IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 18246/15

In the matter between:

FEDSAS Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF EDUCATION:
GAUTENG PROVINCE First Respondent

THE HEAD OF DEPARTMENT
DEPARTMENT OF BASIC EDUCATION:
GAUTENG PROVINCE Second Respondent

EQUAL EDUCATION Amicus Curiae

HEADS OF ARGUMENT OF EQUAL EDUCATION

INTRODUCTION

1. In February 2016, Equal Education ("EE") was admitted as an amicus curiae by the consent of all the parties to this matter, in terms of Rules 16A(2) and (3) of the Uniform Rules of Court. Out of an abundance of caution, EE will file an application for admission with these submissions, which will be moved at the hearing.

2. Equal Education is a membership-based democratic movement of learners, teachers, parents and community members and a non-profit organisation. Its core objective is to work for and campaign to achieve quality and equality in education in South Africa. Equal Education conducts a broad range of activities to advance this objective, including litigation.

3. Equal Education's interest in these proceedings concerns how learners' chosen language of learning and teaching ("LOLT") and the school's language policy should inform the admissions process and any interventions by government in respect of a school's language policy.

4. Equal Education has participated in previous litigation concerning the powers of government to intervene in the determination and application of policies adopted by school governing bodies at public schools.[1] It has

[1] Equal Education has intervened as *amicus curiae* in *MEC of Education and Others v SGB of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) (*"Rivonia"*); and *Head of Department, Department of Education, Free State Province v Welkom High School and*

done so to ensure that national and provincial laws are interpreted so as not to deny government the ability to intervene where school governing bodies adopt and apply school policies, including language and admission policies, that frustrate the constitutional imperative of promoting equitable access to education.[2] Denying government the power to equalise schooling resources is a barrier to its attempts to "*eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege"*.[3]

5. This case, and the relief that FEDSAS seeks, must be viewed in the context of continuing deep inequality in the education system, an enduring and appalling legacy of apartheid.[4] Formerly white schools were hugely better resourced than black schools, and served exclusively white communities. Unequal access to education along racial lines entrenched and perpetuated socio-economic disparaties and unequal access to skills, jobs and livelihoods.[5] The Constitution commits the state to redressing these historical injustices. As the Constitutional Court emphatically held in *Ermelo*:

> *"In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical*

Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2014 (2) SA 228 (CC).

[2] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) paras 45-47 (*"Ermelo"*)

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

[4] The statistics cited by the MEC regarding the underutilised public schools in the Province evidences this enduring legacy. See AA (Part B) paras 68-74, pp 440-441.

[5] This legacy is recognised and described by the Constitutional Court in *Ermelo* paras 45-47.

transformation of society as a whole and of public education in particular."[6]

6. If granted, the relief that FEDSAS seeks – whether or not by design – threatens to undermine the Department's efforts to meet the constitutional demand for the "radical transformation" of public education. It would entrench the inherited privileges of former White, Afrikaans schools, at the expense of the rights of black learners' to equitable access to education under s 29 of the Constitution.

7. It bears emphasis that this case concerns access to public schools – not private and independent institutions.[7] All public schools, and their admissions and language policies, must adapt to meet the changing needs and interests of the communities that they serve. This too was categorically affirmed by the Constitutional Court in *Hoerskool Ermelo*.[8]

8. In these proceedings, EE is especially concerned that the declaratory order sought by FEDSAS will extend a licence to schools to assert their school language policies as barriers, preventing the entry of learners in the feeder areas or school districts to public schools. At the same time, it would stymie the Department's efforts at utilising its resources at public schools in the Province effectively and equitably, *inter alia,* through the

[6] *Ermelo* para 47.

[7] Section 12 (1) of the Schools Act provides: "The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature."

[8] *Ermelo* para 99.

implementation of the e-platform system for processing learner applications for admissions.

9. EE accepts that, for the purposes of determining this application, the Court need not decide whether the Province's regulatory scheme for the admission of learners suffers from "a lacuna", as FEDSAS belatedly contends.

10. However, EE disputes FEDSAS's contention that the only way to "harmonise" the regulatory scheme is to permit schools to apply their language policies in receiving applications or in compiling their waiting lists for admissions. For this reason, EE sets out its understanding of the regulatory scheme.

11. We structure these submissions as follows:

    11.1 First, we address the duty of this Court under s 39(2) of the Constitution;

    11.2 Second, we describe the powers of the Department and school governing bodies in respect of admissions and school language policies;

    11.3 Third, we discuss the importance of the Department's powers for the protection and fulfilment of the right to basic education under s 29(2) of the Constitution;

11.4 Fourth, we explain why the relief sought by FEDSAS would undermine the promotion and protection of learners' rights to equitable access to education in a chosen language of tuition, and would undermine and obstruct the constitutional imperative of transformation of public education.

11.5 Lastly, we set out EE's understanding of the regulatory system and how a school's language policy ought to inform the admissions process.

THE EFFECT OF SECTION 39(2) OF THE CONSTITUTION

12. Section 39(2) of the Constitution requires that, when interpreting any legislation, this Court must "*promote the spirit, purport and objects of the Bill of Rights"*.

13. While the approach required by section 39(2) of the Constitution is well established, it is necessary to set them out. This is because the arguments of the FEDSAS appear to take little or no account of it.

14. The section 39(2) duty is one in respect of which "*no court has a discretion"* and must "*always be borne in mind*" by the courts. Indeed, this is so even if a litigant has failed to rely on section 39(2).[9]

[9] *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) at paras 26 – 27.

15. The Constitutional Court has repeatedly pronounced on the obligations arising from section 39(2) for the interpretation of legislation. There are two independent obligations that emerge from the Constitutional Court's jurisprudence in this regard.

16. The first obligation might conveniently be referred to as the "*Hyundai obligation"*.

16.1 This is that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution.

16.2 Thus, in *Hyundai* this Court held that: *"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution. ... judicial officers must prefer interpretations of legislation that fall within*

constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section." [10]

17. The second obligation might conveniently be referred to as the *"Wary obligation"*.

17.1 This is that if a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that "better" promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.[11]

17.2 As the Constitutional Court explained in *Fraser v Absa Bank:*

> *"Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights."*[12]

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[10] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 22-23.

[11] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

[12] *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47.

18. Thus, the effect of section 39(2) is that this Court must always seek to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values.

19. This is subject only to the proviso that the relevant provision of the Bill must be "*reasonably capable*" of the interpretation concerned – that is the interpretation must not be "*unduly strained".*[13]

20. The primary right involved in the present matter is the right guaranteed by section 29(2) of the Constitution – namely, the right to receive education in an official language of choice in public educational institutions, where reasonably practicable. It is this right that must be promoted when this Court interprets the various statutory instruments at stake.

THE LEGAL CONTEXT: POWERS RELATING TO ADMISSIONS AND SCHOOL LANGUAGE POLICY

21. Under national and provincial laws, the government has considerable powers to oversee and intervene in the admissions process – including in the determination and implementation of the admissions and language policies of public schools. In the main (subject to the national government's power to set minimum norms and standards), these powers are vested in provincial government ("the Department").

[13] *Hyundai* at para 24; *Wary* at paras 59-60 and 106-108.

22. The powers of the Minister and the Department include the following.

22.1 Under the South African Schools Act 84 of 1996 ("Schools Act"):

22.1.1 The Minister may prescribe minimum uniform norms and standards for language policy in public schools, under s 6(1) of the Schools Act.

22.1.2 Provincial government plays *"a direct role in the implementation of a learner's admission to the school"*.[14] Under s 5(7) of the Schools Act, an application for the admission of a learner to a public school is made to the Department, in a manner determined by the head of department. It is the head of department who is responsible for informing a parent of a refusal of an application and the reasons for it. Any refusal is appealable to the MEC (s 5(8) and (9)).

22.1.3 The effect of these provisions is that *"decisions on admission are taken only provisionally at school level, by the principal acting under the authority of the head of department*,"[15] and are subject to ultimate provincial oversight.

22.1.4 Section 22 of the Schools Act further empowers the head of department, on reasonable grounds, to withdraw any

[14] *Rivonia* para 42.

[15] *Rivonia*, para 44.

function allocated to a governing body under the Act, including on an urgent basis. As the Constitutional Court found in *Ermelo*, this power extends to the school governing body's power to determine school language policy under section 6.[16]

22.2 Under the national Norms and Standards for Language Policy in Public Schools[17] ("Norms and Standards"):

22.2.1 The Minister has determined the threshold for when it is "reasonably practicable" for any public school to provide education in a particular language of learning and teaching – i.e., "*if at least 40 in Grades 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it in a particular school*".[18]

22.2.2 Where there is a need in a particular school district that does meet the above threshold, the provincial head of department has the power to determine how the needs of those learners will be met. In doing so, the head of department must take into account the duty of the state and the right of the learners under s 29 of the Constitution (which is informed by considerations of equity; practicability; and the need to redress the results of past racially discriminatory laws and

[16] *Ermelo* para 64.

[17] GN 1701 in Government Gazette 18564 of 19 December 1997, as amended in GN 665 in GG 18887 of 15 May 1998.

[18] Clause V. D(3).

practices) and "*the advice of the governing bodies and principals of the public schools concerned".*

22.3 Under the provincial Gauteng School Education Act 6 of 1995:

22.3.1 The provincial government is empowered to intervene in the determination of a school's language policy, and require its reformulation. Section 18(1) provides that the determination of language policy of a public school shall be made by the governing body of the school concerned "after consultation with" the department and "subject to the approval of" the Member of the Executive Council.

22.3.2 The language policy must be developed in accordance with the principles set out under s 18(2). These include that: "*within practical limits, a learner shall have the right to language choice in education"; "school language policies should be coordinated at a district level and should take into account the availability of human and material resources"*; and "*special measures should be taken to promote the status and use of official languages which have previously been neglected or discriminated against by education authorities in the Province".*[19]

[19] Section 18(2)(b), (e) and (g).

22.3.3 Under s 18(3), the MEC may direct the governing body to reformulate the school's language policy to comply with the principles in (2), after consultation with the governing body concerned.

22.4 Under the Gauteng Province's Regulations on Admission of Learners to Public Schools, 2012[20] ("the Regulations"):

22.4.1 The provincial head of department has overall responsibility for the administration of the admission of learners to a schools, and must certify the admissions policy of every public school in the province (Regulation 2);

22.4.2 In the annual admissions process, the District Director must approve the list of placement of learners at each public school (Regulation 5(7)).

23. For its part, the governing body of a public school is entitled, under sections 5(5) and 6(2) of the Schools Act, *"to determine"* the admissions and language policy of the school respectively. However, as the Constitutional Court observed in *Rivonia*, *"neither the Schools Act nor any related national legislation … goes further than section 5(5) and 5A(3) in describing a more extensive role for the governing body in the implementation of the admission policy or in the determination of capacity."*[21]

[20] GN 4138 in *PG* 129 of 13 July 2001, as amended by GN 1160 in *PG* 127 of 9 May 2012.
[21] Para 40.

24. Moreover, and crucially, sections 5(5) and 6(2) make clear that the governing body's power to determine school policy is "subject to" the Constitution, the Schools Act and "any applicable provincial law".[22]

25. This means that the governing body's power to determine the school's language policy –

    25.1 must be exercised in accordance with the broader constitutional scheme to make education progressively available and accessible to everyone, and to redress historic inequalities; and

    25.2 is subject to the limitations that the Constitution and the Schools Act or any provincial laws lay down, including a lawful exercise of the Department's intervention powers.[23]

THE IMPORTANCE OF THE DEPARTMENT'S POWERS

26. The Department is afforded the extensive powers to intervene in school admissions and language policy detailed above, and must exercise them, to realise the fundamental rights of learners to basic education and equality.

[22] Sections 5(5) provides that "Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school".

Section 6(2) provides that *"the governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law"*.

[23] Ermelo para 61. See also *Rivonia* para 41.

26.1 Section 29(2) of the Constitution imposes a positive duty on the state "*to ensure the effective access to, the right to receive education in an official language of choice in public educational institutions, where reasonably practicable".* In implementing this right, *"the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices".*

26.2 The State is also obliged under s 9(2) of the Constitution to take positive measures – legislative and otherwise – to promote the achievement of equality and to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination.[24]

27. The Schools Act also specifically obliges the Department to ensure that there are enough school places so that every child in the province can attend school.[25]

28. Given these imperatives, and the continuing disparities in accessing resources and quality education in South Africa, EE submits that any fettering of the Department's powers to intervene in admissions and

[24] Section 9(1) and (2) of the Constitution provide:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

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

[25] Section 3(3) of the Schools Act places this obligation on the MEC.

school language policy, where reasonably required to give effect to s 29(2) and related rights, must be carefully guarded against.[26]

29. The MEC attests to the continuing disparities in education in the Province, and the urgent need to improve the allocation and distribution of existing resources to schools in the province. He explains that there are some 516 public schools that perform below average on infrastructure utilization, cost-effectiveness and learner outcomes. These are categorised by the Department as "under-utilised", "small" and "hybrid" schools.[27]

30. The MEC describes the particular problem of the under-utilisation of Afrikaans single medium schools in the Province. The MEC attests that:

    30.1 There are 303 schools in the province that are under-subscribed, having more than 300 free classroom seats.[28]

    30.2 Around 20% of these schools are Afrikaans single medium schools, that could possibly be converted into parallel-medium schools with instruction in both Afrikaans and English to increase learner enrolment.[29]

[26] See *Rivonia* para 49, *Ermelo* paras 78-81.

[27] AA (Part B) paras 69-73.

[28] AA (Part B) para 71, p 441.

[29] AA (Part B) para 74, pp 441-442.

30.3 Read together, this means that there are approximately 18,000 free seats for learners at underutilised Afrikaans single medium schools in the province.

31. It is common cause that a number of Afrikaans single-medium schools in the province have indeed employed their language policies as the basis for barring black learners in the feeder-zones from applying to the school.[30] FEDSAS admits that "*there are instances where schools have used their language policies as a mechanism for screening applications in a manner that suggests that the screening occurs with racist intent*".[31] FEDSAS also furnishes statistics collated from a sample of its members schools, which demonstrates the prevailing racial disparities in accessing public schools in the province. These statistics indicate that – still today – over 70% of learners at Afrikaans single medium schools in the province are White.[32]

32. The relief now sought by FEDSAS must be considered against this background.

[30] See especially paras 112 of the AA (Part B), pp 457-460 and para 119.7, p 468.

[31] RA (Part B) para 40.1, p 581.

[32] RA (Part B) para 49, pp 586-7.

THE RELIEF SOUGHT BY FEDSAS IS IMPERMISSIBLE

33. FEDSAS seeks an order "*declaring that public schools are entitled to take into account their respective language and admissions policies when considering admissions*".[33]

34. The Department accepts that school language and admission policies must be respected, subject to lawful interventions by the Department. On this basis it contends that there is no real issue between the parties, and that the declaratory relief sought is academic. [34]

35. EE submits that the declaratory relief sought by FEDSAS cannot be granted for more fundamental reasons. The declaratory order sought is both impermissibly vague in its terms and purports to ascribe powers to schools in the admissions process that they do not have. EE submits that while the school's admissions and language policy must be taken into consideration by the Department when it places entry-phase learners at public schools, it is not for the governing body itself to apply the school's language policy directly in the admission of entry phase learners.

36. The declaratory order sought by FEDSAS could be interpreted by schools as permitting them –

[33] NoM prayer 1.1. This is the only prayer being persisted with – FEDSAS HOA, para 3.

[34] Respondents' HOA paras 43-44.

36.1 to refuse to accept applications from learners whose choice of LOLT differs from the school's language of tuition;

36.2 to refuse to include such learners on the school's waiting lists for consideration for admission and placement by the Department; or

36.3 otherwise to obstruct lawful interventions by the Department in placing learners at schools.

37. The taking of any of these steps would result in the unlawful exclusion of learners from public schools, and the elevation of school language policies as barriers to equitable access to education. It would obstruct lawful interventions and engagements by the Department, in the exercise of its powers, directed at promoting equitable access to education, respecting the right of learners to receive education in a language of their choice, and redressing the results of past racially discriminatory laws and practices.[35]

[35] Section 29(2) provides:

> "Everyone *has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –*
>
> *(a) equity;*
>
> *(b) practicability; and*
>
> *(c) the need to redress the results of past racially discriminatory laws and practices."*

38. Depending on the circumstances, such steps may also constitute racial discrimination through the implementation of language policy, in contravention of ss 5(1) and 6(3) of the Schools Act.[36]

39. The vacillations by FEDSAS in this matter as to the meaning of the regulatory scheme governing admissions, evidences the problem of vagueness in the declaratory order it proposes.

    39.1 Initially, FEDSAS contended that the regulatory scheme permitted *"early vetting of applications"* for compliance with their language policies – in other words, that schools were entitled to refuse to accept application forms from learners that sought to be taught in a language that differed from the school's language of tuition.[37]

    39.2 In its supplementary founding affidavit in Part B, FEDSAS appeared to concede that it is unlawful for any public school to refuse to accept an application by a learner on the basis that the learner's preferred LOLT differs from the language of tuition at the school. FEDSAS stated that "*No school can prevent a parent from applying for admission in a single*

[36] Sections 5(1) provides: "A public school must admit learners and serve their educational requirements without unfairly discriminating in any way."

Section 6(3) provides: "No form of racial discrimination may be practised in implementing policy determined under this section."

[37] FA para 24.4, 25, p 18.

medium school requesting the child to be educated in a different language of tuition."[38]

39.3 In reply, FEDSAS suggested that the regulatory scheme permits schools to apply their language policies "*at the moment when the schools are considering applications for placement on either the A or B list."*[39] FEDSAS' attempt at clarifying its position is no less bewildering. It states: *"In practical terms it amounts to the process of compiling the A and B lists where the information imparted by parents when making the application (i.e. handing in the application form) will play a role in compiling those lists".*[40]

39.4 FEDSAS's written argument is entirely vague. It is not clear whether FEDSAS has reverted to the contention schools are entitled to vet learners at the application stage, or whether it contends that the language policy must be applied in the compilation or application of the waiting lists.[41]

40. FEDSAS seeks to exploit what it contends is "a lacuna" or vagueness in the Regulations to justify its declaratory order. Yet the meaning and implementation of its declaratory order depends on an understanding of this very same regulatory scheme.

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[38] Supp FA, para 32, p 402.

[39] RA para 33.1, p 576.

[40] RA (Part B) para 73.1, p 599.

[41] FEDSAS heads of argument, paras 36, 38-40.

41. Whatever the merits of FEDSAS's complaint regarding the regulations, FEDSAS and its members cannot be permitted carte blanche to "fill in" whatever it contends is missing from the Regulations by means of a vague declaratory order. Absent a review of the regulatory scheme for vagueness or otherwise – which FEDSAS has not instituted – FEDSAS is not entitled to the declarator it seeks.

42. Granting the declarator would have serious implications for the rights of learners to equitable access to eductaion in the Province, as the declarator would be open to abuse by schools intent on obstructing lawful interventions by the Department. This cannot be permitted.

THE REGULATORY SCHEME FOR ADMISSIONS IN THE PROVINCE

43. It remains for us to address FEDSAS's contention that the only way to "harmonise" the Gauteng Admission Regulations ("the Regulations") and the Norms and Standards is to permit schools to apply their language policies in receiving applications or in compiling their waiting lists for admissions. EE disputes this.

44. EE submits that the scheme of the Regulations, read with the Norms and Standards (and the broader constitutional and legislative framework), is the following:

44.1 No public school may refuse to accept an application form from any learner seeking to apply for admission at the school. It is

incumbent on schools to accept completed application forms, irrespective of the learner's choice of language of learning and tuition ("LOLT"). This follows from Regulation 5(5) and (6).

44.2 Every learner who applies for admission at a school must be placed on the school's waiting list A or B, in the order in which the application is received. Regulation 7(3) stipulates that *"All applicants for admission to a school must be entered on the waiting list for which they are eligible, in the order in which their applications were received."*

44.3 The LOLT choice of the learner may not inform the compilation of the waiting lists by the school. Only the criteria listed in Regulation 7 may inform whether an applicant learner is placed by the school on waiting list A or B. This follows from Regulations 5(6)(a) and 7.

44.4 The waiting list criteria are concerned only with identifying learners who are entitled to preferential placement because they fall within the school's feeder zone or have a sibling attending the school.

44.5 When the waiting lists are considered and approved by the District Director under Regulation 5(7)(b), for the purposes of placing learners, the District Director must apply the Language Norms and Standards which are binding on the Department.

This requires the District Director to consider the LOLT choice of the learners and the school's language policy.

44.6 If there are 40 learners in Grades 1 to 6 or 35 learners in Grades 7 to 12 in a particular grade ("the threshold") who are on waiting list A (i.e. who are entitled to preferential placement) and who request a different language of tuition in a particular school, that school must accommodate those learners in their chosen LOLT.

44.7 If there are learners on waiting list A who request a different language of tuition at a particular school, but number less than the threshold, the head of department has a discretionary power to determine how the needs of those learners will be met. In exercising this power, the head of department must consider the available resources at the district level, including the availability at other schools in the district offering that language of tuition.

44.8 It would be open, however, to the MEC, after considering the available resources in the district and after consulting with the school governing body concerned, to direct the school to reformulate its language policy to accommodate the learners (in accordance with s 18 of the Gauteng School Education Act) – albeit that the threshold in the Norms and Standards is not met. There is nothing in the Regulations that precludes this.

45. FEDSAS contends that Regulation 7(4) creates an insurmountable difficulty because it requires that learners must be placed in accordance with the waiting lists.[42] However, this only follows if the Regulations are read in isolation. Since the Regulations must be read and applied with the national Norms and Standards, Regulation 7(4) must be understood to mean that learners must be placed in accordance with the waiting lists, *subject to the application of the Norms and Standards."*

46. The result of the above is that the school's language policy is indeed taken into consideration during the admissions process. However, the school's language policy is not applied directly by the school during the admissions process for entry phase learners – as the declaratory order proposed by FEDSAS would suggest. Rather, the school's language policy is taken into consideration by the Department (specifically, the District Director and the head of department) when approving the placements of entry-phase learners and exercising their powers under the national Norms and Standards, the Schools Act and the Gauteng School Education Act.

47. The alternative interpretation of the Regulations proposed by FEDSAS would confer on school governing bodies the power to assert the school's language policy as a barrier to entry, and usurp the powers conferred on the Department in respect of admissions and school

[42] Regulation 7(4) reads: *"All available places at the school must be filled – (a) from waiting list A, in the order of the applicant on waiting list A; or (b) if places remain after all applicants on waiting list A have been offered places, from waiting list B, in the order of the position of the applicant on waiting list B".*

language policy. Further, as we have explained, this interpretation would undermine the realisation of the rights of learners under s 29(2). On the application of s 39(2) of the Constitution, such an interpretation cannot be accepted by the Court.

CONCLUSION

48. In view of the above, the application must be dismissed. For the sake of certainty, and to address the obtsructive conduct of certain Afrikaans single-medium schools that is evidenced in the record, EE urges the court to make clear in its judgment that it is not permissable for any public school –

    48.1 to refuse to accept applications from learners whose choice of LOLT differs from the school's language of tuition;

    48.2 to refuse to include such learners on the school's waiting lists for consideration for admission and placement by the Department; or

    48.3 otherwise to obstruct lawful interventions by the Department in placing learners at schools.

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15 February 2016