REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **29847/2014**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

ORGANISASIE VIR GODSDIENSTE-ONDERRIG

EN DEMOKRASIE Applicant

and

LAËRSKOOL RANDHART First Respondent

LAËRSKOOL BAANBREKER Second Respondent

LAËRSKOOL GARSFONTEIN Third Respondent

HOËRSKOOL LINDEN Fourth Respondent

HOËRSKOOL OUDTSHOORN Fifth Respondent

LANGEHOVEN GYMNASIUM Sixth Respondent

MINISTER OF BASIC EDUCATION Seventh Respondent

MINISTER OF JUSTICE AND CORRECTIONAL

SERVICES Eighth Respondent

NATIONAL ASSOCIATION OF SCHOOL

GOVERNING BODIES Ninth Respondent

and

COUNCIL FOR THE ADVANCEMENT OF THE

SOUTH AFRICAN CONSTITUTION First Amicus Curiae

CAUSE FOR JUSTICE Second Amicus Curiae

COUNCIL FOR THE PROTECTION AND

PROMOTION OF RELIGIOUS RIGHTS Third Amicus Curiae

AFRIFORUM Fourth Amicus Curiae

SOLIDARITY Fifth Amicus Curiae

JUDGMENT

Summary: Freedom of religion – religious observances in public schools - application for large number of declaratory orders and interdicts against public schools, amongst others restraining them from adopting a single religion to the exclusion of others, and restraining them from conducting specified religious practices – section 15 (1) and 15 (2) of the Constitution.

Held: Principle of subsidiarity applicable – applicant either to have founded cause of action on basis of conduct not complying with applicable subsidiary national and provincial laws, or applicable rules of relevant school governing bodies; or to have applied for unconstitutionality of such subsidiary laws or rules – applicant having done neither.

Held: Application accordingly dismissed for most part – general declaratory order nonetheless appropriate, declaring s.7 of the Schools Act, 84 of 1996 offended by public schools holding out adherence to a single religion to the exclusion of others.

The Court:

Introduction

[1] The applicant is called "Organisasie vir Godsdienste-Onderrig en Demokrasie". It is a voluntary association which assists its members and children in public schools when those schools infringe the learners' constitutional rights. The first six respondents are public schools as envisaged in the South African Schools Act 84 of 1996 ("the Schools Act"), three of them primary schools and three secondary schools ("the schools"). Four of the schools are in the Gauteng province, and two in the Western Cape. The seventh respondent is the Minister of Education in the National Government, the eighth respondent the Minister of Justice and Correctional Services, and the ninth respondent, the National Association of School Governing Bodies.[1]

[2] Five parties were admitted as friends of the court, being the Council for the Advancement of the South African Constitution, Cause for Justice, the South African Council for the Protection and Promotion of Religious Rights and Freedoms, Afriforum and Solidarity.[2] The seventh respondent (the Minister of Education) was joined as a third party by the schools for declarations of invalidity[3] of certain portions of the National Policy on Religion and Education[4] ("the National Religion Policy"). She abided the judgment of the court in respect of the central dispute between the applicant and the schools, and limited her interest in the proceedings to opposing the declaration of unconstitutionality sought in respect of the National Religion Policy. The eighth respondent (the Minister of Justice and Correctional Services) made no submissions.

[3] The relief claimed in the amended notice of motion falls into two sets of prayers. Prayer 1 and its subparagraphs are for declarations, and prayer 2 and its subparagraphs are for seventy-one final interdicts. Prayer 1 sets out six main declarations, and ends by incorporating all

[1] The ninth respondent was admitted without objection on the first day of a three day hearing.
[2] We express our gratitude to them for their helpful assistance.
[3] Conditional on the National Religion Policy being interpreted in a particular way.
[4] Determined by the Minister of Education in terms of s.3(4)(1) of the National Education Policy Act 27 of 1996, Gov Notice No.1307, 12 September 2003, published in Government Gazette No 25459 of 12 September 2003.

seventy-one interdicts listed in prayer 2 against the respondent schools as part of the prayer 1 declarations. The declarations are sought not only against the six respondent schools, but against *"any public school, as defined in terms of the South African Schools Act 84 of 1996."*

[4] The six main declarations seek to have declared as a breach of the National Religion Policy and as unconstitutional a range of defined propositions, including promoting only one religion in favour of others; associating itself with any particular religion; requiring of a learner to disclose (to the school) adherence to any particular religion; and permitting religious observances during school programs on the basis that a learner may elect to opt out.

[5] The declarations that incorporate by reference the seventy-one interdicts listed in prayer 2, mirror-image against *"any public school"* the set of prayers for interdictory relief sought in prayer 2 against only the six schools here joined. To this extent then there is over-lap: an aggregate of seventy-one interdicts are sought against the six schools; but each one of these interdicts is sought in the form of declarations against all public schools, including also the six respondent schools.

[6] The interdictory relief is to restrain the six respondent schools each from partaking of an identified set of the seventy-one instances of circumscribed conduct with a religious theme, some of which are identified with the Christian faith. These range from the more contentious (*"holding itself out as a Christian school"*[5]) to the possibly more neutral (*"having a value that includes learners to strive towards faith"*[6]).[7] In between are interdicts against endorsing the school as having a Christian character; recording that its school badge represents the Holy Trinity; recording as part of its mission statement that "we believe"; having religious instruction and singing; handing out Bibles; opening the school day with Scripture and explicit prayer dedicated to a particular God; referring to any deity in a school song; having a value

[5] Prayer 2.1.2.
[6] Prayer 2.3.5.
[7] The detailed relief sought would take up too much space to be set out here. The amended notice of motion comes to some thirteen and a half pages, and it lists detailed practices alleged to be conducted at the schools.

that includes learners to strive towards faith; working with learners to understand and self-discover in what relationship they stood with Jesus; teaching creationism; and having children draw pictures depicting Bible stories. As is evident, the conduct ranges from the very generalised to the very specific.

[7] Declaratory relief is discretionarily granted in terms of s.21(1)(c) of the Superior Courts Act, 10 of 2013 (emphasis supplied):

"21 Persons over whom and matters in relation to which Divisions have jurisdiction
(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a) …

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[8] The requirements for a final interdict are a clear right, an injury actually apprehended, and no alternative remedy.[8]

[9] In cases where a court is appropriately seized with a constitutional matter, additional considerations apply. S.172(1)(b) of the Constitution provides that in deciding constitutional matters, a court *"may make any order that is just and equitable"*. In 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,[9] Froneman J and Skweyiya J (with whom Moseneke DCJ and Van der Westhuizen J concurred) said (emphasis supplied):

"[130] This Court in Ermelo[113] observed that when deciding constitutional matters, courts have an "ample and flexible remedial jurisdiction . . . [which] permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements".[114] Cases involving children are pre-eminently of the kind where one must scratch the surface to get to the real substance below."

[8] Setlogelo v Setlogelo, 1914 AD 221.
[9] 2014 (2) SA 228 (CC).

[10]And in Doctors for Life International v Speaker of the National Assembly and Others,[10] Ngcobo, J (then not yet Chief Justice) said:

"[201] The provisions of s 172(1)(a) are clear, and they admit of no ambiguity; '(w)hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid'."

The issue

[11]The unlawfulness relied on both for the declarations and for the interdicts is that the identified conduct is offensive to the Constitution and to the National Religion Policy.[11] Although the applicant referred also to the National Education Policy Act 27 of 1996 in argument, non-compliance with the provisions of that Act did not found its case.

[12]The lengthy affidavits of the schools, supported by lengthy experts' testimony, challenge some of the applicant's facts, particularly that the schools' practices are coercive and abusive,[12] but mostly the applicant's contentions concerning the application of the law to those practices. If the schools' case were to be captured in a nutshell, it would be that the schools too have a right of freedom of religion; that the schools are entitled by law to have an ethos or character; and that the school governing bodies ("SGBs") envisaged in s.16 of the Schools Act are entitled to determine this ethos or character with reference to the religious make-up of the feeder community that serves the particular school.

[13]The schools accepted that this last proposition is subject to the proviso that any religious observances that may be conducted at the schools pursuant thereto are conducted – as required by s.15(2) of the Constitution – *"under rules issued by the governing body"*, *"on an equitable basis"*, and that *"attendance at them by learners and members of staff is free and voluntary."*[13] But they submitted that their practices complied with these measures.

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[10] 2006 (6) SA 416 (CC).
[11] Applicant's heads of argument, paras D1.1 and D1.2. The applicant referred in para A2.2 of its heads to s.7 of the Schools Act in the context of its own objectives, but it did not found its case on it.
[12] Schools' heads, para 49.
[13] This provision effectively mirrors s.15(2) of the Constitution.

[14]As might have been expected, there was considerable debate as to the meaning and reach of the concepts of *"equitable"* and *"free and voluntary"* in this context. The applicant submitted that since it offended s.15(1) of the Constitution for a public school to adopt any religion(s), the adjective *"equitable"* can by definition never justify the adoption by the school of a single religion, even if the learners from the feeder community of that school were all adherents to that religion.

[15]The applicant's central submission was therefore that the provisions of s.15(1) of the Constitution stood in the way of the adoption by a public school of any religion at all; all that was permitted – and then limited to *"religious observances"* – was the window opened under s.15(2) of the Constitution.

[16]As to the notion of *"free and voluntary"*, the applicant submitted that indirect coercion was equally proscribed, and that even if a learner were required to disclose whether she subscribed to a faith, and if so, which or what faith; or even if a learner were given the choice to "opt out" of attending religious observances conducted by a school, that would impinge on her fundamental right to religious freedom.

[17]Central to the applicant's submission concerning the permissive window afforded in terms of s.15(2) of the Constitution, was the proposition that those provisions merely permitted someone else, and not the school itself, to conduct religious observances *"at"* the school. If the school itself were so permitted, the Constitution framers would have used the preposition *"by"* instead, according to the argument.

[18]Taking the lead from Welkom[14] in the Constitutional Court, it would seem – in amongst the myriad of specific instances of allegedly unlawful conduct set out in the notice of motion - that the substantive issues between the parties are really threefold: first, there is the question whether a public school may hold itself out as a Christian school, and if so to what extent;[15]

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[14] Welkom supra, para [130].

[15]Prayers 1.1 and 1.2 are for declarations that it is a breach of the National Religion Policy and unconstitutional for any public school to *"promote or to allow its staff to promote that it, as a public school, adheres to only one*

second, there is the issue of religious observances at public schools – whether a public school itself may conduct these, and the extent to which these may be religion-specific; and third, there is the issue whether a learner may be asked to convey whether or not she adheres to a particular (religious) faith.[16]

The Constitution and religion

[19]The Constitution is the starting point of both the applicant's case and the schools' case.[17] Both main protagonists referred to the Preamble, the applicant stressing the equality of all and the schools stressing the concluding portion with its multiple references to *"God"*. S. 15 of the Constitution, conferring freedom of religion, belief and opinion, was the centrepiece of the debate, and it is useful to quote both s.15(1) and s.15(2) here:

"15. Freedom of religion, belief and opinion.
(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
(2) Religious observances may be conducted at state or state-aided institutions, provided that—
(a) those observances follow rules made by the appropriate public authorities;
(b) they are conducted on an equitable basis; and
(c) attendance at them is free and voluntary."

[20]The content and meaning of the notion of *"religious observances"* play an important role in this application. It will be appreciated that if the schools' allegedly unlawful conduct really comprises no more than varying forms of *"religious observances"* then s.15(2), perhaps more than s.15(1), would provide a relatively circumscribed constitutional threshold against which the conduct would have to be measured. We revert to this below.

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or predominantly one religion"; and *"hold out that it promotes the interests of any one religion in favour of others."* But there are many other forms of declarations and interdicts that go to this issue; see for example prayers 2.1; 2.2; 2.3.4; 2.3.6; 2.3.9; 2.3.11; 2.3.18; 2.3.20; 2.3.22; 2.4.2; 2.4.7; 2.4.8; 2.4.9; 2.4.10; 2.5.1; 2.5.5.3; 2.6.1.1; 2.6.1.2; 2.6.3; and 2.6.5.1.

[16] Prayer 1.4 is for a declaration that it is a breach of the National Religion Policy and unconstitutional for any public school to *"require any learner, either directly or indirectly, to disclose whether or not such learner adheres to any religion"*; and *"to which religion, if any, the learner adheres."*

[17] In terms of sch 4 of the Constitution, the functional areas of concurrent national and provincial legislative competence include *"Education at all levels, excluding tertiary education."*

[21]The parties referred also to the s.7(2) constitutional obligation of the State to promote the rights in the Bill of Rights, the applicant submitting that schools and SGBs as organs of state had concomitant obligations. The equality provisions of s.9 (and especially s.9(3)) were pertinent, as were s.10 (human dignity), s.12 (freedom and security of the person), s.14 (privacy), s. 16 (freedom of expression) and s.18 (freedom of association). The schools relied too on s.31 (cultural, religious and linguistic communities).

[22]Since this case is concerned with the right to freedom of conscience, religion, thought, belief and opinion, it is apposite, before proceeding, to remind oneself of the approach that our courts, and specifically the Constitutional Court, has adopted in such matters. As a general proposition it is suggested that the approach is – in view of the diversity[18] of our nation - one of neutrality and even-handedness; the State should not be seen to be picking sides in matters religion, neither vis-à-vis "non-believers", nor vis-à-vis other religions.

[23]In S v Lawrence; S v Negal; S v Solberg[19] Chaskalson, P (then) said (with reference to s.14 of the interim Constitution, for present purposes the same as s.15)(emphasis suppled):

"[103] Section 14(2) does not, in my view, provide justification for giving an extended meaning to s 14(1). Compulsory attendance at school prayers would infringe freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers, s 14(2) makes clear that there should be no such coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the 'non-believers'. But whatever s 14(2) may mean, and we have heard no argument on this, it cannot, in my view, be elevated to a constitutional principle incorporating by implication a requirement into s 14(1) that the State abstain from action that might advance or inhibit religion."

[18] The constitutional preamble records that *"We, the people of South Africa … Believe that South Africa belongs to all who live in it, united in our diversity."*

[19] 1997 (4) SA 1176 (CC). The lengthy quotation is regretted but unavoidable.

[24]In the same case, O'Regan, J said:

"[116] I shall commence by considering the purpose and meaning of s 14 in our Constitution. Unlike the Constitution of the United States, our Constitution contains no establishment clause prohibiting the 'establishment' of a religion by the State. Nevertheless, the interim Constitution contains a range of provisions protecting religious freedom. In s 8, the interim Constitution prohibits 'unfair discrimination' on grounds of religion. In s 32(c), every person is given the right 'to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race'. And, of course, s 14 protects the freedom of religion. It is not possible to read this array of constitutional protections without realising that our Constitution recognises that adherence to religion is an important and valued aspect of the lives of many South Africans and that the Constitution seeks to protect, in several ways, the rights of South Africans to freedom of religion.

[117] The provisions of s 14 themselves are instructive as to the manner in which the right should be developed in our law. Section 14(1) protects the right to freedom of religion and conscience. Section 14(2) then provides that religious observances may be conducted at State or State-aided institutions provided that they are conducted on an equitable basis and attendance at them is free and voluntary. …

[118] …

[119]The provisions of s 14(2) of the interim Constitution make it clear that religious observances at public institutions will not give rise to constitutional complaint if the observances meet three requirements: the observances must be established under rules made by an appropriate authority; they must be equitable; and attendance at them must be free and voluntary. It seems appropriate to imply from this provision and from the absence of an express establishment clause that a strict separation between religious institutions and the State is not required by our Constitution.

[120] …

[121]The stipulation of voluntariness is not the only precondition established by s 14(2). The subsection requires that, even where attendance is voluntary, the observance of such practices must still be equitable. In my view, this additional requirement of fairness or equity reflects an important component of the conception of freedom of religion contained in our Constitution. Our society possesses a rich and diverse range of religions. Although the State is permitted to allow religious observances, it is not permitted to act inequitably.

[122] In determining what is meant by inequity in this context, it must be remembered that the question of voluntary participation is a consideration separately identified in s 14(2). The requirement of equity must therefore be something in addition to the requirement of voluntariness. It seems to me that, at the least, the requirement of equity demands the State act even-handedly in relation to different religions. …

Requiring that the government act even-handedly does not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality. Indeed, at times giving full protection to freedom of religion will require specific provisions to protect the adherents of particular religions, as has been recognised in both Canada and the United States of America.90 The requirement of even-handedness too may produce different results depending upon the context which is under scrutiny. For example, in the context of religious observances

at local schools, the requirement of equity may dictate that the religious observances held should reflect, if possible, the religious beliefs of that particular community or group. But for religious observances at national level, however, the effect of the requirement is to demand that such observances should not favour one religion to the exclusion of others.

[123] The requirement of equity in the conception of freedom of religion as expressed in the interim Constitution is a rejection of our history, in which Christianity was given favoured status by government in many areas of life regardless of the wide range of religions observed in our society. Sachs J in his judgment in this case has provided a valuable account of the ways in which Christian principles were endorsed by legislation and its practices often imposed upon all South Africans regardless of their beliefs (see paras [148]--[152]). The explicit endorsement of one religion over others would not be permitted in our new constitutional order. It would not be permitted, first, because it would result in the indirect coercion that Black J adverted to in Engel v Vitale; and, secondly, because such public endorsement of one religion over another is in itself a threat to the free exercise of religion, particularly in a society in which there is a wide diversity of religions. Accordingly, it is not sufficient for us to be satisfied in a particular case that there is no direct coercion of religious belief. We will also have to be satisfied that there has been no inequitable or unfair preference of one religion over others."

Subsidiarity

[25]We return below to the issues of diversity and of public schools' endorsement of one religion over another. Before now dealing with the relevant subsidiary legislation, it is necessary first to say that direct invocation of the Constitution for a cause of action inevitably invites a consideration of the principle of subsidiarity.

[26]In My Vote Counts NPC v Speaker of the National Assembly and Others,[20] the Constitutional Court (Cameron, J) wrote in this regard (emphasis supplied):

"[46] Parliament's argument brings to the fore the principle of subsidiarity in our constitutional law. Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail. The word has been given a range of meanings in our constitutional law. It is useful in considering the scope of subsidiarity, and Parliament's reliance on it — to have them all in mind.

…

[52] But it does not follow that resort to constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law — to which one must look first.

[20] 2016 (1) SA 132 (CC).

[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

[54] Over the past 10 years this court has often affirmed this. It has done so in a range of cases. First, in cases involving social and economic rights, which the Bill of Rights obliges the state to take reasonable legislative and other measures, within its available resources, to progressively realise, the court has emphasised the need for litigants to premise their claims on, or challenge, legislation Parliament has enacted. In Mazibuko the right to have access to sufficient water guaranteed by s 27(1)(b) was in issue. The applicant sought a declaration that a local authority's water policy was unreasonable. But it did so without challenging a regulation, issued in terms of the Water Services Act, that specified a minimum standard for basic water supply services. This, the court said, raised 'the difficult question of the principle of constitutional subsidiarity'. O'Regan J, on behalf of the court, pointed out that the court had repeatedly held 'that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution'. The litigant could not invoke the constitutional entitlement to access to water without attacking the regulation and, if necessary, the statute."

National legislation

[27] Legislation dealing with religious observances at public schools has been enacted. The legislation concerned includes both national and provincial legislation; and of course, also the "rules" (whether in the form of mission statements or religious policies) made by SGBs under s.20 (1) of the Schools Act, and in terms of the enabling provisions of the various provincial Acts. And since the applicants' case involves no attack on any of these forms of legislation as being inconsistent with the Constitution, it is necessary to consider the originating source and the reach of these laws to see whether they were intended to give effect to the protection and enjoyment of s.15 rights at public schools.

[28] Starting with the national legislation, under s.12 of the Schools Act, the Member of the Executive Council of a province who is responsible for education in the province must from the provincial budget provide public schools for the education of learners. S.7 of the Schools

Act deals pertinently with freedom of conscience and religion at public schools. It provides (emphasis supplied):

> ***"7. Freedom of conscience and religion at public schools***
> *Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary."*

[29] The correlation here with s.15(2) of the Constitution is self-evident. In principle therefore, certainly as far as *"religious observances"* are concerned, the pathway to potential constitutional unlawfulness of the impugned conduct must, on the principle of subsidiarity, pass through s.7 of the Schools Act before s.15(2) of the Constitution may be invoked directly. The impugned conduct must therefore either fall foul of s.7 of the Schools Act, in which event that is the basis of the unlawfulness; or, assuming the conduct is legitimised by s.7 but is still alleged to be constitutionally offensive, the applicant must attack the constitutional validity of s.7. But as we shall see below with reference to the provincial laws, s.7 of the Schools Act is really just a pass-through of the constitutional imperative to these.

[30] Other relevant provisions of the Schools Act include that the governance of every public school is vested in its SGB (s.16(1)), which stands in a position of trust towards the school (s.16(2)). The professional management, as opposed to governance, of the school is given over to the principal under the authority of the head of the relevant education department ("HOD") (s.16(3)).The elected members of a SGB comprise members from parents of learners, educators, non-educators staff members, and learners in the eighth grade or higher at the school (s.23(1),(2)). The number of parents must comprise one more than the combined total of the other SGB members who have voting rights – in other words, the parents hold statutory sway over SGBs (s.23(9)).

[31] A SGB functions in terms of a constitution compliant with minimum requirements determined by the MEC (s.18(1)), and to be submitted to the HOD within 90 days of its election. In addition, every member of a SGB must adhere to a code of conduct determined by the MEC

(s.18A(1),(3)), and this code of conduct *"must be aimed at establishing a disciplined and purposeful school environment dedicated to the improvement and maintenance of a quality governance structure"* (s.18A(2)).

[32] In terms of s.20 of the Schools Act, the first four functions of a SGB are to promote the best interests of the school and to strive to ensure its development through the provision of quality education for all learners; to adopt a constitution; to develop *"the mission statement of the school"*; and to adopt a code of conduct for learners at the school (s.20(1)(a) – (d)).

[33] Oversight of a SGB rests with the HOD who may withdraw a function of a SGB (s.22), or when the SGB has failed to perform functions allocated to it in terms of the Schools Act, appoint someone else to perform it (s.25).

Provincial legislation

[34] Moving on then to the provincial laws, the first observation is that in the event of a conflict between national legislation and provincial legislation falling within a functional area listed in sch 4 of the Constitution, provincial legislation prevails.[21] Importantly, each of the nine provinces has enacted legislation dealing amongst others with religion at public schools.[22] The relevant provisions of the nine provincial Acts are not identical, but their essential thrust is, at least for present purposes, the same.

[21] See s.146(5) of the Constitution, provided s.146(2) or (3) do not apply, and it is suggested that they do not. See also Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC) at para [25] to [29].

[22] Gauteng School Education Act 6 of 1995 ("the Gauteng Act"); the Western Cape Provincial School Education Act 12 of 1997 ("the Western Cape Act"); the Eastern Cape Schools Education Act 1 of 1999 ("the Eastern Cape Act"); the KwaZulu-Natal School Education Act 3 of 1996 ("the KwaZulu-Natal Act"); the Free State School Education Act 2 of 2000 ("the Free State Act"); the Limpopo School Education Act 9 of 1995 ("the Limpopo Act"); the Northern Cape School Education Act 6 of 19996 ("the Northern Cape Act"); the North-West Schools Education Act 3 of 1998 ("the North-West Act"); and the School Education Act (Mpumalanga) 8 of 1995 ("the Mpumalanga Act").

[35]We will focus on the Gauteng Act and refer also to the Western Cape Act. The Gauteng Act too[23] makes provision for the establishment of SGBs.[24] In regard to their relationship with matters religious at schools, s.21A and s.22 are particularly pertinent (emphasis supplied):

"21A. Religious policy of public schools.

(1) The governing body of a public school must determine the religious policy of the school subject to the Constitution, the South African Schools Act, 1996 (Act 84 of 1996), and this Act in consultation with the Department.

(2) The religious policy of a public school shall be developed within the framework of the following principles:

(a)The education process should aim at the development of a national, democratic respect of our country's diverse cultural and religious traditions.

(b)Freedom of conscience and of religion shall be respected at all public schools.

(3) The governing body of a public school must submit a copy of the school's religious policy to the Member of the Executive Council for vetting and noting within 90 days of coming into office, and as may be required.

(4) If, at any time, the Member of the Executive Council has reason to believe that the Religious Policy of a public school does not comply with the principles set out in subsection (2) above or the requirement of the constitution, the Member of the Executive Council,[25] after consultation with the governing body of the school concerned, direct that the Religious Policy of the school be formulated in accordance with subsection (1) and (2).

[S. 21A inserted by s. 15 of Act No. 5 of 2011.]

22. Freedom of conscience.

(1) No person employed at any public school shall attempt to indoctrinate learners into any particular belief or religion.

(2) No person employed at any public school or independent school shall in the course of his or her employment denigrate any religion.

(3) (a) (i) Every learner at a public school, or at an independent school which receives a subsidy in terms of section 69, shall have the right not to attend religious education classes and religious practices at that school.

[23] As with s.16 to s.20 of the Schools Act.
[24] S.26.
[25] Note that the verb is incomplete in the published version of the Gauteng Act. In s.21 before its deletion the missing word was "may".

(ii) In this regard the department shall respect the rights and duties of parents to provide direction to their children in the exercise of their rights as learners, in a manner consistent with the evolving capacity of the children concerned.

(b) The right conferred by paragraph (a) on a learner at an independent school which receives a subsidy in terms of section 69, may be limited where such limitation is necessary to preserve the religious character of the independent school concerned.

(c) Except as is provided for in paragraph (b) no person employed at a public school, or at an independent school which receives a subsidy in terms of section 69, shall in any way discourage a learner from choosing not to attend religious education classes or religious practices at that school.

(4) No person employed at a public school shall be obliged or in any way unduly influenced to participate in any of the religious education classes or religious practices at that school."

[36]The concept of a *"religious policy"* is defined in the Gauteng Act:

*"**'religious policy'** of a public school, as contemplated in section 21, includes matters relating to—*

(i) the amount, form and content of religious instruction[26] classes offered at the school; and

(ii) the religious practices which are conducted at the school; …"

[37]Some observations concerning the provisions of the Gauteng Act illustrate how both the constitutional s.15(1) and s.15(2) rights, certainly as far as they pertain to public schools, have percolated down from the Constitution, through the national legislation in the form of the Schools Act, and down into the provincial legislation.

[38]First, s.7 of the Schools Act refers to *"religious observances"* as does s.15(2) of the Constitution, and subjects such observances to the Constitution and *"any applicable provincial law"*. The Gauteng Act does not limit its reach to *"religious observances"*, but provides that a public school must have a *"religious policy"* as defined. This definition is not limiting but inclusive, and apart from *"religious practices"*, which is similar to the notion of *"religious observances"*, also includes *"the amount, form and content of religious instruction classes offered at the school"*. The point is, the Gauteng Act does not, as with s.7 of the Schools Act,

[26] One of the prayers sought in the notice of motion, prayer 2.1.6, is an interdict against any school *"rendering religious instruction"*. This provision of the Gauteng Act requires that the religious policy to be determined by the SGB must include detail about the religious instruction classes offered at schools.

deal only with *"religious observances"*, but also with other aspects of religion at public schools in the province.

[39]Second, the religious policy must be determined by the SGB, subject to the Constitution, the Schools Act, and the Gauteng Act, but importantly, *"in consultation with the Department."*[27] It is worth repeating that it is the SGB, not the school, which is vested with the governance of the school; the professional management of the school is given over to the principal, who does so under the authority of the HOD.[28]

[40]The interface with the department is important. It was observed by Moseneke, DCJ in Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another,[29] that education at public schools is the responsibility of a tripartite partnership made up of the SGBs, the provincial and the national departments:

"[56] An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools.[37] The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools[38] and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals.[39] Parents of the learners and members of the community in which the school is located are represented in the school governing body[40] which exercises defined autonomy over some of the domestic affairs of the school.[41]"

[41]This interface is evident not only in the MEC's oversight function relative to the contents of the religious policy, but also in the oversight function generally conferred on the HOD in respect of SGBs.[30]

[42]Third, the Gauteng Act anticipates that there would be *"religious education classes and religious practices"* at a school. These must be incorporated in the religious policy of the school, which will include *"the amount, form and contents of religious instruction classes offered at the school"*, as well as of the *"religious practices"* that are there conducted.

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[27] This is a reference to the provincial education department.
[28] Compare s.16 of the Schools Act.
[29] 2010 (2) SA 415 (CC).
[30] S.30 of the Gauteng Act.

[43]Fourth, the religious policy must be developed having due regard to the need to develop a national, democratic respect for this country's diverse cultural and religious traditions; and it must respect freedom of conscience and of religion. And the fifth observation is that the relevant MEC must vet the policy. If at any time the MEC has reason to believe that the policy does not comply with the principles laid down in s.21A(2), she may – after consultation with the SGB – direct its reformulation.

[44]Reverting then to the principle of subsidiarity: whatever the full ambit of the notion of *"religious observances"* in s.7 of the Schools Act, a topic to which we return below, it is suggested that it is similar to the concept of *"religious practices"* as features in the Gauteng Act. But it is suggested that the concept of a *"religious policy"*, as will have been seen, goes further. It includes also the amount, form and contents of religious instruction classes offered at the school. This implies that the Gauteng Act reaches beyond s.15(2) of the Constitution and also regulates the application of at least certain aspects of s.15(1) of the Constitution at public schools.

[45]If this is correct, as we believe it is, then again the applicant's pathway to potential constitutional unlawfulness of the impugned conduct – whether the conduct is classed as *"religious observances"* or not - must, on the principle of subsidiarity, in principle also pass through the Gauteng Act, at least as far as the province of Gauteng is concerned.

[46]The Western Cape Act also provides for the establishment and government functions of a SGB.[31] S.44 of that Act provides as follows:

"44. Subject to the provisions of sections 6 and 7 of the South African Schools Act, 1996 (Act 84 of 1996), the language policy and the religious observances at a public school shall be determined by its governing body: …".

So in that province too *"religious observances"* must be determined by the SGBs. This section of the Western Cape Act too, it is suggested, as with the Gauteng Act, having received the

[31] Compare s.5, s.6, s.8, s.13, s.21, and s.24 of the Western Cape Act.

baton of responsibility for formulating *"religious observances"* from the Constitution through the Schools Act, passes it on to the SGB of each particular school. But the Western Cape Act appears not to go as far as does the Gauteng Act.

[47] The final level of laws that govern religious matters, including religious observances, at public schools then repose within the rules made by the SGBs, as s.7 of the Schools Act already expressly envisages, and as the two provincial Acts with which we are most concerned, readily acknowledge and circumscribe (although in Gauteng more so than in the Western Cape). These rules may be laid down as part of the "governance" function of the SGBs as founded in s.16 of the Schools Act; or they may take the form of a mission statement developed under s.20(1)(c) of that Act; or the code of conduct adopted under s.20(1)(d) of that Act; or the religious policies determined under (say) s.21A of the Gauteng Act.[32] These laws were annexed by the schools to their answering affidavits, but they did not found the applicant's case.

[48] The conclusion on this part of the judgment is therefore that there exists in this country a body of laws dealing with religious matters, including religious observances, at schools, starting with s.15 of the Constitution as its pinnacle, and thence devolving down through national legislation to provincial legislation and ultimately to a patchwork of laws at individual school level, increasing in specificity of focus and application as the reach descends. We return below to the consequence of this conclusion for the applicant's case.

The National Religion Policy

[49] The second main strut of the applicant's case was the applicability of the National Religion Policy as generally applicable law, directly enforceable against the schools.[33]

[32] The references to the relevant provisions of the other Provincial Acts are these: s.19 of the Eastern Cape Act; s.62 of the Kwazulu-Natal Act; s.18 of the Free State Act; s.19 and s.20 of the Limpopo Act; s. 19 and s.20 of the Northern Cape Act; s.9 and s.10 of the North-West Act; and s.18 and s.19 of the Mpumalanga Act. The detailed provisions vary.

[33] See applicant's head of argument, p24 para 76 ff.

[50]The schools argued in this regard that, in principle, a policy laid down by the Minister cannot constitute law. Here they relied on the judgment of Harms, JA in Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd, for the following principled position (emphasis supplied):

"[7] The word "policy" is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school, can fairly be called a "policy" and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word "young" has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear. Cf Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others [1995] ZACC 8; 1995 (4) SA 877 (CC) par 62. In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear: does it have precedence above ministerial regulations and Board rules where these form part of the definition of "the Law"? The inadvisability of having yet another level of subordinate legislation is immediately obvious; its legality was not debated and need not be decided and I shall assume its propriety for purposes of this judgment. One thing, however, is clear: policy determinations cannot override the terms of the provincial Act for the reasons already given. Where, for instance, the provincial Act entrusts the minister with the responsibility of determining the maximum permissible number of licences of any particular kind that may be granted in a particular area (s 81(1)(d)), the cabinet cannot regulate the matter by means of a policy determination, something it did. Likewise, where s 37 (1)(l) empowers the Board to impose conditions relating to the duration of licences, the cabinet cannot prescribe to the Board by way of a policy determination that, for instance, casino licences shall be for a period of ten years, something else it did. In other words, the cabinet cannot take away with one hand that which the lawgiver has given with another."

[51]The Minister, to whom the applicant deferred on this issue, in turn submitted that whether or not such a policy was enforceable, depended on whether or not it was intended, in its terms, to be enforceable. She referred here specifically to paragraphs 54 to 57 of the National

Religion Policy for the proposition that clearly those provisions,[34] but the others not, were intended to be enforceable. Assuming that constitutional separation of powers is not compromised if empowering legislation expressly authorised policy formulation, much like regulation, the enquiry reverts to the terms of this policy.

[52]And here it seems that the policy expressly disqualified itself from being regarded as enforceable law. To the contrary, Prof Asmal, the then Minister of Education in the National Government, expressly spelled out in the foreword that the policy was intended merely to establish broad parameters within which people of goodwill could work out common ground (emphasis supplied):

"What we are doing through this Policy is to extend the concept of equity to the relationship between religion and education, in a way that recognises the rich religious diversity of our land. In the Policy, we do not impose any narrow prescriptions or ideological views regarding the relationship between religion and education. Following the lead of the Constitution and the South African Schools Act, we provide a broad framework within which people of goodwill will work out their own approaches."

[53] That approach is echoed in the policy itself (emphasis supplied):

"1. In this document we set out the policy on the relationship between religion and education that we believe will best serve the interests of our democratic society. The objective is to influence and shape this relationship, in a manner that is in accordance with the values of our South African Constitution. In recognising the particular value of the rich and diverse religious heritage of our country, we identify the distinctive contribution that religion can make to education, and that education can make to teaching and learning about religion, and we therefore promote the role of religion in education. In doing so we work from the premise that the public school has an educational responsibility for teaching and learning about religion and religions, and for promoting these, but that it should do so in ways that are different from the religious instruction and religious nurture provided by the home, family, and religious community.

2. We do so also in the recognition that there have been instances in which public education institutions have discriminated on the grounds of religious belief, such that greater definition is required. In many cases pupils of one religion are subjected to religious observances in another, without any real choice in the matter. The policy is not prescriptive, but provides a framework for schools to determine policies, and for parents and communities to be better informed of their rights and responsibilities in regard to religion and education. The policy genuinely advances the interests of religion, by advocating a broad based range of religious activities in the school."

[34] The Minister actually referred to selected portions from within those paragraphs.

[54] In the result, in our view, it must be concluded that the National Religion Policy affords no direct basis of unlawfulness of the impugned conduct. This is not to say that it has no role or legitimacy in the current debate. Clearly it has intra-governmental force as a policy direction, and in that regard it will legitimately inform the MEC and HOD in their assessment of SGB's laws insofar as they deal with religious policies, mission statements, and codes of conduct. The ample reach of its language appropriately affords accommodation of the potentially wide variety of religious practices that could legitimately be permitted at public schools.

The implication of subsidiarity for the applicant's case: conclusion

[55] Accordingly, by the principle of subsidiarity, in this matter an applicant who contends that religious conduct at a public school is unconstitutional in that it offends s.15 of the Constitution, must either found its case on a contravention of an applicable SGB rule or, if it contends that the conduct is unconstitutional despite being consonant with the SGB rules, it must attack the relevant SGB rules as being unconstitutional.

[56] The policies of the SGBs made for the six respondent schools are attached to the papers.[35] The applicant did not suggest that any provision of any of the rules in these policies was unlawful. It rested its case for unlawfulness solely on two overarching grounds: a direct call on the Constitution[36] and a direct call on the National Religion Policy.[37] Its case therefore contended for unlawfulness of the conduct, irrespective of whether national legislation, provincial legislation, or the SGB rules might have provided validation of the impugned conduct.

[57] If these subsidiary legislative instruments were then intended to provide embodiment, lower down, of the relevant primordial constitutional rights, then subsidiarity requires that the

[35] "AA3.2; 3.3" Vol 5 p 470-471 (Randhart); "AA4.2; 4.3; 4.5" Vol 6 p 527-537 (Baanbreker); "AA5.2; 5.3" Vol 7 p 580-586 (Garsfontein); "AA6.3; 6.4" Vol 7 p 638-641 (Linden); "AA7.3; 7.4" Vol 7 p 693-696 (Oudtshoorn); "AA8.3; 8.4" Vol 7 p 740-748 (Langenhoven Gimnasium).
[36] Applicant's heads paras 12 to 75.
[37] Applicant's heads paras 76 to 95.

applicant makes it pathway bottom up through those. Does the set of national, provincial and school specific local legislation referred to above provide embodiment of the s.15 religious freedom rights at public schools?

[58]In our view those instruments do, for the following reasons. First, taking the Gauteng Act as a lead, it obliges in specific terms the SGBs to determine religious policies that will deal with the amount, form and content of religious instruction classes offered at schools, as well as the religious practices, or *"religious observances"*, that are conducted at the school. Those must be developed within the framework of certain principles,[38]and these principles stress the development of a national, democratic respect of our country's diverse cultural and religious traditions, as well as respecting freedom of conscience and of religion.

[59] Although the Western Cape Act does not come with the same detailed provisions, it does – as was to be expected given the broad significance of "governance"[39] - locate the responsibility for the religious observances at a public school within the SGBs. Granted, that is not yet of itself an embodiment of the right, but both the 5th and the 6th respondents' SGBs have formulated religious policies,[40] and they expressly deal head on with religious matters at the schools. Since the SGBs were statutorily empowered to determine those policies, if only by dint of their governance powers, they stand until set aside.

[60]Second, in our view, the framers of the Constitution, the originators of the notion of *"religious observances"* in s.15(2) of the Constitution that also found its way into s.7 of the Schools Act,

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[38] S.21A(2)(a) and (b) of the Gauteng Act.

[39] In Welkom supra, Khamphepe J said:

"61. In *Hoërskool Ermelo* this Court explained that "governance" in the context of the Schools Act entails that "in partnership with the State, parents and educators assume responsibility for the governance of schooling institutions. . . . [A governing body's] primary function is to look after the interest of the school and its learners."[53] The Court went on to hold that "[s]chool governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body."[54]

62. "Governance" in the context of the Schools Act should also be understood in contrast to "professional management", the two being distinct categories of responsibilities set out in the statute. As is evident from section 16A(2)(a), the professional management of a public school consists largely of the running of the daily affairs of a school by directing teachers, support staff and the use of learning materials, as well as the implementation of relevant programmes, policies and laws.[55]"

[40] Respectively vol 7 p693 and p740.

in any event intended an expansive meaning to be given to that notion, intending that subsidiary and more specific laws would provide on the ground execution of the principles there captured.

[61]For one, s.15(2) applies to all state or state-aided institutions. That includes many very differing institutions, and the scope for differing applications of the standard would therefore have to be wide. Applied to the public school milieu, those legitimately interested include not only learners and their parents, even if the focus is on them; but also educators and society, both microcosmically and nationally.

[62]What about the applicant's argument that s.15(2) is limited to religious observances, not religious branding, and specifically not the all-embracing freedom conferred under s.15(1) of the Constitution? And allied to that, what about its argument its argument that s.15(2) affords only entitlement to conduct religious observances "at", not "by", public schools?

[63]In our view, s.15(1) of the Constitution sets, as the applicant submits, the all-embracing right. But first, and certainly in the case at least of Gauteng, the provincial legislation has explicitly gone further than conferring on SGBs merely the power to make rules dealing only with *"religious observances"*, as has been pointed out above. Second, in our view s.15(2) of the Constitution focusses on all forms of external manifestations[41] of freedom of religion, conscience and belief at state (and state-aided) institutions.

[64]And specifically, it appreciates that where in a single state institution there may be many individuals, and many differing religious or non-religious belief systems, a local authoritative power is best situated to regulate those necessary interactions. Applied to the statutory tripartite partnership management of public schools, the primary power vests in the SGB, but of course it is exercised consultatively bottom up, through the HOD, MEC and ultimately the Minister in the National Government through the National Religion Policy.

[41] Compare Lawrence supra, para [92].

[65]And so, the concept of *"religious observances"* embraces, particularly at public schools, all external manifestations of belief systems, and so at these schools at least, its regulation devolves down through the Schools Act, through the provincial Acts, and into the rules of SGBs.

[66]That approach also answers the *"by"* or *"at"* debate: in our view, to seek to differentiate in this respect is to take too narrow a view of the constitutional appreciation for practicalities. The SGBs in their tripartite partnership, but no-one else, govern public schools. If outside religious instructors were to be permitted on the school premises, it will occur only if the SGBs laid down the conditions under which this would occur. So s.7 of the Schools Act refers to *"religious observances"* at a public school, whoever conducts them <u>at</u> the public school acting on authority of the SGB.

[67]What about the notion that any religious observances at public schools may, irrespective of the SGB rules, legitimately tested under the second and third measures set out in s.7 of the Schools Act, namely *"equitable"* conducting of such observances, and *"free and voluntary"* attendances at the observances?

[68]The first answer is that the applicant did not found its case on s.7 of the Schools Act. But second, we believe that the rules envisaged under the first measure (*"rules issued by the governing body"*) of s.7 are actually required to comply with the second and third measures (*"equitable"*, and *"free and voluntary"*), for the following reason.

[69]It is difficult to conceive of an unlawfulness attack that says irrespective of what the SGB rules may provide, the impugned conduct – measured without any reference to any of the SGB rules – offends standards of equitability and voluntariness. Surely the answer, on the principle of subsidiarity, is that the SGB has considered and dealt with what may be equitable, or free and voluntary, within the particular facts set; and it has laid down a rule that legitimises the conduct. It is different, of course, if the SGB rules have not dealt with the topic, but no such case is mounted here.

[70]It follows that in our view the principle of subsidiarity applies, and that the applicant's cause of action has not been framed on the basis of a recognition of its reach.

Relief?

[71] It will have become apparent from the above that the true actors on the respondents' side, the bodies in which the governance of the schools repose, are the relevant SGBs. Not one has been joined in the application. The response that they signed confirmatory affidavits does not assist in making them parties against whom, if the applicant were right, orders could issue. It would follow that, from the perspective of interdictory relief, a clear right against the schools themselves has not been shown, and the interdicts sought are, apart from anything else, not available against the schools.

[72] More fundamental, however, is the issue whether, even if the SGBs had been joined, relief could have been granted against them, whether interdictory or otherwise. We defined at the outset the true issues as being threefold: whether a public school may hold itself out as a Christian school and if so, to what extent; second, whether a public school itself may conduct religious observances and the extent to which these may be religion-specific; and whether a learner may be asked to convey whether or not that learner adheres to a particular (religious) faith.

[73]We have concluded that in principle these are matters for regulation at grass roots, SGB level; and that the principle of subsidiarity requires that in this case a constitutional attack must be founded on the level of that regulation, and not directly on the Constitution itself. The schools' policies did not form part of the applicant's founding affidavits, but of the schools' answering affidavits. No cause of action was formulated on such regulation, and consequently no analysis of the policies was done. No particular clause or paragraph in them was lifted out for scrutiny.

[74]This is not just a technical point. Consider the myriad of detailed instances of conduct that the applicant attacks in its amended notice of motion; and consider concomitantly the myriad of

detail arrangements covered by the schools' religious policies. A court is not capable of fishing through those policies to discern whether any of the conduct complained of is actually covered by those policies. Nor is it appropriate to do; our system of civil procedure is adversarial for good reason: so that opposing positions can properly be taken and evolved, thereby better assisting a court in arriving at an appropriate conclusion.

[75] Quite apart from this consideration, there is the following. It will be recalled that the SGBs' religious policies must, at least in the case of Gauteng, be submitted to the MEC for vetting and noting within 90 days of an SGB coming into office. Assuming that that requirement had been complied with in this case, those policies will have been approved by the middle partner in the management of public schools.

[76] But it goes further. As pointed out, again at least in Gauteng, the MEC has the power in given circumstances to direct that the religious policy of a school be reformulated. And so, had the policies properly come up for adjudication, the provincial government would have had a direct and substantial interest in the matter. It is not a party to this litigation.

[77] These considerations lead to the conclusion that interdictory relief cannot be granted, whether or not it is dressed up as declaratory relief.

Diversity

[78] We remain concerned nonetheless about the first issue, that of single faith branding; or, perhaps less secularly put, that of holding out that a public school endorses one particular religion to the exclusion of others. This issue is pertinently raised in those terms in the very first two declarations sought by the applicant.

[79] The question may also be put this way: May a public school, through rules laid down by its SGB relative to say its heraldry, hold out that it is exclusively a Jewish, or a Christian, or a Muslim, or a Buddhist, or an atheist, school? Or: accepting a notional feeder community of 100% single religion parents, could it ever pass the muster of the need for a national,

democratic respect for our country's diverse cultural and religious traditions, for that school to brand itself as adhering to that particular single faith to the exclusion of others?

[80]The respondent schools accept that in given instances they, the schools, have adopted Christianity as the basis for their ethos. In particular, the respondent schools accept that they endorse Christianity insofar as they have adopted it as the basis for their ethos.[42] The schools submitted: *"The substance of the aforesaid is that in each of the respondent schools, human interaction in the education process is conducted on the basis of Christian values and Christian values are imparted to learners."*[43] In argument, the schools did not accept that their acceptance of a single faith in this way was to the exclusion of others.

[81]Their central submission was said to be justified by the respondents' expert submissions that leaners are more susceptible to absorbing universally accepted good values such as honesty and hard work, if these were taught as integrated within the ethos of a particular religion.

[82]In considering this question, something more needs to be said about diversity, particularly in the context of public schools. Public schools are juristic entities and organs of State.[44] The Constitution recognises that the society within which public schools function is diverse. The relevant portion of the Preamble to the Constitution has been referred to above, but is quoted again here:

"We the people of South Africa … Believe that South Africa belongs to all who live in it united in our diversity."

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[42] Answering affidavit vol 4 p337 – 339, paras 618 – 621. Hoërskool Linden (Linden affidavit vol 7 p606, "AA6.4" vol 7, p639, para 2.1), and Hoërskool Oudtshoorn (Oudthoorn affidavit p671 vol 7, para 50, "AA7.3" vol 8, p671) have expressly adopted a Christian ethos. Langenhoven Gimnasium states (Langenhoven affidavit vol 8 p713 para 36.7, "AA8.5" vol 8, p749) that it provides Christian based education. Several of the primary schools have vision and mission statements that are explicitly Christian in character and purpose (Randhart affidavit para 41 vol 5 p449, "AA3.6" para B vol 5 p476; Baanbreker affidavit para 185 vol 6 p521, "AA4.5" vol 6 p537; Garsfontein affidavit para 15.4 vol 6 p550, "AA5.3" para 3 vol 7 p585.

[43] Respondents' schedule submitted in answer to the applicants' schedule provided in response to a request from the court to identify the facts (common cause and otherwise) relied on for the relief claimed, p4.

[44] S. 15 of the Schools Act provides: ""Every public school is a juristic person, with legal capacity to perform its functions in terms of this Act".

The need to celebrate this diversity has been emphasised in our judgments.[45] The concept of the unity of our nation from this diversity is well-known and has often been recognised.[46]

[83] The Constitution provides in its Preamble that it lays the foundations for a democratic and open society in which every citizen is equally protected by law and establishes a society based on democratic values, social justice and fundamental human rights. Everyone is equal before the law and entitled to fully and equally enjoy all rights and freedoms.[47]

[84] Paragraph 31 of the Constitution reads as follows:

> ***"31 Cultural, religious and linguistic communities***
> *(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-*
> *(a) to enjoy their culture, practise their religion and use their language; and*
> *(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.*
> *(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights".*

[85]The Constitution requires the freedom with which it deals to be exercisable by any person in society irrespective of whether or not s/he resides in a particular smaller community or not. The fact that a smaller community may coincidentally as a result of history or otherwise have a particular character does not entitle that community to legislate interests in conflict with the interests legislated for the greater community of which it forms an integral part.

[86]The Schools Act provides for a uniform system for the organisation, governance and funding of schools. It records in the preamble that the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation. It states that the country requires a new national system for schools which will

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[45]See for example, De Lange v Methodist Church and Another 2016 (2) SA 1 (CC) at para [31]; Tshwane City v Afriforum and Another 2016 (6) SA 279 (CC) at paras [7] to [16]; Gumede v President of RSA 2009 (3) SA 152 (CC) at para [22]; Hassan v Jacobs NO 2009 (5) SA 572 (CC) at para [22].

[46] See for example Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amicus Curiae); Lesbian and Guy Quality Project and Others v Minister of Home Affairs and Others 2006 (1) SA 524 (CC), para [95]; Lawrence supra, (para [147]).

[47] S.9 of the Constitution.

address past injustices in educational provision, provide an education of progressively high quality for all learners.

[87]In doing so this new national system will lay a strong foundation for the development of all the country's peoples, talents and capabilities and advance the democratic transformation of society, combat racisms and sexism and all other forms of unfair discrimination and intolerance. It will contribute to the eradication of poverty and economic well-being of the society and protect and advance the country's diverse, cultures and languages while upholding the rights of learners, parents and educators and promoting their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State.

[88]Inherent in the establishment of public schools is that all share in and participate fully in the schooling system as individual schools comprising that system. All children in the Republic are required to attend school up to the age of 15 years.[48]

[89]At the level of principle then, the overarching constitutional theme is that our society is diverse, that that diversity is to be celebrated, and that specific rights are conferred and dealt with in pursuance of that principle. Within this context, public schools are public assets which serve the interests of society as a whole.

[90]The SGBs are required to respect this.[49] In Fedsas it was said:[50]

"Public schools are not rarefied spaces only for the bright well-mannered and financial well-yield learners. They are public assets which must advance not only the parochial interests of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education".

[91]Neither the Constitution nor the Schools Act confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others. Rather, the Constitution

[48]See Minister of Education, Western Cape and Others v Governing Body, Mikro Primary School and Another 2006 (1) SA 1 (SCA) paras [18] to [21] and [25].
[49]Ermelo supra, at para [8]; Welkom supra, at para [141]; MEC for Education Gauteng Province and Others v Governing Body, Rivonia Primary School and Others 2013 (6) SA 582 (CC) at para [70]; Fedsas supra, at para [44].
[50]Op cit.

authorises and the subsidiary laws to which we have referred provides for appropriately representative bodies that are required to make rules that provide for religious policies and for religious observances that are to be conducted on a *"free and voluntary"* and on an *"equitable"* basis. And, as we have seen, *"this requirement of equity demands the State act even-handedly in relation to different religions."*[51]

[92] Returning then to the question posed at the outset of this section, namely whether a public school may hold out that it has adopted one religion to the exclusion of others, we suggest the answer is No, for these reasons. First, feeder communities continually evolve, and must be encouraged to evolve, given an unnatural residential demographic configuration that has resulted from historic laws that were racially skewed.

[93] Second, take the case of the minority religion (or non-religion) affiliated learner who, driven by economic and other circumstances to have no choice in the matter, attends a school that has adopted an ethos based on a religion not only other than her own, but exclusionary of her own. Even accepting the existence of SGB rules that make non-attendance at religious observances voluntary and substantively free and fair, does the fact that the school holds itself out as subscribing to the ethos of a religion different from and exclusionary of hers, likely inculcate a sense of inferior differentness in her? Not always and not necessarily, depending on the learner; but we think it could.

[94] But whether or not a particular learner could be or is affected, the Gauteng Act expressly provides that the religious policy of a public school must be developed within a framework that accepts that the education process should aim at the development of a national, democratic respect of our country's diverse cultural and religious traditions, and that accepts that freedom of conscience and of religion must be respected at all public schools.[52]

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[51] As appears from the dicta of O'Regan, J in Lawrence supra, quoted above.

[52] These legislative provisions find resonance in an earlier portion of Prof Asmal's foreword to the National Religious Policy (emphasis supplied):

[95]This fits a twin theme often raised during argument, and accepted by all, namely first, that we are not a secular State and, second, that in this country our diversity is celebrated, not tolerated.

[96]Third, accepting as one must, that the SGB rules must provide equitably for all faiths (given present and evolving future demographics), would the adoption of a single faith brand that excludes others not misrepresent the legally required position? That learners of all faiths are (should be) welcome? We think it would.

[97]The question is then whether it would be appropriate for this court to issue a declaratory order, acting under the power afforded under s.172(2)(b) of the Constitution, read with s.21(1)(c) of the Superior Courts Act? In our view it would, principally for these reasons. First, the issue was fully canvassed before us over a period of three days, with nine parties putting up comprehensive submissions. Second, the issue is of considerable importance to many parents, educators, and learners.

[98]And third, we are reminded of the passage of Froneman J and Skweyiya J in Welkom quoted above, that s.172(2)(b)permits a court to identify the real dispute between the parties and would place substance over form. Granted, here – given the absence of the SGBs as joined parties – this court would not be able to make an order against them, such as requiring them to resubmit their religious policies to the MEC. And given the principle of subsidiarity, the issue of religion at public schools is a matter dealt with in the subsidiary laws to which we have referred, and causes of action should, in principle, be founded there.

"I have great pleasure in publishing this Policy on Religion and Education, as approved by the Council of Education Ministers on 4th August 2003. The Policy is necessary and overdue to give full expression to the invocation of religion in our Constitution and the principles governing religious freedom.
As a democratic society with a diverse population of different cultures, languages and religions we are duty bound to ensure that through our diversity we develop a unity of purpose and spirit that recognises and celebrates our diversity. This should be particularly evident in our public schools where no particular religious ethos should be dominant over and suppress others. Just as we must ensure and protect the equal rights of all students to be at school, we must also appreciate their right to have their religious views recognised and respected."

[99] But it is suggested that the protagonists here are plainly interested parties and declaratory relief, without any concomitant consequential orders, may legitimately serve as a guide to them.

[100] There is the question of the reach that such a declaratory order should assume. The applicant's list of allegedly unlawful conduct is comprehensive, as we have remarked at the outset. We have found that the principle of subsidiarity could conceivably legitimise, depending on the peculiar circumstances pertaining at a particular school, some of the conduct targeted in the notice of motion, but that whether it does, is a matter for the SGB and the department in the first instance. We have found too that if such conduct is considered unlawful, the principle of subsidiarity required either that the appropriate SGB rule be attacked as unconstitutional or that the conduct must be attacked as offending the appropriate SGB rule.

[101] We have however also found, at the level of principle, that neither an SGB nor a public school may lawfully hold out that it subscribes to only a single particular religion to the exclusion of others. In these circumstances a declaratory order should not, in our view, extend any further than what we have concluded at the level of principle, nor any further than the first two prayers of the applicant's amended notice of motion.

[102] In the circumstances we issue the following order:

(a) It is declared that it offends s.7 of the Schools Act, 84 of 1996 for a public school -

  (i) to promote or allow its staff to promote that it, as a public school, adheres to only one or predominantly only one religion to the exclusion of others; and

  (ii) to hold out that it promotes the interests of any one religion in favour of others.

(b) The remainder of the relief claimed is refused.

(c) There is no order as to costs.

_____
CG Lamont
Judge, High Court
Johannesburg

_____
WHG van der Linde
Judge, High Court
Johannesburg

_____
NTY Siwendu
Judge, High Court
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Date argued: 15, 16 & 17 May, 2017

Date judgment: 28 June, 2017