from falling pregnant again. . . . Each case needs to be resolved quickly to avoid secondary victimization of the affected learner and parents or guardians."

This circular must be taken as either the policy of the HOD, Free State, as contemplated in section 16A(3)(b) of the Schools Act or an instruction of the HOD, Free State, as contemplated in section 16A(3)(a) to principals of schools in the Free State, including the principal of Welkom High School on how they should handle incidents of learner pregnancies in their schools.[162]

[162] Section 16A(3)(a) and (b) of the Schools Act reads as follows:

> "The principal must assist the governing body in the performance of its functions and responsibilities, *but such assistance or participation may not be in conflict with—*
>
> (a) *instructions of the Head of Department*;
>
> (b) *legislation or policy*". (Emphasis added.)

[185] The chairperson of the school governing body, Mr T E Mathibe, addressed a letter to Mrs Kitching of the provincial Department of Education dated 11 October 2010 in which he said that the school governing body had not expelled the learner but had "interrupted the academic progress of the learner to the benefit of all concerned."

[186] By a letter dated 20 October 2010 the Free State HOD instructed the principal of the school to allow the learner back at school with immediate effect. In that letter the HOD, Free State, said that NMD's case had been brought to his attention. He said that, if the decision to let the learner stay at home for the remainder of the year was based on the Measures, he wished to advise the principal "to rescind it and inform the learner to return to school [within] 5 days of receiving this letter." The HOD, Free State, went on to say that his decision was informed by the following:

> "• MG Circular No 18 of 2010 which clearly stipulates for the learner to return to school as soon as possible.
> • Chapter 2 of the Constitution, section 9(3) which states clearly that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . gender, sex [or] pregnancy . . . . *The School being an organ of State can therefore not discriminate against any pregnant learner.*
> • In terms of Chapter 2 of the South African Schools Act, section 9(1) there are only two ways in which a learner can be involuntarily excluded from attending classes, namely, suspension and expulsion after finding the learner guilty of a misconduct as stipulated in the Code of Conduct." (Emphasis added.)

In the concluding paragraph of the letter the HOD wrote:

> "In view of the above it is clear that no learner should be kept from school due to pregnancy. You are therefore instructed to allow the learner back at school with immediate effect and to put in place measures to help the learner catch up with any work she might have missed whilst still at home."

[187] After this instruction the school governing body received advice to "re-admit" NMD to the school on a temporary basis pending an urgent application that the school governing body was to make to the High Court. NMD was then allowed back to school. Mr Radebe said in his affidavit that the conduct of the HOD, Free State, created "uncertainty and undermines the school governing body's functioning." He also said that the Free State HOD's conduct rendered the school governing body's learner pregnancy policy superfluous.

The appeal

[188] The dispute between the school governing body and the Free State HOD arose because the school governing body had sought to enforce its learner pregnancy policy and the Free State HOD sought to resist the enforcement of that policy or that part of the policy which involved the exclusion of a pregnant learner from school because he believed that the policy or the relevant part of the policy was in breach of the Constitution, legislation and the policy of the provincial Department of Education. The Free State HOD, therefore, contends that the school governing body had no power to make a policy which required the exclusion of a learner from school owing to pregnancy. He argued that he was, therefore, entitled to instruct the principal to allow the learner

back at school. The school governing body contends that it had the power to adopt and enforce the learner pregnancy policy and the Free State HOD had no power or right to instruct the principal to act in conflict with that policy.

[189] The Free State HOD contended that this case is not just about whether he was entitled to issue the instruction that he issued to the principal but, first and foremost, it is about whether the school governing body had power to make a learner pregnancy policy at all or to make a learner pregnancy policy that included provisions inconsistent with an Act or the Constitution. The school governing body adopted a different approach. It said that the lawfulness or otherwise of its learner pregnancy policy or of any of the provisions of the policy was not an issue that the Court was called upon to decide because the Free State HOD did not bring a counter-application in the High Court for an order declaring the policy unlawful and setting it aside. It contended that the only question before the Court was the lawfulness or otherwise of the Free State HOD's instruction to the principal. Quite clearly, the parties have adopted divergent approaches on how the Court should determine the dispute.

[190] In *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*[163] (*Ermelo*) the school and the school governing body took the attitude that that case was about the principle of legality and the proper exercise of administrative power, and not about the language policy of the school. The HOD and

[163] [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

the Minister in that case adopted a different stance. They contended that the core of the dispute was the appropriateness of the school's language policy which in effect had a disparate impact of excluding learners who chose to be taught in English. This Court, through Moseneke DCJ, said: "I agree that issues of legality and administrative justice do arise pointedly and call for resolution. It is, however, also true that the exclusive-language policy arises just as sharply."[164] Later he said: "In my view, it would be both unrealistic and unjust to look at only one of these two scrambled issues."[165] In the present case as well I think that both the lawfulness of the learner pregnancy policy or at least some of its provisions and the lawfulness of the Free State HOD's instruction need to be considered. Accordingly, I decline the school governing body's invitation to focus only on the lawfulness of the Free State HOD's instruction to the principal and not extend the inquiry into the lawfulness of the learner pregnancy policy or at least some of its provisions.

[191] If the learner pregnancy policy was, or at least its relevant provisions were, unlawful or if the school governing body had no power to make the policy or the relevant provisions, there can be no doubt that the Free State HOD was entitled, if not obliged, to instruct the principal not to act in breach of the law or the Constitution and, in my view, that should be the end of this matter. Accordingly, it seems to me that ordinarily, the inquiry should consider the lawfulness of the policy or its relevant provisions before the

[164] Id at para 39.

[165] Id at para 40.

lawfulness of the Free State HOD's instruction can be considered. However, I find it convenient to start with the question of whether the Free State HOD had power to issue the instruction to the principal.

The Free State HOD's power to give the principal an instruction

[192] The school governing body went to the High Court to obtain an order that the Free State HOD had no authority to give the principal the instruction that he gave him, an order interdicting the Free State HOD from doing so and an order that the HOD's instruction was unlawful. In considering this question I think that the starting point has to be the relationship between the Free State HOD and the principal. That relationship is an employment relationship. The Free State HOD is the employer of the principal and the principal is an employee of the Free State HOD.[166] For a long time our law has been and continues to be that an employer has the right to give an instruction to his or her employee and that the employee is obliged to obey his or her employer's instruction. The only exception to this rule is that the employee is not obliged to obey the employer's instruction where the instruction is unlawful or unreasonable. In the last-mentioned scenario the onus is upon the employee to show that the instruction is unlawful or unreasonable. If the employee cannot show that the instruction was unlawful or unreasonable, he is obliged to obey it.

[166] See section 3(1)(b) of the Employment of Educators Act 76 of 1998.

[193] The employer's right to issue instructions to his or her employee is very important because, for example, as a general proposition, he is in law vicariously liable for the actions of the employee performed within the course and scope of his or her employment. As a result of his employee's conduct within the course and scope of his or her employment which infringes third parties' rights, the employer is vicariously liable and may be ordered to pay large sums in damages and legal costs. Therefore, it may be necessary for the employer to protect its rights and interests by taking steps designed to prevent the commission of acts which may render him vicariously liable. Issuing instructions to an employee to desist from committing such acts is one of the preventative steps open to an employer.

[194] In the present case the employee, namely, the principal, has not filed any affidavit to the effect that the HOD's instruction was unlawful or unreasonable or that he considered it unlawful or unreasonable. Accordingly, this matter must be decided on the footing that the employee to whom the HOD issued the instruction did not dispute the lawfulness or reasonableness of the HOD's instruction. It is the school governing body which contends that the HOD had no authority to issue the instruction that he issued to his employee.

[195] To show that the HOD had no authority to issue the instruction, the school governing body has only relied upon its alleged power to send the learner on a "leave of absence" from school or on its alleged power to "interrupt" the learner's schooling owing

to her pregnancy. I use the phrases "leave of absence" and "interrupt" because those are the phrases that the school governing body and the principal used to describe the school governing body's exclusion of the learner from school that was intended to be from 16 September 2010 to April 2011. This means that the school governing body's approach is that it was entitled or had the power to issue the learner pregnancy policy and to send the learner on a "leave of absence" or to "interrupt" the learner's schooling, as it did, in terms of its policy, and that, therefore, the HOD could not have been entitled or could not have had the power to instruct the principal to allow the learner back at school. This approach is not necessarily correct because there could be a situation, as I think there is in the present case, where legislation makes provision that in the event of a conflict between an instruction from the HOD and an instruction from the school governing body, the principal is obliged to carry out the HOD's instruction.[167]

The MEC, HOD and the principal

[196] There are certain provisions of the Schools Act that relate an HOD and the principal that I think need to be given special consideration. Section 2(2) of the Schools Act provides that an MEC and an HOD exercise any power conferred upon them by or under the Schools Act after taking full account of the applicable policy determined in terms of the National Education Policy Act.[168] In *Ermelo* this Court held that the HOD

[167] Section 16A(3) of the Schools Act.

[168] 27 of 1996.

and MEC exercise "executive control over public schools through principals."[169] Section 16 of the Schools Act bears the heading: "Governance and professional management of public schools". Section 16(1) vests the governance of a public school in a governing body "[s]ubject to this Act". Section 16(3) obliges the principal to undertake "the professional management of a public school . . . under the authority of the Head of Department". Section 16A(1)(a) provides that "[t]he principal of a public school represents the Head of Department in the governing body when acting in an official capacity as contemplated in sections 23(1)(b) and 24(1)(j)."

[197] Section 16A(2) inter alia provides:

> "The principal must—
>
> (a) in undertaking the professional management of a public school as contemplated in section 16(3), carry out duties which include, but are not limited to—
>
> (i) the implementation of all the educational programmes and curriculum activities;
>
> (ii) the management of all educators and support staff;
>
> (iii) the management of the use of learning support material and other equipment;
>
> (iv) *the performance of functions delegated to him or her by the Head of Department in terms of this Act;*
>
> (v) the safekeeping of all school records; and
>
> (vi) *the implementation of policy and legislation*;
>
> (b) attend and participate in all meetings of the governing body;
>
> (c) provide the governing body with a report about the professional management relating to the public school;
>
> (d) assist the governing body in handling disciplinary matters pertaining to learners;

[169] *Ermelo* above n 163 at para 56.

(e) assist the Head of Department in handling disciplinary matters pertaining to educators and support staff employed by the Head of Department;

(f) *inform the governing body about policy and legislation*". (Emphasis added.)

There can be no doubt that one piece of legislation that a principal is required by section 16A(2) to implement is the Schools Act. Section 16A(2)(a)(vi) is an express provision making it obligatory for a principal to implement policy and legislation.

[198] Section 16A(3) reads as follows:

"*The principal must assist the governing body in the performance of its functions and responsibilities, but such assistance or participation may not be in conflict with—*

(a) *instructions of the Head of Department*;

(b) *legislation or policy*;

(c) *an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister*; or

(d) a provision of the Employment of Educators Act, 1998 (Act No. 76 of 1998), and the Personnel Administration Measures determined in terms thereof." (Emphasis added.)

[199] In my view section 16A(3) draws the limits of what a principal may do and may not do in his or her interaction with the school governing body of his or her school. On the one hand, it obliges him or her to "assist the governing body in the performance of its functions and responsibilities", but, on the other, it makes it clear that such assistance or participation in any responsibilities or functions of the governing body "*may not be in conflict with instructions of the Head of Department*", "*legislation or policy*" or "an

obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister". (Emphasis added.) Section 16A(3)(a) is a clear indication that it was contemplated that the relationship between a school governing body and the HOD could result in the principal being faced with conflicting instructions given by the school governing body and the HOD. It was then decided to include this provision so that the functioning of the school would not be adversely affected by any uncertainty that the principal would otherwise have as to which instruction he should carry out. The purpose of section 16A(3) is to ensure that there is no uncertainty. Its effect is that the HOD's instruction prevails over any contrary instruction from the school governing body. Section 16A(3) provides clear "proof", if "proof" is required, that the HOD has power, not only to issue instructions to a principal, but also to issue an instruction to him that may be contrary to an instruction of the school governing body. This position remains until at least the school governing body has gone to court and obtained an order declaring such instruction unlawful or setting it aside. The rationale for this provision was to make it clear that in such a case the decision of the HOD prevails until then.

[200] Section 16A(3)(b) makes it clear that the principal may not be required by the school governing body to assist it in anything that is in conflict with legislation or policy. In this case the school governing body sought to have the principal act in conflict with legislation. As if the provisions of section 16A(3)(a) and (b) were not enough, provision was also made in section 16A(3)(c) that a school principal may not act in conflict with

any obligation that he or she has towards the HOD. It seems that section 16A(3)(c) may have been meant to cover any other obligation.

[201] In my view section 16A(3)(c) includes the obligation on the part of the principal to obey the instructions of the HOD which arise from their employment relationship. If ever there was any doubt that an HOD has the power to issue an instruction to a school principal, the provisions of section 16A(3)(c) remove that doubt. Once this is accepted, anyone contending that, although an HOD has such power, that power did not include the power to issue the instruction that the Free State HOD issued in this case has to show what the basis is for excluding the instruction in this case from that wide power. In my view there is no doubt that the Free State HOD had the power to issue the instruction that he issued in the present case.

The obligation of the state under section 7(2) of the Constitution

[202] Section 7(2) of the Constitution provides that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." The Free State HOD is a functionary of the state. Section 7(2) of the Constitution obliges him as a functionary of the state to give protection to anyone whose rights entrenched in the Bill of Rights are threatened or infringed, particularly, when he is approached and asked to provide such protection. In this case the learner's uncle, Mr MD, wrote to, among others, the MEC for Education in the Free State and asked for the learner to be protected from the violation of her rights in the Constitution by the school. In fact Mr MD threatened legal action against the

education authorities if this was not done. The MEC must have passed the letter on to the Free State HOD who then initially asked Mrs Kitching to approach the principal about the matter. As I said earlier, Mrs Kitching sent the principal a copy of Mr MD's letter. In his letter Mr MD had written: "This is not only a discriminatory act on [the school's] part as defined by international law but is in contravention of the clear and unambiguous directive of the Constitution in relation to an individual's right to education."

[203] In *Minister of Home Affairs and Others v Tsebe and Others*[170] (*Tsebe*) this Court held that, when a person in this country is wanted by another state for crimes that could lead to the imposition of the death sentence if he or she was found guilty of such crimes in that country, section 7(2) imposes an obligation on the government of the Republic to refuse to extradite or hand over that person to such a state unless that state gave the government an undertaking that, if he were found guilty and sentenced to death, the death sentence would not be executed. Along the lines of that reasoning, it seems to me that, when a learner's right to a basic education in the Bill of Rights is violated or is about to be violated, that learner or someone else on his or her behalf is entitled to approach the HOD and ask him to intervene and ensure that the learner's right is not violated. In such a case, if, indeed, the learner's rights are threatened or are being violated, the HOD is obliged by section 7(2) of the Constitution to come to the protection of the learner. It cannot be that the HOD's obligation under section 7(2) to provide protection to the

[170] [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

learner against the violation of her rights suddenly ceases to be of force and effect once there is a policy of a school governing body providing for such violation.

[204] The effect of this Court's decision in both *Mohamed*[171] and *Tsebe* is that the state is obliged not to facilitate in any way the violation of anyone's right to life, the right to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. If the state facilitates a violation of those rights, it acts in breach of section 7(2). In *Mohamed* the facilitation took the form of the co-operation that the South African immigration authorities gave to the US authorities to effect Mr Mohamed's removal from South Africa to the USA well-knowing that he would face capital charges in the USA. In the present case it was the role played by the principal in the implementation of the learner pregnancy policy that facilitated the violation of the learner's rights. If, in *Tsebe*, the Government had granted Botswana's request for the extradition of Mr Tsebe and Mr Tsebe had been sentenced to death in Botswana and that sentence was executed, South Africa would have facilitated the violation of Mr Tsebe's right to life and human dignity and that would have been a breach by the Executive of its section 7(2) obligation. I cannot see how one could say that section 7(2) placed an obligation upon the Executive not to facilitate the violation of Mr Tsebe's right in that scenario but say that when a learner approaches an HOD and asks for protection when her right to a basic education in the Bill of Rights is threatened or violated by a principal

[171] *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (*Mohamed*).

at the instance of the school governing body, the HOD is not under an obligation to give the learner protection under section 7(2).

[205] In this case the learner has a right "to a basic education" which is entrenched in section 29 of the Bill of Rights. That right can be limited only in terms of a law of general application in accordance with section 36 of the Constitution.[172] If the limitation is not authorised by a law of general application, the limitation of the right is unjustifiable and, therefore, constitutes an infringement of the learner's right. In excluding the learner from school, the school governing body limited the learner's right to a basic education. In so far as the exclusion was effected in terms of the school governing body's learner pregnancy policy, the exclusion was an unjustifiable limitation and, therefore, an infringement of that right because it was done in terms of a policy and a policy is not a law.

[172] Section 36 reads:

"**Limitation of rights**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[206] In their respective letters, one written to the principal by the Free State HOD and the other written by Mr MD to, among others, the MEC for Education, both the Free State HOD and Mr MD made it clear that the learner's exclusion from school was an infringement of her right to education in terms of the Constitution. Accordingly, when the school governing body and the school brought their application to the High Court, they knew well that the Free State HOD's case included a contention that the school governing body's conduct in excluding the learner from school was an infringement of the learner's right to education provided for in the Bill of Rights. The school governing body had ample opportunity to address this contention in its founding affidavit when it sought to challenge the Free State HOD's instruction in the High Court but it elected not to deal with it. When the Free State HOD filed his answering affidavit in the High Court he repeated this contention. The exclusion of the learner from school against her will and that of her parents as a result of her pregnancy was an unjustifiable limitation of the learner's right to a basic education and, therefore, an infringement of that right.

[207] The Free State HOD was entitled to take the view that the exclusion of the learner from school was a violation of her rights in the Constitution. The view was correct and he was obliged, in the light of section 7(2), to protect the learner's right by instructing the principal to allow the learner back at school.

[208] The school governing body, as an organ of state, also has an obligation to respect, protect and promote the rights entrenched in the Bill of Rights. Therefore, irrespective of

whether the school governing body had the power to make a learner pregnancy policy, that power could not be exercised inconsistently with its constitutional obligations. Since the learner pregnancy policy violated the learner's right to a basic education provided for in section 29 of the Constitution, the school governing body acted in breach of its section 7(2) obligations.

[209] The right to a basic education is not the only right of the learner that has been violated due to her exclusion from school. Section 9(1), (2) and (3) of the Constitution reads as follows:

> "**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 . . . gender, sex, pregnancy".

To give effect to the right to equality entrenched in section 9 of the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act[173] (PEPUDA) was enacted. PEPUDA seeks to, among other things, prevent and prohibit unfair discrimination, promote equality and eliminate unfair discrimination.

[173] 4 of 2000.

[210] The term "discrimination" is defined as follows in PEPUDA:

> "'[D]iscrimination' means any act or omission, *including a policy*, law, rule, practice, condition or situation which directly or indirectly—
>
> (a) imposes burdens, obligations or disadvantages on; or
>
> (b) withholds benefits, opportunities or advantages from,
>
> any person on one or more of the prohibited grounds".[174] (Emphasis added.)

The "prohibited grounds" are listed in the definition of the phrase "prohibited grounds" in section 1 of PEPUDA. One of the listed grounds is pregnancy. Section 6 of PEPUDA reads: "Neither the State nor any person may unfairly discriminate against any person." Section 8 reads in relevant part:

> "Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—
>
> . . .
>
> (f) discrimination on the ground of pregnancy;
>
> (g) limiting women's access to social services or benefits, such as health, education and social security".

[211] In my view the school governing body's decision in terms of the learner pregnancy policy that the learner was to be excluded from school for the period 16 September 2010 to April 2011 was without justification and constituted unfair discrimination against the learner on the ground of pregnancy. I would, therefore, conclude that on the ground that the principal was taking part or had taken part in the exclusion of the learner from school

[174] Section 1(viii) of PEPUDA.

in terms of the learner pregnancy policy of the school governing body and, therefore, engaged in conduct constituting unfair discrimination, the Free State HOD was not only entitled but obliged to intervene and instruct the principal to allow the learner back at school. I now turn to the question whether the school governing body had the power by way of a policy determination to require that a learner who is pregnant be excluded from school for the periods envisaged in the learner pregnancy policy.

Did the school governing body have power to exclude the learner from school?

[212] The learner pregnancy policy stipulates, among other things, that a learner who is pregnant must be given a "leave of absence" from school. The leave of absence is imposed on the learner and her parents and is not consensual. Its duration can go up to more than 12 months depending on the month in which the learner gives birth. The policy stipulates that the learner may not return to school in the same year in which she gives birth and may only return to school in the year following the year in which she gives birth. Obviously, this will mean that the learner is prevented from writing the end of year examinations for the grade which she was doing when she was given the "leave of absence".

[213] The above means that, if the learner gives birth in April and she is in matric, she will not be allowed to continue her schooling for the rest of the year and will have to return to school the following year and repeat matric. In fact, if a learner were to be excluded from school in October of 2013 and she gave birth early in January of 2014, she

would lose two years of schooling. She would lose 2013 because she would have been excluded from school in October and, therefore, before the end of year examinations. She would lose 2014 because she would have given birth during 2014 and the learner pregnancy policy says that a learner may not return to school in the year in which she gives birth even if she is in matric when she is excluded. Accordingly, in terms of the policy, she would only be allowed to return to school in 2015.

[214] No explanation has been given by the school governing body to justify these drastic provisions of its learner pregnancy policy. They are, undoubtedly, aimed at punishing the learner for falling pregnant irrespective of the circumstances under which she may have fallen pregnant. Forcing a learner to be out of school for such long periods is completely unjustified and is extremely detrimental to her future.

[215] The inquiry to determine the dispute between the Free State HOD and the school governing body also requires that we determine whether the school governing body had the power to adopt or enforce its learner pregnancy policy or at least to enforce that part of its learner pregnancy policy which required the exclusion of a pregnant learner from school for the periods contemplated in the policy. This is necessary because, if it is found that the school governing body had no power to adopt or enforce such a policy or at least that part of the policy which requires the exclusion of a pregnant learner from school for the periods contemplated in the policy, that would be the end of the matter since, even in the absence of section 16A(3)(a) of the Schools Act, the Free State HOD would have

been entitled to issue the instruction that he issued to the principal. The purpose of the instruction was to ensure that the learner's right to a basic education entrenched in the Bill of Rights was not violated.

[216] Before I can embark upon the inquiry whether or not the school governing body had the power to require the exclusion of a pregnant learner from school for the periods envisaged in the policy, it is necessary to first consider the nature of a policy and the relationship between a policy and legislation.

[217] In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*[175] (*Akani*) the Supreme Court of Appeal had to consider the relationship between policy and legislation. It indicated that any course or programme of action adopted by a government may consist of general or specific provisions and, because of this, the Court did not consider it prudent to define the word "policy" either in general or in the context of the Act under consideration in that matter. The Court went on to say:

> "I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. *Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear*. Compare *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289) in para [62]. In this case, however, it seems that the provincial

[175] [2001] ZASCA 59; 2001 (4) SA 501 (SCA).

> legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear".[176] (Emphasis added.)

In *Minister of Education v Harris*[177] this Court referred to this passage with approval. Later on, the Supreme Court of Appeal also said in *Akani*:

> "One thing, however, is clear: policy determinations cannot override the terms of the provincial Act for the reasons already given. Where, for instance, the provincial Act entrusts the minister with the responsibility of determining the maximum permissible number of licences of any particular kind that may be granted in a particular area (section 81(1)(d)), the cabinet cannot regulate the matter by means of a policy determination, something it did. Likewise, where section 37(1)(l) empowers the board to impose conditions relating to the duration of licences, the cabinet cannot prescribe to the board by way of a policy determination that, for instance, casino licences shall be for a period of ten years, something else it did. *In other words, the cabinet cannot take away with one hand that which the lawgiver has given with another*."[178] (Emphasis added.)

Although this passage was not considered by this Court in *Harris*, its thrust seems to me to be consistent with the thrust of the passage quoted from *Akani* which this Court approved. In any event it reiterates a sound principle.

[218] Although the issue that this Court was called upon to decide in *Ermelo* is different from the issue we are called upon to decide in the present case, two common features in both cases are the extent of the powers of the school governing body and the extent of the powers of an HOD. In *Ermelo* the main issue was whether the HOD in that case had

[176] Id at para 7.

[177] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) at para 10.

[178] *Akani* above n 175 at para 7.

power to withdraw from the school governing body its power to determine a language policy. In the present matter the main question is whether or not the school governing body had power to adopt a learner pregnancy policy or at least a learner pregnancy policy that has provisions that are inconsistent with an Act or the Constitution and, whether, where such a policy has been adopted by the school governing body, its provisions prevail over an Act or the Constitution.

[219] The decision of the Supreme Court of Appeal in *Akani* is in line with certain statements made by this Court in *Ermelo.* In *Ermelo* this Court inter alia said:

> "Put otherwise, the statute devolves power and decision-making on the school's medium of instruction to a school governing body. *It would, however, be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice*. The Constitution itself enjoins the *State to ensure effective access to the right to receive education in a medium of instruction of choice*."[179] (Footnote omitted and my emphasis.)

Of even greater importance is the fact that this Court went on to say in *Ermelo*:

> "What is more, the governing body's extensive powers and duties do not mean that the HoD is precluded from intervening, on reasonable grounds, to ensure that the admission or language policy of a school *pays adequate heed to section 29(2) of the Constitution. The requirements of the Constitution remain peremptory*."[180] (Emphasis added.)

[179] *Ermelo* above n 163 at para 78.

[180] Id at para 81.

[220] In *Ermelo* this Court held that the governing body's extensive powers did not mean that the HOD was precluded from intervening to ensure that the admission or language policy of a school paid adequate heed to section 29(2) of the Constitution. In the present case it can also be said that, if the school governing body had power to make a learner pregnancy policy, its power did not mean that the Free State HOD was precluded from intervening to ensure that no learner's rights entrenched in the Bill of Rights, including the right to a basic education, were violated.

[221] If this Court adopted, as I think it should, the view that in the present case, the HOD was entitled and obliged to intervene to ensure that the principal and the school governing body paid "adequate heed to" sections 9 and 29 of the Constitution, the Schools Act and PEPUDA, that would be in line with what this Court said in the above passage in *Ermelo*. In other words, with changes necessitated by the context, one can say in the present case, using the statement from *Ermelo*, that "the governing body's extensive powers and duties do not mean that the HOD is precluded from intervening, on reasonable grounds, to ensure that [the learner pregnancy policy] of a school pays adequate heed to [section 29(1)(a)] of the Constitution. The requirements of the Constitution remain peremptory."[181] Accordingly, this statement that was made by this Court in *Ermelo* in relation to the power of the HOD to intervene when the school governing body makes an admission or language policy that is inconsistent with the Constitution applies equally to the intervention of the Free State HOD when he realised

[181] Id.

that the school governing body's policy was in breach of the Constitution. In other words what this Court said in this passage in *Ermelo* applies with equal force to the present case.

[222] In *Ermelo* this Court also emphasised that the power of the governing body to determine a language policy is not absolute but the policy "is made, in so many words, 'subject to the Constitution, [the Schools Act] and any applicable provincial law'."[182] (Footnote omitted.) This shows yet again that this Court has already decided that a policy cannot prevail over an Act and the Constitution. This Court went on to say that the qualifier "subject to the Constitution and [the Schools Act] . . . is obviously superfluous in relation to the Constitution because all law is subservient to our basic law." (Footnotes omitted.) It said that "the qualifier" emphasises that the power to fashion a policy on the medium of instruction must be accorded contours that fit into the broader ethos of the Constitution and cognate legislation. "In addition, it seems plain that the power must be understood and exercised subject to the limitation or qualification the Schools Act itself imposes."[183]

[223] In *Ermelo* this Court also said:

> "It is therefore clear that the determination of language policy in a public school is a power that in the first instance must be exercised by the governing body. The power

[182] Id at para 59.

[183] Id.

> must be exercised subject to the limitations that the Constitution and the Schools Act or any provincial law laid down. Even more importantly, it must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."[184]

[224] It was implied in this Court's judgment in *Ermelo* that in determining a language policy the school governing body was required to ensure consistency with relevant provisions of the Constitution and the Schools Act. Referring to the approach that had been adopted by the governing body in *Ermelo* in determining language policy, this Court said:

> "That approach, as I have said before, is not consistent with the relevant provisions of the Constitution and the Schools Act. *A school is obliged to exercise its power to select a language policy in a manner that takes on board the provisions* of section 29(2) of the Constitution, section 6(2) of the Schools Act and the norms and standards prescribed by the Minister."[185] (Emphasis added.)

[225] Although in this last sentence the obligation therein referred to is said to be that of a school, the governing body must have been intended because in terms of the Schools Act it is the governing body that has the power to determine a language policy. By parity of reasoning one can say that the obligation referred to in the last sentence of the passage applies to the governing body as well when it determines a learner pregnancy policy, if it

[184] Id at para 61.

[185] Id at para 99.

does have that power. In the present case the school governing body acted in breach of that obligation.

Did the exclusion from school constitute an expulsion?

[226] In seeking to determine whether the school governing body had the power or right to make a policy determination that required the exclusion of a pregnant learner from school, it is necessary at this stage to consider whether the exclusion of a learner from school constituted an expulsion or suspension of the learner from school. Bearing in mind that the policy is to the effect that a learner who has been given "leave of absence" is not to return to school in the year in which she gives birth, it seems to me that it can be said that the learner is expelled from school for the academic year in which she is excluded from school but is re-admitted once the period of exclusion has expired. If one approaches the exclusion in this way, it would be consistent with the terminology of re-admission to the school which the principal and the school governing body used in this case to describe the learner's intended return to the school in April 2011.

[227] In terms of section 9(2) of the Schools Act only the HOD has the power to expel a learner from school.[186] Even then, such expulsion must follow a disciplinary procedure

[186] Section 9(2) of the Schools Act reads as follows:

> "A learner at a public school may be expelled only—
>
> (a) by the Head of Department; and
>
> (b) if found guilty of serious misconduct after disciplinary proceedings contemplated in section 8 were conducted."

prescribed in section 9 of the Schools Act. The school governing body had no power or right to make a policy determination that in effect constituted an expulsion of the learner from the school for the specific academic year. As the Supreme Court of Appeal said in *Akani*, a policy determination cannot take with one hand that which legislation has given with the other.[187] The school governing body had no power to make a policy determination that is in conflict with an Act. In purporting to do so, it acted unlawfully. It also had no power to require the principal to carry out its unlawful policy determination. In doing so it acted unlawfully.

Did the exclusion constitute a suspension?

[228] The exclusion can also be viewed as a suspension of the learner from school. It may be viewed as a suspension to the extent that the learner was prevented from attending school for a certain period but, after the expiry of that period, she would be allowed to return to school. The use of the term "leave of absence" by the principal and the school governing body to describe the period of the learner's exclusion from school fits well with the notion of a suspension. Sometimes when someone is not allowed to continue with his or her normal duties or responsibilities, some entities say that such a person has been given "special leave". In this case the verb "interrupt" was also used by the school governing body and the principal. They said the learner's studies were interrupted. There may, therefore, be more justification in regarding the exclusion as a suspension than as an expulsion, particularly because it seems that the learner was

[187] *Akani* above n 175 at para 7.

guaranteed "re-admission" to the school after the expiry of the period of exclusion. This exclusion could well have been called a suspension because it seems to have all the essential elements of a suspension.

[229] The question that arises is whether the school governing body had the power or right to require a learner, by way of policy determination, to be suspended from school due to pregnancy or to be suspended from school at all. In terms of section 9(1) of the Schools Act the school governing body's power to suspend a learner from school is limited to those cases where "a learner is suspected of serious misconduct" and in respect of whom disciplinary proceedings are contemplated. It is not the school governing body's case in the present matter that it was suspecting the learner of serious misconduct nor is it its case that it contemplated conducting disciplinary proceedings against the learner when it gave her the so-called "leave of absence" and, thus, excluded her from school. Since the Schools Act does not give the school governing body any power to suspend a learner for any reasons other than the reason given in section 9(1), the school governing body had no power to make a policy determination which was in conflict with section 9(1) of the Schools Act. In purporting to amend the Act by way of a policy, the school governing body acted unlawfully and sought to exercise power that it did not have.

Did the power to adopt a code of conduct give the school governing body the power to issue the policy?

[230] There was an argument to the effect that the school governing body derived its power to make the learner pregnancy policy from the fact that under section 8 of the Schools Act it has power to adopt a code of conduct for learners. Section 8(1) reads as follows:

> "Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school."

This provision does not give a school governing body power to adopt a learner pregnancy policy. It gives it power to adopt a code of conduct. It may well be that, if a school governing body had adopted a code of conduct and the code of conduct had a section dealing with learner pregnancy, this argument may have had some merit, but a governing body which has not adopted a code of conduct, such as the school governing body of Welkom High School, cannot rely upon section 8 to justify issuing a learner pregnancy policy. However, even if the school governing body of Welkom High School had adopted a code of conduct containing a section dealing with a learner pregnancy policy, such policy would not have helped it in this case because the exclusion of a learner from school is a limitation of the learner's right to a basic education entrenched in the Bill of

Rights and in terms of section 36 of the Constitution a limitation of such a right is not justifiable if it is not provided for in a law of general application which a policy is not.[188]

[231] Furthermore, section 8(1) requires that a code of conduct be adopted "after consultation with the learners, parents and educators of the school." It is not part of the school governing body's case that its learner pregnancy policy was adopted as a code of conduct "after consultation with the learners, parents and educators of the school". In fact no evidence has been put up to show that it was adopted by the school governing body itself despite the fact that the Free State HOD challenged the school governing body in his answering affidavit to produce evidence of a meeting in which this learner pregnancy policy was adopted. The contention that section 8 gave the school governing body power to issue the learner pregnancy policy is misplaced.

[232] The main judgment concludes that in terms of the Schools Act "the Welkom and Harmony governing bodies were empowered, pursuant to their governance responsibilities and their authority to adopt codes of conduct, to adopt pregnancy policies for their respective schools."[189] As I understand the judgment, that conclusion is based, largely, on the place occupied by a governing body in relation to the governance of the

[188] In *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) in which this Court inter alia said:

> "The right to a basic education in section 29(1)(a) may be limited only 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." (Footnote omitted.) (Para 37.)

[189] See [70] above.

school and the specific powers it has in relation to the adoption of a code of conduct. As I have already said, in my view, section 8, which gives a school governing body the power to adopt a code of conduct for learners, does not give it such power. However, even if it did give it such power—

(a) that would not help the school governing body's case in the present matter because it has not adopted a code of conduct;

(b) that power could not include power to adopt a policy that is inconsistent with the Constitution or the Schools Act; in other words, even if the school governing body did have the power to adopt a learner pregnancy policy in general, it did not have power to adopt a policy that had clauses that would subject a learner to unfair discrimination based on gender or pregnancy or that would be inconsistent or conflict with legislation such as the Schools Act and PEPUDA.

To the extent that the school governing body included in its learner pregnancy policy provisions which are inconsistent with the Constitution or legislation, it acted ultra vires and thus violated the principle of legality.

Did the school governing body's power to adopt an admission policy include the power to exclude a learner from school owing to pregnancy?

[233] The school governing body also contended that it derived its power to exclude the learner from school from the fact that in terms of section 5(5) of the Schools Act it has power to determine the admission policy of the school. Section 5(5) reads as follows:

> "Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of the school."

The school governing body said that in the absence of a clear policy on the learner pregnancy policy issued by the Free State HOD, it was "entitled to determine an admission policy on an ad hoc basis with regards to the further school attendance of the pregnant Learner." In saying this the school governing body seems to admit that ordinarily it does not have the power to make a learner pregnancy policy and the Free State HOD had that power and that it only determined such policy because the Free State HOD had failed to determine it. The school governing body also said that it was of the "humble opinion" that it was "entitled to enforce such an admission decision (policy), amongst others to ensure a disciplined and purposeful school environment". The reference to a "disciplined and purposeful school environment" seems to be taken from section 8(2) of the Schools Act which provides that a code of conduct, which section 8(1) obliges a school governing body to adopt, "must be aimed at establishing a disciplined and purposeful school environment".

[234] The school governing body's reliance upon section 5(5) of the Schools Act as giving it power to exclude from school during the year a learner who was admitted to the school at the beginning of the year – presumably in terms of the admission policy of the school – is misplaced and nothing more needs to be said about it.

[235] The school governing body also relied upon some unexplained discretion to justify its decision to exclude the learner from school. In the founding affidavit Mr Radebe said in part: "This decision was taken in the discretion of the Welkom High [school governing body] *inter alia* in view of [NMD]'s advanced stage of pregnancy and upon the authority as provided for in the [Schools Act] dealing with the admission of Learners." The answer to this contention is that the provisions of the Schools Act which empower a school governing body to determine an admission policy relate to whether a learner may be admitted to the school and does not relate to an effective suspension of a learner who has been admitted to the school. In any event, while a school governing body has power to determine an admission policy in terms of the Schools Act, the latter Act, quite clearly, gives the HOD and not the school governing body the power to expel a learner from school. The Schools Act does not confer upon a school governing body the power to in effect suspend a learner's schooling for the reason it was done in this case. In any event the school governing body's learner pregnancy policy is not part of an admission policy of the school adopted by the school governing body.

[236] In my view it is not strictly necessary in the present case to decide whether or not as a general proposition a school governing body has power to make a learner pregnancy policy. What is critical is to determine whether the school governing body had power to make a policy that requires a learner to be excluded from school at all or to be excluded from school in the circumstances, under the conditions and for the periods contemplated in the learner pregnancy policy. Even if a school governing body has power to make a

learner pregnancy policy, it certainly has no power to make a policy that includes provisions that are inconsistent with the Constitution or legislation such as the Schools Act or PEPUDA. The main judgment is in agreement with this. To a question which is formulated in the main judgment as being whether the Schools Act authorises "governing bodies to adopt pregnancy policies that have exclusionary effects, that are premised on rigid application and that do not take sufficient account of constitutional rights", the main judgment answers: "This question must be answered in the negative."[190]

[237] I am of the opinion that, once one accepts that the school governing body did not have the power to make a policy that has the effects to which reference is made above, it should follow, as the night follows the day, that in making a policy with such effects, the school governing body in this case acted unlawfully and in the light of section 16A(3)(a) and (b) of the Schools Act, the Free State HOD was not only entitled but obliged to instruct the principal not to carry out or implement an unlawful act, decision or policy. It is difficult to understand the basis for the view that the Free State HOD had no right to issue the instruction that he issued in this case when it is accepted that the school governing body had no power to make a policy requiring the exclusion of a pregnant learner from school and that section 16A(3)(a) does show that an HOD has power to issue instructions to a principal.

[190] Main judgment at [71].

[238] After answering the above question, the main judgment points out that the issue will be dealt with later.[191] However, it expresses the view that the Court is concerned in the present case with determining whether the Courts below were correct in granting the interdictory relief restraining the Free State HOD from conducting himself in a particular manner in relation to the respondent schools. It then says: "We therefore need to determine what the Schools Act empowers the HOD to do when faced with policies adopted by school governing bodies that prima facie (on the basis of the HOD's analysis) offend the Constitution and the Schools Act".[192] As already indicated, in my view, once it is accepted, as the main judgment seems to do, that the school governing body's policy was unlawful and unconstitutional in so far as it required the exclusion of a pregnant learner from school, it logically follows that the principal was obliged not to implement that policy and the HOD was not only entitled but obliged to give the instruction that he did to ensure that the principal did not act unlawfully and unconstitutionally.

[239] The main judgment then expresses the view that the HOD's course of action in such a situation is not "to act as if those policies do not exist."[193] It says that the Schools Act rather obliges the HOD to engage in a "consultative process with the governing body and then, if there are reasonable grounds for doing so, to take over the performance of the particular governance function in terms of section 22, in order to give effect to the

[191] For the question and answer referred to herein, see the last sentence of [236].

[192] See [72] above.

[193] Id.

relevant constitutional rights and the objectives of the Act."[194] This approach raises two questions. The one is: what will prevail between the school governing body's policy and an Act or the Constitution in the meantime while the consultation process is going on? The other question is: if there are no reasonable grounds for the HOD to withdraw the function from the school governing body, is it the school governing body's policy or the Act and the Constitution that will prevail? In other words will the principal in the meantime be required to comply with the school governing body's policy or with the Act and the Constitution? The main judgment fails to address the question of what the HOD is required to do where there are no reasonable grounds for him to withdraw the function of the school governing body and yet the school governing body is requiring the principal to implement an unconstitutional and unlawful policy in violation of a learner's rights entrenched in the Bill of Rights and the learner or her parents appeal to the HOD to intervene to protect the learner's rights or where they threaten legal action.

[240] As indicated earlier, the main judgment takes the view that the question for determination is not whether school governing bodies have authority or power under the Schools Act "to adopt pregnancy policies that have exclusionary effects . . . and that do not take sufficient account of constitutional rights". As will have been seen above, I see the matter differently. I take the view that that is the first and most critical question that we are called upon to decide because, if the school governing body did not have the power or authority to make such policies and we all agree, as I think we do, that the

[194] Id.

policy in question had such "exclusionary effects" and was a policy that failed to "take sufficient account of constitutional rights", then the school governing body's conduct was in breach of the principle of legality, was unlawful and unconstitutional and the judgment of this Court should give effect to that conclusion. My view that no school governing body has power to make policies that are inconsistent with the Constitution is in line with what this Court said in *Ermelo*. All public power is subject to the Constitution and must be exercised in the light of the Constitution.[195] Furthermore, section 16 of the Schools Act, which vests the "governance of every public school . . . in its governing body", opens with the words "subject to this Act" before it goes on to vest the governance of a public school in its governing body. Section 16(1) reads: "Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act." I have quoted above a passage from what this Court said in *Ermelo*[196] about the phrase "subject to", namely, that it qualifies the power that the governing body has and means that that power must be exercised subject to other provisions of the Act.

[241] In addition to the phrase "subject to this Act", section 16(1) goes a step further and makes it crystal clear that a school governing body may only perform functions and exercise rights that are "prescribed by the Act." It follows from this provision that a school governing body may not adopt a learner pregnancy policy that is inconsistent with

[195] *Ermelo* above n 163 at para 78.
[196] See [223] above.

the Schools Act. Accordingly, in performing its functions a school governing body may not go against a provision of the Schools Act.

[242] Furthermore, I am unable to agree with the proposition that, instead of instructing the principal to allow the learner back at school, the Free State HOD should have invoked section 22 of the Schools Act. Section 22 reads as follows:

> "(1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body.
>
> (2) The Head of Department may not take action under subsection (1) unless he or she has—
>
> (a) informed the governing body of his or her intention so to act and the reasons therefor;
>
> (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and
>
> (c) given due consideration to any such representations received.
>
> (3) In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter—
>
> (a) furnishes the governing body with reasons for his or her actions;
>
> (b) gives the governing body a reasonable opportunity to make representations relating to such actions; and
>
> (c) duly considers any such representations received.
>
> (4) The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3).
>
> (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council."

[243] I do not think that the power conferred upon an HOD in section 22 of the Schools Act is there for use by an HOD in a situation such as this one where there is a difference of opinion between an HOD and a school governing body on whether the school governing body has a certain power. Obviously, the HOD cannot withdraw a function from a school governing body when he thinks that the school governing body does not even have such a function. In any event section 22 does not place an obligation on an HOD to withdraw a function from a school governing body. It confers upon him power to withdraw a function as an option which he may or may not use in a particular situation. The use of the word "may" in section 22(1) indicates that the HOD is not obliged to use the power to withdraw a function of a school governing body but may, in his discretion, do so in the circumstances contemplated in the section. The main judgment deals with the matter as if section 22(1) places an obligation on the HOD to withdraw a function of a governing body. In my view no justification exists for treating section 22(1) as if it places such an obligation upon an HOD.

[244] In my view section 22 is there for use by an HOD in a case where a school governing body has failed without any acceptable reasons to perform a function it is required by the Schools Act to perform or where it does not have the capacity or expertise necessary for it to perform that function. In this case there is no suggestion that the school governing body has no capacity to formulate a learner pregnancy policy but the issue is that the one that it has issued includes provisions which are inconsistent with the Constitution and legislation. All the school governing body requires here is correct

advice. That is no ground for the Free State HOD to withdraw the function from the school governing body if it has such a function. In any event it was not the school governing body's case in the papers that the Free State HOD should have invoked section 22. Accordingly, the Free State HOD has not been given an opportunity to be heard on a case based on section 22. As the Supreme Court of Appeal correctly said recently through Wallis JA in *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others*:[197]

> "It cannot be emphasised too often that courts are, generally speaking, bound by the issues that the parties to litigation have formulated and it is not open to them to deal with and determine cases on a different basis. That is particularly the case where the court is a court of review of what has transpired in a lower court, as is the position with the land claims court when exercising its jurisdiction under section 19(3) of the Act."[198]

Wallis JA then referred to *CUSA v Tao Ying Metal Industries and Others*[199] where this Court also said that, subject to a case where a point of law is apparent from the papers in which the Court may raise such point mero motu, "*the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues which were not raised by the party who seeks to review an arbitral award*."[200] (Emphasis added.) These statements by this Court apply with equal force to all matters brought to court by way of motion proceedings.

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[197] [2012] ZASCA 77; 2012 (5) SA 392 (SCA).

[198] Id at para 26.

[199] [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC).

[200] Id at 67.

High Court

[245] In the High Court the school governing body's case was that the HOD had no power to issue the instruction to the principal in disregard of its learner pregnancy policy. The Free State HOD's defence was that the school governing body had no power to adopt such a policy, particularly a policy which required the exclusion of a pregnant learner from school and that the exclusion was in breach not only of legislation but also of the Constitution. The Free State HOD said that, for those reasons, and for the fact that he was the principal's employer and because of the provisions of the Schools Act, he had the power to give the instruction that he gave to the principal. The Free State HOD also contended that in terms of section 7(2) of the Constitution he was obliged to come to the assistance and protection of the learner whose constitutional right to a basic education was being violated by the implementation of the policy.

[246] The High Court took the view that it was not open to the HOD to challenge the lawfulness and constitutionality of the learner pregnancy policy or that part of it that required the exclusion of a learner from school because he had not brought a counter-application for such orders. The High Court accordingly took the view that it would not consider the Free State HOD's contention that the school governing body's conduct in seeking to exclude the learner or the policy or the relevant provisions of the policy were unlawful.

[247] The High Court concluded that it was persuaded that "the action taken by the [HOD] was not sanctioned by the applicable legislation".[201] It went on to say that the instruction given by the Free State HOD to the principal "did not . . . constitute proper exercise or performance of any appropriate function in terms of the school's legislation."[202] It said that the Free State HOD was "not . . . empowered by legislation to merely direct the principal to ignore the policy adopted by the school governing body and to act contrary to such a policy on the grounds that in more ways than one, the pregnancy policy was not in harmony with the law."[203]

[248] The High Court relied on the principle of legality for its conclusion.[204] I have immense difficulty with the notion that a policy document produced by a school governing body may make provisions that are inconsistent with an Act and even the supreme law of the country, the Constitution. I also have difficulty with the notion that, where a policy or some of its provisions are inconsistent with an Act or the Constitution, it is the provisions of the policy that prevail over an Act or the Constitution and yet a policy is not even subordinate legislation. I would have thought that the correctness of the proposition that a school governing body may not make a policy that is in conflict with an Act, not to speak of one in breach of our supreme law, is not open to debate. I would also have thought that if a policy is or some of its provisions are, inconsistent with

[201] High Court judgment at para 33.

[202] Id.

[203] Id.

[204] Id at para 35.

an Act or the Constitution, such a document would be subservient to the Act and our supreme law.

[249] I have even more difficulty with the proposition that if, in a case where a school governing body has issued a policy that is, or that contains provisions that are, inconsistent with an Act or the Constitution, the HOD instructs the principal not to act in breach of an Act or the Constitution, his conduct is in breach of the principle of legality. In such a case I would have thought that the HOD is acting in compliance with the principle of legality and that the conduct that is in breach of the principle of legality is conduct requiring the principal to comply with the school governing body's policy that is in conflict with an Act or the Constitution.[205]

[250] The High Court later said that what it was called upon to decide "was really not the unlawfulness of the pregnancy policies adopted and implemented but rather the

[205] This Court said in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56:

> "[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law." (Footnote omitted.)

This Court went on to say at para 58:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

As this principle applies to organs of state as well, it applies to a school governing body.

lawfulness of the instruction given."[206] It said that the Free State HOD and the amici curiae urged it to decide the "unlawfulness of the pregnancy policies". It said:

> "But there was no avenue open to me to get there. None of the respondents had filed any counter-application to challenge the pregnancy policies adopted by the schools."[207]

In my view it was not necessary that the Free State HOD make any counter-application to have the pregnancy policy declared unlawful or invalid before the High Court could pronounce upon the lawfulness or otherwise of either the issuing of the policy by the school governing body or the lawfulness of the specific provisions of the policy requiring the exclusion of a pregnant learner from school. Not only was the High Court entitled to pronounce upon that issue, but it was in fact obliged to do so because of the nature of the defence put up by the Free State HOD.

[251] In terms of the policy the school governing body required the principal to act unlawfully and unconstitutionally. The principal was entitled, if not obliged, to say to the school governing body: I refuse to carry out this policy or instruction or requirement because it is an unlawful instruction! The Free State HOD was not only entitled but also obliged to make sure that his employee and representative, the principal, did not act unlawfully or did not carry out any unlawful instruction from anyone including the school governing body and that he did not take part in the violation of the learner's

[206] High Court judgment at para 36.

[207] Id.

constitutional right to a basic education. That was a legitimate defence which the High Court was obliged to consider and pronounce upon. Furthermore, the provisions of section 16A(3)(a) and (b) of the Schools Act make it clear that an HOD may issue instructions to the principal.

[252] The High Court relied upon the decision of the Supreme Court of Appeal in *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another*[208] (*Mikro*). It said that in that case the Supreme Court of Appeal said that, since the Free State HOD was not a professional manager of the school, he could not manage its affairs as if he were its principal. The High Court went on to hold that "[t]he direct order by the senior functionary to reverse, as he did, the decision of the school principal whose sole responsibility it was to professionally manage the school was procedurally flawed."[209] I think, in saying this, both the Supreme Court of Appeal in *Mikro* and the High Court in the present case, lost sight of the fact that the Schools Act expressly provides that a principal carries out his responsibility of the professional management of the school "under the authority of the Head of Department."[210]

[253] The High Court expressed the view that the Free State HOD should have made an urgent application for an order declaring the school governing body's learner pregnancy policy or the exclusion of the learner from school unlawful or unconstitutional and not to

[208] [2005] ZASCA 66; 2006 (1) SA 1 (SCA).

[209] High Court judgment at para 43.

[210] Section 16 of the Schools Act.

issue the instruction that he issued to the principal. In my view the Free State HOD did not need to go to court. He is the ultimate functionary responsible for the professional management of the school which the principal exercises under his authority. As a senior manager and leader of the provincial Department of Education he must take such steps as are reasonably necessary to ensure that the principal does not act in breach of the law and the Constitution and, where he becomes aware that the principal is acting in breach of legislation and the Constitution, he must issue an instruction to make sure that the principal observes the law and the Constitution and need not go to court first before he can issue such an instruction. Section 16A(3)(a) of the Schools Act makes it clear that it contemplates that an HOD may issue instructions to a principal. This being the case, it would be very strange if the HOD may not issue an instruction that the principal must not act in breach of an Act and the Constitution. I think the notion that the HOD has no power to issue such an instruction to a principal is completely untenable.

Supreme Court of Appeal

[254] The Supreme Court of Appeal agreed with the conclusion of the High Court that the Free State HOD had no authority or power to issue the instruction that he issued to the principal in disregard of the school governing body's learner pregnancy policy. It amended that part of the order of the High Court which declared the learner pregnancy policy to be valid by interdicting the Free State HOD from directing the principal to act in a manner contrary to the school governing body's learner pregnancy policy for as long as the learner pregnancy policy remained in force.

[255] The Supreme Court of Appeal referred to its decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[211] (*Oudekraal*) and said that in that case it had held that a person has the right to raise a collateral challenge to the validity of an administrative act where he or she is threatened with coercive action by a public authority.[212] The Supreme Court of Appeal then quoted the following passage from *Oudekraal*:

> "When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain *from performing an act in the absence of a lawful basis for that compulsion*. It is in those *cases — where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act — that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.*"[213] (Emphasis added.)

[256] With the last sentence of this passage in mind, the Supreme Court of Appeal went on to say in the present case:

> "There is no act that the HOD is compelled to perform or refrain from performing in consequence of the pregnancy policies. Neither is there any coercive action directed at him consequent upon the implementation of the pregnancy policies. The learners could have mounted a collateral challenge in order to resist attempts by the schools to prevent

[211] [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

[212] Supreme Court of Appeal judgment at para 13.

[213] *Oudekraal* above n 211 at para 32 quoted in the Supreme Court of Appeal judgment at para 13.

> them from attending school, had the schools for instance applied to interdict them from doing so."[214]

[257] Like the High Court, the Supreme Court of Appeal refused to consider the HOD's contention that the learner pregnancy policy was unlawful and unconstitutional or at least that those of its provisions which required the exclusion of a learner from school owing to pregnancy were unlawful and unconstitutional. In my view the passage quoted above contains the finding upon which the Supreme Court of Appeal refused to consider the Free State HOD's defence. It later said:

> "In my view, the fact that a collateral challenge was not available to the HOD puts paid to this argument. Secondly, the passage I have quoted from *Mkangeli* is to the effect that when a constitutional challenge is properly before a court, it must deal with it. In this case, because the HOD was not entitled to raise a collateral challenge, the constitutionality of the pregnancy policies was not properly before the court a quo."[215]

[258] The finding of the Supreme Court of Appeal that precluded it from considering the Free State HOD's defence is the finding that "[t]here is no act that the HOD is compelled to perform or refrain from performing in consequence of the pregnancy policies. Neither is there any coercive action directed at him consequent upon the implementation of the pregnancy policies."[216] The view I take on this point differs from that of the Supreme Court of Appeal. The enforcement or implementation of the school governing body's

[214] Supreme Court of Appeal judgment at para 14.

[215] Id at para 19.

[216] Id at para 14.

learner pregnancy policy required the principal to exclude the pregnant learner from school for certain periods. The policy of the school governing body required this to be carried out or executed by the principal. If the principal was required by the school governing body to implement the policy, he was required to implement it in his capacity as an employee and representative of the Free State HOD at the school. In those circumstances, the Free State HOD was entitled to raise the defence because he was objecting to his employee or representative being required to do something unlawful or something he considered to be unlawful. Therefore, this is a case which falls within the last sentence of the passage quoted above from *Oudekraal* and the Supreme Court of Appeal and the High Court should have considered the Free State HOD's defence. In my view, if the High Court and the Supreme Court of Appeal had considered the Free State HOD's defence, they may have concluded that excluding the learner from school in accordance with the school governing body's policy would have been unlawful and unconstitutional and that, therefore, the Free State HOD was entitled to instruct the principal as he did. It was because those two Courts considered themselves precluded from considering the Free State HOD's defence that they reached the conclusion that they reached.

[259] To deal with the Free State HOD's contention that, as the principal's employer, he was entitled to issue the instruction to him, the Supreme Court of Appeal said that that argument was flawed and was a recipe for chaos because "it ignores the fact that . . . the adoption of a code of conduct is a governance issue that falls within the domain of the

governing body. It does not fall within the professional management of a public school that must be undertaken by the principal under the authority of the HOD."[217]

[260] In my view this proposition misses the point inherent in the Free State HOD's contention. The Free State HOD's contention was and remains that the school governing body's policy required the principal to do something unlawful when it required him to exclude the learner from school as envisaged in the policy. In so far as the school governing body's reply to this contention was that it had the power to adopt a code of conduct and in the code of conduct it could require the exclusion of pregnant learners from school, the Free State HOD's argument was this: the school governing body does not have power to adopt a code of conduct containing provisions that are inconsistent with legislation or the Constitution and the requirement that the learner be excluded from school owing to pregnancy falls into that category.

[261] So even if the school governing body had power to adopt a code of conduct, and, in this case it has not claimed to have adopted a code of conduct, its power was limited to adopting a code of conduct that is consistent with the Schools Act and the Constitution. In this regard section 8 of the Schools Act, which gives the governing body of a public school the power to "adopt a code of conduct", makes it clear that that power is given "subject to this Act" which is a reference to the Schools Act. Accordingly, such a code as may be adopted by the school governing body may not be inconsistent or in conflict

[217] Supreme Court of Appeal judgment at para 22.

with other provisions of the Schools Act. The Schools Act gives the ultimate power to suspend a learner from school for longer than seven days and the power to expel a learner from school only to the HOD.[218] So, a code of conduct adopted by the school governing body may not purport to take this power away from the HOD and give it to the school governing body because that would render the code inconsistent with the Schools Act.

[262] The Supreme Court of Appeal also held that the Free State HOD had acted in breach of the principle of legality in issuing the instruction that he issued in the present case. The principle of legality required both the HOD and the school governing body to exercise only those powers they have in law. In my view the HOD did not act in breach of the principle of legality but the school governing body did.

[263] In *Ermelo* the Supreme Court of Appeal held that the function of determining a language policy for a school belonged to the governing body of the school alone and the HOD had no power whatsoever to revoke that function under the Schools Act and his only remedy was judicial review. This Court disapproved of that view and reasoning. In the present case the Supreme Court of Appeal also adopted the reasoning that the power to determine a learner pregnancy policy belonged to the school governing body alone and that the HOD's remedy, if he was unhappy about it, was a judicial review to have the policy set aside. Just as this Court disapproved of that reasoning in *Ermelo*, I am of the opinion that in the present matter that reasoning should also be rejected.

[218] Section 9(2)(a) of the Schools Act.

[264] In their judgment Froneman and Skweyiya JJ conclude that the appeal should be dismissed. They base that conclusion on the principles of co-operative governance and inter-governmental relations. That judgment takes the view that the parties had an obligation to engage with each other before the Free State HOD could issue the instruction and before the school governing body could go to court. I am unable to agree that the matter should be decided on this basis. This is a point that was not taken by either party in the papers. If the matter is decided on this basis the Free State HOD loses the case on the strength of a point on which he has never been given an opportunity to be heard. This is contrary to the tenets of fairness embodied in the principle of *audi alteram partem*.

[265] In the circumstances I would grant leave to appeal, uphold the appeal, set aside the decision of the Supreme Court of Appeal and that of the High Court and replace the decision of the High Court with an order dismissing the school governing body's and Welkom High School's application. I would not make any order of costs in this matter as the matter raises important constitutional issues. I would also have made a similar order in the Harmony High School matter.

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For the Respondents:	Advocate J Du Toit SC and Advocate N Snellenburg instructed by M J Van Rensburg.
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For the Second Amicus Curiae:	Advocate N Rajab-Budlender instructed by the Centre for Child Law.