THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 161/12

Reportable

In the matter between:

THE GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	**FIRST APPELLANT**
RIVONIA PRIMARY SCHOOL	**SECOND APPELLANT**

and

MEC FOR EDUCATION: GAUTENG PROVINCE	**FIRST RESPONDENT**
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	**SECOND RESPONDENT**
DISTRICT DIRECTOR: JOHANNESBURG EAST D9 – GAUTENG DEPARTMENTOF EDUCATION	**THIRD RESPONDENT**
CELE: STHABILE	**FOURTH RESPONDENT**
MACKENZIE: AUBREY	**FIFTH RESPONDENT**
DRYSDALE: CAROL	**SIXTH RESPONDENT**
AMICI CURIAE, EQUAL EDUCATION AND THE CENTRE FOR CHILD LAW	

Neutral citation: *The Governing Body of the Rivonia Primary School v MEC for Education: Gauteng Province* (161/12) [2012] ZASCA 194 (30 November 2012)

Coram: Nugent, Cachalia, Shongwe, Wallis JJA and Saldulker AJJA

Heard: **16 November 2012**

Delivered: **30 November 2012**

Summary: **In terms of s 5(5) read with s 5A of the South African Schools Act 84 of 1996 the governing body of a public school has authority to determine the capacity of a school as an incident of its admission policy. Provincial education authorities may not 'override' the policy.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mbha J sitting as court of first instance):

The appeal is upheld with costs, such costs to be paid by the first, second and third respondents. The order of the high court is, save for paras 6 and 7 thereof, set aside and the following order substituted in its place:
'It is declared that the instruction given to the principal of the Rivonia Primary School to admit the learner contrary to the school's admission policy, and the placing of the learner in the school, were unlawful.'

JUDGMENT

CACHALIA JA (NUGENT, SHONGWE, WALLIS JJA AND SALDULKER AJA CONCURRING):

[1] What occurred in this case might have occurred at any public school that had a waiting list for the admission of learners – and there are many such schools. As it happens, it occurred at a school located in an affluent, historically white suburb, where a little more than half the learners were white. Much was made of that in the judgment of the court below, and in the affidavits filed by the respondents, and in argument that was advanced before us on their behalf, but none of it is relevant to this appeal. The issues before us concern the structure of governance of all public schools, wherever located, whatever their circumstances, and whatever the composition of their learners.

[2] The school concerned is Rivonia Primary School. It declined to admit a child to its Grade 1 class for the 2011 school year, because she was twentieth on the waiting list, against the insistence of her mother. The mother persisted in her demand that the

child be admitted and garnered the support in her cause of officials of the Gauteng Department of Education. Some weeks into the school year the head of the department (HoD) instructed the principal to admit the child. Before the governing body could meet to consider the instruction, officials of the department arrived at the school and summarily deposited the child in a classroom. That high-handed conduct can only be deprecated. For reasons I now turn to it was also unlawful.

[3] Governance of public schools is regulated by the South African Schools Act 84 of 1996. Section 5(5) of the Act provides that:

'[subject] to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.'

The principal question that arises in the appeal is whether that entitles the governing body to determine the number of learners the school may admit. The provincial government contends that it falls within its authority to do so, and not the authority of the governing body.

[4] Rivonia Primary School is a public school situated in one of Johannesburg's more affluent, historically white areas. Since the days when schools were racially segregated, the school's learner-profile has changed materially. In February 2011 it had 388 black learners, 52 of whom were in Grade 1. This represented 46% of the total learners at the school.

[5] The governing body had prepared an admission policy, which the department accepted on 4 March 2010, in which the capacity of the school was set at 770 learners, of which 120 could be accommodated in Grade 1.

[6] The school's post provisioning for the 2011 year, funded through the provincial budget, was a total number of 22 educators – including the principal, a deputy principal, three heads of department and 17 teachers – determined on the basis of 37 children per class. The school, however, had a lower learner-class ratio of 24 learners per class – one of the lowest ratios in the province. This is because the governing body employed 22 additional educators to ensure each child's adequate supervision. From 2000 to 2009 the governing body spent R3 251 036 on construction projects including building nine further classrooms. The parents – not the department – funded

these extra costs. They did so to ensure that their children would have a solid foundation to equip them for their later school years.

[7] The governing body determined its capacity by taking into account a number of factors, including its statutory obligation to promote the best interests of the school, and to ensure its development through the provision of quality education. The number of educators, their space requirement, the number of designated classrooms, and the optimum desk working space, were all factored into making this determination. There is no suggestion that it set its capacity unreasonably or irrationally.

[8] The school opened its application process for admission of children to Grade 1 for the school year starting in January 2011 on 13 July 2010. Over the next few days many application forms were collected. The mother of one of the children, with whom this appeal is concerned, collected hers on 15 July and submitted it to the school on 21 July. At this stage the school had handed out 191 application forms of which 139 had been returned. At the time the child's mother submitted her application for entry to Grade 1 – which had a capacity of 120 – she was number 140 on the admission list.

[9] On 26 October 2010, the school informed the mother by e-mail that her child's application for admission was unsuccessful and that her details had been sent to the District Office to assist her with finding a place for the child. The e-mail went on to say that she would be advised in due course where her child may be accommodated. Meanwhile the child would remain on the waiting list. Similar notices were sent to other unsuccessful applicants.

[10] On 4 November 2010 the mother wrote to the principal, Ms Carol Drysdale, asking why her application had not been accepted. Ms Drysdale gave the reason in a letter the following day: the school had reached its capacity. The letter also stated that her application was then number 14 on the waiting list, presumably because some of the children ahead of her on the waiting list had been accommodated at other schools.

[11] The mother then lodged an appeal against this decision with the MEC for Education on 5 November 2010. Meanwhile she continued to put pressure on officials of the department to place her child at the school. There were various meetings

between the governing body, Ms Drysdale and the department's officials to find a solution. At a meeting on 30 November 2010 it appears to have been accepted that the child would have to wait her turn until a place became available. Her mother then enrolled her at a private school, Lifestyle Montessori School, where she commenced attending classes on 12 January 2011.

[12] Late in January 2011, with the school year well underway, the mother's appeal was brought to the MEC's attention. Mr Len Davids, the Deputy Director General of the department, and deponent to the respondents' answering affidavit, explained the extraordinary delay in bringing the matter before the MEC as 'due to administrative issues'. Bearing in mind that the appeal had been lodged on 5 November, and almost three months had since passed, this anodyne explanation is hardly acceptable.

[13] The MEC, quite properly, declined to entertain the appeal before the HoD had dealt with the matter in accordance with reg 13 made under the Gauteng School Education Act 6 of 1995. This is because reg 14 allows an appeal to the MEC only after the HoD has considered the matter, which had not happened.[1] So the MEC referred the matter to the HoD for attention.

[14] On 2 February 2011 the matter took a new turn. The HoD, Mr Boy Ngobeni, informed Ms Drysdale by letter that the school's 'tenth day statistics' revealed that it had not reached its capacity. (The department uses these statistics to determine the number of children who have been enrolled at a school.) The letter went on to instruct her to admit the learner forthwith.

[15] It appears that Mr Ngobeni's conclusion that the school had not reached its capacity was based on information gleaned from the statistics, which showed that the school had admitted 124 learners to Grade 1 even though its stated capacity was only 120. The school, however, explains that it is common practice to accept a few more learners as substitutes for those who had been accepted but do not arrive to take up their positions. This explains the discrepancy between the statistics and the actual number of admitted learners, and refutes Mr Ngobeni's suggestion that the school had incorrectly stated its capacity. It is, however, clear that by instructing Ms Drysdale to

[1] Regulations 13 and 14. GN 4138, PG 129, 13 July 2001.

admit the child, Mr Ngobeni was not acting on the terms of the mother's original complaint and in accordance with reg 13, but on this new information.

[16] Five days later, on 7 February, the mother arrived at the school to have her child admitted. Ms Drysdale explained that an urgent meeting of the governing body had been called to discuss the issue, and asked her to leave with her child while the matter was being resolved. Not satisfied, the mother left after telling Ms Drysdale that 'she is going straight to the MEC's office'.

[17] The following day, on 8 February, she returned to the school with her child. This time she was accompanied by an official from the department, Mr Thlage Petlele, who was armed with an instruction from Mr Ngobeni to Ms Drysdale to admit the child. They encountered a representative of the governing body, Mr Paul Lategan, who requested them to await the outcome of their attempt to resolve the dispute, and not to subject the child to any further unpleasantness.

[18] Mr Petlele presented a letter to Mr Lategan and Ms Drysdale from Mr Ngobeni. It stated that Ms Drysdale's admission function as the principal had been withdrawn. Some thirty minutes later another official, Mr Babsy Matabane, arrived at the school. He handed a letter to Ms Drysdale informing her that the admission function had now been delegated to him.

[19] Mr Lategan again asked the officials to remove the learner pending a resolution of the dispute. But they were adamant that they were acting on the authority of the HoD, and they were there to place the learner. Mr Lategan phoned the department's legal division to intervene, but the official who responded, Mr Qinso Zwane, was not willing to entertain his plea.

[20] The two officials, accompanied by a security guard, then proceeded to the Grade 1 classrooms with the child and her mother. They arrived at one of the classrooms with the least number of learners and after speaking to the teacher decided not to place the child in that classroom. They then went to another classroom where they met a teacher outside that classroom. They asked her to allow them entry so that they could place the child there and she obeyed. They entered and seated the

child at an empty desk that had been installed earlier that morning for a child with attention and learning difficulties, and then left.

[21] The appellants – the governing body and the school – applied to the South Gauteng High Court for declaratory and interdictory relief aimed at the department's decision to override the school's admission policy on capacity, the withdrawal of Ms Drysdale's admission function, and the forced admission of the child. In the interests of the child the appellants commendably abandoned the relief concerning her admission.

[22] Save for the relief pertaining to the withdrawal of Ms Drysdale's admission function, which the court (Mbha J) granted,[2] the application was dismissed. With the leave of the high court the appellants now appeal that order. The respondents do not cross-appeal the order that the withdrawal of Ms Drysdale's admission function 'was not exercised bona fide and is set aside.'

[23] After leave was granted there was a new development. On 9 May 2012 the MEC amended the regulations on the admissions of learners to public schools in Gauteng.[3] Regulation 8, as amended, now provides that the HoD – not the governing body – shall determine the capacity of a school.[4] The respondents contended that this regulation rendered the appeal moot.

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[2] '1. Section 5(5) of the South African Schools Act No 84 of 1996, does not appropriate to a school governing body the unqualified power to determine a public school's admission policy.
2. The power to determine the maximum capacity of a public school in Gauteng Province vests in the Gauteng Department of Education and not in the school governing body.
3. The Gauteng Department of Education has the power to intervene with the school governing body's power to determine the admission policy of a public school.
4. The Member of the Executive for Education, Gauteng Province, is the ultimate arbiter whether or not a learner should be admitted to a public school.
5. The application in respect of prayers 2 to 7, 9 and 10 of the Notice of Motion is dismissed.
6. The application succeeds in respect of prayer 8 of the Notice of Motion.
7. Each party shall pay their own costs.'

[3] GN 1160, PG 127, 9 May 2012.

[4] '**8 Declaring schools full**
(1) Notwithstanding the provisions of the admission policy of a school, or the provisions of any national or provincial delegated legislation or any determination made in terms thereof, for the purpose of placing learners whose applications for admission have not been accepted at any school in the public schooling system, until such time as norms and standards contemplated in section 5A(2)*(b)* of the South African Schools Act are in force the objective entry level learner enrolment capacity of a school shall be determined by the Head of Department.'

[24] Courts will generally decline to entertain litigation in which there is no live or existing controversy. That is principally for the benefit of the court so as to avoid it being called to pronounce upon abstract propositions of law that would amount to no more than advisory opinions. The principle so far as appeals are concerned is captured in s 21A of the Supreme Court Act 59 of 1959, which allows an appeal to be dismissed on the ground alone that the judgment or order sought will have no practical effect or result.

[25] The lawfulness or otherwise of the HoD's conduct is certainly a live issue. It also cannot be said that our decision on the matter will have no practical effect. The submission that the new regulation has overtaken events assumes that the regulation is valid – which is not before us to decide – but the proper meaning of the Schools Act is relevant to deciding that question. Moreover, our decision will indeed have a practical effect so far as Ms Drysdale, who has an interest in the appeal, is concerned. We were informed from the bar that she was subjected to disciplinary sanctions for not complying with the HoD's instruction. That instruction, as will emerge later in this judgment, was unlawful. She was given a final warning and had a month's salary deducted.

[26] I turn, then, to the structure of governance in public schools.

[27] The first democratically elected Parliament passed the Act soon after the Constitution was adopted. Its objective, according to the long title, was to '[t]o provide for a uniform system for the organisation, governance and funding of public schools'. The preamble records that schools would henceforth be governed democratically with learners, parents and educators assuming this responsibility in partnership with the State. Public school governance, in the words of the Education White Paper which preceded the Act, would become part of the country's new structure of democratic governance.[5] It would represent a radical departure from the model of the authoritarian control of education of the pre-constitutional era.

[5]The Organisation, Governance and Funding of Schools (Education White Paper 2), GN 130, February 1996 (Organisation, Governance and Funding White Paper) para 3.17.

[28] The governance of public schools is now vested in their governing bodies whose functions, obligations and rights are prescribed.[6] Their membership in primary schools is elected from the learners' parents, educators and staff members.[7] They may co-opt other members to assist in discharging their functions.[8] The principal serves ex officio on the governing body as a representative of the HoD[9] and must assist the governing body to perform its functions and responsibilities.[10] It is implicit in this that the principal is obliged to implement the policies lawfully determined by the governing body within its sphere of authority.

[29] A governing body stands in a position of trust towards the school.[11] It promotes the school's best interests and strives to ensure its development by providing quality education to the learners.[12] Implicit in this model of governance is an acceptance on the lawmaker's part that the state cannot provide all the resources for the proper functioning of a high quality schooling system. So governing bodies are enjoined to 'take all reasonable measures within [their] means to supplement the resources supplied by the State in order to improve the quality of education provided by the school . . .'[13]

[30] Governing bodies thus have a mandate – indeed, an obligation – to raise additional funds through the active involvement of the parents, who in return for their financial contributions are given a direct and meaningful say in school governance and the employment of school funds.[14] Governing bodies set their own school fees and prepare budgets for approval by the general meeting.[15] It is in pursuance of that injunction that Rivonia Primary School's governing body has been able to reduce its learner-educator ratio by building extra classrooms and employing additional educators.

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[6] Section 16(1).
[7] Section 23(2).
[8] Section 23(6).
[9] Section 16A(1).
[10] Section 16A(3).
[11] Section 16(2).
[12] Section 20(1).
[13] Section 36(1).
[14] P J Visser 'Some Thoughts on Legality and Legal Reform in the Public School Sector' (2006) 2 *TSAR* 359 at 360.
[15] Section 39.

[31] Section 20(1) details a long list of functions that the governing body performs. In addition to these the Act explicitly makes language policy,[16] religious policy observance[17] and admissions policy[18] – the subject of the present dispute – the responsibility of the governing body.

[32] While school governance is the responsibility of the governing body, the professional management of the school is undertaken by the principal under the authority of the HoD.[19] In undertaking the professional management of a school a principal must carry out several duties, including implementing educational programmes and curriculum activities, managing educators and support staff,[20] maintaining the discipline of educators, support staff and learners, and, importantly, implementing policies and legislative prescriptions.[21]

[33] Admission to public schools is thus under the control of their governing bodies, which both devise and implement their admission policies. The HoD is responsible for the administration of the admission process. The Act specifies that applications for the admission of learners are made to the department in the manner that the HoD determines.[22] In practice, as happened in this case, the HoD delegates the administration of this function to principals.[23] The HoD, acting through the principal, is thus responsible both for professional management, and for the administration of admission, which must necessarily be administered in accordance with the governing body's admission policy.

[34] Before I consider the central issue in this appeal – whether a governing body has the authority to determine school capacity as an incident of admission policy, and if so whether a provincial authority may override this determination – it must be borne in mind from what I have said thus far that the structure of the Act and its underlying philosophy places the governance of the school in the hands of the local community

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[16] Section 6(2).
[17] Section 7.
[18] Section 5(5).
[19] Section 16(3). *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA) para 5; *The Head of Department: Department of Education, Free State Province v Welkom High School & Harmony High School* [2012] *ZASCA* 150 (28 September 2012) para 11.
[20] Section 16A(ii).
[21] Sections 16A2(vi) and 16A2(e).
[22] Section 5(7).
[23] Section 16A2(iv).

through the governing body, while officials of the department are responsible for professional management and for the administration of admissions. These functions are distinct and a failure to see them as such will compromise the objectives of Act and be at odds with its scheme.

[35] That does not mean, however, that the authority of a governing body to govern a school is absolute. The White Paper foresaw that governing bodies might exceed, or fail to exercise, their powers, and envisaged an oversight role for the provincial government, which it explained thus:

'The province would need to reserve the right to intervene to ensure that law and policy were being upheld, and in particular that funds were properly administered and accounted for. There would need to be provision for the provincial authority to withdraw certain responsibilities from a governing body at its own request, or in the event of seriously unsatisfactory performance.'[24]

[36] That was embodied in s 22(1) of the Act, which authorises the HoD, on reasonable grounds, to withdraw any one or more of the functions of a governing body, but only after informing the governing body of his intentions and the reason therefor, granting the governing body a reasonable opportunity to make representations, and giving due consideration to those representations. Any person aggrieved by a decision of the HoD may appeal to the MEC. But the HoD is only able to take action under this section if the governing body performs the function allocated to it or exercises any power conferred on it unreasonably, unconstitutionally or otherwise unlawfully. He may also intervene under s 25(1) if he determines on reasonable grounds that the governing body has ceased to perform any function, in which case he may appoint other persons to perform the function.[25] These powers may be exercised in addition to his right to institute review proceedings against the governing body. It was not contended that any of these provisions gave him the authority to override the principal's decision and to admit the child.

[37] I turn, then, to the main issue raised by this appeal, which is the authority to determine the capacity of a school. I have pointed out that s 5(5) of the Act expressly

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[24] Organisation, Governance and Funding White Paper para 3.20.

[25] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) paras 72, 81 and generally at paras 82-85.

provides that the admission policy of a school is determined by its governing body. That must necessarily include the determination of its capacity, which is central to admission to the school and forward planning, and particularly the determination of its budget. Any doubt on that score is removed by s 5A, which allows the Minister of Education to prescribe minimum and uniform norms and standards for 'the capacity of a school in respect of the number of learners a school can admit'. The factors to be taken account of in setting those norms and standards are set out in s 5A(2)(b), and include the number of teachers and the class size; the quality of performance of a school; the curriculum and extra-curricular choices; the classroom size and the utilisation of available classrooms. In terms of s 5A(3) – a critical section – a governing body must, when compiling its admission policy, comply with these norms and standards. In the event that the school has an existing policy, it must, in terms of s 5A(4), within a period of 12 months after the Minister has prescribed the norms and standards, review its admission policy to ensure its consistency. That the governing body is enjoined to compile and review its admission policy in accordance with such norms and standards makes it clear beyond doubt that the admission policy contemplated by the Act includes the capacity of the school.

[38] Equally clear is the role the Act gives to the provincial authorities – in s 58C – to ensure compliance with such norms and standards.[26] Section 58C(2) imposes an obligation on an MEC to ensure that a school's admission policy, which I have said includes its capacity, accords with national norms and standards. Sections 58C(5) and (6) set out the duties of the HoD in respect of the determination of infrastructure and capacity at public schools to ensure compliance with norms and standards. Once the HoD communicates this determination to the school[27] the governing body is able to take the necessary steps to prepare its budget and fulfil its responsibility to supplement the school's resources.[28]

[39] Thus each of the partners in this tri-partite arrangement – the governing body, the Minister and the provincial authorities – has defined responsibilities.[29] Where the Minister has determined national norms and standards after consulting the Council of

[26] Section 58C inserted by s 11 of Act 31 of 2007.
[27] Section 58C6(b).
[28] Section 36(1).
[29] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 56.

Ministers, the governing body must ensure that its admission policy accords with such norms and standards. (The Minister has not prescribed norms and standards for the capacity of schools.) In this regard it is accountable to the MEC. The HoD, in turn, must account to the MEC for ensuring that the norms and standards are met.[30]

[40] While governing bodies are charged with determining their admission policies, including the capacity of the school, they do not have a free hand in doing so. The Act specifies that a school's admission policy may not be unfairly discriminatory,[31] may not require an admission-test to be administered to a learner[32] and may not refuse admission to a learner because the parent has not paid or is unable to pay the school fees.[33] And as I observed earlier, a governing body must necessarily act reasonably and rationally when determining its capacity.

[41] Notwithstanding those clear provisions of the Act, the respondents contend that the provincial government has the final say on the capacity of a school, and is entitled to override the capacity set by the governing body. They find the source of that alleged power in ss 3(3) and 3(4). Section 3(3) obliges the MEC to 'ensure that there are enough school places so that every child who lives in his or her province can attend school . . .'. Section 3(4) obliges the MEC, if he or she cannot comply with subsection (3) because of a lack of capacity existing at the time of commencement of the Act, to 'take steps to remedy such lack of capacity as soon as possible' and to 'make an annual report to the Minister on the progress achieved in doing so'.

[42] The respondents rely in addition on s 39(2) of the Constitution[34], which calls for the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting statutes, which, they submit 'compels' us to interpret the provisions in this manner so as to give effect to the constitutional rights to equality[35] and to basic

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[30] Section 58C(e).
[31] Section 5(1).
[32] Section 5(2).
[33] Section 5(3)(a).
[34] Section 39(2) provides: **39 Interpretation of Bill of Rights**
'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[35] Section 9 of the Constitution.

education.[36] In this contention they are supported by the amici curiae, Equal Education and the Centre for Child Law. The high court accepted these contentions.

[43] A plain reading of ss 3(3) and 3(4) makes it clear that they are concerned with the MEC's obligation to ensure that infrastructure is provided for compulsory attendance of all children in the province between the ages of seven and 15 years of age as envisaged by s 3(1).[37] To this end these provisions require the MEC to determine the infrastructural shortcomings that impede the fulfilment of this objective and to report annually to the Minister on any remedial steps being taken to remedy these problems. They plainly have no relation to the governance of a school.

[44] A contextual reading of these provisions lends further support to this interpretation. Section 3(1) imposes a duty on every parent to ensure a child's attendance at school. A parent who fails to comply with this duty is liable, under s 3(6), to prosecution. Where the reasons for a child's absence from school are unknown, s 3(5) imposes a duty on the HoD to investigate the circumstances of the child's absence and to take the necessary remedial steps, including issuing a written notice to the parent to comply. No mention is made of any duty on a school regarding the compulsory attendance of children. Quite simply there is no hint in the text of s 3 that suggests that its purpose is to deal with any issue concerning the admission policy of a school, much less to override it.

[45] Properly understood, s 3 deals with compulsory attendance and the provision of infrastructure for this purpose, and s 5 with admissions. Neither section qualifies or limits the other. There is simply no room in their language to support any other

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[36] Section 29 of the Constitution provides:
'(1) Everyone has the right–
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'

[37] Section 3, under the heading 'Compulsory attendance', provides:
'(1) Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.'

interpretation. The submission of the respondents that the Bill of Rights compels their interpretation requires us to ignore the language to achieve what they believe would be a socially desirable result – giving them the power to override the policies of governing bodies to advance the objectives of the Constitution. The lawmaker chose to give the power over admission policy to governing bodies so as to promote democratic school governance. And it limited the provincial education department's role to the 'minimum required for legal accountability'.[38] I find nothing constitutionally offensive about this choice.

[46] The facts of the case show how misplaced the respondents' reliance on ss 3(3) and 3(4) is. The parent of the child and the department were not faced with the problem that the child would not be able to attend a school or be denied the right to receive a basic education – she had already been admitted to another school. Nor was the child's right to equality at issue. On the contrary had the school succumbed to the department's pressure to admit the child while others were awaiting their turn on the waiting list ahead of her, it would have unfairly given her preference over those children.

[47] The facts also show that the department accepted the school's admission policy in March 2010 and received the updated policy in line with reg 2(3).[39] Both policies appear to have been carefully considered: they demonstrate that the governing body had determined the school's capacity rationally after considering a range of factors relating to its available facilities and programmes. The first policy determined the capacity at 770 learners, and the second at 840. Included among the policy objectives are to ensure that the admission of learners is done in a 'fair, practical and transparent manner' and that 'no learner will be unfairly discriminated against'.

[48] Once having determined its admission policy it remains for the governing body to apply that policy. It is within the power of a governing body to apply its policy flexibly to meet the exigencies of a particular case – indeed, in this case the admission policy of Rivonia Primary School expressly reserved its right to exceed its capacity – and it

[38] See Organisation, Governance and Funding White Paper para 3.17.
[39] Regulation 2(3) provides that the governing body must make a copy of the admission policy of the school available to the Head of Department for certification.

must naturally exercise that power when the occasion demands. Just as it must act rationally and reasonably when determining its policy so it must act rationally and reasonably in its application.

[49] Counsel for the respondents contended that because the school was able to reduce its learner-educator ratio, this imposed an obligation on it to admit the child, failing which the MEC had the duty to override the school's refusal to do so. But as I have said the school has been able to improve its learner-educator ratio in the lower grades by investing substantial funds for which the parents have themselves paid. I agree with the appellants' contention that it is perverse for the department to use this fact to compel the school to accept more children. Were the department to be correct that would operate as a disincentive for parents to contribute by way of fees and fundraising to improve the quality of education of their schools, and would be at odds with their obligation under s 36(1) to supplement resources supplied by the State, according to their means.

[50] Once Rivonia Primary School's governing body lawfully adopted its admission policy, then subject to what I have said above regarding the HoD's authority to intervene where this power is exercised unreasonably, unconstitutionally, or otherwise unlawfully, it bound the MEC and the HoD. They could not ignore it much less override it, no matter how well meaning. The HoD was quite entitled to ask the governing body to exercise the discretion embodied in the policy to exceed its capacity, so as to accommodate a learner who had not been placed, and the governing body would be obliged to consider such a request on reasonable and rational grounds. If the governing body or the principal on its behalf exercised that discretion on an incorrect basis and refused to admit the child, the Act and the regulations provided a safety valve. Section 5(9) read with reg 14 allowed an appeal to the MEC for the child who had been refused permission and reg 13(1)(a) gave the HoD, before the appeal, the authority to set aside the decision of the principal. But all that ought to have been done in accordance with the policy. That is not what occurred in this case. On the contrary, the HoD first issued an unlawful instruction to the principal to admit the child. Then the officials of the department were told that the governing body would shortly be meeting to consider the case, but far from awaiting its decision they proceeded to deposit the child nonetheless.

[51] The high court, as I mentioned earlier, relied on reg 13(1)(a), as the immediate source of the HoD's authority to compel the school to enrol the child. But the regulation gives the HoD no such power; it would be *ultra vires* if it purported to do so because it would be contrary to the statute. This much is trite. Regulation 13(1)(a) simply allows the HoD 'to confirm or set aside' a principal's decision to refuse admission to a learner. That decision is one made under the school's admission policy and the decision to confirm it or set it aside is likewise made under that policy. In any event, it is clear that on the facts of this case, the HoD did not purport to set aside Ms Drysdale's decision.

[52] It would not be out of place to observe that I find the approach of Mr Ngobeni and the department's officials in this case most disturbing. There was not one bit of evidence to suggest that the school has ever refused admission to a child – including this child who happens to be black – on the grounds of race or has unfairly discriminated against any child on this basis. Counsel for the respondents quite properly accepted this much during the hearing. The school's refusal to admit the learner in this case had nothing to do with her race or her background. It came about solely because her application was far down the waiting list. The department's stated policy itself expressly requires admission to follow the chronological sequence of applications and the mother in this case was obliged to stand in line, just as the parents of the other learners who had submitted late applications had to do. She was not entitled to preferential treatment, from the school or the department.

[53] But instead of treating this matter as an ordinary dispute relating to the application of the school's admission policy the department opprobriously invoked the ugly spectre of race to obfuscate its unlawful conduct: In his answering affidavit, Mr Davids stigmatises the school as being in a 'peculiarly privileged position that can primarily be linked to the historical disparities in the resourcing of public education under Apartheid'. It draws a learner enrolment, he continues, that remains disproportionately 'white' when compared to the overall demographic profile of the province. This theme is pursued in counsel's heads of argument to make the case that s 39(2) of the Constitution compels an interpretation that disallows 'privileged governing bodies in historically white areas to entrench racially discriminatory

privileges bequeathed by Apartheid'.[40] The facts simply do not sustain the suggestion that that occurred in this case, and an admission policy that did that would be unlawful.

[54] To conclude, governing bodies are enjoined to determine school policies, including their capacity, while provincial departments are responsible for the professional management of schools and administration of admission. These functions must not be conflated. The determination of capacity must comply with national norms and standards set by the Minister and must be determined on reasonable and rational grounds. Just as a governing body may determine the school's capacity, so too does it have a discretion to exceed that capacity if the circumstances require, and that discretion must also be exercised on rational and reasonable grounds. But it is not open to the HoD summarily to override that authority as occurred in this case.

[55] I mentioned earlier that Ms Drysdale was sanctioned for failing to comply with the HoD's unlawful instruction. Although the sanctions imposed on Ms Drysdale are not before us, I am confident that the department is sufficiently gracious to withdraw these sanctions in the light of this judgment.

[56] In the high court the parties had agreed that no costs order would be made. In the result the appeal is upheld with costs, such costs to be paid by the first, second and third respondents. The order of the high court is, save for paras 6 and 7 thereof, set aside and the following order substituted in its place:
'It is declared that the instruction given to the principal of the Rivonia Primary School to admit the learner contrary to the school's admission policy, and the placing of the learner in the school, were unlawful.'

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JUDGE OF APPEAL

[40] The Heads of Argument were drawn by Mr Berger's predecessor, who was not available to argue the matter.

APPEARANCES

For first and second Appellants:	G C Pretorius SC (with him A Kemack SC) Instructed by: Shepstone & Wylie, Johannesburg Webbers, Bloemfontein
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