IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO. 5/86/22

In the matter between:

EQUAL EDUCATION LAW CENTRE	First Applicant
[redacted]	Second Applicant
	Third Applicant
	Fourth Applicant
	Fifth Applicant
	Sixth Applicant
	Seventh Applicant

And

HOD: WESTERN CAPE EDUCATION DEPARTMENT	First Respondent
DIRECTOR OF THE METRO EAST EDUCATION DISTRICT	Second Respondent
MEC FOR EDUCATION, WESTERN CAPE	Third Respondent

APPLICANTS' HEADS OF ARGUMENT

" Access to schools is, therefore, a necessary condition for the achievement of the right to education"[1]

INTRODUCTION

1 This application concerns the respondents' ongoing failure to fulfil their statutory and constitutional obligations to ensure that all learners in the Metro East Education District are appropriately accommodated in schools for the 2022 academic year. The respondents' conduct has barred the individual learners named in the notice of motion and similarly situated learners from accessing what is recognised in South Africa and throughout the world as a fundamental right that is essential to empowerment, self-development and the achievement of equality.

2 The United Nations Committee on Economic, Social and Cultural Rights, the body in charge of monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights has in General Comment No. 13, made the following apt remark on the right concerned in this matter.

> "Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and

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[1] Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM).

hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make.

3 This application, which seeks to compel the respondents to adhere to their constitutional and statutory obligations, is brought in two parts: Part A is an application for interim relief pending review in Part B. This application seeks both individual and systemic relief.

3.1 The individual relief is intended to address the severe and ongoing violation of the right to basic education of the individual learners named in the notice of motion. The stories of each of these seven learners are detailed in their supporting affidavits.

3.2 The parents and caregivers of the named learners had all individually and repeatedly sought the assistance of the first and second respondents – the Head of Department and the Metro East Education District – yet their efforts (set out in painful detail in the founding affidavit) came to naught. After a long and arduous process of pleading with the respondents to assist, this matter culminated in this application. In the face of this litigation, the respondents are now taking steps to place the seven named leaners and to develop the appropriate remedial plans.[2] That, however, is not the end of the relief sought in Part A.

[2] AA: para 6.6, p.503 – 504; annexures BW 1 – BW 7, p519 – 526.

3.3 The Constitutional Court has made it clear on several occasions that '[e]ffective relief requires that relief be afforded not only to the specific litigant but to all people who are similarly situated.'[3] As such, the applicants also seek an order directing the respondents to place similarly placed learners and take appropriate remedial plans regarding the learners whose names do not appear from Annexure 1 to the notice of motion designed to ensure that the affected learners can minimise their learning losses the harm on-going harm that they suffer from being out of school.

4 It is not entirely clear from the answering affidavit whether or not the Department disputes the fact that the number of unplaced learners is significantly higher than the seven named applicants. To be frank, the Department's answer is simply a bare denial of the applicants' case. Given the Department's refusal to be transparent and to approach this Court with candour, the first applicant has furnished this Court with all the evidence that has come to light since this litigation was instituted, showing that the numbers of unplaced children are even higher than was known by the EELC at the time of bringing this application. The EELC has set this information out to ensure the Court has all the necessary facts to decide on an appropriate relief.

5 In what follows, we deal with the following:

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[3] S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 32. See also Gory v Kolver NO & Others 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 42; Van der Merwe v Road Accident Fund & Another (The Women's Legal Centre Trust as amicus curiae) 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC) at para 71; Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 74.

5.1 The background facts

5.2 The respondents' statutory obligation to provide for basic education

5.3 Urgency.

5.4 The requirements for an interim interdict;

5.5 The appropriate relief.

5.6 Costs.

THE BACKGROUND FACTS

6 This application was precipitated by a group of ten learners and parents that approached the EELC seeking assistance with being placed into schools in the Metro East Education District for the 2022 academic year.

7 As is the practice of the EELC, the parents and caregivers were advised by the EELC to approach the Metro East Education District, as the office empowered by the Western Cape Education Department in areas such as Khayelitsha, to assist with issues related to placements and admissions of learners into schools. Each of these parents and caregivers did so in an effort to enrol the learners in their care.[4] Their efforts to obtain assistance from the Metro East Education Department were unsuccessful. Parents and caregivers reported that as early as February 2022,[5] District officials were informing them that schools were

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4 FA: para 37 - 39, p 19-20.

5 FA: para 42, p 21; para 46, p22; para 55 p25; para 56 p25.

oversubscribed and that they were unable to accept additional learners for the 2022 academic year. The parents reported that they were then instructed to apply for the 2023 school year. This report was confirmed in the supporting affidavits of the second to fourth applicants.[6]

8 Alarmed at the reports that were emerging of parents being turned away and learners being told that they must languish at home for the whole academic year because schools were oversubscribed, the EELC decided to intervene. The EELC took up the cause of these parents and sent numerous emails and letters to the District and later to the HOD to plead for assistance for these learners. The EELC's efforts were met with no substantive response as most of these learners remained unplaced and out of school.

9 Following the experience that the EELC had in 2021, where 23 learners (12 of whom were of compulsory school-going age) were made to sit out the entire academic year because of the failure of the District and the HOD to place them in schools,[7] the EELC knew that their efforts to engage may be fruitless unless steps were taken to urgently to compel the District and the HOD to do so.

10 Following the launch of this application, GroundUp published an investigative report where it revealed a group of a dozen learners that were out of school and were unplaced by the respondents. The GroundUp report featured the story of Simthandile Sekeyi who has been out of school for the past two years.[8] The learner's grandmother had visited relevant district office over ten times without

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6 SA: p57 – 81.

7 FA: para 99, p 44.

8 RA: para 15, p 577; Annexure RA 1, p 597 – 600.

assistance. The pattern of conduct reported in the GroundUp article was strikingly similar to the reports of the applicants in this matter. Even more reports of unplaced learners have emerged through enquires that were made by the EELC's partner organisation EE.[9]

11 What is clear therefore is that the experiences of the second to seventh applicants are not merely applicable to seven individual learners but rather demonstrate and illustrate a pattern of conduct and systemic maladministration failures, which exacerbate the exclusion experienced by vulnerable learners seeking to attend school and fulfil their right to basic education.

12 The learners represented by the applicants represent a fraction of the learners unable to attend school despite extensive efforts on the part of their parents and caregivers.

13 More importantly, the experiences of the second to seventh applicants illustrate how the costly and extensive efforts parents and caregivers undertake to have learners placed are met with little to no assistance from the District or any other officials. In many instances, the District officials have refused to offer assistance or allow learners to be placed on an unplaced learners list.

14 Even where the learners have received some assistance from District officials, this assistance has ultimately been meaningless. In many instances the information and or instructions provided by Districts often conflicted with the

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9 RA: para 22, p 581; Annexure RA 5, p621.

information and service provided by schools. This occurrence indicates the District's inability to accurately track and manage the placement of learners.

15 Beyond this, the effect of the conduct of District officials in failing to place learners on the unplaced learner lists is to, at best, avoid accurately capturing the number of unplaced learners within the Metro East Education District and through this, absolving the MEC, HOD and District of their obligations to take steps to place such learners.

16 It is for this reason that the applicants seek individual and systemic relief.

THE RESPONDENTS' STATUTORY OBLIGATION TO PROVIDE FOR BASIC EDUCATION

17 Section 29(1)(a) of the Constitution states that everyone has the right to basic education. The primary legislation giving effect to this right is the Schools Act.[10]

18 The Schools Act provides for the organisation, governance, and funding of schools.

18.1 In terms of section 3(1) of the Schools Act, every parent must cause every learner for whom they are responsible to attend a school from the first school day of the year in which a learner reaches the age of seven years until the last school day of the year in which such a leaner reaches the age of fifteen years or the ninth, which occurs first.[11]

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10 Act 84 of 1996.

11 FA, para 15.1, p 11.

18.2 To enable the fulfilment of that obligation on parents in section 3(1) of the Schools Act, section 3(3) requires that "[e]very member of the Executive Council [MEC] must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2)."

19 The applicants submit that section 3(3) places a direct and binding obligation on the third respondent as the MEC for Education to ensure that there are sufficient places for every child in their province and that the fulfilment of this obligation is integrally linked to a parent's ability to meet their obligations under section 3(1).[12] This is not disputed by the respondents.

20 Where the MEC cannot comply with this requirement, the Schools Act requires, under section 3(4), that the MEC must take steps to remedy the lack of capacity *"as soon as possible"* and must make an annual report to the Minister on the progress achieved in doing so. Thus, where the MEC is unable to ensure there are sufficient places for every child, they are required to act and take steps to remedy this lack of capacity. <u>They have, simply, done nothing</u>.[13]

21 The National Admission Policy for Public Schools ("**National Policy**") published in terms of the National Education Policy Act states that the HOD is responsible for administering the admission of learners to a public school. HOD is required to coordinate the provision of schools and the administration of admissions to ensure that "<u>all eligible learners are suitably accommodated</u>." The Admission

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12 FA, para 15.3, p 11.

13 FA, para 15.4, p 11.

Policy further emphasises that "it is particularly important that all eligible learners of compulsory school-going age are accommodated in public schools."[14]

22 In the Western Cape, the HOD has determined that the process for registration of learner admissions to public schools will be in accordance with the Central Education Management Information System (CEMIS online application). Each year a timetable is released to allow parents and caregivers to apply for admission to public schools.

23 While ideally, all applications for learner admissions should be made the preceding year by the CEMIS online application process, there remain a variety of reasons why at the commencement or during the academic year many learners still need to be placed in appropriate schools. As such, placing learners in appropriate schools is a continuous and ongoing obligation of the respondents and not discharged merely because applications have not been made "timeously" under the CEMIS system. This is recognised by the Western Cape's Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools ("**WCED Policy**"), which states the following in respect of "late applications":

> "Learners who apply after October for admission in the following year shall be accommodated where school places exist, but not necessarily at the nearest school to the learner's place of residence or the school of choice.

14 FA, para 17.1 and 17.2 p12.

> Learners who require admission to a WCED school at the commencement of the new year, or during the year, shall report to the WCED education district office nearest to their place of residence to enquire about a school where vacancies exist. **District officials shall assist parents to place learners whenever district intervention in the admission process is required.**" [Emphasis added] (WCED policy para 13)

24 Importantly, there is nothing, within these provisions, which absolve the District from an obligation to place learners who make late applications. In fact, the opposite is true as the policy requires learners to be accommodated and that district offices are required to assist in this placement where assistance is required.

25 The role of the district is therefore critical in assisting parents and caregivers, especially dealing with late applications to schools. The WCED policy requires district officials to assist in the placement of learners where their intervention is required.

26 It is apparent from the answering affidavit that the respondents seek to place emphasis on the obligation of parents and caregivers to enrol learners in schools. However, the facts of this matter are that the applicants have all taken steps to enrol the learners, they have approached the schools individually and they have also approached the District office for assistance. There can therefore be no basis to criticize the applicants for the District office's failure or refusal to assist them.

URGENCY

27 The urgency of this matter is not in dispute. This is indeed so because the academic year is well underway and there are learners who have still not been placed in any schools by the respondents. The respondents do not deny that they have an obligation to do so and neither do they deny the substantial prejudice that learners suffer when they are out of school.

28 The uncontested expert evidence of Professor Hoadley's expert affidavit is that disruption to schooling results in learning losses that compound with each day of absence.[15] Over time, prolonged disruptions to learning will result in learning losses that exceed the actual number of days missed. [16]The only way to address this is to minimise lost learning and prevent further disruptions to schooling. Professor Hoadley concludes that where disruptions to learning have occurred, all efforts must be made to minimise further time away from school for learners given the harmful effects of being out of school.

29 Given the range of benefits of attending school, even where learners start the school year late or miss a portion of the school year, the placement of children in school should not be deferred to the start of a new academic year. In light of the above, the matter is urgent.

THE NEED FOR AN INTERIM RELIEF

30 The legal requirements for an interim interdict are well-established, the

[15] EA: para 16, p287.
[16] EA: para 16, p287.

applicants must demonstrate:

30.1 prima facie right worthy of protection.

30.2 reasonable apprehension of irreparable harm.

30.3 that the balance of convenience favours the grants the interim relief; and

30.4 that there are no reasonable alternative remedies available.

31 The applicants have satisfied all these requirements. There is nothing in the respondents' papers that indicates the contrary. The applicants also have strong prospects of success in the review – a factor that weighs in assessing the balance of convenience.

A PRIMA FACIE RIGHT

32 The failure or refusal to place the learners constitutes a violation of learners' rights to a basic education[17], dignity,[18], equality, [19] and to public administration that is in line with section 195 of the Constitution.

The approach to interpreting the right to basic education

33 Section 29(1)(a) states that everyone has the right to a basic education including

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17 Section 29 of the Constitution.

18 Section 10 of the Constitution.

19 Section 9 of the Constitution.

adult basic education. The Constitutional Court has held in **Welkom High School** that:

> "Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."[20]

34 Unlike the other socio--economic rights in the Constitution such as the right to further education [section 29(1)(b)], the right to housing (section 26) and the rights to health care services, sufficient food, water and social security (section 27), the right to a basic education is not qualified by the terms "progressive realisation" and "within the state's available resources".

35 The framing of the right to basic education as an unqualified right is suggestive of a higher level of protection being accorded to this right compared to the qualified socio--economic rights.

36 That this is indeed the case was confirmed in the foundational case of **Juma**

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[20] Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2014 (2) SA 228 (CC) at para 43.

Musjid Primary School.[21] An important passage from the judgment has laid a firm foundation for the approach to the right and has significantly shaped the jurisprudence in respect of the right that has accrued subsequent to the judgment. The Court held:

> "It is important, for the purpose of this judgment, to understand the nature of the right to a basic education" under section 29(1)(a). Unlike some of the other socio-ˇeconomic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application, which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'." [22]

37 The immediate realisable principle recognised in **Juma** was also affirmed by the Supreme Court of Appeal in **Basic Education for All**. [23] The Supreme Court of Appeal affirmed the immediate realization principle. The Court held:

> "The Constitutional Court stated emphatically that the right to a basic education entrenched in s 29(1)(a) is 'immediately realisable' and may only, in terms of s 36(1) of the Constitution,

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21 Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 (7) BCLR 651 (CC).

22 Id at para 37.

23 [2016] 1 All SA 369 (SCA).

be limited in terms of a law of general application that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'"[24]

38 The immediate realisation principle was further affirmed in **Madzodzo** which dealt with the systemic failure of government to provide desks and chairs to schools in the Eastern Cape. The Court held that flowing from the right to basic education, government was required to take "all reasonable measures to realise the right to basic education **with immediate effect**."

39 Thus, the following principles emerge:

39.1 The right to basic education is one of the most important socio-economic rights.

39.2 As framed in our Constitution, it is a right that is said to be immediately realisable.

39.3 The right, because it is immediately realisable, can only be limited by a law of general application.

39.4 The government must take all reasonable measures to realise the right to basic education with immediate effect.

Right to Equality

40 The failure by the respondent also unfairly discriminates against the learners,

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[24] Id at para 36.

who are predominately impoverished. The supporting affidavit demonstrates that the respondent's failure or refusal to place learners affects, in the main, impoverished, black learners many of whom have migrated from the Eastern Cape and reside in areas such as Khayelitsha. It constitutes direct and indirect on the basis of race, poverty and social origin.

41 Due to a radically unequal distribution of resources – related to a history of systematic discrimination – still makes this constitutional guarantee to education inaccessible for large numbers of South Africans. The impact of this painful legacy was recognised by this Court in **Ermelo** as follows:

> "Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us."[25]

42 The Constitutional Court has held—

> "Continuing disparities in accessing resources and quality education perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity. The question we face as a society is not whether, but how, to address this problem of uneven access to education. There are various stakeholders, a diversity of interests and competing visions.

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25 Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) at para 45.

> Tensions are inevitable. But disagreement is not a bad thing. It show we manage those competing interests and the spectrum of views that is pivotal to developing a way forward. The Constitution provides us with a reference point – the best interests of our children. The trouble begins when we lose sight of that reference point. When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of children."[26]

43 We submit that the respondents' failure amounts to intersectional discrimination on race and poverty. This was recognised in the **Social Justice Coalition v Minister of Police.**[27]

44 It is also important to note that the right to basic education is connected to human dignity. The Supreme Court of Appeal in **Minister of Home Affairs and Others v Watchenuka and Others** affirmed this.[28] The Court stated:

> The freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education[29].

45 In light of the above, the applicants have established proof of a prima facie right worthy of protection.

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26 MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others 2013 (6) SA 582 (CC) at para 2.

27 2019 4 SA 82 (WCC).

28 [2003] ZASCA 142.

29 Id at para 36.

A reasonable apprehension of harm

46 The following explanation of 'reasonable apprehension' was quoted with approval in **Nordien**:[30]

> "A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."[31]

47 The applicants submit should an interim interdict not be granted, and should the non-placement of learners continue, the harm caused to the learners will be severe and irreversible. In addition to the harm that will be suffered as a result of the continued violation of the learner's constitutional rights, the learners will suffer the following irreparable harm:

47.1 First, the consequences of interrupted learning disproportionately disadvantage under-privileged learners who tend to have fewer educational opportunities beyond school. The disruption of one calendar year of a learner may reverberate for a lifetime.

47.2 Second, the interruption in learning increases the risk of learners

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30 Minister of Law and Order and Others v Nordien and Another 1987 (2) SA 894 (A).

31 Id at 896G-I.

dropping out. This is especially the case because the interruption in learning increases the social isolation of the learner which makes it difficult for them to re-integrate into schools.

47.3 Third, the lack of access to school increases the learner's exposure to violence and exploitation. This is a concern echoed in the supporting affidavits of the affidavits who have expressed concern that the learners may be exposed to sexual violence, may become involved with gangs or may start abusing drugs.[32]

48 Professor Hoadley's expert affidavit demonstrates that disruption to schooling results in learning losses that compound with each day of absence. Over time, prolonged disruptions to learning will result in learning losses that exceed the actual number of days missed.[33]

49 Further, Professor Hoadley's expert deals with psycho-social impacts of school absence on a child's well-being and the impact that disruption of schooling has, in particular, on nutritionally vulnerable learners.[34]

50 All the above establish a reasonable apprehension of harm for the learners.

THE BALANCE OF CONVENIENCE FAVOURS THE APPLICANTS

51 We submit that the balance of convenience clearly favours the applicants there can be no prejudice suffered by the respondents in requiring them to adhere to

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[32] FA, para 83.1 – 83.3, p 36.

[33] Expert affidavit by Professor Hoadley: para 16, p287.

[34] EA: para 6.3, p 284.

their statutory and constitutional obligations. The placement of learners is precisely the responsibility that the statutory and policy frameworks have delegated to the respondents. This is not denied by the respondents.

52 Further, we submit that the immediate relief sought concerns learners who should have, in any event, been recorded on the respondents' system which would have then compelled the respondents to accommodate the learners at appropriate schools.

53 The balance clearly plainly favours the intervention of this court in the interim.

The alternative remedies lead to a dead-end

54 There is simply no alternative remedy available to the applicants.

55 The applicants have repeatedly pleaded with the respondents to place the unplaced learners, but they have refused.

56 The suggestion made to some of the applicants that these learners should apply and seek to re-enter the schooling system in 2023 is, self-evidently, no solution at all. The option available to the applicants and learners has been clearly defined as a singular one, namely that the learners do not attend school this year.

57 In the absence of the Court directing the first and second respondents to adhere to their statutory obligation, the learners will not be afforded an opportunity to attend school this year and continue to be deprived of their constitutional rights.

58 As such, the requirements for interim relief have been met and there is simply no alternative remedy available to the applicants, save for approaching this court for

an urgent interim interdict.

THE APPROPRIATE RELIEF

59 The respondents have infringed the rights of learners. Appropriate and effective relief must be granted. There is a dispute between the parties about what is the appropriate remedy.

59.1 The respondents refuse to accede to being ordered that publish a notice in local radio stations and newspapers calling on all parents/ caregivers in the district with unplaced learners in the district for the 2022 academic year.[35] They allege that they have done enough with the advocacy campaigns and further that the obligation rests on the parents.

59.2 The applicants do not dispute that there is an ongoing advocacy program for the respondents' annual admissions cycles. The first applicant has on its website posted all the circulars that are mentioned. But that advocacy program is not targeted at the learners who are the subject of this application and remain unplaced in the 2022 academic year. As the replying affidavit demonstrates, the lack of placement in schools is not only applicable to the seven individual learners but to countless other similarly situated learners. This highlights that a further advocacy campaign needs to be done to reach these learners.

60 In **Fose**[36] the Constitutional Court explained the meaning of “appropriate” relief.

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35 AA, para 25.2.

36 1997 (3) SA 786 (CC).

It stated:

> "Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country so few have the means to enforce their rights through the Courts, it is essential that on those occasions where the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The Courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."[37]

61 In **Hoffmann v South African Airways**,[38] the Court held that appropriate relief in terms of section 38 must be construed purposively and in the light of section 172(1)(b), which empowers the Court in constitutional matters to make any order that is just and equitable. The Court held that "appropriate relief must be fair and just in the circumstances of the particular case". Appropriateness imports the "elements of justice and fairness":

> "… the determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the

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37 Id at para 69.

38 2001 (1) SA 1 (CC).

remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with, and fourth of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the case."[39]

62 Appropriate relief is also forward-looking. One of its objects is to "deter future violations". This imposes an obligation on the Court, faced with evidence which proves violation of rights, not to gloss over the violation on the basis that relief is not necessary.

63 We submit that placing notices with radio stations and newspapers is just and equitable in this case and it is an appropriate remedy. Further, it will be effective and ensure that the right to basic education is fulfilled as learners who remain unplaced know that they can still approach the District offices for assistance. It will vindicate the Bill of Rights and ensure that the continuing breach is remedied.

64 The respondents' do not want to include of "curriculum requirements for the 2022 academic year" as they say that it presents several fundamental difficulties.[40]

65 We submit the outlined examples to show how learning especially in a subject like Mathematics is progressive and builds on prior learning. This is correct and more reason why an urgent catch-up plan needs to be developed and

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39 Id at para 42.

40 AA, para 25.3.

implemented.

66 The applicants submit that the order it seeks will ensure protection of the rights in the Bill of Rights. As the Constitutional Court in *Fose* made it clear that courts are left to determine "appropriate relief" in the context of the particular case in question, and that such determination is confined to the facts thereof. In this regard, the Constitutional Court held that

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.[41]

67 For three reasons, the applicants submit that the reporting relief is just and equitable. This is justified because:

67.1 First, the respondents have refused to be transparent with the first EELC and this Court about what is the extent of the problem and what steps are they taking to resolve this.

67.2 Second, requiring the applicants to report to the Court on the steps taken will ensure that this Court has all the necessary information, if necessary,

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41 Fose v Minister of Safety and Security at para 19.

to fashion a just and equitable, if necessary.

67.3 Third, it is a forward-looking remedy.

67.4 Fourth, the degree of violation is egregious. The learners affect are a vulnerable group in general. These learners require this Court to be extra vigilant in protecting their rights.

67.5 Fifth, the consequences of continued breach by the respondents are very serious: very large numbers of learners will continue to without a basic education, which the Constitution has stated is immediately realisable.

68 In the replying affidavit, we have highlighted a story that has been in the media of a young girl who has been out of school for two years. At this present moment, we are uncertain of the number of learners who have been unplaced and who are continuously denied their right to basic education. It is impossible for us to know for certain that they will all be placed.

69 For these reasons, we submit that supervision is required from this Court.

70 It needs to be emphasised that the issue to be determined is not far-reaching and impossible, it is an issue that deals with the right to basic education which is immediately realisable. In granting the draft order as proposed by the applicants, this Court will be safeguarding the rights of children to basic education.

COSTS

71 The applicants in this case legitimately seek to vindicate their right to education,

dignity and equality. The nature of the application is clearly in the public interest.

72 The applicants have been forced to bring this application because of the state's failure to uphold the Constitution.

73 If unsuccessful, the applicants fall under the protections afforded by **Biowatch**.[42]

CONCLUSION

74 It needs to be emphasised that the issue to be determined is not far-reaching and impossible, it is an issue that deals with the right to basic education which is immediately realisable. In granting the relief as proposed by the applicants, this Court will be safeguarding the rights of learners to basic education and ensuring that this violation of learners' rights does not continue to perpetuate.

75 We submit that a proper case has been made for the relief sought, with costs including the cost of two counsel.

TEMBEKA NGCUKAITOBI SC

LERATO ZIKALALA

LETLHOGONOLO MOKGOROANE

Counsel for the applicants

26 MAY 2022

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42 Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).