CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 209/15

In the matter between:

FEDERATION OF GOVERNING BODIES FOR SOUTH AFRICAN SCHOOLS — Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG — First Respondent

HEAD OF DEPARTMENT OF EDUCATION, GAUTENG — Second Respondent

and

EQUAL EDUCATION — Amicus Curiae

Neutral citation: *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14

Coram: Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J

Judgment: Moseneke DCJ (unanimous)

Heard on: 5 May 2016

Decided on: 20 May 2016

Summary: Regulations Relating to the Admission of Learners to Public Schools in Gauteng — validity of amendments promulgated in 2012 — no conflict between national and provincial legislation

— impugned regulations are rational, reasonable and justifiable — cooperative governance to ensure universal access to basic education — MEC to determine feeder zones

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted save in respect of the abandoned costs order of the Supreme Court of Appeal.
2. The appeal against the order of the Supreme Court of Appeal is dismissed, subject to paragraph 3.
3. The first respondent, Member of the Executive Council for Education, Gauteng, is directed to determine the feeder zones for public schools in Gauteng province in the manner required by regulation 4(1) of the Regulations Relating to the Admission of Learners to Public Schools within a reasonable time but not later than 12 months from the date of this judgment.

JUDGMENT

MOSENEKE DCJ (Mogoeng CJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring)

Introduction

[1] Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are

taught and learn how to live useful and fulfilled lives. So education's formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now. The indigenous and ancient African wisdom teaches that "*thuto ke lesedi la sechaba*"; "*imfundo yisibani*" (education is the light of the nation) and recognises that education is a collective enterprise by observing that it takes a village to bring up a child.

[2] Of this Aristotle, Immanuel Kant, Karl Marx, Mahatma Gandhi, Helen Keller, Nelson Mandela, Kofi Annan, Malala Yousafzai, the Holy Bible, Buddha, and the Holy Quran have said:

> "Education is an ornament in prosperity and a refuge in adversity." – Aristotle
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> "How then is perfection to be sought? Wherein lies our hope? In education, and in nothing else." – Immanuel Kant
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> "The education of all children, from the moment that they can get along without a mother's care, shall be in state institutions." – Karl Marx
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> "If we want to reach real peace in this world, we should start educating children." – Mahatma Gandhi
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> "Education should train the child to use his brains, to make for himself a place in the world and maintain his rights even when it seems that society would shove him into the scrap-heap." – Helen Keller
>
> "Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine, that a child of a farmworker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another." – Nelson Mandela

> "Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development." – Kofi Annan

> "There are many problems, but I think there is a solution to all these problems; it's just one, and it's education." – Malala Yousafzai

> "My people are destroyed for lack of knowledge." – The Holy Bible: Hosea 4:6

> "To have much learning, to be skilful in handicraft, well-trained in discipline, and to be of good speech – this is the greatest blessing." – Buddha

> "Are those equal, those who know and those who do not know? It is those who are endowed with understanding that receive admonition." – The Holy Quran: Surah Al Zumar 39:9

[3] Despite these obvious ancient virtues, access to teaching and learning has not been freely and widely accessible to all people at all times. All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning. At the end of a long and glorious struggle against all forms of oppression and the beginning of a democratic and inclusive society, we, filled with rightful optimism, guaranteed universal access to basic education. We collectively said: "[e]veryone has the right to basic education, including adult basic education".[1]

[4] Even so, disputes on access to basic education in our society are not scarce. There are continuing contests on the governance of public schools and policies on

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[1] Section 29(1) of the Constitution provides:

> "Everyone has the right—
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> (a) to a basic education, including adult basic education; and
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> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

admission of learners. This despite a number of precedents of our courts that were meant to clear the murky waters of the shared space between school governing bodies and provincial executives charged with the regulation of public schools.[2]

[5] Here, this contestation plays itself out in an application for leave to appeal against an order of the Supreme Court of Appeal in which the applicant seeks an order reversing orders 3 and 4(a) of that Court.[3]

[6] The hub of the remedy sought is the invalidity of certain amendments to the Regulations Relating to the Admission of Learners to Public Schools published in 2012.[4] More tightly, the central issue is whether the Regulations are inconsistent with the South African Schools Act[5] (Schools Act) or with the applicable provincial law,[6] or are invalid because they are irrational or not reasonable nor justifiable.

[7] In preceding courts, the span of the attack of the applicant was wide and included several specified regulations. However, in this Court, its target of challenge has narrowed down to regulation 3(7); regulation 4(2) read with regulation 4(1);

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[2] See, for instance, *Head of Department, Department of Education, Free State Province v Welkom High School and Others* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) (*Welkom High School*); *MEC For Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (*Rivonia Primary School*); and *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*).

[3] The Supreme Court of Appeal judgment was delivered on 16 October 2015. Orders 3 and 4(a) of that decision read:

> "3 The appeal is upheld with costs, such costs to include the costs of two counsel;
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> 4 The order of the High Court below is set aside and is substituted with the following:
>
> > '(a) Save to the very limited extent set out below, the application is dismissed with costs of two counsel.'"

[4] Gauteng School Education Act (6/1995): Regulations Relating to the Admission of Learners to Public Schools, 2012, GN 1160 *Provincial Gazette* 127, 9 May 2012 (Regulations).

[5] 84 of 1996. Section 5(5) of the Schools Act provides:

> "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."

[6] Section 11(1) of the Gauteng School Education Act 6 of 1995 provides:

> "Subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools."

regulation 5 read with regulation 8; regulation 11(5) and regulation 16. The respondents urge us to dismiss the appeal as none of the impugned regulations offend for the reasons contended for by the applicant.

[8] The dispute is between two stakeholders to our public school system. The applicant is the Federation of Governing Bodies for South African Schools (FEDSAS), a national representative organisation for school governing bodies. The first respondent is the Member of the Executive Council for Education, Gauteng (MEC) and the second respondent is the Head of Department for Education, Gauteng (HOD).[7] The dispute has drawn in Equal Education (amicus), a membership-based democratic movement of learners, teachers, parents and community members. It has been admitted to make submissions as a friend of this Court.

Background

[9] The origin of the difference between the parties was on 18 July 2011 when the MEC published draft amendments to the Regulations. The MEC did this under the authority of section 11(1) of the Gauteng School Education Act[8] and invited comments from interested parties. FEDSAS submitted comments within a month of the invitation.[9]

[10] In its representations, FEDSAS was unhappy with a significant part of the proposed regulations. It took issue with 29 provisions in the draft amended regulations. A broad description of its concerns should suffice. It viewed the amended regulations as invalid because they contradicted national legislation.[10] They were an encroachment on the powers of the school governing bodies and their remit was beyond the empowering legislation. The amended regulations transgressed

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[7] Together, the MEC and the HOD are referred to as “the respondents”.

[8] 6 of 1995.

[9] FEDSAS submitted their comments on 17 August 2011.

[10] FEDSAS referred to the Constitution and legislation, including the Schools Act, Gauteng School Education Act, National Education Policy Act 27 of 1996, Admission Policy for Ordinary Public Schools and the Gauteng Education Policy Act 12 of 1998.

section 5 of the Schools Act because they empowered officials to enforce admission on schools. That was at odds with section 5 that points to the admission of learners by a school governing body only. And in turn, the section limits the HOD's involvement in placing unsuccessful applicants in different schools. FEDSAS adds that the amended regulations violated the principle of legality and were enacted in a procedurally unfair manner.[11]

[11] The respondents say that they gave the representations serious consideration and altered some of the draft amended regulations to meet some of the concerns of FEDSAS and other people and bodies that made submissions. The amended regulations were ultimately promulgated on 9 May 2012.

[12] FEDSAS remained unhappy with the amendments and turned to the South Gauteng High Court (High Court). In motion proceedings, it mounted a facial attack on the validity of selected regulations. It challenged the validity of the regulations mainly on three grounds: (a) they were in conflict with the Schools Act; (b) they were *ultra vires* the powers conferred on the MEC by section 11(1) of the Gauteng School Education Act; and (c) they were not reasonable and justifiable in terms of section 4 of the Gauteng School Education Act. The MEC opposed the application.

[13] The High Court upheld the application with costs. It struck down several of the regulations as invalid for one or more of the grounds advanced by FEDSAS. They included regulation 2(2),[12] regulation 2(2A),[13] regulation 3(7),[14] regulation 4,[15] regulation 5 read with regulation 8,[16] regulation 11[17] and regulation 16.[18]

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[11] In terms of section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act 3 of 2000.

[12] Regulation 2(2) provides that "[t]he admission policy of a school, determined by a governing body of that school in terms of section 5(5) of the [Schools Act], may not be inconsistent with any provision of these regulations". The Court held that the regulation was reasonable and justifiable.

[13] Regulation 2(2A) provides that "[t]he Department may determine the minimum standards for the formulation of the admissions policy for specialist schools, technical schools and education institution". The Court concluded that a procedural defect invalidated regulation 2(2A) and that the regulation must be set aside.

[14] Regulation 3(7) provides that "[w]hen a learner has applied for admission to a school, neither the governing body of that school nor any person employed at that school may request the learner's current school or any person employed at that school, to furnish it with a confidential report in relation to that learner". The Court

[14] The MEC and HOD approached the Supreme Court of Appeal. That Court upheld the appeal and reversed the decision of the High Court save in one respect.[19] It held that none of the impugned regulations were invalid on procedural or substantive grounds. It found that the Regulations were enacted in terms of section 11(1) of the Gauteng School Education Act.

[15] On FEDSAS' submission that section 5(5) of the Schools Act entrusts the school governing bodies with the power to determine admission policies, the Supreme Court of Appeal found that FEDSAS failed to take into account the enduring disparities in the education system characterised by the legacy of apartheid. The Court observed that there is a need to reform the public education system, and for that reason, the Court recognised that education under Schedule 4 of the Constitution is a concurrent function between the national and provincial Legislatures. That being so, it acknowledged that there is likelihood of overlap and conflicts between national and provincial legislation. The Court took the view that FEDSAS' submissions failed to

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held that the regulation was unjustifiable and unreasonable as it offended section 4 of the Gauteng School Education Act.

[15] Regulation 4(1) provides "[s]ubject 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". Regulation 4(2) provides "[u]ntil 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". The Court held that section 11(1) of the Gauteng School Education Act does not empower the MEC to determine feeder zones. It held regulation 4 to be beyond the power given by section 11(1) and invalid.

[16] Regulation 5 specifies how applications for admission must be made to the HOD. It empowers the District Director to place learners on a waiting list at schools that have not been declared full by the HOD in terms of regulation 8. The Court held regulation 5, save for regulation 5(5), to be *ultra vires* and invalid. In order to save regulation 5(5) the Court deleted the words "in accordance with regulation 5(9)".

[17] Regulation 11 deals with the procedure to be followed in order to transfer a learner between schools. The High Court held that even though the regulation falls within the ambit of the MEC's powers in terms of section 11(1) of the Gauteng School Education Act, it is nonetheless *ultra vires*. This is because the regulation enjoins the District Director to transfer a learner to a school that has not been declared full. The Court saved the regulation by deleting the words "that has not been declared full".

[18] Regulation 16 provides for an objection process by a parent of a learner to the HOD, prior to an appeal to the MEC. The Court held that in terms of section 105 of the Gauteng School Education Act, the MEC is not empowered to delegate to the HOD her power to decide an appeal. The High Court held that the regulation impinges on the right of a parent to appeal directly to the MEC and found that the regulation was *ultra vires*.

[19] The Supreme Court of Appeal held that "[r]egulation 2(2A) of the regulations published under the General Notice 1160 of 2012 is declared invalid and of no force and effect".

take into account that the impugned regulations were aimed at achieving even distribution of learners of various intellectual ability and behavioural dispositions amongst public schools. Ultimately, the Court observed that the Regulations went beyond the racial profiles of learners and income capacities of their parents.

[16] The Court pointed out that the issue of policy-making authority entrusted on governing bodies by the Schools Act had been dealt with by this Court and it is now settled that even though there are certain powers entrusted on the governing bodies of schools, the power does not exist in a vacuum and should be exercised in accordance with the applicable provincial law.[20]

[17] The Supreme Court of Appeal then considered the impugned regulations individually. It agreed with the High Court and struck down regulation 2(2A) on the ground that the inclusion of "education institutions" in the regulation detracts from its main purpose.

[18] The Court found regulation 3(7) to be reasonable as it protects burdensome learners from unfair discrimination and ensures that the right to education extends equally to all learners.

[19] It observed that the determination of feeder zones in terms of regulation 4 entailed extensive consultations. It found regulation 4 to be rational and reasonable as it attempts to ensure that learners have ready access to schools that are closest to their homes or their parent's workplace.

[20] The Supreme Court of Appeal held that regulation 5 read with regulation 8 was neither *ultra vires* nor constituted unlawful delegation of power. It relied on *Rivonia Primary School* and held that the Gauteng Department of Education (Department) had the authority to exercise reasonable control over admissions and

[20] See above n 2.

capacity in public schools. For the same reasons, the Court also overturned the High Court finding that regulation 11 was beyond the MEC's powers.

[21] Lastly, the Supreme Court of Appeal considered regulation 16. It held that the regulation does not constitute delegation of authority to the HOD to decide appeals. And the regulation does not constitute an additional layer of appeal nor is it in conflict with the provisions of section 5(8) of the Schools Act.[21]

[22] Having cleared the deck, what remains is to decide whether this Court ought to hear the appeal mounted by FEDSAS. Should leave be granted, I will have to decide its merits but only of the specific regulations impugned in this Court.

Leave to appeal

[23] The application engages important constitutional questions of equitable access to education – a promise made by section 29 of the Constitution. We are also required to interpret national and provincial legislation in light of our supreme law. The contest between the applicant, representing certain school governing bodies, and provincial government is neither new nor of passing public interest. The concern of equitable access to quality basic education is of vast public importance. It is certainly worthy of the attention of this Court. Leave to appeal the specified orders of the Supreme Court of Appeal should be granted.

[24] The applicant also sought leave to appeal against the costs order made by the Supreme Court of Appeal against it on the ground that it impinges on its section 34 right in the Constitution and it is inconsistent with *Biowatch*.[22] The respondents have abandoned the costs order in their favour. The costs order no longer has binding force on the applicant nor may the respondents enforce it. Thus, there is no live controversy

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[21] Although FEDSAS' objection to the regulation was that it was in conflict with section 5(9) of the Schools Act, the Supreme Court of Appeal held that the regulation was not in conflict with section 5(8) of the Act.

[22] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

on costs between the parties. There is no proper appeal to hear. Leave to appeal the costs order must be refused.[23]

Merits

Conflict between national and provincial legislation

[25] The foremost contention of the applicant is that provincial legislation that conflicts with national legislation is unconstitutional and is required to be struck out. The applicant adds that the Regulations and particularly regulation 5 read with regulation 8 have caused a conflict between national and provincial legislation.

[26] I think not. This contention ignores the provisions of the Constitution and the Schools Act. Education is a functional area of concurrent national and provincial legislative competence.[24] Parliament may legislate on education and a province too.[25] In turn, the Premier and MECs in a province exercise authority by implementing provincial legislation.[26] The legislative competence of a province cannot be snuffed out by national legislation without more. The Constitution anticipates the possibility of overlapping and conflicting national and provincial legislation on concurrent provincial and national legislative competences. In *Mashavha* this Court pointed out:

> "It is inherent in our constitutional system, which is a balance between centralised government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity."[27]

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[23] The principles relating to costs between private parties and the State have been settled in *Biowatch* – there is no need to address them again here. In *Biowatch* this Court held that if a private party lost against the State in constitutional litigation, costs should not be granted against the private party.

[24] See Schedule 4 Part A to the Constitution.

[25] See sections 44(1)(a)(ii) and (b)(ii) read with section 104(1)(b)(i) of the Constitution.

[26] Section 125(2)(a) of the Constitution.

[27] *Mashavha v President of the Republic of South Africa and Others* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) (*Mashavha*) at para 49.

[27] For this very reason, the Constitution has extensive provisions geared to regulate envisaged conflict between provincial and national legislation. The conflict resolution scheme of sections 146, 149 and 150 of the Constitution departs from the conventional hierarchy that provincial legislation may not be in conflict with national legislation. Automatic repugnancy between the two classes of legislation does not arise. This scheme readily acknowledges and manages the potential conflict related to concurrent national and provincial law-making competences. Under the scheme, provincial legislation prevails over national legislation except if the national legislation applies uniformly countrywide or the matter cannot be regulated effectively by respective provinces or the matter is one listed in the Constitution as requiring uniformity across the nation. None of these considerations apply here.

[28] Even if there was conflict, it does not render the national or provincial legislation on Schedule 4 matters invalid. A court must first attempt to avoid the conflict by preferring any reasonable interpretation of the two pieces of legislation which avoids conflict.[28] If the conflict persists, the provincial legislation prevails.[29] It must be added that national legislation may enjoy supremacy over provincial law only in accordance with the test laid down in sections 146(2) and (3) of the Constitution and in terms of section 148 if section 146 does not apply. However, the trumped provincial or national legislation is not to be struck down. It simply "becomes inoperative for as long as the conflict remains".[30]

[29] The Regulations are legislation authorised by provincial legislation. A plain reading of regulations 5 and 8 reveals that they are consonant with or may be read in harmony with the scheme of sections 5(1) to (5) of the Schools Act[31] and the

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[28] Section 150 of the Constitution.

[29] Section 146(5) of the Constitution.

[30] See section 149 of the Constitution.

[31] Section 5 of the Schools Act provides:

> "(1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

National Education Policy Act. The power of the school governing body to formulate admission policy is clearly subject to limitations in sections 5(1) to (3) of the Schools Act and provincial law as commanded by section 5(5) of the Schools Act. About this I say more below as I look closer at each of the impugned regulations in this Court.

Regulation 3(7) – unfair discrimination

[30] Regulation 3(7) disallows a learner's prospective school from requesting confidential information from her current school.[32] In effect the regime prevents a school from obtaining the confidential report[33] before making the admission decision. The applicant claims that a portion of the definition of "confidential report" renders the regulation irrational, unreasonable and not justifiable because it prevents the

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(2) The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test.

(3) No learner may be refused admission to a public school on the grounds that his or her parent—

(a) is unable to pay or has not paid the school fees determined by the governing body under section 39;

(b) does not subscribe to the mission statement of the school; or

(c) has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner.

(4) The Minister may by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine age requirements for the admission of learners to a school or different grades at a school.

(5) 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.

(6) In determining the placement of a learner with special education needs, the Head of Department and principal must take into account the rights and wishes of the parents of such learner.

(7) An application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department.

(8) If an application in terms of subsection (7) is refused, the Head of Department must inform the parent in writing of such refusal and the reason therefor.

(9) Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council."

[32] See above n 14.

[33] Regulation 1 defines "confidential report" as "a report containing information about the financial status of a parent, whether the parent can afford school fees and employment details of a parent or any other information that may be used to unfairly discriminate against a learner".

disclosure of "any other information that may be used to unfairly discriminate against a learner". In its founding papers, the applicant argued that the definition stood in the way of the school's right to "discriminate fairly". At the hearing, the applicant submitted that the problem with the regulation is that the prohibition is very wide, and suggested that the portion of the regulation that talks of "other information" could be remedied by listing specific information on what is permissible or not permissible information to access. The applicant also illustrated that its need for the confidential report is, amongst other things, to assess special education needs of learners before their admission.

[31] The respondents have disclosed that the purpose of the regulation is served by precluding a school from accessing a learner's confidential report before admission to the school she has applied to. The regulation is designed to prevent unfair discrimination against a learner during the admission phase. That is a plainly legitimate purpose.

[32] The respondents have set out uncontested facts on the Department's experience relating to admission patterns. Schools that are told in advance of admission that a learner has learning or remedial difficulties or is troublesome, tend to refuse that learner's admission. Schools would rather have higher achieving learners and better results. The respondents explained that schools may purport to reject learners for reasons other than their remedial difficulties or troublesome behaviour. In that event, it is difficult for the learner's parents to know the true reason for the non-admission. The MEC is correct that there can be no justification for one school to shift the burden of admission of a troublesome learner onto other schools. It is quite reasonable and justifiable that the Department prefers to arrest the real prospect of unfair discrimination by preventing access to confidential information before admission.[34] Moreover, the ban on accessing confidential information of a learner stays valid only

[34] See *Member of the Executive Council for Education, Gauteng and Another v Federation of Governing Bodies for South African Schools* [2015] ZASCA 149; [2015] 4 All SA 591 (SCA) at para 30.

during the admission phase. Thereafter the school may call for the information on a learner it has already admitted.

[33] I think the means the MEC has used are properly aligned to the objective of preventing unfair exclusion of a learner at the point of admission to a school. The measure in regulation 3(7) is properly tailored to arrest the specific mischief of potential unfair discrimination. Save for revealing the preference of the applicant, none of the grounds it has advanced show that the regulation is not rational, reasonable or justifiable. The legitimate thrust of the regulation is to screen learners from unfair discrimination. This is plain from the heading and from the provisions of regulations 3(1) to (6) read as a whole. This attack of regulation 3(7) is meritless and must fail.

Regulation 4(1) and 4(2) – feeder zones

[34] Regulation 4(1) and (2) provide:

> "(1) 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.
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> (2) 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:
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> (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 5 km radius of the school."

[35] In the High Court, the applicant impugned regulations 4(1) and (2) and they were struck down. In this Court both the applicant and amicus accept that the MEC

was rightly empowered to fix feeder zones for schools. However, both the applicant and the amicus are unhappy about the default feeder zones set by the MEC in regulation 4(2), albeit for different reasons. The applicant contends that despite its use of the permissive "may", regulation 4(1) compels the MEC to determine feeder zones "after consultation with relevant stakeholders". A default regime frustrates the right of school governing bodies to consultation before feeder zones are set. The applicant, like the amicus, asks this Court to compel the MEC to exercise his or her power to determine feeder zones in terms of regulation 4(1) by a predetermined date or in accordance with a published timetable.

[36] The applicant's attack is limited to requiring the MEC to make a determination under regulation 4(1). I have sympathy for the applicant's contention that the MEC may not create a permanent default regime of feeder zones and thereby escape the duty to consult "relevant stakeholders" which would obviously include school governing bodies.

[37] The respondents argued that regulation 4(1) is permissive and that the MEC may in his or her discretion set only default feeder zones for schools. I think not. There is indeed much to be said for the applicant's insistence that the word "*may*" in regulation 4(1) should be read to mean "*must*". This construction is stoutly supported by the introductory phrase in regulation 4(2) which makes plain that a default feeder zone is envisaged only "*until such time as the MEC has determined a feeder zone for a particular school*".[35] Default feeder zones are obviously intended to be transitional. They are set unilaterally and indeed do deny relevant stakeholders meaningful participation in a matter that affects a school materially. I accept the invitation of the applicant that the MEC must be directed to set feeder zones required by regulation 4(1) within a reasonable time and not later than 12 months from the date of this order.

[35] Emphasis added.

[38] The amicus also made a substantive attack on the constitutional validity of the default feeder zones presently prescribed in regulation 4(2) on the ground that they unfairly discriminate by perpetuating apartheid geography. The gut of the objection is that default feeder zones are defined in spatial terms of place of residence or of work. Since the apartheid residential and workplace lines remain firm, the impact of the criteria of the MEC is to prolong and legalise racial exclusion.

[39] There is traction in the contention of the amicus. But I am uncertain that an amicus could introduce a new cause of action – unfair discrimination – and press for a remedy that none of the parties has sought.[36] Happily I do not have to decide the issue because the order we will make will compel the MEC to formulate fresh rules for feeder zones as required by regulation 4(1).

Regulation 5 (placing an unplaced learner at any school) and regulation 8 (declaring a school full)

[40] Regulation 5(8) provides that despite “the provisions of any school admission policy”, the District Director may at the end of the admission period place an unplaced learner “at any school” that has not been declared full and where there remains no unplaced learners on the waiting list. In addition, regulation 8 provides that “notwithstanding the provisions of the admission policy of a school” and until norms and standards required by the Schools Act are in force, “the objective entry level learner enrolment capacity of a school shall be determined by the [HOD]” who may also declare the school full if the school has reached its enrolment capacity.

[41] The applicant complains that regulations 5 and 8 are irrational and not justifiable because they cannot be read harmoniously with sections 5(1) to (3) of the Schools Act. The regulations oust a vital partner – the school governing body – from the public school model imagined in the Schools Act. The amicus’ grievance is that

[36] In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 31 the Court held that an amicus is not entitled to raise a new cause of action.

these powers are open-ended and are granted without strictures that would banish arbitrariness. The respondents submitted that the powers are narrow, defined and rational as their purpose is to ensure the placement of all unplaced learners as the Constitution[37] and Schools Act[38] require. They added that, in any event the safeguard is that the HOD's decision would amount to administrative action that is open to judicial review.

[42] The irresoluble conflict of provincial and national law seen by the applicant fails to have proper regard to how the provisions of section 5(1) to (3) qualify and limit section 5(5) of the Schools Act. Section 5 regulates admission to public schools. Its opening provision in section 5(1) is plain and emphatic: "[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way". Section 5(2) requires a school governing body not to administer a test related to the admission of a learner. Obviously, a learner may not be excluded only on account of failing to satisfy a test the school might choose to put up. Section 5(3) introduces a number of grounds on which a learner may never be refused admission. These include an inability or failure to pay school fees or failure to subscribe to the mission statement of the school. Then follows section 5(5) whose exact words bear repetition:

> "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."

[43] The provision has at least two important internal qualifiers. First, the governing body determines admission policy of a school subject to the Schools Act and "any applicable provincial law". About this, in *Rivonia Primary School*, Mhlantla AJ (as she then was) explained that—

[37] Section 29(1)(a).

[38] The preamble of the Schools Act realises the need to "provide an education of progressively high quality . . . [and] uphold the rights of all learners". Section 3(3) of the Act prescribes that "[e]very Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school". Section 34 further obliges the State to "fund public schools from public revenue on an equitable basis *in order to ensure the proper exercise of the rights of learners to education* and the redress of past inequalities in education provision". (Emphasis added.)

> "there is an important textual qualifier in section 5(5) subjecting a school governing body's power to other provisions of the Schools Act, as well as to applicable provincial law. The effect of this is that the determination of admissions may be subject to provincial government's intervention in terms of the Schools Act, or applicable provincial law if the intervention is provided for in those instruments."[39]

[44] Secondly, it is trite that the admission policy of a school must conform to all applicable law including provincial law. It cannot be otherwise because that is what the rule of law requires. It is so that when a school fashions its admission policy it will be actuated by the internal interests of its learners. It is also quite in order that a school seeks to be a centre of excellence and to produce glittering examination and other good outcomes. But public schools are not rarefied spaces only for the bright, well-mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education.

[45] That, however, must occur within the broader framework of all valid law led by the vision of universal access to education embraced by the Constitution. The duty to place unplaced learners falls on the MEC who must ensure that there are enough school places so that every child can attend school.[40] Similarly, the power to determine learner enrolment capacity and declare a school full or not, in the absence of norms and standards required by the Schools Act that are in force, rightly falls on the HOD. Absent this power the statutory task of the MEC and HOD to place unplaced learners may come to naught.

[46] Regulation 5 read with regulation 8 is rational, reasonable and justifiable and it is not at odds with section 5(5) of the Schools Act. Even if they were, they are plainly reconcilable with the scheme of the statute.

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[39] *Rivonia Primary School* above n 2 at para 41.

[40] See section 3(3) of the Schools Act.

[47] It remains important to recognise that school governing bodies are a vital lifeblood to proper and fulsome learning and teaching. Parents must be meaningfully engaged in the teaching and learning of their children. The Schools Act carves out an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up in a democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school. The Constitution and the Schools Act also entrust vital tasks related to the education of our children to the MEC and HOD. In the past, this Court has correctly cautioned against undue dominance of school governing bodies by the provincial Executive. We have called for cooperative governance between statutory creatures – school governing bodies and the MEC and HOD – entrusted with effective and universal access to basic education. Of this, Froneman J and Skweyiya J wrote in *Welkom High School*:

> "The school governing bodies and HOD are organs of state. In terms of section 41(1)(h) [of the Constitution] they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions, and avoiding legal proceedings against one another."[41]

Regulation 11(5) – transfer of learners between schools

[48] The applicant's written argument extends to an attack on regulation 11(5) as vague and inoperable.[42] It empowers a District Director to consider the relative

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[41] *Welkom High School* above n 2 at para 141.

[42] Regulation 11(5) provides:

> "In making a decision in terms of sub-regulation (3) to admit a learner to a particular school, the District Director shall have regard to—
>
> (a) the reasons of the learner for applying to leave the school at which he or she is currently enrolled;
>
> (b) whether the learner would have qualified for the waiting list A for the school to which he or she seeks admission if he or she were to have applied as an entry phase learner; and
>
> (c) the capacity of the school to which the learner seeks admission relative to the capacity of—

capacity of other schools in a district as a criterion for placing a learner in a particular school. At the hearing this line of attack was not pressed on us. Regulation 11(5) has built in several factors that the District Director has to consider before exercising the power and it is for the narrow purpose of admitting a learner to a school that has not been declared full. The school governing body's role is understandably parochial but the HOD's is provincial. Here too, the guiding purpose is to ensure that every learner is placed in a school. This attack that regulation 11(5) is irrational or unreasonable or unjustifiable has no merit.

Regulation 16 – objections and appeals

[49] The applicant argues that the objection process envisaged by regulation 16 impinges on the right of the parent of a learner to appeal directly to the MEC.[43] This observation is prompted by an amendment to the Regulations that inserts an extra layer of objection by a parent first to the HOD. But the HOD's decision is subject to an appeal to the MEC. That process is anticipated by section 5(9) of the Schools Act. I do not think that the extra layer of the appellate process amounts to a delegation of authority by the MEC to the HOD to decide an appeal. Regulation 16(4) preserves the appeal to the MEC in so many words. None of his or her appellate powers are shed in favour of the HOD. It is consequently unnecessary to enquire whether a delegation of this kind is permissible in terms of section 105 of the Gauteng School Education Act that regulates delegation of power and assignment of duties.

Conclusion

[50] The Supreme Court of Appeal reached a supportable conclusion in relation to the merits of the appeal before it. I will grant leave to appeal but dismiss the appeal

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(i) any other schools in respect of which the learner would have qualified for the waiting list A if he or she were to have applied as an entry phase learner; and

(ii) other schools in the District."

[43] Regulation 16(2) provides:

"A parent of a learner, who wishes to lodge an objection against a decision contemplated in regulation 5(7)(c)(iii) may object to the [HOD] within 7 school days of being provided with the documents listed in regulation 5(7)(c)(iii) and (iv)."

save to the extent of requiring the MEC to determine new feeder zones in terms of regulation 4(1) within 12 months of the date of delivery of this judgment. The MEC and HOD have been substantially successful but there is no cause to make an order as to costs. FEDSAS raised important constitutional questions and I find no valid cause to have it bear costs of the application.

Order

[51] The following order is made:

1. Leave to appeal is granted save in respect of the abandoned costs order of the Supreme Court of Appeal.
2. The appeal against the order of the Supreme Court of Appeal is dismissed, subject to paragraph 3.
3. The first respondent, Member of the Executive Council for Education, Gauteng, is directed to determine the feeder zones for public schools in Gauteng province in the manner required by regulation 4(1) of the Regulations Relating to the Admission of Learners to Public Schools within a reasonable time but not later than 12 months from the date of this judgment.

For the Applicant:	J I Du Toit SC, C Dreyer and J Merabe instructed by Claude Reid Inc
For the First and Second Respondents:	W Trengove SC, S Budlender and B Lekokota instructed by the State Attorney
For the Amicus Curiae:	T Ngcukaitobi and F Hobden instructed by Equal Education Law Centre