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# A critical analysis of the learners' constitutional rights to basic education in South African public schools

## Abstract

*Globally, several countries have been proposing to make primary education compulsory and freely available to all. Although there has been steady growth in learner enrolment in South African public schools since 1994, the socio-economic status of parents, racial and religious discrimination, high cost of school fees and schools' language policies have prevented poor learners from accessing basic education, especially in public schools located within affluent areas. This paper critically examines legislation and policies relating to children's constitutional rights to basic education. The government's mandate to redress past injustices and concentrate on social justice and equity in public education is hampered by the failure of many schools to correctly interpret or consistently apply legislation and regulations relating to learner admissions. It has been found that the admission policies drawn up by school governing bodies (SGB) covertly prevent poor learners from enrolling at affluent schools. Although school admissions have been contested in various court cases, governing bodies of some affluent public schools continue to practise unfairness in opening its doors to all children. To ensure that social justice and equity prevail in school education, the Department of Education should revise policies or amend existing legislation encouraging SGBs to provide learner access without any prejudice.*

**Keywords:** access, constitutional rights, legislation, exclusions, exemptions

## 1. Introduction and background to the problem

During the Apartheid regime black South Africans experienced degradation as a result of inferior education provided to them. They were deemed to be mere labourers and systematically excluded from receiving any formal quality education. This ensured a steady supply of cheap labour, particularly for the agricultural, mining, and domestic service sectors. Despite political changes since 1994, numerous socio-economic challenges for blacks still persist. Various policies have been unveiled and legislation enacted to hasten equity and social justice in education, however inferior schooling is still provided to impoverished communities (Vally & Dalamba, 1999).

Today, South Africa like many other countries globally, is increasingly faced with serious problems such as poverty and illiteracy; the widening gap between rich and poor; proliferating acts of violence; and social exclusion, with large numbers of children living below the poverty line. The right to education has become indispensable and invaluable in a bid to eradicate poverty and to tackle socioeconomic challenges (South African Human Rights Commission [SAHRC], 2012). More recently, the National Development Plan (NDP) 2030 has mapped out South Africa's development trajectory for the next two decades. It places the provision of quality basic education at the nucleus of achieving the national goals of reducing poverty and inequality. The NDP 2030 specifically targets improving the quality of education and equalising educational opportunities for black African children, girl-children and children with disabilities who were marginalised through apartheid policies (National Planning Commission, 2012).

Education is undoubtedly a basic human right that is enshrined in international and

national laws. Article 28 of the *United Nations Convention on the Rights of the Child* compels the state to "make primary education compulsory and freely available to all". In the *African Charter on Human and People's Rights*, Article 17 states that every individual has the right to education, and Article 11(3) of the *African Charter on the Rights and Welfare of the Child* provides that "States to the present *Charter* shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular provide free and compulsory education [...]". In the *Universal Declaration of Human Rights*, Article 26 stipulates that "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages and should be made compulsory." *The Convention on the Rights of the Child*, Article 28 acknowledges that the "state recognizes the right of the child to education with a view of achieving this right progressively and on the basis of equal opportunity".

As the United Nations Educational, Scientific and Cultural Organization (UNESCO) focused on basic education, they collaborated with United Nations International Children's Emergency Fund (UNICEF) in organizing the Jomtien Conference held in Thailand in 1990, to galvanize national governments and aid agencies throughout the world to move towards education for all. The conference produced the "*World Declaration on Education for All*", which called for universalisation of access to basic education for children, youth and adults. The Declaration called for the universalisation of primary education, a goal that was reiterated at the World Education Forum (WEF) held in Dakar in 2000, and that constituted the second of eight Millennium Development Goals (World Education Forum, 2000). Over 160 countries agreed on the 'Education for All' goals set for 2015. These goals guaranteed everyone the opportunity to improve their life through education.

Globally, access to education means that every child should be able to acquire the necessary knowledge, to live in and adapt to a rapidly changing world. Eliminating inequalities that prevent children from going to and staying in school should form part of any government's programme. Special attention should be given to inequities caused by gender, socioeconomic status, or other type of marginalisation. Although the Millennium Development Goals were partially achieved in 2015, countries are continuing to reimagine strategies to achieve full access to primary education.

At a national level, the South African government has made great strides in providing learners access to basic education post-apartheid (National Treasury, 2015). They passed legislation, policy documents, plans, strategies and interventions that are intended to ensure equitable access to education for all children (Sayed & Motala, 2012). According to Sayed and Soudien (2005), policies have focused on developing frameworks to address the historical inequalities of apartheid, and at the same time creating a broad-based vision for a new South African education system. The Constitution (South Africa, 1996a) and the South African Schools Act (hereafter Schools Act) (South Africa, 1996b) have paved a way for a democratic approach to education (Bloch, 2009:12) resulting in more children gaining access to basic education. Many South African children have gained physical access to public schools (Sayed & Motala, 2012). Very few children fail to enrol in a school, their daily attendance is relatively high, repetition rates are relatively low and dropout is rare, at least during primary school (Meny-Gibert & Russell, 2012).

According to Statistics South Africa (2010), General Household Survey (2009) and Analysis by UNICEF South Africa (2009), the following statistics reflect the state's mandate to address equity and provide learners easy access to education:

- Learner enrolment at primary school (age 7–13 years) and secondary school (age 14–18 years) attending educational institutions has increased to over 90% throughout all nine provinces of the country.
- Gender parity among boys and girls attending schools has been achieved. However, 10 per cent of children (ages 7 to 15 years) with disabilities still do not attend any school.

- A significant number of children (662 000) do not attend any educational institution and reasons cited include pregnancy, and learners unable to perform satisfactorily, illness and family circumstances (child minding or child headed households).
- Repetition rates are high, especially in Grade 10 and Grade 11. Nonetheless, it is disturbing that at least 2% of all learners never enter public schooling. These learners are the most marginalised of all, often schools excluding them access, or suffering from disabilities, deep poverty and/or lack of access to social grants (Sayed & Motala, 2012). Anecdotal evidence suggests that schools have no control over learners who drop out of schools or where children (orphans or homeless) do not attend schools at all. The state has not put effective mechanisms in place to compel parents or children of compulsory age to attend schools. Research conducted by Motala, Dieltiens and Sayed (2012) shows that finding a place in a school is both constitutionally guaranteed and practically assured in South Africa, yet there are many children who never enter a school. The school's admission policy maybe one possible reasons for this practice.

It has been reported that many children from impoverished homes are deliberately excluded from access to education. The school's admission policy regarding zoning and feeder schools, or the high cost of school (user) fees are some of the reasons cited to parents. The main research question addressed in this article was: *Why are poor learners denied access to basic education, especially in affluent public schools?*

## 2. Aims of the study

Using educational lenses, this article critically examines the reasons for affluent schools excluding poor learners' access to basic education.

The objectives of this study were to:

- examine the legal framework concerning learners from gaining access to some affluent public schools; and
- cite court cases to explain possible reasons for schools excluding impoverished learners from gaining access to affluent schools; and
- provide guidelines of how policy makers and school managers of affluent schools can address equity and social justice in their admission policy.

## 3. Methodology

A hermeneutic methodology was adopted to determine the causes for some affluent schools denying impoverished learners access to public schools and interpreting human activities relating to learner access and admission to public schools. The major social actors were governing bodies, principals, parents, and Department of Education officials, and the unit of analysis was governing bodies and Department of Education officials. This method was primarily influenced by the central idea in hermeneutics that the analyst must seek to bring out the meanings of a text from the perspective of its author (Bryman, 2006).

The researcher conducted a literature review and analysed secondary data such as legislation, policies and court cases. Court cases were examined to establish reasons for affluent public schools denying learners' access. In the landmark case between Rivonia Primary School and the Gauteng Department of Education, learner admission to public schools was raised at the High Court and thereafter contested in the Supreme Court of Appeal and Constitutional Court.

## 4. Legal frameworks and schools' admission policy

This section of the paper accentuates the application of national legislation and policies relating to learner access. The legal framework includes the Constitution (South Africa, 1996a), the National Education Policy (South Africa, 1996c), the South African Schools Act (South Africa, 1996b) and Employment for Educators Act (South Africa, 1998). The admission policy drawn up and implemented by the SGB provides role-players with a clear understanding of how learner admissions are dealt with at school level.

The *Bill of Rights* (Chapter 2), as entrenched in the *Constitution* (South Africa, 1996a), specifies that everyone has the right to a basic education, which the state, through reasonable measures, must progressively make available and accessible.

The right to a basic education is a constitutionally protected right that is unequivocally guaranteed to all children in South Africa (SHRC, 2012: 1).

Section 29(1) of the Schools Act (South Africa, 1996b) stipulates that everyone has the right to a basic education, including adult basic education and further education, which the state, through reasonable measures, must progressively make available and accessible. Section 3(1)) makes it compulsory for all children to attend school from the age of seven until they reach the age of 15 or the end of Grade 9, whichever comes first for all children to attend school.

The National Education Policy Act (South Africa, 1996c) requires that the Minister of Education provide an admission policy which will serve as guidelines to schools. The SGB is required to draw up an admission policy for the school and once the policy is adopted by key role-players, the SGB is required to make a copy of the policy and forward it to the provincial Head of Department (HOD) of Education for approval. The admission policy of a public school is determined by a school governing body (SGB) in terms of section 5(5) of the Schools Act (South Africa, 1996b). The process of developing and implementing school policies should be a collaborative process where the school management team (SMT), parents, Department of Education (DoE) and SGB are directly involved in the process. The admission policy should be consistent with the Constitution (South Africa, 1996a) and other applicable provincial law.

## 5. Learner access to basic education

Education access includes learner attendance as well as enrolment, progression at the appropriate age, achievement of learning goals, equitable access to opportunities to learn and availability of an adequate learning environment (Soudien, Motala & Fataar, 2012). The following are reasons for poor learners excluded from gaining access to affluent schools.

### 5.1 Post provisioning norms and capacity of schools

Learner access to public schools is highly dependent on the size of the school and post provisioning norms (the number of teachers appointed by the DoE for each school under their jurisdiction). Although the learner: teacher ratio is set at 40:1 for primary schools and 35:1 in secondary school (South Africa, 1998), most public schools exceed the post provisioning norms determined by the DoE. Public schools in townships are usually overcrowded with fewer teachers appointed, whereas in affluent schools, more teachers are employed above the DoE's post-provisioning norms and not paid from state subsidies. These schools are characterised by smaller class sizes and many more teachers than schools located within townships. SGBs of affluent schools intentionally exclude access for learners who reside outside feeder zones or where parents are unable to pay exorbitant school (user) fees.

### 5.2 Exorbitant School (user) Fees

Most of the historically advantaged public schools (mainly former Model C) have been

subjected to severe cutbacks in state funding. These schools, financially advantaged under the pre-1994 education dispensation in South Africa, have adequate resources to provide quality education (Fiske & Ladd, 2005; Motala, 2011). However, to sustain their school funds and continue to provide effective education, most of the SGBs charge excessive school fees, resort to aggressive marketing and fundraising initiatives. These schools' budgets cater for the provision for salaries above the post-provisioning norm determined by the DoE, state-of-the-art resources, safety and security, extra-mural activities and stationery. Parents who cannot afford school fees are automatically denied access. Although an exemption policy determined by the DoE exists, SGBs of affluent public schools deliberately keep poor parents ignorant of such policies.

### **5.3 Admission functions of the Department of Education and SGBs**

It is important to note that the Head of Department (HOD) of the provincial education department (PED) is responsible for coordinating the provision and administration of admissions of learners to public schools in the province. Together with SGBs they should ensure that all eligible learners of compulsory school-going age are suitably accommodated. Furthermore, the HOD after consultation with representatives of SGBs may determine feeder zones for public schools, in order to control the learner numbers of schools and co-ordinate parental preferences. Such feeder zones need not be geographically adjacent to the school. If a feeder zone is created then preference should be given to a learner who lives in the feeder zone of a school or who resides with his or her parents at an employer's home in the feeder zone. The admission policy and the administration of admissions by a PED should not unfairly discriminate against a learner seeking admission to any particular public school. Any learner or parent of a learner who has been refused admission to a public school may in terms of section 5(9) appeal against the decision to the Member of the Executive Council (MEC) for Education.

According to section 3(5) of the Schools Act (South Africa, 1996b), the admission policy is determined by the governing body. The Act prohibits SGBs from administering any test relating to admissions. Furthermore, the admissions policy may not exclude learners on the grounds of a language policy as well as the child's disability, race, culture, religion, HIV status, or pregnancy. Learners who register late or is not a South African citizen; or where parents who cannot afford to purchase uniforms or school books; or where schools do have capacity may also not be cited as reasons for learner exclusion. A learner should be admitted to the total school's programme and may not be suspended from classes, denied access to cultural, sporting or social activities of the school, denied a school report or a transfer certificate, or otherwise victimised on the grounds that his or her parent – (a) is unable to pay or has not paid the required school fees; (b) does not subscribe to the mission statement and code of conduct of the school; or (c) has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner.

The principal and admissions committee (where such committee exists) ensure that Grade 1 children enrolled at their school are at least seven years old. Parents must provide authentic documentation (e.g. birth certificate) when they enrol their children. If a learner of compulsory school-going age fails to attend school, the HOD may take the necessary actions as stipulated in sections 3(5) and 3(6) of the Schools Act. According to Potgieter (2006), the demographic complexity in South Africa on its own is sufficient to create challenging problems in dealing with the right to education.

In the implementation of schools' admission policies, many schools have clashed with PEDs. School districts have instructed principals and SGBs of affluent schools (former Model C schools) to admit learners even though these schools may have been over-subscribed. The contestations and contradictions in the interpretation of relevant legislation and the admission policy relating to learner access have resulted in several court cases between the state and SGBs. In the case between the School Governing Body and Rivonia Primary School

v MEC for Education, Gauteng Province and Others<sup>1</sup>, contestations over the admission policy and school capacity were highlighted. When a parent made an application for admission, her child was placed on the waiting list. However, the school duly informed the parent that her application was unsuccessful, and the matter was referred to the District Office. The parent launched an appeal directly to the MEC against the refusal by the school to admit her child. The HOD instructed the school to admit the learner without delay, contrary to the provisions of the school's admission policy and Circular 21 of 2010 (Gauteng Department of Education (GDE), 2010). When the parent arrived at school with the learner demanding that the learner be admitted to Grade 1, the principal suggested that the learner be taken home until the matter was resolved with the GDE. The next day the principal was advised that the admission function delegated to her in terms of Circular 21 of 2010 was withdrawn and that she should enrol the learner. She still refused to enrol the learner. The GDE then subjected the principal to disciplinary sanctions for not complying with the HOD's instruction and was given a final warning with a month's salary deducted.

The SGB of Rivonia Primary School approached the South Gauteng High Court on the grounds that the appeal by the learner's parent to the MEC, and the decision taken by the HOD was not in accordance with the provisions of the admission policy and Circular 21. This Circular makes reference to Regulation 2(1) of the Admission Regulations of the Gauteng School Education Act of 1995, which regulates the management of admissions to ordinary public schools. One of the clauses of the Act emphasises that the district director determines and declares a school full and the decision is informed by *inter alia*, the school's capacity and admission data.

Although the SGB had powers to determine the admission policy (section 29), it did not have the power to determine the enrolment capacity of the school. This power is accorded to the MEC under section 3(3) of the Schools Act, who has to ensure that the public education system has the capacity to provide school places to all learners of compulsory school-going age. The SGB of Rivonia Primary School submitted that they are the sole body that determines its admission policy which complies with the Constitution, the Schools Act and applicable provincial law. It is argued that there is no statutory or other legal power given to the MEC or HOD to determine the capacity of a school as this is a necessary incident of any admission policy. The HOD, MEC and Departmental Officials were bound by the school's admission policy and could not ignore or override it. The departmental circulars were not applicable to provincial law, and the HOD had no power or authority to determine a school's capacity.

The Department (MEC, HOD and District Director) submitted that the school's capacity was one that could not be legitimately determined by the admission policy drawn up by an individual governing body, but one which had to be determined at a systemic level by the provincial education department. If each public school were entitled to determine how many learners it would accommodate, this would prevent the public educational resources from being used in an equitable and efficient manner, and could carry the risk of a class of school age children being denied access to public education. This would thus infringe on the constitutional rights of equality and education which are found in sections 9 and 29 respectively. The Department argued that if SGBs of former Model C schools (schools serving historically white children) were allowed to determine their school capacities at levels far lower than those of the rest of the public schooling system, the racially discriminatory privileges bequeathed by apartheid would be capable of entrenchment under the new democratic order.

The Court found that although the Schools Act gives SGBs the authority to determine their own admission policies, it did not mean that they also had the authority to determine the schools' capacity to the exclusion of the authority of the Department. Judge Mbha noted

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1 11/08340/2012 [2012]ZASGHC

in his judgment that: “Although schools are now open to all children of all races, the consequences of apartheid forced removals and racially exclusive zoning mean that the majority of formerly white schools remain disproportionately white, while the majority of black schools continue to serve almost solely black children”.

The SGB of Rivonia Primary School was not pleased with the High Court’s decision and appealed to the Supreme Court of Appeal<sup>2</sup>.

The Supreme Court of Appeal argued that the governance of schools is vested in their SGBs whose functions, obligations and rights are prescribed. The principal serves *ex officio* on the SGB as a representative of the HOD and must assist the SGB to perform its functions and responsibilities. Since the state cannot provide all the resources for the proper functioning of a highly quality schooling system, the SGB has to take all reasonable measures within their means to supplement the resources supplied by the state in order to improve the quality of education provided by the school. The SGBs have a mandate to raise additional funds through the active involvement of the parents, who in return for their financial contributions are given a direct and meaningful say in school governance and the employment of funds. In pursuance of this, the Rivonia Primary School reduced the learner-teacher ratio by building extra classrooms and employing 22 additional teachers. Section 20(1) details the functions of SGBs including the designing and implementing of the schools’ admission policy.

The Supreme Court of Appeal found that the school’s refusal to admit the learner had nothing to do with race or her background. It came about solely because the parent’s application was far down the waiting list. The Department’s stated policy expressly requires admission to follow the chronological sequence of applications and the mother in this case was obliged to stand in line, just as the parents of other learners who had submitted late applications had to do. She was not entitled to preferential treatment from the school or the Department.

In terms of Section 5(5) of the Schools Act, the governing body of a public school has authority to determine the capacity of a school as an incident of its admission policy. Provincial education authorities may not ‘override’ the policy. In view of this, the order of the High Court was set aside and the following order substituted in its place:

It is declared that the instruction given to the principal of the Rivonia Primary school to admit the learner contrary to the school’s admission policy, and the placing of the learner in the school, were unlawful.

The GDEon then approached the Constitutional Court<sup>3</sup> for relief. The Constitution Court emphasised the three-tier partnership consisting of the national government, provincial government and the parents of learners and members of the community in which the school is located. At a national level, the Minister of Education may prescribe minimum uniform norms and standards for the capacity of a school in respect of the number of learners can admit, including class size, the number of teachers, and the utilization of available classrooms. These norms and standards have not been prescribed. At a provincial level, the Schools Act places an obligation on the MECs to ensure that there are enough school places so that every child in the province can attend. If the MEC encounters problems in this regard, he or she (together with the Minister of Education) must take steps to remedy such lack of capacity. In terms of section 58C of the Schools Act, the HOD should determine the minimum and maximum capacity of a public school and communicate this to the SGB and principal of the school. At school level, in terms of section 5(5) of the Schools Act, the SGB is responsible for determining the admission policy of the school and may include a

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2 16/12 [2012] ZASCA 194

3 CCT 135/12 [2013] ZACC 34

determination as to the capacity of the school.

Thus, while the SGB determines the admission policy, individual decisions on admission are taken provisionally at school level by the principal acting under the authority of the HOD where the need arises. Section 5(9) of the Schools Act provides a safety valve, which allows the MEC to consider admission refusals and overturn an admission decision taken at school level. In terms of the Gauteng Regulations, if a principal refuses to admit a learner, he/she must provide reasons in writing to the Gauteng HOD who then confirms or set aside the decision made by the principal.

Where the Schools Act empowers an SGB to determine the policy, the HOD cannot simply override the policy adopted. This does not mean that the SGB's powers are unfettered or that the policy is immune to intervention. Moreover, the SGB must act reasonably and procedurally fairly. The Constitutional Court stressed the importance of the partnership model envisaged by the Schools Act and that the Department and SGB are to act in good faith on disputes over policies adopted by the SGB in the best interest of learners.

The admission policy adopted by the SGB is not law and the HOD was therefore entitled, when exercising his constitutional and statutory powers, to deviate from a capacity determination as reflected in the school's admission policy. The school contended that the SGB is responsible for the implementation of its admission policy, whereas the Department is responsible for the administration of the admission policy process. The Court was of a different opinion in that the Department has ultimate control over the implementation of admission decisions. The general position is that the admission policy must be applied in a flexible manner. Thus, the capacity determination as set out in Rivonia Primary School's admission policy could not have inflexibly limited the discretion of the Gauteng HOD. The principal and HOD may for good reasons depart from the policy.

In this regard, the Court found that the Department had not complied. The HOD should have afforded the school an opportunity to make representations and respond to the tenth-day statistics before the learner was forcibly placed in the school.

The Court found that the decision taken by the HOD was not exercised in a procedurally fair manner and that very little cooperation existed between the Department and school. Regarding the issue on capacity, the PED is under obligation to ensure that there is enough space for every child to attend school. Where the Department requires a school to admit learners in excess of the limits stated in the school's admission policy, there must be proper engagement between all parties affected. The principle of cooperation permeated this Court's approach and placed strong emphasis on the relevant stakeholders' obligation to engage in good faith before turning to the courts. The heavy-handed approach of the Department created antagonism and mistrust in the Rivonia SGB, causing them to retaliate. Equally problematic was the SGB's reaction when they failed to place the interests of the learner first. They resorted to litigation. The counsel for the school conceded that "one additional learner would not burden the school to a point of collapse." The failure of the HOD and the Rivonia SGB adequately to engage had a direct effect on the learner who was caught in the centre of the power struggle.

#### **5.4 Language Policy of Public Schools**

Several cases have been reported where learners have been denied access as a result of the school's language policy. Two court cases will be discussed to highlight this trend. In the case between the *Minister of Education, Western Cape (MEC), and Others v Governing Body, Mikro Primary School, and Another*, learners were denied access based on the language policy of the school.

Mikro Primary School has been a single-medium school in which Afrikaans was the language of instruction. The HOD in the Western Cape, after several requests, instructed the principal

to accommodate 21 black Grade 1 learners and the relevant number of teachers would be provided to ensure effective learning and teaching took place. The language of instruction for these learners would be English. The school however, refused to enrol these learners. This matter was then brought to the High Court. The basis of the SGB's argument was that Afrikaans was the language of instruction based on the language policy of the school. According to section 6(2) of Schools Act, the SGB of a public school may determine the language policy subject to the Constitution, the Schools Act and any applicable provincial law. As determined by the SGB, Mikro Primary School's language of instruction was Afrikaans – a single medium language. The Western Cape Department of Education (WCDoE) wanted to alter the school's language policy and convert the school, *de facto* into a parallel medium school, where English and Afrikaans would be the medium of instruction.

Unquestionably, the language policy went hand-in-hand with its admission policy, and had to a large extent determined what learners were admitted to the school. The WCDoE had not seen the admission policy of the school until 2005 and therefore considered it unlawful and unconstitutional. The Court averred that the admission policy could not have played a role in decisions taken by the Department before 2005, nor could it have influenced them in their conduct before that date. The Judge ruled in favour of the SGB and Mikro Primary School. The Department was prohibited and restrained from compelling or attempting to compel the principal to admit learners for instruction in the medium of English. The Department was also prohibited from interfering unlawfully in the governance and professional management of the school.

In another similar case, the *HOD and MEC for Education v Hoërskool Ermelo, SGB and Others*, the school's language policy featured prominently. Although single medium institutions are recognised expressly in section 29 of the Constitution, the recognition was conditional. The state was required to consider it as a reasonable alternative, taking into account equity, practicability and the need to redress the results of past discriminatory laws and practices (Potgieter, 2006).

This case was first brought to the North Gauteng High Court of Pretoria which ruled in favour of the HOD and the MEC, then went on appeal to the Supreme Court of Appeal, and subsequently contested in the Constitutional Court. The HOD and MEC sought leave to appeal against a decision of the Supreme Court of Appeal.

At the beginning of 2006, the Department approached Hoërskool Ermelo requesting that the school admit 27 Grade 8 learners who could not be accommodated at any of the English medium schools in the town who were operating at full capacity. The SGB initially refused to accede to the Department's request but subsequently agreed that these Grade 8 learners could be admitted provided that they submit to Afrikaans as the language of instruction in accordance with the school's admission policy. However, in terms of section 22 of the Schools Act, the HOD withdrew the SGB's function to draw and implement the language policy and appointed an interim committee to perform these functions for a period of three months (section 25). This committee altered the language policy to parallel medium to facilitate the admission of the Grade 8 learners who were "stranded". The principal refused admission on the grounds that he was unaware of any new language policy. The SGB then urgently launched an application to the High Court to set aside the decision of the HOD to withdraw their function of determining the language policy. The High Court found that the SGB had unreasonably refused to review its language policy, and in so doing prevented the admission of the Grade 8 learners who chose to be taught in English. The High Court concluded that the appointment of the interim committee was authorised by section 25 of the Schools Act and that the new language policy was lawfully set and was accordingly binding on the school and its SGB.

On appeal, the Supreme Court of Appeal reversed the decision of the High Court. It characterised the dispute as solely about the rule of law, and not the language policy. The

Grade 8 learners that were enrolled at the school in terms of the parallel medium language policy were entitled to be taught in English until the completion of their schooling career. The Court concluded that the HOD had no power to revoke the competence of the SGB to determine the language policy, and that this power vested exclusively in them. The Court accordingly overruled the interpretation of section 22 of the Schools Act, and found that the HOD had acted unlawfully.

The Department then appealed to the Constitutional Court to rule on the constitutional and legislative provisions that governed this dispute. The school and the SGB urged the Court to look at this case as being only about the principle of legality and the proper exercise of administrative power, and not about the language policy of the school. The HOD and the MEC assumed a different stance. They contended that the core of the dispute was the appropriateness of the school's language policy which excluded learners who chose to be taught in English. These were exclusively black learners.

The Judge explained that the apartheid regime had left the country with many scars. White schools were hugely better resourced than black schools. Blacks are being deprived of free access to education in well-resourced formerly white schools. The Constitution demanded that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular. In terms of section 29(2) of the Constitution, two issues were examined. Firstly, a person had the right to receive education in a public school in a language of choice when it is "reasonably practicable". This implied that relevant circumstances such as availability of and accessibility to public schools, their enrolment levels, the medium of instruction, the language choices of learners, should be considered. Secondly, the Constitution points to the manner in which the state must ensure effective access to and implementation of the rights to be taught in the language of one's choice. In resorting to a single or parallel medium of instruction, the state should take into account of what is fair and feasible and satisfied the need to remedy the results of past racially discriminatory laws and practices.

The appeal made by the Department failed. The Constitutional Court reached its decision that where reasonable grounds existed, the HOD had the power under section 22(1) to withdraw the SGB's function of determining the language policy under section 6(2). The other principal finding made is that even given the power to withdraw the language policy under section 22(1), the HOD unlawfully conflated the requirements of section 22(1) and of section 25 by withdrawing the function and at the same time establishing an interim committee under section 25. It follows that the language policy the interim committee devised was void and had no legal consequences, The agreed order entitling learners enrolled at the school in terms of a parallel medium language policy will continue to be taught and to write examinations in English until the completion of their school careers must be affirmed.

## 6. Conclusion

Based on the judgments of some cases (Hoërskool Ermelo case and Rivonia Primary School), it would appear that some SGBs of former white schools have covertly used legislation to restrict learners (mostly black learners) from accessing well-resourced schools. Judge Mbha who presided over the Rivonia Primary School case stated that "although schools are now open to all children of all races, the consequences of apartheid forced removals and racially exclusive zoning mean that the majority of formerly white schools remain mainly white, while the majority of black schools continue to serve almost solely black children". In the Hoërskool Ermelo case the Judge explained that the apartheid regime had left the country with many scars. White schools were hugely better resourced than black schools. Blacks are being deprived of free access to education in well-resourced formerly white schools."

In all three schools' court cases, the core problem of disputes pertaining to the admission of

learners to public schools is the interpretation of the *Constitution* and *Schools Act*. In the first case, the SGB of Rivonia Primary School argued that they were responsible for determining the admission policy of the school, and therefore had the power to declare that the school had reached its capacity. However, the Department had a different stance: they have the power to declare a school full based on the GDE's Circular 21.

Two important themes emerged from the Mikro Primary school and Hoërskool Ermelo case: the admission policy and language policy. In the Mikro Primary school case, the language and admission policy were the core disputes. The Court ruled in favour of the SGB and Mikro Primary School, and the Department was prohibited and restrained from compelling the principal to admit learners for instruction in the medium of English. In the Hoërskool Ermelo case, the language policy was again an issue. Although the SGB won the case in the Constitutional Court, two crucial matters emanated from this case. Firstly, the 113 learners who were admitted to the school and taught in English could continue until they had completed Grade 12 at that school. Secondly, based on past imbalances in school funding and uneven resource allocation between the affluent and poor schools, the SGB was requested to review its admission policy and language policy to cater for learners from historically disadvantaged communities.

Based on the analysis of the three schools, the SGBs and the respective PEDS had problems in interpreting and implementing the law and sought relief from the Courts. However, the High Courts and the Supreme Courts of Appeal also had serious problems in interpreting the law and the Constitutional Court (the supreme court of the country) had to make final rulings of the two cases mentioned above. They found that the Supreme Court of Appeal had erred in interpreting The Schools Act. In the Rivonia Primary School case, the Constitutional Court expressed serious concerns of the lack of cooperation and support by both the Department of Education and the SGB. The principle of cooperation permeated this Court's approach and placed strong emphasis on the relevant stakeholders' obligation to engage in good faith before turning to the courts.

The learners' constitutional rights to basic education is seriously infringed upon by many SGBs of affluent schools who find it difficult to open up public schools to all learners irrespective of race, language, culture and the socio-economic status of parents.

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