

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

CASE NO: 18775/13

In the matter of

MICHELLE SAFFER

Applicant

and

**HEAD OF DEPARTMENT, WESTERN CAPE
EDUCATION DEPARTMENT**

First Respondent

**THE SCHOOL GOVERNING BODY,
FISH HOEK HIGH SCHOOL**

Second Respondent

FISH HOEK HIGH SCHOOL

Third Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
EDUCATION IN THE WESTERN CAPE
PROVINCIAL GOVERNMENT**

Fourth Respondent

MINISTER OF BASIC EDUCATION

Fifth Respondent

MATTHEW GRAY

Sixth Respondent

WOMEN'S LEGAL CENTRE (*Amicus Curiae*)

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. The applicant ("Ms Saffer") is a mother and custodian parent of Zoe Olivia Saffer Gray, who was, at the time the application was launched, a grade 10 learner at Fish

Hoek High School (“the school”). Ms Saffer, acting both in her own interest and in representative capacities,¹ seeks orders:

- 1.1 Reviewing and setting aside the decision of the first respondent (“the head of department”), in an appeal in terms of s 40(2) of the South African Schools Act 84 of 1996 (“the Act”), made on or about 19 September 2013, dismissing Ms Saffer’s appeal against the second respondent’s (“the governing body”) decision to refuse her a partial exemption from the payment of 2013 school fees;
- 1.2 Declaring that regulation 6(2), read together with the definition of the phrase ‘*Combined Annual Gross Income of Parents*’ in regulation 1 of the regulations relating to the exemption of parents from the payment of schools in public schools, promulgated in GN 1052 of 18 October 2006 (“the regulations”), is inconsistent with the Constitution and invalid;
- 1.3 Declaring that Ms Saffer qualifies for a fee exemption for the 2013 academic year, together with a determination of the amount of the exemption for which she qualifies;
- 1.4 Declaring that Ms Saffer has been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her

¹ Founding affidavit, pp. 12 – 13: 3.

2011, 2012 and 2013 applications for exemption from the payment of school fees;

- 1.5 Declaring that the first, fourth (“the MEC”) and fifth (“the Minister of Basic Education”) respondents (collectively referred to as “the respondents”) have failed to comply with their constitutional and statutory obligations to ensure that fee-charging public schools in the Western Cape comply with the requirements of the Act and regulations in relation to fee exemptions;²
- 1.6 Directing the respondents to comply with their constitutional and statutory obligations as declared by this Court;
- 1.7 Granting a structural interdict against the respondents;³ and
- 1.8 Awarding her costs.

² The manner in which the respondents have failed to comply with their obligations is particularised in the amended notice of motion at pp. 986 – 990: 6.1 – 6.16.

³ The form of the structural interdict is set out in the amended notice of motion at pp. 990 – 991: 8.1 – 8.4.

THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

2. The right to education is entrenched in s 29(1) of the Constitution, which states:

“(1) *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.”*

3. Unlike most of the other socio-economic rights, the right to basic education is immediately realisable. It is not subject to any internal limitation requiring that the right be ‘*progressively realised,*’ within ‘*available resources*’ or subject to ‘*reasonable measures.*’ The right can only be limited by a law of general application in terms of s 36(1) of the Constitution. The right to further education in s 29(1)(b), by contrast, is progressively, rather than immediately, realisable.⁴ The Constitutional Court has emphasised that education is both a human right in itself and an indispensable means of realising other human rights, by empowering people to lift themselves out of poverty and to participate fully in their communities.⁵

4. The preamble to the Act makes it clear that its purpose is to transform South Africa’s apartheid era education system in such a way that the talents and

⁴ *Governing Body of Juma Masjid Primary School & Others v SA & Others v Essay NO & Others (Centre for Child Law & Another as Amicus Curiae* 2011(8) BCLR 761 (CC) [2011] ZACC 13 [37].

⁵ *Juma Masjid*, [41].

capabilities of all learners can be developed, thereby advancing the democratic transformation of our society.

5. The Act and the Norms and Standards for School Funding, Annexure “MS2” (“the Norms and Standards”), establish a pro-poor system by means of a progressive state funding policy for public schools which favours poor communities.⁶ Section 39(7) of the Act requires the Minister annually to determine quintiles (established on the basis of a poverty index) for public schools, which the MECs must use to identify those schools, situated in poorer communities that may not charge school fees.
6. Those schools which have not been declared no fees schools in terms of s 39 of the Act, may charge parents school fees for purposes of:
 - 6.1 raising additional resources to supplement those which the state provides from public funds; and
 - 6.2 encouraging wealthier parents to increase their financial and other contributions to the quality of their children’s’ education.⁷
7. Section 39(1) of the Act states that school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending a general meeting after at least 30 days’ notice has been given

⁶ Norms and Standards, paras 31 – 40.

⁷ Norms and Standards, para 37.

of the meeting.⁸ Section 39(2) stipulates that the resolution adopted by a majority of parents must provide for:

- “(a) *the amount of school fees to be charged;*
- (b) *equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees; and*
- (c) *a school budget that reflects the estimated cumulative effect of –*
 - (i) *the established trends of non-payment of school fees; and*
 - (ii) *the total, partial or conditional exemptions granted to parents in terms of regulations contemplated in subsection (4).”*

8. Section 39(4) requires the Minister to make regulations regarding equitable criteria and procedures for fee exemptions.
9. The Act makes it clear that whether or not schools (which have not been declared no-fee schools) charge fees is a matter for the parents to decide.⁹ The Norms and Standards note that in most public schools where parents decide to charge fees, the ability of parents to pay may vary considerably, leading to difficult decisions concerning the level of fees and the threshold for exemption from payment.¹⁰ If a

⁸ Section 39(1), read together with s 38(2).

⁹ Norms and Standards, para 42.

¹⁰ Norms and Standards, para 44.

majority of parents vote in favour of school fees, every parent is responsible for paying the required fees, unless granted an exemption.¹¹

10. Paragraph 153 of the Norms and Standards sets out the criteria applicable to the determination of exemptions:

“School fees must not be allowed to become an obstacle in the schooling process, or a barrier preventing access to schools, especially as far as the most marginalised are concerned. Government believes that in the schools serving the poorest communities, there should be no school fees. Moreover, where schools do charge school fees, proper parent participation in the fee-setting process is critical. Effective criteria determining which schools should not charge school fees, as well an effective exemptions policy to protect those who are less advantaged economically within fee charging schools, are of utmost importance.”
[emphasis added].¹²

11. Section 41(1) of the Act authorises public schools to enforce the payment of school fees ‘*by a process of law*’ subject to ss 41(4) and (5), which read as follows:

“(4) A public school may act in terms of subsection (1) only after it has ascertained that—

(a) the parent does not qualify for exemption from payment of school fees in terms of this Act;

¹¹ Norms and Standards, para 45.

¹² The above principle gives effect to s 40(1) of the Act which states that:

“A parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act.”

- (b) *deductions have been made in terms of regulations contemplated in section 39 (4), for a parent who qualifies for partial exemption; and*
 - (c) *the parent has completed and signed the form prescribed in the regulations contemplated in section 39 (4).*
- (5) *Despite subsection (4), a public school may act in terms of subsection (1) if—*
- (a) *that school can provide proof of a written notification to the parent delivered by hand or registered post that the parent has failed to apply for exemption contemplated in section 39; and*
 - (b) *despite the notice contemplated in paragraph (a), the parent fails to pay the school fees after a period of three months from the date of notification.”*

12. The formula in terms of which exemptions are calculated is set out in regulation 6(2) as follows:

“(2) (a) *The governing body must apply the following formula when considering the application for exemption:*

$$E = 100 \left(\frac{F+A}{C} \right)$$

where –

E = school fees as a proportion of the income of a parent.

F = annual school fees, for one child, that a school charges in terms of section 39 of the Act.

A = additional monetary contributions paid by a parent in relation to a learner's attendance of, or participation in any programme of, a public school.

C = combined annual gross income of parents. 100 = the number by which the answer arrived at in the brackets is multiplied so as to convert it into a percentage."

13. The phrase '*combined annual gross income of parents*' is defined in regulation 1 to mean '*the annual gross income of the parents, calculated together, or, if a learner has only one parent, the total annual gross income of such parent.*' A parent is defined in s 1 of the Act as:

- "(a) the biological or adoptive parent or legal guardian of a learner;*
- (b) the person legally entitled to custody of a learner; or*
- (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school."*

14. Once E (school fees as a proportion of the parents income) has been determined, the extent of the exemption to which the parent is entitled can be established with regard to the table in regulation 6(6).

15. The regulations contain a number of safeguards designed to ensure that parents are informed of, and able to assert, their rights to fee exemptions. They stipulate, amongst other things, that:

15.1 A form (annexure “A”) must be completed by the parent (and signed by both the principal and the parent) indicating that the parent has been informed of the amount of school fees, the procedures for applying for exemptions and that the parent is liable for the payment of school fees unless granted an exemption;¹³

15.2 A governing body must display a copy of the regulations in a conspicuous place at the school;¹⁴

15.3 A governing body must make a decision on an exemption application within 30 days of it having been received;¹⁵

15.4 A governing body may grant a conditional exemption subject to such conditions as it may deem reasonable;¹⁶

¹³ Regulation 3(1). This provision is headed “*Obligations of governing bodies and principals when learner is admitted to public school.*” The form is considered in greater detail below in the section entitled “*Repeated Violations of Constitutional and Statutory Rights.*”

¹⁴ Regulation 3(2).

¹⁵ Regulation 6(1).

¹⁶ Regulation 6(7). A conditional exemption is defined in regulation 1 as:

the exemption granted to a parent who-

- (a) *qualifies for partial exemption but, owing to personal circumstances beyond his or her control, cannot pay even the reduced amount; or*
- (b) *does not qualify for exemption but supplies information indicating his or her inability to pay school fees owing to personal circumstances beyond his or her control,*

which exemption the school governing body grants with the proviso that the parent agrees to certain conditions for the payment of the school fees;”

- 15.5 A governing body must notify an applicant for exemption of its decision, and the reasons for it, in writing within seven days of the decision being taken;¹⁷
- 15.6 If an exemption application is declined, the notice advising the parent concerned must refer to the right of appeal provided for in terms of s 40(2) of the Act;¹⁸
- 15.7 If a parent does not qualify for exemption, the governing body may enforce the payment of school fees by a process of law only after:
- 15.7.1 notifying the parent in terms of the appropriate subregulation; and
- 15.7.2 considering reasonable forms of payment other than cash;¹⁹
- 15.8 A parent who is dissatisfied with a governing body's decision on a fee exemption application may appeal against the decision to the head of department, in writing, within 30 days of being notified of the decision;²⁰

¹⁷ Regulation 6(9).

¹⁸ Regulation 6(13). Section 40(2) states that "A parent may appeal to the Head of Department against a decision of a governing body regarding the exemption of such parent from payment of school fees."

¹⁹ Regulation 6(14). This provision should be read in the context of paragraph 39 of the Norms and Standards, which notes that poor people have contributed a disproportionate share of their incomes over many decades to the building, upkeep and improvement of schools, both through school funds and "other contributions, including physical labour."

²⁰ Regulation 8(1).

15.9 No applicant for a fee exemption may be disqualified on the ground that his or her application form is either incomplete or incorrectly completed;²¹ and

15.10 The Provincial Education Department must develop measures for assisting schools in applying the formula contemplated in regulation 6.²²

16. We turn now to consider the constitutionality of regulation 6(2), a core issue in this application.

²¹ Regulation 9(3).

²² Regulation 10(1).

THE CONSTITUTIONALITY OF REGULATION 6(2)

17. Ms Saffer seeks a declaration that regulation 6(2), read together with the definition of the phrase “*combined annual gross income of parents*” in regulation 1, is inconsistent with the Constitution and invalid, on the grounds that it infringes, amongst other things, her right to dignity in terms of s 10 of the Constitution. In her evidence she describes how degrading and humiliating it had been for:

17.1 her fee exemption application to be dependent on her ex-husband providing particulars concerning his income; and

17.2 her ex-husband and her to be treated as a “*family unit*” for purposes of the application.²³

18. Ms Saffer states that the formula for the calculation of fee exemptions contained in regulation 6(2) is highly prejudicial to single parents living apart from their former partners.²⁴

19. Ms Saffer also seeks to have the regulation declared invalid on the basis of infringements to the right to education (s 29(1)) and the right to the equal protection and benefit of the law (s 9(1)).²⁵

²³ Founding affidavit, p. 42: 81.3.

²⁴ Replying affidavit, p. 906: 150.

²⁵ Founding affidavit, p. 13: 4.

The position of custodial parents

20. The Constitutional Court has described the circumstances faced by women raising children following the breakdown of a marriage (or similar relationship) in the following terms:

“[29] . . . it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.

[30] These disparities undermine the achievement of gender equality which is a founding value of the Constitution. The enforcement of maintenance payments therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. . . .”²⁶

[footnote omitted]

21. Ms Saffer’s position, as a mother with custody of her child, struggling to make ends meet, is far from unique. It is against the context of the double-disadvantage

²⁶ *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003(2) SA 363 (CC) [29] – [30].

described by the Constitutional Court, that the evidence in this case should be evaluated.

The evidence

22. Ms Saffer's daughter was admitted as a grade 8 pupil at the school in January 2011. On 1 March Ms Saffer submitted her fee exemption application to the school. Following a lengthy process in which the school repeatedly insisted on receiving the financial information of both parents in order to process the application,²⁷ in November 2011 the governing body addressed a letter to Ms Saffer (and her ex-husband) informing her that it was not in a position to provide her with a fee exemption as it was unable to determine the income of both Zoe's parents. It also stated that, from the information it had, it did not appear that the income of her family unit entitled her to an exemption. The letter concluded by stating that the school would hand the matter over to its attorney to recover the outstanding school fees unless both she and her ex-husband completed the exemption form or paid the fees.²⁸

23. In her reply, Ms Saffer objected to the "*bullying tone*" of the school's letter and stated:

"I am in no way a family unit with my daughter's biological father. I divorced him soon after she was born. Divorced is another way of saying: we are separated. I know very little

²⁷ Founding affidavit, pp. 20 – 24.

²⁸ Founding affidavit, p. 25: 32.

about his life. I do not have the kind of relationship which would enable me to do financial calculations as a 'family unit'."²⁹

24. Ms Saffer also placed on record that she and the sixth respondent lead separate lives, that it was ridiculous for the school to demand that they complete a joint exemption application and that she found the school's insistence that "*Mr Gray and I be treated as a "family unit", and that the outcome of my fee exemption application was dependent on his co-operation, to be deeply offensive and humiliating.*"³⁰
25. Ms Lisa Whyte, another Fish Hoek High School parent, also testified that she found the school's insistence on treating her and her ex-husband as a family unit for purposes of her fee-exemption application, to be deeply humiliating.³¹
26. Ms Moyo, a former EELC attorney, gave evidence, which is not disputed by the respondents, that it is clear from the cases dealt with by EELC that the fee exemption procedures are applied in a manner which causes great hardship for single parents, invariably women, who are not receiving maintenance from their former partners.³²

²⁹ Founding affidavit, p. 25: 33.

³⁰ Founding affidavit, pp. 25 – 26: 24.

³¹ Ms Whyte's replying affidavit, p. 938: 37.

³² Ms Moyo's affidavit, p. 328: 20, read together with the head of department's affidavit, p. 706: 138 – 141.

27. Although the respondents formally deny that regulation 6(2) infringes Ms Saffer's right to dignity,³³ this denial is not supported by their evidence, which in many respects confirms that the provision infringes the constitutional and statutory rights of custodial parents.
28. The head of department concedes that over the years parents have experienced 'a variety of problems in relation to liability and payment for schools and exemption from school fees.'³⁴ She also states that her department has recognised that there are 'grey areas' in the fee exemption policy and that, as a result, it had made a submission to the National Department of Basic Education to review the current regulations.³⁵
29. Annexure "PV12" to the head of department's affidavit contains a submission made by her department to the 'headcom legal subcommittee'³⁶ concerning the regulations. In an email from Advocate Lynn Coleridge – Zils of the Directorate: Policy Co-ordination to the head of department, dated 25 June 2013 it is recorded that the committee at its meeting in Pretoria on 20 and 21 June 2013, 'recommended and noted that these issues are critical and that it be placed on the agenda of the Review of Legislation Committee in order to consider proposed amendments of SASA and the said regulations.'³⁷

³³ Minister's affidavit, p. 813: 24. It is contended, in the alternative, that the infringement is justified in terms of s 36(1) of the Constitution (p. 815: 30).

³⁴ Head of Department's affidavit.

³⁵ Head of Department's affidavit, p. 692: 76.

³⁶ The legal subcommittee of the heads of education departments committee established in terms of s 10 of the National Education Policy Act 10 of 1996 ("NEPA").

³⁷ Annexure "PV12", p. 780.

30. Annexure “PV12” contains an internal memorandum from the Director: Institutional Management and Governance Planning, dated 24 May 2013, in which it is stated that the current regulations concerning exemptions from the payment of school fees ‘*have become increasingly cumbersome to interpret and apply*’ as:

“Some schools refuse to consider applications of parents who deny them exemption for reasons that are not clearly defined in the regulations. These governing body’s decisions are based on their interpretation of the regulations. Although legal opinions have been obtained regarding the interpretation of certain stipulations and loopholes in the policy, some schools still ignore these views and make decisions based on their own interpretation or the advice of their own legal advisors.”³⁸

31. The internal memorandum concludes by stating that the issues on which the department wanted guidance are set out in a draft letter attached to the memorandum. In supporting the submission, the department’s Chief Director: Districts stated that ‘*These are troublesome issues and questions.*’³⁹

32. In the head of department’s submission it is acknowledged that the regulations are:

“Frequently difficult to apply as they are silent on certain common situations which affect parents’ obligation to pay school fees. This leads to different interpretations of the policy by public schools in the province, which, in turn, leads to dissatisfaction among parents, legal proceedings against parents by schools and appeals submitted to this department.... Below are a few examples of situations which frequently lead to appeals

³⁸ Annexure “PV12”, p. 782

³⁹ Annexure “PV12”, p. 783.

by parents against a governing body's decision on school fees."⁴⁰
[emphasis added]

33. The second example of situations which frequently lead to problems identified in the head of department's submission is headed '*Combined annual gross income*'.

The relevant part of the submission states the following:

"(a) *The definition of 'combined annual gross income of parents' in the regulations is interpreted by some schools as meaning the income of both biological parents, even if*

(i) *the biological parents are divorced with no maintenance agreement between the custodian and non-custodian parents for the support of the child(ren)*

(ii) *the custodian and non-custodian parents have no contact with each other;*

(iii) *the non-custodian parent has legally agreed to a maintenance payment to the custodian parent and regards this as his or her contribution to the education of the child(ren); or*

(iv) *the non-custodian parent has remarried, and now has a new family of his or her own and has a responsibility towards that new family.*

In the above cases, schools expect the parent to provide full details of both parents, even if it is a single unmarried parent. In most of the above cases the custodian parent

⁴⁰ Annexure "PV12", p. 784.

finds it difficult to obtain and provide the income details of the non-custodian parent in their application for exemption. Schools then refuse to accept or consider the applications of that parent until the information is provided. A possible solution to this problem could be to make each parent liable for half of the school fees and for each parent to be required to apply for exemption from payment of his or her half of the school fees.

- (b) *Another situation involves both divorced parents separately applying for exemption from the paying of school fees and the non-custodian parent fails to obtain exemption. When such a parent fails to fulfil his or her obligation, the school fees are then claimed from the custodian parent. If the latter fails to pay the non-custodian's contribution, legal proceedings are then instituted against him or her to recover the outstanding school fees. . . .*⁴¹ [emphasis added]

34. The head of department's submission also notes that although regulation 9(3) stipulates that no application may be disqualified on the ground that it is either incomplete or incorrectly completed, 'Many schools refuse to consider applications from which the information on the non-custodian parent has been omitted or in which certain information cannot be provided' (emphasis added). The letter asks for guidance on this issue and notes that the stipulation is misinterpreted by schools and should be revisited.⁴²

⁴¹ Annexure "PV12", pp. 785 – 786.

⁴² Annexure "PV12", p. 787.

35. Annexure “PV12” accordingly demonstrates beyond any doubt that Ms Saffer’s experience is not an isolated occurrence.
36. In addition, the submission records that schools which refuse to consider applications without access to the details of the non-custodian parent are instructed by the head of department to consider the applications and make decisions in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). However some schools do not comply and instead hand the parents over for the collection of the outstanding fees. The letter states that the head of department does not have any recourse in such cases ‘*and it is requested that this matter be addressed in revised regulations.*’⁴³
37. The Minister’s affidavit concedes that the regulations ‘*create practical difficulties for parents like the Applicant who struggle to get the requisite financial information from the other parent*’ and states that ‘*legislative amendments to address this difficulty are being prepared for consideration*’ by the Minister and the council of education ministers.⁴⁴
38. Although the respondents do not accept the unconstitutionality of regulation 6(2), their denial that the provision infringes Ms Saffer’s constitutional rights is undercut by their acknowledgement of the need to amend the regulations (for the same reasons which she states that they infringe her constitutional rights).

⁴³ Annexure “PV12”, p. 787.

⁴⁴ Minister’s affidavit, p. 816: 32.

39. We now to consider the right to dignity in s 10 of the Constitution.

The right to dignity

40. Section 10 of the Constitution entrenches the right to dignity in the following terms:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

41. Human dignity is a fundamental value underpinning our constitutional scheme, as is reflected in, amongst other things, sections 1, 7(1), 36(1) and 39(1) of the Constitution.⁴⁵ However, the Constitutional Court has stated that human dignity is not simply a value that informs the interpretation of other rights and that:

*“Section 10, however, makes it plain that dignity is not only a ‘value’ fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.”*⁴⁶

42. In many cases in which the value of human dignity is violated, the primary constitutional breach will be a more specific right, but this does not detract from the enforcement of the right to dignity, particularly in cases where no other right is implicated.⁴⁷

⁴⁵ See: *Dawood, Shalabi & Thomas v Minister of Home Affairs* 2000(3) SA 936 (CC) [34].

⁴⁶ *Dawood*, [35].

⁴⁷ *Cf Dawood*, [35].

43. Kriegler J has stated that human dignity is one of three ‘*conjoined, reciprocal and covalent values*’ which are foundational to the country.’⁴⁸ The Constitutional Court has highlighted the importance of recognising and protecting dignity by referring to it as ‘*the touchstone of the new political order and is fundamental to the new Constitution*’.⁴⁹
44. In considering the content of the right to dignity, the Constitutional Court has referred to the common law concept of *dignitas*, which relates to an individual’s sense of self-worth, but extends to a variety of personal rights including the right to privacy. Under the Constitution no sharp line can be drawn between injuries to personality rights and the:

*‘value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements....It should also be noted that there is a close link between human dignity and privacy in our constitutional order.’*⁵⁰

45. In short, regulation 6(2), and in particular the definition of the “*combined annual gross income of parents*”, has been the root cause of Ms Saffer’s humiliating and

⁴⁸ *S v Mamabolo (ETV & Others Intervening)* 2001(3) SA 409 (CC) [41].

⁴⁹ *S v Makwanyane & Another* 1995(3) SA 391 (CC) [329], cited with approval in *NM & Others v Smith & Others (Freedom of Expression Institute as Amicus Curiae)* 2007(5) SA 250 (CC) [51].

⁵⁰ *Khumalo & Others v Holomisa* 2002(5) SA 401 (CC) [27].

degrading treatment at the hands of the school. The respondents' evidence establishes beyond doubt that many other similarly situated parents have also had their rights to human dignity violated. We accordingly submit that an infringement of s 10 of the Constitution has been established.

The right to equal protection and benefit of the law

46. In terms of s 9(1) of the Constitution '*Everyone is equal before the law and has the right to equal protection and benefit of the law.*'
47. Regulation 6(2), read together with the definition of the phrase '*combined annual gross income of parents*' in regulation 1, infringes the s 9(1) rights of divorced or separated parents by assuming that they will be able to obtain the required information concerning the incomes of their ex-partners. The regulations are unconstitutional in their effect as they: (i) fail to acknowledge or provide for the substantial handicap faced by separated parents in obtaining the requisite financial information; and (ii) require such parents' exemption applications to be calculated in terms of the same formula as parents living in the same household. This leads to schools not considering the exemption applications of many separated parents (who are unable to furnish all the required financial information), thereby depriving them of their rights to the equal protection and benefit of the law.

The right to education

48. The circumstances referred to in the previous paragraph will, by parity of reasoning, result in a number of children of separated parents being denied access to public schools which charge fees, thereby infringing those learners's 29(1) rights to education.

The justification enquiry

49. Section 36(1) of the Constitution states that:

“(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.”*

50. A party who bears the ‘*onus*’ of establishing that a statute is a justifiable limitation of a fundamental right bears the burden of placing before the court the facts and/or policy considerations relied upon in order to justify the provision.⁵¹
51. Where facts are relied upon to justify a limitation, the party seeking to uphold the statute should set out the purpose of the limitation and the facts necessary to assess the legitimacy of this purpose and the efficacy of its execution.⁵² If policy considerations are relied upon, the relevant party should clearly articulate the policy objectives he or she seeks to achieve, the reasons for the policy and why it is reasonable to limit a constitutional right in order to advance that policy.⁵³
52. It is important that the party seeking to uphold the statute should clearly motivate the basis on which she or he submits that the provision is justified, so as to enable the applicant to rebut these contentions by means of countervailing factual material or expert opinions.⁵⁴
53. If the party seeking to uphold the statute fails to satisfy the burden that he or she bears to place legal argument, facts and policy considerations before the court, this may tip the scales against the party concerned and result in the invalidation of the provision.⁵⁵

⁵¹ *Minister of Home Affairs v NICRO & Others* 2005(3) SA 280 (CC) [34].

⁵² *NICRO*, [36], read together with *Centre for Child Law v Minister of Justice and Constitutional Development & Others* 2009(6) SA 632 (CC) (“Child Law”) [54].

⁵³ *NICRO*, [36], read together with *Child Law* [54].

⁵⁴ *NICRO*, [36].

⁵⁵ *NICRO*, [36].

54. Although the Minister has contended that regulation 6(2) would constitute a justifiable limitation of any right infringed, in terms of s 36(1) of the Constitution, the respondents have failed to place any facts or policy considerations before this Court in support of this contention. Given the acknowledged need to amend the regulations, it is submitted that regulation 6(2), read together with the definition of “*combined annual gross income of parents*”, demonstrably does not satisfy the requirements of s 36(1) and should be declared invalid.

THE REVIEW AND 2013 FEE EXEMPTION DECLARATOR

55. Ms Saffer seeks an order reviewing and setting aside the decision of the head of department to dismiss her appeal against the governing body's decision to refuse her a partial exemption from the payment of school fees for the 2013 academic year.

56. The head of department motivated her decision to refuse Ms Saffer's appeal in her letter of 19 September 2013, annexure "MS50", on the following grounds:

56.1 she would not regard Ms Saffer as having launched an appeal until such time as the governing body had made a decision and informed her of it;

56.2 the governing body's decision to refuse Ms Saffer's fee exemption application was conveyed to her in a letter dated 16 July 2013;

56.3 Ms Saffer failed to lodge an appeal within 30 days of the governing body's decision as required by the regulations and therefore she had forfeited her right to appeal; and

56.4 as the governing body had instituted legal proceedings against Ms Saffer, she (the head of department) could not intervene in the matter.⁵⁶

57. This reasoning is indefensible:

⁵⁶ Ms Saffer's founding affidavit, pp. 38 – 39, read together with "MS50", p. 308.

- 57.1 Ms Saffer submitted her application for a fee exemption for 2013 to the governing body in March of that year. Regulation 6(1) required the governing body to decide the application within 30 days. It did not do so, but on 16 May 2013 sent her a letter of demand claiming R12 800, 00 in respect of the 2013 school fees. The only inference to be drawn was that the governing body had rejected her application and it was on this basis that Ms Saffer's attorneys launched an appeal to the head of department on 28 May 2013;
- 57.2 The Chairperson of the governing body conceded that the letter of 16 July 2013 was sent to the wrong address and therefore never reached Ms Saffer. The head of department was demonstrably wrong in determining Ms Saffer's appeal on the basis that she failed to launch the appeal within 30 days of being advised of the governing body's decision on 16 July 2013; and
- 57.3 The statement that the governing body had instituted legal proceedings against Ms Saffer is also incorrect. The summons for the 2013 school fees was issued on 3 October 2013, approximately two weeks after the head of department's letter of 19 September 2013.⁵⁷
58. We accordingly submit that the head of department's decision stands to be set aside, in that:

⁵⁷ Ms Saffer's founding affidavit, pp. 39 - 40.

- 58.1 it was materially influenced by an error of law;
- 58.2 irrelevant considerations were taken into account and relevant considerations were not considered when she made her decision;
- 58.3 the decision was not rationally connected to the purposes for which it was taken, the information that was before the head of department and the reasons given for it by the head of department;
- 58.4 the decision was grossly unreasonable; and
- 58.5 it was based on a material error of fact, which was uncontentious and objectively verifiable.⁵⁸
59. On 2 December 2013, after this application was launched, the head of department conceded the review. She states that this was because her decision was based on the error of fact relied upon by Ms Saffer (concerning the governing body's mistaken assumption that it had notified her of its decision).⁵⁹
60. On 2 December 2013 the MEC also conceded the review and the chairperson of the governing body sent an email to the department stating that he agreed with this concession.⁶⁰

⁵⁸ *Dumani v Nair* 2013 SA 274 (SCA) [26] – [32].

⁵⁹ Head of department's answering affidavit, p. 670: 6.

⁶⁰ Head of department's answering affidavit, p. 671: 7.

61. We submit that the head of department's decision was indefensible and the respondents' concession of the review unavoidable.
62. However, the chairperson of the governing body subsequently proposed that Ms Saffer re-apply for an exemption from school fees for the 2013 school year, and that she be granted an extension until February 2014 to submit a fresh exemption application.⁶¹
63. On 28 May 2014, the department's Director Institutional Management and Governance Planning ("the Director") sent an email to the chairperson of the governing body requiring the school to revisit Ms Saffer's 2013 application as a matter of urgency.⁶²
64. On 6 June 2014 2014 the chairperson of the governing body advised the Director that the governing body had reviewed the Ms Saffer's application but was unable to make a determination on the 2013 year. It also offered to provide fee exemption application forms to both parents and to reassess the new applications for 2013.⁶³
65. The governing body's proposal would have the effect of putting Ms Saffer in the same position as she was before launching this application. Neither Ms Saffer nor her attorneys were informed of these proposals prior to the filing of the respondents' answering affidavits in September 2014.⁶⁴ Furthermore, these

⁶¹ Head of department's answering affidavit, p. 671: 7. See "PV1", p. 713.

⁶² Head of department's answering affidavit, p. 671: 8. See "PV2", p. 714.

⁶³ Head of department's answering affidavit, p. 671: 10. See "PV3", p. 715.

⁶⁴ Replying affidavit ('RA'), p. 859: 8.

attempts to reconsider the application are to no avail as both administrative bodies are *functus officio*, and, in any event, a reconsideration would be of no benefit to Ms Saffer, as the governing body clearly will not budge from its position that it cannot consider Ms Saffer's application unless it includes details of her ex-husband's income.

66. The head of department has admitted that there are "*grey areas*" in the regulations which result in varied interpretations of the policies.⁶⁵ She also states that on reconsideration she believes her decision to uphold Ms Saffer's 2012 appeal was wrong.⁶⁶ In a letter to Ms Saffer's attorney she has admitted that the regulations "*are not clear on issues pertaining to the responsibilities of divorced parents*".⁶⁷ Ms Saffer states, with considerable justification, that the head of department is confused as how the regulations apply to her.⁶⁸ It is accordingly in the interests of justice for this Court to authoritatively determine the extent to which Ms Saffer is liable for her daughter's 2013 school fees.

67. We submit that:

67.1 it is common cause that the head of department's decision of 19 September 2013 should be reviewed and set aside;

⁶⁵ Head of department's answering affidavit, p. 692: 76.

⁶⁶ Head of department's answering affidavit, p. 697: 104.

⁶⁷ Rule 53 record, p. 551.

⁶⁸ Replying affidavit, p. 861: 16. This contention is further borne out by what is stated by the department in Annexure PV12 with regard to the definition of "*combined annual gross income*" (pp. 785 – 786).

67.2 the regulation 6(2) formula is unconstitutional and should be declared invalid for the reasons advanced above in the section entitled “*The Constitutionality of Regulation 6(2)*”; and

67.3 pending the amendment of the regulations so as to clarify the rights of estranged parents, Ms Saffer should be given a conditional exemption from liability for 83% of her daughter’s school fees, on the same basis as the head of department determined Ms Saffer’s 2012 appeal.⁶⁹

⁶⁹ Ms Saffer’s founding affidavit, p. 30: 49, read together with “MS30”, p. 260.

REPEATED VIOLATIONS OF CONSTITUTIONAL AND STATUTORY RIGHTS

68. Ms Saffer seeks an order declaring that she has been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her exemption applications between 2011 and 2013.⁷⁰ The infringements of her rights by the school (including the governing body) and the head of department will be considered separately.

The school

Section 41(4)(b)

69. In terms of s 41(4)(b) of the Act, a school may enforce the payment of school fees by process of law only after it has ascertained that appropriate deductions have been made in terms of the regulations for a parent who qualifies for a partial exemption. This provision should be read together with regulation 3(1)(e), which requires the governing body to investigate whether a parent qualifies for an exemption, if he or she is in arrears by one month or more, before launching legal proceedings.

⁷⁰ Amended notice of motion, p. 986: 5.

70. We have described above how the school repeatedly claimed that it had been unable to finalise Ms Saffer's exemption application as it had not received the requisite information concerning the income of her ex-husband.⁷¹
71. In May 2012 the school issued summons against Ms Saffer, claiming R7 250, 00 in respect of 2011 school fees from her and her ex-husband, jointly and severally.⁷² As the school claimed not to have been able to finalise Ms Saffer's fee exemption application, it could not have ascertained whether she qualified for a partial exemption.
72. In October 2013 the school again issued summons against Ms Saffer and her ex-husband, claiming R7 383, 30 in respect of 2013 school fees.⁷³
73. In both instances, the school launched legal proceedings without complying with s 41(4)(b) of the Act.

Section 41(4)(c)

74. Section 41(4)(c) of the Act stipulates that a public school may enforce the payment of school fees by process of law only after it has ascertained that the parent has completed and signed the form prescribed in the regulations contemplated in s 39(4).

⁷¹ See, for example, founding affidavit, p. 24: 30.

⁷² Founding affidavit, p. 27: 39.

⁷³ Founding affidavit, p. 38: 76, read together with annexure "MS52", p. 315.

75. Regulation 3(1), which is headed '*Obligations of governing bodies and principals when learner is admitted to public school*', requires every principal to notify the parent of: (i) the amount of the annual school fees; and (ii) the procedures to be followed in order to apply for exemption. The regulation also stipulates that a form (annexure "A") must be completed by the parent and signed by both the principal and the parent. Annexure "A" consists of a checklist requiring the parent to confirm that he or she has been informed of the rights in the regulation. A copy of Annexure "A" must be handed to the parent on the admission of the learner, another sent to the department and the original form retained by the school.
76. Ms Saffer evidence is that the school twice issued summons against her for the recovery of school fees, despite the fact that she never signed annexure "A".⁷⁴ The Minister's affidavit does not dispute this, but claims that the reason why she may not have signed the form is that she posted the application for exemption to the school and it thereafter '*inadvertently omitted to send the form to her*'.⁷⁵
77. There can be no doubt that the school failed to comply with s 41(4)(c) and regulation 3(1).

Regulation 3(2)

78. Regulation 3(2) requires the governing body to cause a copy of the regulations to be displayed in a conspicuous place at the school. Ms Saffer states in her founding

⁷⁴ Founding affidavit, p. 44: 83.2.

⁷⁵ Minister's affidavit, p. 829: 74.

affidavit that she has never seen a copy of the regulations on display at the school in all the time that she has been a parent there.⁷⁶ This is not disputed by the head of department in her answering affidavit, but she claims that after the application was launched a summary of the regulations was posted outside the bursar's office.⁷⁷

79. The evidence establishes that Ms Saffer's rights in terms of regulation 3(2) were infringed in the course of her 2011, 2012 and 2012 fee exemption applications.

Regulation 6(1)

80. Regulation 6(1) requires a governing body to consider a fee exemption application and to take a decision within 30 days after it has been received.
81. In 2011 Ms Saffer submitted her fee exemption application on 1 March.⁷⁸ The school subsequently claimed on several occasions to be unable to process her application because it required information concerning the income of Ms Saffer's ex-husband. The school never determined Ms Saffer's application and in May 2012 it issued summons claiming the amount allegedly owed for outstanding 2011 school fees.⁷⁹

⁷⁶ Founding affidavit, p. 44: 83.5

⁷⁷ Head of department's answering affidavit, p. 701: 117.

⁷⁸ Founding affidavit, p. 22: 23.

⁷⁹ Founding affidavit, p. 27: 39.

82. In 2012⁸⁰ and 2013⁸¹ the school similarly failed to process Ms Saffer's fee exemption applications within the requisite 30 day period.

Regulation 6(7)

83. Regulation 6(7) provides that a governing body may attach such conditions as it deems reasonable to a conditional exemption.⁸²

84. In light of the school's claim that it was unable to process Ms Saffer's application, it should have regarded her as a prime candidate for a conditional exemption. Ms Saffer noted that the failure of the school to provide her with such an exemption until such time as it had obtained the requisite information from her ex-husband '*would indicate a callous disregard for my financial position as the sole breadwinner for my family.*'⁸³

85. This is not denied in the Minister's answering affidavit, which concedes that Ms Saffer '*could fairly be regarded as someone who did not qualify for an exemption (i.e. for purposes of paragraph (b) of the definition of a conditional exemption)*'⁸⁴

86. We submit that the school breached Ms Saffer's rights in terms of s 6(7) by failing to grant her a conditional exemption.

⁸⁰ See founding affidavit, p. 28: 16 – p. 30: 48.

⁸¹ See founding affidavit, p. 32: 54 – 56.

⁸² The definition of a conditional exemption has been furnished above in the section entitled "*The Constitutional and Statutory Framework*".

⁸³ Founding affidavit, p. 23: 27.

⁸⁴ Minister's answering affidavit, pp. 823 – 824: 56.

Regulation 6(9)

87. Regulation 6(9) states that a governing body must notify a fee exemption applicant of its decision within seven days and give reasons for the decision. Ms Saffer notes that after she submitted her fee exemption application in March 2013, she received no response from the school or the governing body until they issued a letter of demand, dated 16 May 2013, from which she could only infer that her application had been rejected.⁸⁵
88. Neither the head of department nor the Minister dealt with this evidence in their answering affidavits.⁸⁶

Regulation 6(13)

89. Regulation 6(13) states that if a fee exemption application is declined, the notices informing the parent of the decision must include (reference) to the right of appeal to the head of department in terms of s 40(2) of the Act.
90. The school routinely violated Ms Saffer's right to be informed of the appeal procedure in the course of processing her applications between 2011 and 2013.

⁸⁵ Founding affidavit, p. 46: 83.9.

⁸⁶ Head of department's answering affidavit, pp. 701 – 701 and Minister's answering affidavit, pp. 830 – 831.

Regulation 6(14)(b)

91. Regulation 6(14)(b) stipulates that a governing body may only take steps to enforce the payment of school fees by a process of law after considering reasonable forms of payment other than cash. Ms Saffer notes that at no stage did she receive any indication from the governing body that it was prepared to accept alternatives to payment in cash. She also testifies that if she does not qualify for an exemption, she would be prepared to offer her services to the school as a journalist or in any other reasonable capacity in lieu of payment in cash.⁸⁷
92. This is not denied by the head of department in her answering affidavit, who states that it is not clear that Ms Saffer offered her services to the school prior to deposing to her affidavit.⁸⁸ This response loses sight of the fact that the regulation places the *onus* on the governing body to consider reasonable forms of payment other than cash. The context to this provision is provided by Paragraph 39 of the Norms and Standards, which states that poor people have contributed disproportionately to the building, upkeep and improvement of schools, through school funds and other contributions, including physical labour.
93. It would be inconsistent with the purpose of the regulation, namely to enable poor people to meet their obligations to pay school fees through payments in kind rather than cash, for it to place the *onus* on parents to tender alternative forms of payment.

⁸⁷ Founding affidavit, p. 46: 83.10.

⁸⁸ Head of department's answering affidavit, p. 702: 121.

We accordingly submit that the school has infringed Ms Saffer's rights in terms of this provision.

Regulation 9(3)

94. Regulation 9(3) provides that no applicant for a fee exemption may be disqualified on the grounds that his or her application form is incomplete or incorrectly completed. Ms Saffer's rights in terms of regulation 9(3) were infringed in 2011, 2012 and 2013, as has been described above.

Constitutional rights

95. The school repeatedly infringed Ms Saffer's rights in terms of sections 9 and 10 of the Constitution, as has been described above in the section entitled "*The Constitutionality of Regulation 6(2)*."

96. In addition to the evidence considered above, the school infringed Ms Saffer's right to dignity by:

96.1 characterising her inability to provide the financial information of her ex-husband as a dispute between parents;⁸⁹

96.2 applying the fee exemption procedure in a manner that rendered it unworkable;⁹⁰

⁸⁹ Founding affidavit, p. 23: 28.

⁹⁰ Founding affidavit, p. 24: 31.

- 96.3 referring to Ms Saffer and her ex-husband as a family unit;⁹¹
- 96.4 attempting to compel Ms Saffer to reopen the problematic interactions she had experienced with her ex-husband;⁹²
- 96.5 suggesting, through its attorney, that she was working in cahoots with her ex-husband to defraud the school;⁹³
- 96.6 causing a letter of demand to be issued in respect of 2012 school fees, when she had successfully appealed against the governing body's decision not to grant her a partial exemption, and accordingly was not liable for any outstanding fees;⁹⁴ and
- 96.7 advising her, through the chairperson of its governing body, that her 2013 exemption application had been declined, incorrectly stating that a registered letter had been sent to her advising her of this fact, informing her that her account had been handed over for collection to its attorney and requesting her attorneys to stop '*wasting the time of both myself and the head of department*'.⁹⁵
97. Neither the head of department nor the Minister deny that the school has, from the outset, been obstructive and un-cooperative with regard to her fee exemption

⁹¹ Founding affidavit, p. 25: 32 – 33.

⁹² Founding affidavit, p. 26: 36.

⁹³ Founding affidavit, p. 27: 37.

⁹⁴ Founding affidavit, p. 31: 52 – 53.

⁹⁵ Founding affidavit, p. 35: 67.

applications and repeatedly flouted the requirements of the Act and the regulations.⁹⁶

98. Although we submit that regulation 6(2) is unconstitutional, for the reasons stated above, the harsh and unremitting manner in which the school applied the provision exacerbated – rather than ameliorated – the resultant infringements of Ms Saffer’s right to dignity.

The head of department

99. Section 40(3) of the Act requires the head of department to follow due process, which safeguards the interests of the parent and the governing body, in deciding an appeal against a fee exemption decision by a governing body. The head of department infringed Ms Saffer’s rights under this provision, as has been described above in the section entitled ‘*The Review and the 2013 Fee Exemption Declarator.*’

100. Furthermore, Ms Saffer noted that after the head of department upheld her 2012 appeal, she (the head of department) abrogated her responsibility to ensure that the school applied her decision and simply accepted the school’s defiance of her authority.⁹⁷

⁹⁶ Founding affidavit, p. 143: 83, read together with head of department’s answering affidavit, p. 700: 114 – 116 and Minister’s answering affidavit, p. 829: 72 – 73.

⁹⁷ Further affidavit, 660: 9.

101. This is exemplified by the head of department's 30 May 2012 letter to Ms Saffer's attorney in which she expressed concern at the manner in which her exemption application had been dealt with by the governing body and undertook to address the matter in correspondence to the school. However, the rule 53 record reflects that the head of department's letter to the chairperson of the governing body on the same day simply explained the basis for her decision and requested the chairperson's assistance in its implementation. The letter conspicuously failed to communicate to the governing body any concern over the manner in which it had dealt with Ms Saffer's exemption application.⁹⁸ There is no evidence indicating that the head of department took the matter up with the governing body in any other way.

102. In the governing body's letter of 30 July 2012 it advised the head of department that it was unable to accede to her '*request*' to grant Ms Saffer a fee exemption for 2012 and reserved its right to proceed against both parents in terms of the Act.⁹⁹

103. This recalcitrant attitude was confirmed in a subsequent email from the school's attorney who advised the department that the school had indicated that it did not wish to be involved in unnecessary disputes with the department and advised it to address further correspondence to him. Rather than accepting the head of department's ruling, the attorney stated that the dispute between the school, Ms

⁹⁸ Further affidavit, p. 661: 11.

⁹⁹ Further affidavit, p. 662: 12.

Saffer and her ex-husband was the subject of pending litigation and would have to be dealt with through the courts.¹⁰⁰

104. In considering the implications of the school's decision to defy her authority, the head of department just noted that the department could incur fruitless and wasteful expenditure should it intervene in the legal process between Ms Saffer and the governing body.¹⁰¹

105. Ms Saffer justifiably stated that the head of department had completely disregarded her duty to respect, protect and promote her constitutional rights and left her at the mercy of a school set on defying the head of department's decision and intent on hauling her through costly litigation, in circumstances where she was unable to pay full school fees, never mind costly litigation.¹⁰²

¹⁰⁰ Ms Saffer's further affidavit, p. 662: 13.

¹⁰¹ Ms Saffer's further affidavit, p. 663: 16.

¹⁰² Ms Saffer's further affidavit, p. 663: 17.

THE RESPONDENTS' FAILURE TO COMPLY WITH THEIR CONSTITUTIONAL AND STATUTORY OBLIGATIONS

106. The respondents have failed in many respects to comply with their constitutional and statutory obligations to ensure that fee-charging public schools in the Western Cape comply with the requirements of the Act and regulations. We first consider the evidence set out in Ms Saffer's founding papers in support of this contention.

The EELC report

107. In February 2013 the Equal Education Law Centre ('EELC') submitted a report to the department: (i) describing a number of issues which had been identified as problem areas by people it had assisted; and (ii) making recommendations to enable the department to address the issues.

108. In summary, the report stated the following with regard to fee exemptions:

108.1 schools either do not inform parents of the exemption policies, or, where they do, this is done in such a way that it has the effect of discouraging their use or shaming parents into not applying for exemptions;

108.2 schools frequently sift poor learners during the application process to ensure that only parents who can guarantee full payment of fees are admitted;

- 108.3 De Hoop Primary School in its application form states that only parents who reside in the feeder area of the school may apply for exemptions from school fees; and
- 108.4 both Fish Hoek High School and Wynberg High School advise parents that they may apply for fee exemptions, but do so in such a way that emphasises the additional financial burden that this will place on other parents.
109. The report concludes by recommending that all schools make applicants aware of the provisions of the fee exemption policy and that schools desist from attempting to shame poor parents into not applying for admission into fee charging schools.¹⁰³
110. The head of department, in her response, claimed that she could not say whether the EELC report had been received by the department, but that she was certain that none of the issues raised in it were reported to her.¹⁰⁴ It is clear from the replying affidavits that the department did receive the report.¹⁰⁵

The case studies

111. The EELC also compiled case studies regarding how seven fee charging schools it had dealt with were applying the regulations.¹⁰⁶ This sample, although small in relation to the 570 fee charging schools in the Western Cape, nevertheless

¹⁰³ Ms Moyo's supporting affidavit, pp. 322 – 326: 11 – 13.

¹⁰⁴ Head of department's answering affidavit, p. 705: 136.

¹⁰⁵ Ms Saffer's replying affidavit, p. 899: 126 read together with Ms Moyo's confirmatory affidavit, p. 974: 6.

¹⁰⁶ Ms Moyo's supporting affidavit, p. 328: 22

provides a good indication of the broader problems. Only one of the seven schools, namely Edgemoor High School, appeared to have a proper understanding of what is required by the Act and the regulations with regard to the recovery of school fees, and made a genuine attempt to apply appropriate procedures.¹⁰⁷

112. The head of department accepts that there are some problems with the handling of fee exemptions, but she denies that they are widespread or that she is not dealing with them adequately.¹⁰⁸ We submit that this is not borne out by the respondents' evidence, which is considered below.

113. The head of department states, in relation to the affidavit deposed to by Ms Precillar Moyo on behalf of the EELC, that *'besides the seven cases referred to later in her affidavit she has not provided a statistically defensible sample set that shows that there is indeed a widespread pattern of abuse.'*¹⁰⁹

114. This approach is unrealistic. Ms Saffer and the EELC have provided this Court with the information available to them. They do not have the resources to gather a large *'statistically defensible'* as required by the head of department. The respondents, on the other hand, have no such handicap and they have, or should have, information at their disposal concerning the extent of the problems. They make no attempt to provide a comprehensive report on the extent of the issues. However, it is clear from the evidence that they do place before this Court, that

¹⁰⁷ Ms Moyo's support affidavit, p. 328: 22.

¹⁰⁸ Head of department's answering affidavit, p. 703: 128.

¹⁰⁹ Head of department's answering affidavit, p. 703: 128.

there are widespread problems with the application of the regulations. We shall demonstrate this below in the section entitled “*The respondents’ evidence*”.

115. We now turn to summarise the cases dealt with by the EELC.

Table View Primary School

116. The Chirwa family fled to the Cape from Zambia in 2004 as a result of the threat of political prosecution. Mr Chirwa has been recognised as a refugee in terms of s 24(3)(a) of the Refugees Act 130 of 1998. Since 2007 the family has enrolled their children at the Table View Primary School (“TVPS”). In 2008 the school did not respond to their application for a fee exemption. In 2009 they again applied, but were told by the school bursar that as they were refugees they did not qualify for an exemption. They subsequently received a letter from TVPS purporting to confirm that immigrants and refugees were not allowed to apply for exemptions. In June 2009 summons was issued against them for the recovery of outstanding fees, but in September 2012 the matter was struck from the roll after the school’s attorney failed to appear at court.

117. In 2010 the Chirwa’s again applied for a fee exemption and once more were informed by TVPS that refugees do not qualify for assistance. Later that year summons was again issued against Mr Chirwa for arrear school fees and judgment was granted in favour of TVPS in October 2010 and the property of the Chirwa’s were sold in execution of the judgment debt of R12 200,00.

118. In 2011 the Chirwa's again indicated that they wished to apply for a fee exemption, but no application form was provided to them and the school sent them a statement indicating that they had to pay the entire school fees in advance by 7 April of that year.
119. In 2012 the Chirwas' request to apply for a fee exemption was met with the response, from the bursar, that as foreigners they were not eligible. Later that year TVPS issued summons for R20 000, 00 for outstanding fees. Default judgment was granted against Mr Chirwa in September 2012 and a warrant of execution issued. The EELC is assisting Mr Chirwa in applying to rescind the default judgment and setting aside the warrant of execution.¹¹⁰
120. The head of department in her response attaches a statement from TVPS and although she claims that the principal of TVPS would depose to an affidavit confirming its correctness, no such affidavit has been provided.¹¹¹ Mr Chirwa's evidence accordingly stands uncontested. In any event, the unconfirmed report states that the Chirwas failed to apply for fee exemptions in the years from 2009 to 2012, without disputing Mr Chirwa's evidence that the school repeatedly informed him that, as a foreigner, he did not qualify for an exemption.¹¹²
121. The above evidence demonstrates that the Chirwas have been victims of a systematic abuse of the fee exemption procedures. Although the head of

¹¹⁰ Ms Moyo's affidavit, pp. 327 – 331: 16 – 32.

¹¹¹ Head of department's answering affidavit, p. 707: 142.

¹¹² See annexure "PV15": pp. 794 – 796.

department complains that the Chirwas' situation was not brought to her attention before the application was launched and that the department would in due course engage with the school and Mr Chirwa, the department has not provided any evidence as to whether such an engagement has taken place or, if it did, what the outcome was.¹¹³

De Hoop Primary School

122. Mrs Dunywa, a parent from Khayelitsha, had sought to obtain admission for her daughter at De Hoop Primary School, which rejected her application. De Hoop Primary School's application form limited eligibility for fee exemptions to parents who reside in the feeder area of the school, an unlawful restriction of parents' rights to access exemptions.¹¹⁴ The head of department responded by stating that she had referred the wording on the document to the principal concerned and claimed that the school has subsequently changed the form to comply with the requirements of the Act and regulations.¹¹⁵

Wynberg Girls Junior School

123. Ms Pasquallie is a divorcee and the father of her child, who is legally responsible for school fees in terms of their divorce order, failed to pay the fees.¹¹⁶ After granting Ms Pasquallie fee exemptions from her daughter's school fees in 2009,

¹¹³ See head of department's answering affidavit, p. 707: 144.

¹¹⁴ Ms Moyo's supporting affidavit, p. 331: 33.

¹¹⁵ Head of department's answering affidavit, p. 708: 146.

¹¹⁶ Ms Moyo's supporting affidavit, p. 333: 39.

2010 and 2011, the Wynberg Girls Junior School (“Wynberg”) in 2012 rejected her fee exemption application.¹¹⁷

124. The head of department attached to her affidavit a statement from Wynberg, but despite her claim that the content of the response would be confirmed by an affidavit from the principal, no such confirmatory affidavit was provided. The unconfirmed statement claims that Ms Pasquallie’s ex-husband reappeared at the school during 2012, made a payment and undertook to pay all school fees from then onwards.¹¹⁸ Wynberg accordingly turned down Ms Pasquallie’s application on the grounds that her application form was not complete as it did not contain her ex-husband’s financial information.¹¹⁹

125. In 2013 Ms Pasquallie applied for and was granted a 78% exemption from school fees.¹²⁰ However Wynberg subsequently instituted legal proceedings against Ms Pasquallie, claiming the 2012 school fees, without first complying with the procedures required by the Act and the regulations, in circumstances where it was clear that she was not in a position to pay the full school fees and that she did not have access to her husband’s financial information.

126. In addition, Wynberg did not inform her of her right to appeal to the head of department against the decision to refuse her 2012 application, nor did it explore with her the possibility of her meeting her outstanding obligations to the school

¹¹⁷ Ms Moyo’s supporting affidavit, p. 334: 40.

¹¹⁸ “PV16”, p. 797

¹¹⁹ “PV16”, p. 797.

¹²⁰ Ms Moyo’s supporting affidavit, p. 334: 40.

by means of reasonable form of payment other than cash, as required by Regulation 6(14)(b).¹²¹

Rondebosch Boys High School

127. The EELC report notes that Rondebosch Boys High School (“Rondebosch”) actively discourages grade 8 learners from applying for exemption in their first year of high school and only considers exemption applications when the financial circumstances of a family has changed. As a result, the school sifts out learners from poor families during the application process, thereby ensuring that only children of parents who can afford full payment of fees are admitted.¹²²

128. In response the head of department attaches a letter from Rondebosch (which is again not confirmed by affidavit), but neither the head of department nor the letter dispute what is stated in the preceding paragraph above.¹²³

Fish Hoek High School

129. The approach of the school to fee exemption applications has been detailed above in relation to Ms Saffer’s evidence. Ms Lisa Whyle’s affidavit confirms the harsh manner in which divorced parents are treated by the school.¹²⁴

¹²¹ Ms Moyo’s supporting affidavit, p. 334.

¹²² Ms Moyo’s affidavit, pp. 322 – 323: 31.1 – 31.2.

¹²³ Head of department’s answering affidavit, p. 709: 152 – 153, read together with annexure “PV17”, pp. 799 – 800.

¹²⁴ See Ms Whyle’s affidavit, pp. 933 – 939: 25 – 41.

The respondents' evidence

130. In many respects the evidence in the founding affidavits concerning the hardship caused by the Act and regulations in their current form, and abuses by schools of the fee exemption procedures, is confirmed by the respondents' affidavits. We begin by considering the head of department's response to the EELC cases.

The response to the EELC cases

131. Ms Moyo summarised the conclusions to be drawn from the cases dealt with by the EELC as follows:

“18. *It is apparent from the cases dealt with by EELC that fee-charging schools often do not inform parents of their right to apply for fee exemptions or provide those seeking the admission of their children into schools with copies of the applicable exemption policies and application forms. When they do inform parents of the availability of fee-exemptions, the information is often couched in terms which are designed to discourage parents from applying. Schools also place unlawful restrictions on the right to apply for exemptions, such as excluding refugees and immigrants or people living outside the feeder area of the school. I am not aware of any school that complies with its obligation in terms of Regulation 3(2) to display a copy of the Regulations in a conspicuous place.*

19. *The most common irregularities that EELC have encountered relate to the enforcement of school fees. Section 41(4) of SASA requires a school to ascertain that a parent does not qualify for a*

fee-exemption before instituting legal proceedings for the recovery of fees. Similarly, Regulation 3(1)(e) stipulates that if a parent is in arrears by one month or more, the governing body must investigate whether he or she qualifies for exemption before instituting legal proceedings. Schools routinely disregard these requirements, as will be detailed below. None of the schools that EELC has dealt with complied with Regulation 6(14)(b), which requires them to consider reasonable forms of payment other than cash before instituting legal proceedings for the recovery of fees. Similarly, I am not aware of any schools that have considered conditional exemptions in terms of Regulation 6(7) - for parents who do not qualify for exemptions but supply information indicating their inability to pay school fees owing to personal circumstances beyond their control - or the discretionary exemptions referred to in sections 168 and 170 of the Norms and Standards for School Funding.

20. *It is clear from the cases dealt with by EELC that the fee-exemption procedures are applied in a manner that causes great hardship for single parents, invariably women, who are not receiving maintenance from their former-partners.*

21. *Furthermore, parents who apply for funding are often simply not informed of the outcome of the application and the reasons for the decision (as required by Regulation 6(9)) or of their right of appeal to the Head of Department (as required by Regulation 6(13)).”¹²⁵*

¹²⁵ Ms Moyo’s affidavit, pp. 327 – 328: 18 – 21.

132. The most noteworthy aspect of the head of department's response to the above paragraphs is the allegations which are not disputed. These include:

132.1 schools often do not inform parents of their right to apply for fee exemptions or provide those seeking exemptions with copies of the applicable policies and application forms;

132.2 when parents are informed of fee exemption procedure, information is often couched in terms designed to discourage parents from applying;

132.3 schools place unlawful restrictions on the right to apply for exemptions, such as excluding refugees and immigrants or people living outside the feeder area; and

132.4 the fee exemption procedures are applied in a manner which causes great hardship for single parents, invariably women, who are not receiving maintenance from their former partners.¹²⁶

133. The head of department also fails to deal with, or dispute, Ms Moyo's statements that:

133.1 she is not aware of any school that complies with its obligation to display a copy of the regulations in a conspicuous place;

¹²⁶ Ms Moyo's affidavit, pp. 327 – 328: 18 – 20, read together with the head of department's answering affidavit, p. 706: 138 – 141.

133.2 none of the schools which EELC has dealt with complied with its obligation to consider reasonable forms of payment other than cash before instituting legal proceedings for the recovery of fees; and

133.3 she is not aware of any school that have considered conditional exemptions in terms of regulation 6(7) for parents who do not qualify for exemptions but supply information indicating their inability to pay school fees owing to circumstances beyond their control.

134. In the head of department's response to these paragraphs in Ms Moyo's affidavit, she limits herself to stating the following:

134.1 The EELC has not provided a statistically defensible sample that shows there is indeed a widespread pattern of abuse. This claim has been considered above;¹²⁷

134.2 Neither the applicant nor Ms Moyo have raised instances of the department not assisting when called upon to do so. This statement overlooks Ms Saffer's complaint that the head of department abrogated her responsibility to ensure that the school applied the Act and regulations in processing her exemption applications and capitulated in the face of the school's unlawful refusal to implement her 2012 appeal decision.¹²⁸ Ms Saffer's further affidavit concludes by stating that the head of department

¹²⁷ Under the heading "*The case studies*".

¹²⁸ Ms Saffer's further affidavit, p. 660: 9.

completely disregarded her duty to respect, protect and promote her constitutional rights and left her at the mercy of a school set on defying her (i.e. the head of department) and intent on hauling Ms Saffer through costly litigation. This was exacerbated by the fact that the record also demonstrates her failure to take any corrective action with regard to the school's abuses of the exemption procedures.¹²⁹ The head of department does not dispute or in any way deal with the damning contents of Ms Saffer's further affidavit of 21 January 2014.¹³⁰

134.3 The head of department claims that Ms Moyo overlooks the fee exemption compensation paid by the department to schools. Notwithstanding this compensation, the evidence gathered by EELC strongly suggests that schools do have a financial interest in discouraging fee exemption applications; and

134.4 The head of department claims that the appropriate remedy for schools unlawfully launching legal proceedings for the recovery of fees is the deferral or the failure of the enforcement proceedings.¹³¹ As Ms Saffer points out, it is cynical and unrealistic to expect financially burdened parents, who are unable to afford school fees, not to mention the expense of litigation, to defend legal proceedings in the courts. Many of these cases will be undefended, resulting in the parents being unable to resist

¹²⁹ Ms Saffer's further affidavit, p. 663: 17 – 18.

¹³⁰ Ms Saffer's further affidavit, pp. 657 – 664.

¹³¹ The head of department's answering affidavit, p. 706: 141, read together with p. 683: 47.

the claims.¹³² We submit that the head of department ought to understand her duty to protect parents from unlawful litigation.

Annexure “PV12”

135. Annexure “PV12” to the head of department’s affidavit - which has been discussed above in relation to the unconstitutionality of regulation 6(2) - establishes that the department accepts that a number of ‘critical’ issues are raised in this application which warrant amendments to the Act and the regulations.¹³³
136. Annexure “PV12” acknowledges that the regulations ‘*have become increasingly cumbersome to interpret and apply*’ and a number of schools are refusing to consider exemption applications or deny them for reasons ‘*not clearly defined in the regulations and ignore legal opinions on certain aspects of the policy provided by the department.*’¹³⁴ The department also accepts that the regulations are ‘*frequently difficult to apply*’ in view of their silence on ‘*certain common situations which affect parents’ obligation to pay school fees,*’ resulting in dissatisfaction amongst parents and litigation.¹³⁵
137. The concessions made by the department in “PV12” with regard to the definition of ‘*combined annual gross income*’, the difficulties which custodian parents often experience in obtaining details of the income of non-custodian parents and the

¹³² Ms Saffer’s replying affidavit, p. 898: 124, read together with p. 899: 128 and p. 915: 185.

¹³³ Annexure “PV12”, p. 780.

¹³⁴ Annexure “PV12”, p. 782.

¹³⁵ Annexure “PV12”, p. 784.

application of regulations, have been considered above in relation to the unconstitutionality of regulation 6(2) and those submissions are not repeated.

138. However, the department's submission also identifies the application of exemption procedures to refugees and asylum seekers as an issue to be considered and notes that certain schools demand full payment of school fees from foreign nationals in advance, irrespective of their residence status.¹³⁶

139. The submission further notes that regulation 6(1), which requires governing bodies to consider and determine exemption applications within 30 days, places a '*huge administrative burden*' on governing bodies.¹³⁷ This implies that a substantial number of governing bodies are failing to comply with the provision.

The departmental circulars

140. The departmental circulars issued by the head of department further support EELC's case. The 4 April 2011 circular issued by the head of department noted that it had received complaints from parents concerning, amongst other things:

140.1 the refusal of schools to provide parents with official application forms for fee exemptions;

¹³⁶ Annexure "PV12", p. 787: 4(a).

¹³⁷ Annexure "PV12", p. 786: 3(b).

- 140.2 governing bodies refusal to consider applications where parents do not provide all the required information;
- 140.3 the failure to notify parents of the outcome of their application; and
- 140.4 the failure to follow the prescribed procedures before launching legal proceedings for the payment of schools fees.¹³⁸
141. The circular records that ‘*it often happens that a legal process is instituted by a school against the parents to recover outstanding school fees, without first applying the above stipulation [i.e. regulation 3(1)].*¹³⁹ [emphasis added]
142. The circular also states that ‘*single parents, in particular, experience many difficulties in providing information about the non-custodian parent.*¹⁴⁰
143. On 5 August 2013 the head of department issued another circular in which she recorded, amongst other things, that it was apparent from complaints and enquiries received from the public that a number of provisions of the Act in relation to the payment of school fees were being disregarded. In paragraph 3.2 of the circular she noted that the following irregularities had been reported:

“(b) *Some schools refuse to provide parents with the application form on which to apply for school fee exemption.*

¹³⁸ Ms Moyo’s affidavit, p. 321: 7.

¹³⁹ Ms Moyo’s affidavit, p. 321: 8.

¹⁴⁰ Ms Moyo’s affidavit, p. 321: 9.

(c) *The admission of a learner is dependent on the ability of the parents or guardians to pay school fees.*

...

(e) *Foreign parents who have acquired residential and work permits are refused the right to apply for exemption from the payment of school fees.*

(f) *Parents are not informed of exemption policy.*

(g) *Parents who choose not to enrol their child at the nearest no-fee school, are told they cannot apply for fee exemption.”*

144. In summary, the effect of the respondent’s evidence is to strengthen and confirm EELC’s case that frequent and widespread infringements of parents’ constitutional and statutory rights are taking place. This is further reinforced by the respondents’ concession that the Act and regulations, in their present form, require amendment.

145. Given the evidence summarised above, we submit that a proper case has been made out for the declaratory orders sought in paragraphs 6.1 to 6.16 of the amended notice of motion.¹⁴¹

¹⁴¹ Amended notice of motion, pp. 986 – 990.

REMEDY

146. The head of department, the MEC and the Minister are the education authorities responsible for ensuring that:

146.1 the procedures set out in the Act and regulations in relation to fee exemptions and the recovery of school fees are followed; and

146.2 the payment of school fees does not constitute a barrier to learners' rights of access to education in fee paying public schools.

147. The following considerations are significant with regard to crafting an appropriate remedy to redress the infringements of the rights set out in the sections entitled "*Repeated violations of constitutional and statutory rights*" and "*The respondents failure to comply with their constitutional and statutory obligations*", read together with the discussion of the unconstitutionality of regulation 6(2):

147.1 the Minister's abrogation of her statutory responsibilities;

147.2 the department's failure to understand or accept the extent of the difficulties experience by parents seeking exemptions; and

147.3 the department's ineffectual attempts to deal with the problems.

The minister's abrogation of responsibility

148. In the Minister's answering affidavit she denies any failure to comply with her constitutional and statutory obligations to ensure that public schools in the Western Cape process fee exemption applications in a lawful manner, claiming:

'If and to the extent that any of the obligations referred to in this paragraph exist, they are duties of the First Respondent or the Fourth Respondent and not duties of the National Minister or the National Department of Basic Education (whose primary role is to set uniform norms and standards for public schools).'¹⁴²

149. The Minister fails to comprehend the extent of her responsibilities.

150. Section 8(1) of NEPA requires the Minister to monitor and evaluate the standards of education provision, delivery and performance throughout the Republic in order to assess progress made in complying with the provisions of the Constitution and national education policy.

151. Paragraph 46 of the Norms and Standards obliges the Ministry of Education to monitor all aspects of the implementation of the Act, in order to assess the extent to which its objectives are being met. It states that *'in particular, the effect of the new budget allocation policy on the current inequalities in school provision, the levels of fee charging by public schools and the uses to which such income is put,*

¹⁴² Minister's answering affidavit, p. 820: 45.

are all matters of legitimate concern to the Ministry and the public, which must be kept under review.’ [emphasis added]

152. In addition, paragraph 196 of the Norms and Standards requires the Ministry of Education, in cooperation with the provincial departments and independent school representatives, to monitor the application of the norms and standards in order to:

“(a) *monitor fee levels;*

(b) *monitor subsidy levels;*

...

(d) *ensure that national education policy objectives are being well served by the norms and their application.”*

153. The Minister attempt to wash her hands of her responsibility to monitor and evaluate the manner in which the fee exemption regulations are being applied cannot be sustained. She is under a duty to ensure that national education policy objectives, as reflected in the regulations and the Norms and Standards, are being served by the manner in which the regulations are being applied.

The respondents’ failure to accept the extent of the problem

154. We have shown above in our analysis of the respondents’ answering papers that there is compelling evidence that widespread and recurring problems are being experienced by parents seeking fee exemptions.

155. However, the respondents seem intent on turning a blind eye to these problems.

This can be illustrated by:

155.1 the head of department's admission that the department has not developed measures for assisting schools in applying the regulation 6 formula, despite being required to do so by regulation 10(1);¹⁴³ and

155.2 the contradictory stance adopted on behalf of the Minister, who concedes that while the regulations '*create practical difficulties for parents like the Applicant who struggle to get the requisite financial information from the other parent*', and claiming legislative amendments to address the difficulty are being prepared,¹⁴⁴ while at the same time denying that it is unreasonable to require applicants for exemption to furnish financial information from both parents.¹⁴⁵

Regulation 10(1)

156. The head of department attempts to explain the failure to develop measures for assisting schools in applying the regulation 6 formula on the grounds that the department '*has concluded that the formula for the calculation of school fee exemption as indicated in the Regulations is so uncomplicated that it does not warrant any special measures to assist schools in applying it.*'¹⁴⁶

¹⁴³ Head of department's answering affidavit, p. 682: 42.

¹⁴⁴ Minister's answering affidavit, p. 816: 32.

¹⁴⁵ Minister's answering affidavit, p. 822: 51.

¹⁴⁶ Head of department's answering affidavit, p. 682: 42.

157. The above claim is contradicted by annexure “PV12”, in which it is acknowledged that the regulations are ‘*frequently difficult to apply*’ given that they are silent on certain common situations affecting parents’ obligations to pay school fees, resulting in dissatisfaction and the institution of legal proceedings. Examples of the problems identified in Annexure “PV12” include the definition of combined annual gross income - a key component in the formula which the head of department claims is so uncomplicated that there is no need to assist schools in applying it.¹⁴⁷

158. In addition, the head of department now claims that she wrongly applied the formula in upholding Ms Saffer’s 2012 appeal.¹⁴⁸ She also concedes that the regulations are not clear with regard to the responsibilities of divorced parents in relation to the payment of school fees.¹⁴⁹

159. We accordingly submit that the claim that the formula is so uncomplicated as not to warrant the development of measures for assisting schools in applying it is demonstrably false. It is symptomatic of the department’s failure to comprehend the extent of the problems with which it is faced.

Access to financial information

160. The Minister’s affidavit states, on the one hand, that she accepts that the regulations create practical difficulties for parents like Ms Saffer who struggle to

¹⁴⁷ Annexure “PV12”, pp. 784 – 785.

¹⁴⁸ Head of department’s answering affidavit, p. 697: 104

¹⁴⁹ Rule 53 record, p. 551.

obtain the required financial information from their ex-partners and that this warrants the preparation of legislative amendments to redress the situation.¹⁵⁰ However, in the very same affidavit, the Minister denies that it is unreasonable for the regulations to require financial information from both parents.¹⁵¹ This amounts to claiming that it is not unreasonable for the regulations to impose an obligation to obtain financial information, even if this will create practical difficulties for vulnerable custodian parents such as Ms Saffer (and inevitably render the fee exemption procedures unworkable for many such parents).

The department's ineffectual response

161. The primary measures taken by the department to address the problems raised in this application have been to issue circulars to *inter alia* principals of governing bodies, in 2006, 2011 and 2013. The head of department does not claim that the circulars have had any great impact and the evidence before this Court reflects that the department has been toothless in dealing with schools that have failed to comply with the exemption procedures.

162. Ms Saffer's case proves the point. She states in her supplementary affidavit that the manner in which the head of department allowed the school to defy her authority demonstrates that the department lacks the will to address the far-reaching irregularities in the exemption procedures and necessitates a court

¹⁵⁰ Minister's answering affidavit, p. 816: 32.

¹⁵¹ Minister's answering affidavit, p. 882: 51.

supervised process to ensure that the rights of vulnerable parents will be protected and promoted.¹⁵²

163. Annexure “PV12” shows that Ms Saffer’s case is not an isolated example and that there have been a number of instances in which schools have defied instructions from the head of department with regard to fee exemption applications. The department’s submission states that the head of department “*does not have any recourse*” to deal with schools that defy her instructions in such cases.¹⁵³ This reflects that the head of department does not grasp the extent of her powers under the Act to ensure that governing bodies comply with its provisions.

164. Section 22 of the Act reads 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;*

¹⁵² Ms Saffer’s further affidavit, p. 664: 19.

¹⁵³ Annexure “PV12”, p. 787: 4(c).

- (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.”*

165. The authority of a head of department to revoke a function conferred by s 22(1) of the Act is broad, in the sense that it relates to any function of a governing body conferred by the Act. Nothing in the text, purpose or overall scheme of the Act

justifies a limitation on the power of a head of department to withdraw a governing body function in terms of s 22.¹⁵⁴

166. Once a function has been properly withdrawn in terms of s 22(1), it is vested with the head of department, who is entitled and duty bound to exercise it in the furtherance of a goal permitted by the Act. The head of department has to exercise the withdrawn function only for as long as, and in a manner that, is necessary to achieve the remedial purpose for which it has been withdrawn.¹⁵⁵
167. The head of department could also approach the courts to compel governing bodies to comply with their obligations under the regulations, if the issues cannot be addressed adequately through a process of good faith engagement.¹⁵⁶
168. However, the head of department is either unaware of the extent of her powers or not prepared to exercise them against schools which defy her authority or abuse the exemption procedures. There is no indication that she has begun taking steps to identify the schools (apart from Fish Hoek High) which are consistently flouting the statutory exemption procedures, still less that she has initiated any good-faith engagement process, which is a necessary prelude to more stringent action, either in terms of s 22(1) of the Act or by means of litigation.

¹⁵⁴ *Head of Department, Mpumalanga Department of Education and another v Hoerskool Ermelo and Another* 2010(2) SA 415 (CC) [69] – [70].

¹⁵⁵ *Hoerskool Ermelo* [87] – [88].

¹⁵⁶ *MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others* 2013 (6) SA 582 (CC) [41], [68] and [73].

169. We submit that the head of department's reflects a failure to understand the impact of the abuses on vulnerable parents or a lack of resolve to deal with the problems, if not both. In either event, a structural interdict, as proposed in paragraph 8 of Ms Saffer's amended notice of motion,¹⁵⁷ is required to ensure that the Minister and the department comply with their constitutional and statutory obligations and that the rights of vulnerable parents are respected and protected.

¹⁵⁷ Amended notice of motion, p. 990.

CONCLUSION

170. Ms Saffer requests an order in terms of paragraphs 1, 2, 3.3, 3.4, 5, 6, 7 and 8 of her amended notice of motion,¹⁵⁸ together with a costs order, including the costs of two counsel, against the respondents, jointly and severally.

171. In the alternative to prayer 3.3, Ms Saffer seeks an order in terms of prayer 3.1, in the further alternative prayer 3.2, of her amended notice of motion.¹⁵⁹

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4 March 2016

¹⁵⁸ Amended notice of motion, p. 985 – 991.

¹⁵⁹ Amended notice of motion, p. 985.