IN THE CONSTITUTIONAL COURT

Case No.: CCT 209/15

In the matter between:

FEDERATION OF GOVERNING BODIES OF SOUTH AFRICAN SCHOOLS Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL First Respondent

HEAD OF DEPARTMENT, EDUCATION, GAUTENG Second Respondent

and

EQUAL EDUCATION Amicus Curiae

EQUAL EDUCATION'S HEADS OF ARGUMENT

INTRODUCTION

1. Equal Education has been admitted as an amicus curiae in this application for leave to appeal between FEDSAS, the Member of the Executive Council ("**MEC**") and the Head of Department for Education in Gauteng Province.[1]

2. FEDSAS challenges the validity and lawfulness of the amendments to the Gauteng Regulations for Admission of Learners to Public Schools, published in 2012.[2] ("**the Gauteng Regulations**")

[1] The application for admission was filed on 23 March 2016 within the time periods set by Rule 10 of the Constitutional Court Rules. On 30 March 2016, this Court ordered that Equal Education is admitted as an amicus curiae.

[2] The Regulations for Admission of Learners to Public Schools Published in Provincial Gazette Extraordinary, No. 127, General Notice 1160 of 2012 on 9 May 2012. The Gauteng Regulations are at pages 55 - 83 of the Paginated Papers. The High Court

3. Equal Education aligns itself with the submissions of the MEC and the conclusions of the Supreme Court of Appeal. Equal Education commends the Gauteng MEC and Department of Education on its commitment to equality and transformation through the promulgation of the Gauteng Regulations. However, Equal Education makes two primary submissions in relation to the implementation of the powers under the Gauteng Regulations:

3.1. Firstly, Equal Education submits that the default regime created by regulation 4(2) determines school feeder zones solely on the basis of proximity. This criteria, although neutral on its face, coincides with racially based apartheid urban divisions. The differentiation has a disparate racial impact and the implementation of the feeder zones amounts to indirect unfair discrimination on the basis of race, and a violation of section 9(3) of the Constitution.

3.2. Secondly, Equal Education contends that until the Norms and Standards dealing with school capacity are in force, the MEC, Head of Department ("**HOD**") and department officials must exercise their powers and perform their functions under the Gauteng Regulations in accordance with the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, promulgated on 29 November 2013[3] ("**Infrastructure Norms and Standards**") to ensure the achievement of equality and fulfilment of the right to basic education under section 7(2) of the Constitution.

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judgment is at pages 84 - 105 of the Paginated Papers. The Supreme Court of Appeal judgment is at pages 106 - 127 of the Paginated Papers. In this Court, FEDSAS seeks leave to appeal against paragraphs 3 and 4(a) of the Supreme Court of Appeal's order that upheld the MEC's appeal against the judgment of Janse van Nieuwenhuizen AJ in the South Gauteng High Court which declared the Gauteng Regulations ultra vires and set them aside.

[3] Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure Published in Government Gazette No. 37081 on 29 November 2013.

OBLIGATION TO PROMOTE THE ACHIEVEMENT OF EQUALITY

4. The exercise of the MEC's powers in the Gauteng Regulations must be considered in light of the transformative imperatives set out in the education legislation as well as the two obligations directly imposed by the Constitution on the MEC and HOD and their officials.

5. Section 9(2) places on the state a positive obligation to promote the achievement of equality.[4] Substantive equality for all South Africans is key to the transformation required by the Constitution. For this reason, equality is one of the fundamental goals fashioned by the Constitution.[5] It is the *"bedrock of our Constitutional architecture*" and *"a standard which must inform all law and against which all law must be tested for constitutional consonance*."[6]

6. This positive duty on the state acknowledges that the project of transformation and the journey to equality in South Africa is on-going. In **Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa** Mahomed DP noted *that "[g]enerations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid…".* [7] In **Minister of Finance and Other v Van Heerden**, Moseneke warned that *"[a]bsent a positive commitment progressively to eradicate socially*

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[4] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 24, Moseneke J noted:

> "Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality – a duty which binds the judiciary too" (footnotes omitted).

[5] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) Ngcobo J at para 74.

[6] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) Moseneke J at para 22.

[7] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) at para 43.

constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."[8]

7. Similarly, section 7(2) of the Constitution places an obligation on the MEC to respect, protect, promote, and fulfil the right to equality and the right to basic education. Equal access to basic education for children in South Africa is key to achieving substantive equality. Section 29 has been interpreted by our courts to entail a package of rights and services and to impose an obligation on the State to not only provide education but to also simultaneously redress past imbalances caused by the racially discriminatory laws and practices of the Apartheid era.[9]

8. This Court has emphasised that "*education is the engine of any society*"[10] and equal access to education is the key to the realisation of other constitutional rights. It is the primary way in which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. As the Court noted in **MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others** "*[c]ontinuing disparities in accessing resources and quality education perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity*".[11]

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[8] Minister of Finance and Other v Van Heerden 2004 (6) SA 121 (CC) at para 31.

[9] *MEC for Education, Northern Cape Province, and Another v Bateleur Books (Pty) Ltd and Others* 2009 (4) SA 639 (SCA) Jafta JA at para 31.

[10] *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC) Moseneke DCJ at para 2.

[11] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) Mhlantla AJ at para *2*.

9. The link between the right to equality and the right to basic education is also recognised by Parliament. Collectively, the education legislative framework speaks to the eradication of all forms of discrimination in education and the redress of past inequality in education provision.[12]

10. These fundamental obligations must form part of the contextual and purposive interpretation of SASA and the Gauteng Regulations. The legislation and subordinate legislation must be read in light of the desperate inequality persisting in Gauteng, and the need of the Gauteng Department of Education to ensure that there is an equitable distribution of learners across the system. This approach accords with section 39(2) of the Constitution and this Court's jurisprudence requiring an approach that interprets legislation through a constitutional lens[13] and has "*regard to the context in which the words occur, even where the words to be construed are clear and unambiguous*."[14] Courts are also required to pay "*close attention to the socio-economic and institutional context in which a provision under examination functions*."[15]

[12] See, the Preamble and section 34 of the South African Schools Act 84 of 1996, as well as section 4 of the National Education Policy Act 27 of 1996 .

[13] Section 39(2) reads: "[w]hen interpreting any legislation … every court ... must promote the spirit, purport and objects of the Bill of Rights."

[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2 Ngcobo J at para 90, quoted with approval in *Du Toit v Minister for Safety and Security and Another* 2009 (12) BCLR 1171 (CC) Langa CJ at para 38.

[15] South African Police Service Association 2007 (3) SA 521 (CC) Sachs J at para 20

RACE AND GEOGRAPHY IN GAUTENG

11. Despite formal desegregation, the legacy of apartheid spatial planning persists across South Africa and in Gauteng. Academic studies and writing concludes that in post-apartheid South Africa geography, race and socio-economic status remain highly correlated.

11.1. Beall, Crankshaw and Parnell recognise that the inequalities of apartheid persist in Johannesburg along geographic and racial lines:

> *"poverty in Greater Johannesburg is geographically concentrated. It's distribution still follows the pattern of residential segregation laid down during the apartheid period which saw the removal of African people from the central city and their confinement to townships located at some distance from the city centre. Apartheid planners deliberately reinforced this residential segregation. … The recent erosion of racial residential segregation has done little to affect the geography of inequality in Johannesburg."*[16]

11.2. Yamauchi's research findings showed that both historical constraints (apartheid inequality and spatial segregation) as well as financial constraints played a significant role in access to quality education.[17] He finds that "*the legacy of apartheid imposes historical constraints on the spatial distribution of income and population grounds. Good schools are located in selected areas. This has maintained inter-racial diversity in access to good education, as well as racial and socio-economic homogeneity within neighbourhoods*." Despite the removal of apartheid restrictions on mobility, poorer people are prevented from moving to well-off areas that have better education opportunities

[16] Bealll, J and Crankshaw, O. 2000. Local government, poverty reduction and inequality in Johannesburg in Environment and Urbanization Vol. 12 No. 1. p116.

[17] Beall et al, p155.

because of financial constraints. Ultimately, the opportunity for better education is geographically correlated with land prices. The study showed that "*formerly white schools are located in subplaces where the population of whites is still the majority."*[18]

> *"Residential area choice is limited even now, so schools that are locally available to African children are largely formerly African schools, many of which are historically disadvantaged. Schools in well-off areas can charge higher school fees, which finance school inputs, and, by doing this, can also avoid the enrolment of children from low-income families."*[19]

11.3. Furthermore, it still matters whether a learner attends a school from a historically 'black' area or a historically 'white' area. Van den Berg concludes that race remains a major factor to explain school performance. He finds that despite massive resource shifts to black schools, overall matriculation results did not improve in the post-apartheid period. The persistence of former racial inequalities is reflected in extremely poor pass rates in mainly black schools. Regressions of matriculation pass rates from school level data show that racial composition of schools – as a proxy for former school department – remains a major explanatory factor beside socio-economic background and educational inputs. [20]

11.4. Bell and McKay conducted an empirical study in Sandton, Gauteng, investigating the extent to which socio-economic status influences access to public secondary schools in this former 'white' area. They

[18] F Yamauchi (2011) *School Quality, Clustering and Government Subsidy in Post-Apartheid South Africa* Economics of Education Review 30: 146-156 p150.

[19] Yamauchi, p148.

[20] S. Van der Berg (2007) *Apartheid's Enduring Legacy: Inequalities in Education* Journal of African Economies 16(5): 849-880.

found that geographic catchment zones superimposed on embedded residential class patterns were a strong influence on the class profile of these schools.[21]

11.5. Hunter notes that children born to very poor residents of urban informal settlements face considerable barriers when trying to access well-resourced schools.[22] While there is formal desegregation, the way in which class and race are embedded into access to schooling has become far more complex. Hunter highlights school admissions processes, both formal and informal, as one of the primary factors shaping the inequality in schools in South Africa:

> *"(b) Admissions. All of the schools agreed that they had a legal obligation to admit a child when the school was the nearest to the child's home. Schools differed, however, as to whether they drew on a more informal rule that place of work must be considered during admissions (the inspector I spoke with said that this should be considered). Students admitted from out of area typically amount to between 40% and 70% of total enrolments for former white schools. Most former white schools conduct admissions interviews."*[23]

12. Despite acknowledging the inequality in access to education that still persists in Gauteng, neither the MEC nor the Supreme Court of Appeal considered the "*inextricable link*" between geography and race in South Africa that has been confirmed in academic literature as described above, and highlighted by this Court.[24]

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[21] J Bell and T Morton McKay (2011) *The Rise of 'Class Apartheid' in Accessing Secondary Schools in Sandton, Gauteng* Southern African Review of Education, 17: 27-48.

[22] M. Hunter (2010) *Racial Desegregation and Schooling in South Africa: Contested Geographies of Class Formation* Environment and Planning A 42(11):2640-2657, p2640

[23] Hunter, p 2647.

[24] In the High Court, the MEC emphasised that "the inequality in access to education that persists in Gauteng is characterised by deep inequality in the distribution of resources along racial lines. Schools with adequate resources and infrastructure tend to be located in white communities while those without access to these resources tend to be in black communities". Page 206, Vol. 2, Para 12, Answering Affidavit in High Court; Record.

12.1. In **City Council of Pretoria v Walker**, Langa CJ held that: **"***The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory*."[25]

12.2. In **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others** , O'Regan J noted at para 264 how the legacy of apartheid persists in the shortage of housing in Cape Town:

> *"In this case, that legacy is sharply reflected in the desperate shortage of adequate housing for African people in one of our major urban centres, Cape Town. As several of my colleagues have described, that shortage arose in part because of the apartheid government's 'Coloured labour preference policy' in terms of which African people were not afforded rights to reside in the Western Cape; and housing was not built for them."*

13. Outside of the facts of this case, this Court has noted and accepted the way in which "*the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners*".[26] This Court has held that historical and persistent inequality threatens the full and equal enjoyment of the right to basic education. In Rivonia this Court held that the "*radically unequal distribution of resources – related to a history of systemic discrimination" – still makes the constitutional guarantee of the right to a basic education "inaccessible for large numbers of South Africans*".[27]

The SCA noted that the education system inherited by the first democratic government was a segregated one which was "marked by disproportionate government spending on the education of white children above the children of other racial groups, least of all black children." Page 110, Paginated Papers. Para 9, SCA Judgment.

[25] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) at para 32.

[26] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 42. See also *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 2.

[27] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) at para 1.

UNFAIR DISCRIMINATION

The determination of feeder zones under the Gauteng Regulations

14. Regulation 4 deals with the determination of feeder zones for admission of entry phase learners. These are learners attending a new school at grade 1 or grade 8.[28] Regulation 4 is complemented by Regulation 33 of the Admission Policy for Ordinary Public Schools (promulgated under NEPA).[29] A feeder zone is "*an area that a school should prioritise when admitting learners and taking into consideration learners who live close or whose parents work close to that school*."[30]

15. The MEC is empowered to determine feeder zones under regulation 4(1). She has not done so.[31] To cater for this interim period, regulation 4(2) provides that an interim default feeder zone regime will apply. This default feeder zone regime is based solely on the distance between the school and the learners' home or parent's workplace.[32] We refer to this criteria as the criteria of "proximity".

16. A learner will fall into a feeder zone of a school if that school is either within a 5km radius of the learner's place of residence, or their parent's place of work,

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[28] Regulation 4(1) reads as follows: "Subject to the National Education Policy Act No. 27 of 1996 and other applicable laws the MEC may, by notice in the Provincial Gazette, determine the feeder zone for any school in the Province, after consultation with the relevant stakeholders have been conducted.

[29] GN 2432 GG 19377 of 19 October 1998. It provides: "A Head of Department, after consultation with representatives of governing bodies, may determine feeder zones for ordinary public schools, in order to control the learner numbers of schools and coordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other."

[30] Page 56, Paginated Papers. Page 90, Record.

[31] Page 122, Paginated Papers. Para 34, SCA Judgment.

[32] Regulation 4(2) provides:

> "Until such time as the MEC has determined a feeder zone for a particular school, in relation to a learner applying for admission to that school, the feeder zone for that school will be deemed to have been determined so that a place of residence or work falls within the feeder zone, if:
>
> (a) relative to that place of residence or place of work, the school is the closest school which the learner is eligible to attend, or
>
> (b) that place of residence or place of work for that parent is within a 5km radius of the school."

or it is closest school to the learner's residence or their parent's place of work that the learner is eligible to attend.

17. Similarly, the MEC is empowered in terms of regulation 4(3) to designate a primary school as a feeder primary school for a high school. The interim default feeder school regime in regulation 4(4) is that the closest primary school to a high school is the feeder primary school for that high school.

18. Learners may apply for admission to any public school. The regime does not preclude a learner who falls within one feeder zone from seeking admission at school in another feeder zone. However, regulation 7(1) requires schools to create Waiting List A for those learners who fall within the feeder zone or who have a sibling at the school. Any other applicants must be placed on Waiting list B. The available places at the school are filled from Waiting List A in the order of the position of the applicant on the waiting list. It is only if any places remain after all the applicants on waiting list A have been offered places, that the learners from Waiting List B are offered places.

19. While the feeder zones are not compulsory, the very harm of compulsory feeder zones arises in practice. Woolman and Fleisch contend that compulsory zoning regulations were not created post-apartheid as policy makers were of the view that regulations of this sort would prevent learners in predominantly black communities from accessing better resourced schools in predominantly white, privileged communities.[33] Such regulations, according to Woolman and

[33] S. Woolman and B Fleisch *The Constitution in the Classroom: Law and Education in South Africa* (Cape Town: Pretoria University Law Press, 2009) at 9.

Fleisch would arguably constitute unfair discrimination and lead to the impairment of dignity.[34]

The determination of feeder zones solely on the basis of proximity unfairly discriminates

20. Subsection 9(3) of Constitution prohibits both direct and indirect discrimination on listed grounds which include race, ethnic and social origin, colour and birth. In this manner, it is concerned with the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 9(3) of the Constitution.[35] Unfair discrimination in the admission of learners to public schools is also expressly prohibited in the Schools Act and the Gauteng Regulations.[36]

21. A potential infringement of the right to equality must be examined through the enquiry in **Harksen v Lane NO:**[37] (a) Does the differentiation amount to discrimination? [38] (b) Is the discrimination unfair? (c) If the unfair discrimination arises out of a law of general application, is it justified.[39]

22. In **City Council of Pretoria v Walker** the Council had allowed residents of (previously black) townships to pay a flat (and lesser) rate for municipal

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[34] Woolman and Fleisch at 9.

[35] Currie & De Waal *The Bill of Rights Handbook* 6 ed (Cape Town, 2014) Juta (Currie & De Waal) at 238. *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)) at para 31.

[36] Section 5 of Schools Act, relating to the admission of learners to public schools, provides that public schools must admit learners without unfairly discriminating in any way.

Regulation 3 of the Gauteng Regulations, requires that the admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission.

[37] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 53.

[38] *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) at para 31.

[39] Currie & De Waal at 216.

services and had refrained from collecting arrear payments in these areas. In contrast, the mostly white residents of "old Pretoria" were required to pay a metered rate for services, and arrear payments were enforced. The late Chief Justice Langa stated that "*the effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory*." For this reason, "*conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race*."[40]

23. A similar reasoning applies in the current case. Proximity purports to be a neutral criteria in the determination of the default feeder zones. However, this facially neutral determination has a disparate racial impact.

24. This Court can accept that geography and race are inextricably linked in Gauteng. Black learners will primarily live in historically 'black areas'. They will fall into the feeder zones for historically 'black schools' that continue to be poor, under-resourced and under-performing. On the contrary, white learners living in affluent previously 'white areas' will fall into the feeder zones for historically white, privileged schools.

25. In this way, the determination of feeder zones on the basis of proximity only, creates an admission system that indirectly discriminates on the grounds of

[40] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC at para 32.

race and colour. The discrimination on a specified ground is presumed to be unfair and is a contravention of section 9(3) of the Constitution.

26. Despite learners having the option to seek admission in schools in whose feeder zones they did not fall, Equal Education has continued to observe that the limitation of schools' intake based on geographical location results in the exclusion of black learners from more affluent schools despite them having the capacity to take on more learners.[41]

Limits to the MEC's power and timeframes

27. The Gauteng Regulations do not specify a time period in which the MEC must determine the feeder zones, or what factors to take into account. The MEC has a positive duty to promote the achievement of equality and the right to basic education. The determination of the feeder zones after the necessary consultation is a key step in ensuring the substantive right to equality, education and the best interests of the child.

28. Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. This section can be read with section 195 which sets out the values and principles that must govern public administration. In ***Minister for Justice and Constitutional Development v Chonco and Others***[42] this Court held the delay in fulfilling constitutional

[41] E Fiske and H Ladd *Elusive Equity: Education Reform in Post- apartheid South Africa* (Washington DC: Brookings Institution Press, 2004) at 4.

[42] *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC).

obligations "*is out of kilter with the vision of democratic and accountable governance*."[43]

29. The MEC has a constitutional obligation to determine the feeder zones without delay in order to curtail the time that the default feeder zone regime is in place, and to prevent further infringements on learners' rights to equality and basic education.

30. It is no answer to say that the default feeder zone is merely an interim position. Even at a transitional level, the discrimination is unacceptable. The feeder zones affect entry level learners who are likely to remain in the school where they begin grade 1 or grade 8. The discrimination will be perpetuated until these learners finish school.

31. Equal Education submits that the default feeder zone regime further entrenches current discriminatory practices that result in the exclusion of poorer learners from more affluent schools. This Court cannot endorse such a regime.

32. FEDSAS challenges the constitutionality of the Gauteng Regulations. To the extent that this Court considers the operation of the default feeder schemes to constitute a breach of section 9(3), Equal Education submits that this Court should find and declare the regulation unconstitutional and invalid, and that in order for the education system to be the indispensable tool in transforming learners' socio-economic futures, school feeder zones must be determined on the basis of factors other than geographic vicinity.

[43] *Chonco* at para 45.

33. In addition, Equal Education urges this Court to provide direction to the MEC in this regard, and to compel the MEC to determine the feeder zones by a predetermined date or in accordance with a published timeframe. To this extent, Equal Education supports FEDSAS's position with regard to regulation 4(2).[44]

CONSTITUTIONAL CONSTRAINTS ON POWERS UNDER THE REGULATIONS

34. The Regulations 5 and 8 give extensive powers to the MEC, HOD and department officials in respect of the admission of learners to schools.[45]

35. Equal Education aligns itself with the MEC's contention that regulation 5 and 8 of the Gauteng Regulations are not in conflict with provincial or national legislation. The MEC rightly submits that section 5(5) of the South African Schools Act 84 of 1996 which governs the powers of school governing bodies over admissions states that it is subject to the Act and to "*any applicable provincial law*". Indeed, as the MEC points out, this proviso was recognised in **Rivonia**.[46] The legal and policy framework governing admissions constructs a scheme where the MEC and HOD have ultimate oversight over the implementation of admission decisions, which enables the province to fulfil its responsibility to ensure that every learner can be placed at a school.

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[44] FEDSAS Heads of Argument, para 66.

[45] Regulation 8(1) provides that:

> "Notwithstanding the provisions of the admission policy of a school, or the provisions of any national or provincial delegated legislation or any determination made in terms thereof, for the purpose of placing learners whose applications for admission have not been accepted at any school in the public schooling system, until such time as norms and standards contemplated in section 5A(2)(b) of the South African Schools Act are in force, the objective entry level learner enrolment capacity of a school shall be determined by the Head of Department."

[46] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) at para 41.

36. However, in respect of the implementation of those powers, Equal Education submits that the exercise of the MEC and HOD's powers in terms of the Gauteng Regulations must be consistent with and informed by its obligation to promote the achievement of equality and the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, promulgated on 29 November 2013.[47]

37. Section 5A(1)(a) and (b) of SASA empowers the Minister to introduce minimum norms and standards regarding the *"capacity of a school in respect of the number of learners a school can admit"*. These include norms on the class size, the number of teachers and the spatial size of a classroom and, the "utilisation of available classrooms of a school". ("**the Capacity Norms and Standards**") The Capacity Norms and Standards have not been prescribed. This Court has noted that this "regrettable" situation causes a number of difficulties.[48] This is particular so in respect of the determination of objective enrolment capacity. Regulation 8(1) clearly contemplates that the MEC's power will be governed by the Capacity Norms and Standards.

38. In the absence of Capacity Norms and Standards, regulation 8(1) empowers the HOD to determine the objective entry level learner enrolment capacity of a school.

39. Once a school reaches its objective entry level enrolment capacity, the HOD or his or her delegate may declare the school full.[49] Until a school reaches its objective entry level enrolment capacity and is declared full, regulation 5(8)

[47] Government Gazette no. 37081.

[48] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) at para 38.

[49] Regulation 8(3).

permits the District Director to place a learner in a school if the learner has not been placed in any school 30 days after the end of the admission period.[50]

40. Without the Capacity Norms and Standards in place, the HOD determines the objective enrolment capacity merely by consideration of the factors set out in the definition: availability of space, classroom and educators, resources linked to teaching and learning; available state resources; and the immediate need of the learners to receive basic education.[51]

41. These general factors provide no clear yardstick for determining when a school can be considered under capacitated and the nature (both overall and on a classroom level) and extent of under- subscription at that school, nor do they require that the powers are exercised in accordance with the transformative mission of the education legislation.

42. This Court has held that it is not enough for Parliament or the Executive to assume when granting powers to officials that the constitutional obligations of the state will always be fulfilled.[52] Nor should it be assumed that the exercise of powers under the Gauteng Regulation will always be used for transformative purposes as intended by the Gauteng Regulations.

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[50] The Gauteng Regulations impose two requirements limiting the schools in which the District Director or HOD may place a learner: The school must be one where there are no remaining unplaced learners on a waiting list, and the school must be one that has not been declared full in terms of Regulation 8.

[51] Page 57, Definitions of the Gauteng Regulations. The Gauteng Regulations define 'objective entry enrolment capacity' as:

> *"the act of officially admitting a learner to a total school programme in the maximum amount that the school can accommodate the learner in a classroom and/or facilities as determined by the HoD on consideration of, amongst other things: the availability of space, classroom and educators; resources linked to teaching and learning and the immediate need of the learner to receive basic education."*

[52] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 54.

43. For this reason, in the absence of the Capacity Norms and Standards, Equal Education submits that the MEC and HOD must exercise their powers in conformity with the Infrastructure Norms and Standards.

43.1. Both sets of Norms and Standards seek to act as the framework for MECs/HODs to ensure, in accordance with their constitutional obligation, that schools, as state resources, are managed in an *"efficient, economic, and effective"*[53] manner.

43.2. The Infrastructure Norms and Standards are a method of promoting the achievement of equality. This is evident from the Preamble which makes reference to the "systemic inequalities" experienced by learners as a result of the "legacy of apartheid" and the "uneven development with regard to the provision of basic school infrastructure to all public schools."

43.3. The Infrastructure Norms and Standards set out the minimum space in a school allocated for each learner and educator[54] and the acceptable norms for class size.[55] A class size of Grade R learners is a maximum of thirty learners and a maximum of forty learners for other classes. They are directly relevant to the issue of objective enrolment capacity.

44. In this manner, the Infrastructure Norms and Standards can provide essential direction to the exercise of powers under the Gauteng Regulations and secure its transformative purpose now and in the future.

[53] The Constitution, section 195(1)(b).

[54] Regulation 9.

[55] Regulation 9(2).

CONCLUSION

45. In the circumstances, Equal Education submits that the application should be dismissed, and that this Court, in its interpretation and application of the Gauteng Regulations, pronounces on the issues raised by Equal Education in order to give further guidance to the MEC in fulfilling her constitutional obligations.

Tembeka Ngcukaitobi

Frances Hobden

Chambers, Sandton

14 April 2016

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