Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case no: 12880/2019

In the matter between:

EQUAL EDUCATION Applicant

And

PROVINCIAL MINISTER FOR EDUCATION:
WESTERN CAPE PROVINCE First Respondent

PREMIER OF THE WESTERN CAPE PROVINCE Second Respondent

MINISTER OF BASIC EDUCATION Third Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Fourth Respondent

And

Case No: 4566/2019

In the matter between:

SOUTH AFRICAN DEMOCRATIC TEACHER'S UNION Applicant

And

MEC FOR EDUCATION: WESTERN CAPE	First Respondent
NATIONAL MINISTER OF BASIC EDUCATION	Second Respondent
SPEAKER OF THE PROVINCIAL LEGISLATURE, WESTERN CAPE PROVINCE	Third Respondent
THE PREMIER OF THE WESTERN CAPE	Fourth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent

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Judgment Delivered: 17 July 2023

Le Grange, ADJP:

Introduction:

"*Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine and that a child of a farmworker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another*" (Nelson Mandela).

[1] The right to education[1] and the best interest of the minor child[2] are at the heart of both matters, which at the best of times are both mutually important and weighty considerations. These matters are no different. The genesis of the dispute between the parties in these two separate applications revolves around certain provisions in the Western Cape Provincial Schools Education Act, No 12 of 1977 ("the Provincial Act") which were brought about by the Western Cape Provincial School Education Amendment Act No 4 of 2018 ("the Amendment Act"). The commonality of the parties and the issues made it convenient to hear both applications together.

[2] The challenge by EE and SADTU is to declare the establishment of Collaboration Schools (s 12C) including the definitions of 'operating partner' and 'donor' in section 1 and 9A, Donor Funded Public Schools, (s 12D) and Intervention facility (s 12 E), including the definition of an intervention facility in s 1 and s 45, invalid and to make a just and equitable order under s 172(1)(b) of the Constitution (the Validity Challenge). Secondly, that the provisions of the Provincial Act dealing with Collaboration Schools, Donor Funded Schools, and Intervention facilities are in conflict with SASA, which is national legislation, and such conflict must be resolved in favour of SASA. (EE did not persist with this ground during argument.)

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[1] The governing constitutional provision reads as follows:

"29 Education

(1) Everyone has the right –

(a) To basic education, including adult education; and

(b) To further education, which the state, through reasonable measures, must make progressively available and accessible."

[2] See s 28 of the Constitution.

[3] The challenge by SADTU is also to declare the following provisions invalid and inconsistent with the Constitution, the Monitoring and support of curriculum delivery (s 9 A); the Establishment of Schools Evaluation Authority (s 11A); the Eligibility for appointment as Chief Evaluator, Lead Evaluator or Evaluator (s 11 B); Removal from office (s 11 C); Functions of School Evaluation Authority (s 11 D); Remuneration and allowance (s 11E); Functions of Head of Department regarding Schools Evaluation Authority (s 11 F); Dissolution (11 G); Offences relating to functions of particular persons (s 58 (aA); the establishment of the Intervention Facilities (s 12 C) and Donor Funded Public Schools (s 12 D); Intervention facility (s 12 E); (viii) Code of Conduct, suspension and expulsion at public schools (sections 45(5)(b)(i), 45(6)(a), 45(14A), 45(14B); and (ix) the exception to prohibition of alcoholic liquor on school premises or during school activities.

Background:

[4] The facts underpinning the WEDC and Provincial Government's decision to introduce the two types of schools and the Intervention facilities are not a subject for consideration and largely accepted. The MEC, at the time, filed a comprehensive answering affidavit on behalf of the First and Second Respondent, dealing extensively with the legal challenges. In addition, the following was highlighted: the constitutional framework in respect of the State's obligation to realise the right to education; the background underpinning the process that was followed in adopting the Amendment

Act; the current state of education and the challenges the WCED face in delivering quality education were fully discussed.

[5] It is evident that despite the Government's relatively high levels of spending on public education the quality of education in our public schools remains weak. The majority of learners when entering school for the first time are poorly equipped. School leadership and management (School Governing Bodies "SGB" and the principals) does not function optimally. For a variety of reasons, teachers are poorly equipped to do their core function, the overwhelming evidence is that the majority of them have become demoralized to teach.

[6] The dismal state of the majority of the public schools was explained as follows: Schools in each province are classified into five groups from the poorest to the least poor. Quintile 1 is a group of schools in each province catering for the poorest 20% of schools. Quintile 2 caters for the next poorest 20% of schools while quintile 5 schools represent the wealthiest schools. Schools receive money from government according to quintiles. Quintile 1 schools receive the highest allocation per learner, while quintile 5 receives the lowest. In the Western Cape circumstances have changed substantially over the years, to the extent that schools that previously served wealthier communities, now serve very poor communities. There are schools that have to be classified as Quintile 4 or 5 according to the policy, that are serving very poor communities, yet the perception is that they are "wealthy". Whilst the schools can apply to the Provincial

Minister, to change their quintile status, the budget, which has been reduced in real terms over the last number of years, and continue to be reduced, has become a reality.

[7] The MEC relied on a report from the Institute for Race Relations in South Africa (IRR Report), dated May 2018, wherein the crisis of the education system was discussed and which is still relevant. According to the IRR report, the South African education system is in a serious crisis. Children attending South African schools fare poorly on almost every metric, and are ill-prepared for the world after school. More tragically, it is black children that are suffering disproportionately from the current schooling system. Most children entering Grade One in any given year are unlikely to matriculate, and an even smaller proportion will complete their 12 years of schooling with a good mark in mathematics. In 2015, the Organisation for Economic Co-operation and Development (OECD) released a report ranking the education systems of 76 countries from around the world. The rankings were determined by examining how well students did in mathematics and science tests and of the 76 countries studied, South Africa performed poorly. The OECD reported that South Africa had the 75th poorest education system, with Ghana ranked the worst.

[8] South Africa has also performed poorly in other international rankings. In the Trends in International Mathematics and Science Study (TIMMS), grade four and grade eight learners are tested on how proficient they are in mathematics and science. Although most other countries test their grade four learners, South Africa tests its grade five

learners, which makes the country's dismal performance in this ranking even more concerning. In 2015, the performance of South African grade five learners for mathematics was found to be the second worst. Of the 49 countries tested, South Africa came 48th, above only Kuwait. Similarly, South Africa did poorly in the grade eight mathematics ranking too – again, having subjected grade nines to the test instead. Set against the performance of the grade eights of the 38 other countries that participated in TIMMS in 2015, South Africa was again second last, scoring only above Saudi Arabia. South Africa's performance in science was worse – once more, with the country's grade nines rather than grade eights taking part: of the 39 countries that participated in the 2015 TIMMS, South Africa came stone last.

[9] In 2016, less than one percent of learners writing mathematics in quintile one schools managed a mark of above 80%, while more than three-quarters could only manage a mark of 40% or lower. In the better-off quintiles a higher proportion of learners managed 80% or above for mathematics, although the proportions were still low. For example, about 1.5% of learners in quintile three schools scored above 80% for mathematics, and three percent of those in quintile four schools managed this mark. Nearly ten percent (9.7%) of those in the richest schools – quintile five – managed to achieve above 80% for mathematics in 2016.

[10] According to the MEC, it is black children who are currently suffering disproportionately from the poor educational outcomes, compared to the other race groups. It first promoted Collaboration Schools as a new system for addressing the

difficulty of underfunded and underperforming public schools, which serve marginalised communities in the Western Cape. It started with an experimental pilot project in 2015 to test its efficacy. Existing no-fee public schools were identified; private donors provided funding to those schools (to supplement the state funding); and donor-selected operating partners were paired with each school. The aim was to address inadequate public funding, which hinders the Department's ability to deliver on its mandate, ill-equipped learners, unsuitably skilled teachers and badly functioning school leadership and management. The trial solution was to overhaul the governance model for ordinary public schools prescribed under SASA. Despite setbacks, the outcome of the pilot project had significant success and caused the Province to introduce an amendment to the Act.

[11] The Provincial Act provides for the establishment of two types of schools. The first is Collaboration schools in terms of s 12 C of the Provincial Act[3].

[3] The relevant provisions provide as follows:
"Collaboration schools 12C".
(1) The Provincial Minister may identify a public school contemplated in section 12(1)(a) to (f) for declaration as a collaboration school if he or she is satisfied that such declaration will be in the interests of education at the school, having regard to relevant reports on the school, including reports on the performance of the school.
(2) Subject to subsection (1), the Provincial Minister may, on the recommendation of the Head of Department, enter into an agreement with—
(a) a donor;
(b) an operating partner; and
(c) the governing body of a public school, in terms of which an existing public school contemplated in section 12(1)(a) to (f) is to be declared a collaboration school.
(3) The Provincial Minister may, on the recommendation of the Head of Department, enter into an agreement with a donor and an operating partner for the establishment of a new collaboration school and establish the school.
(4) The agreements contemplated in subsections (2) and (3) shall contain the minimum requirements prescribed by the Provincial Minister.
(5)-(8)
(9) The membership of the governing body of a collaboration school shall comprise 50 per cent of representatives of the operating partner, with voting rights, and 50 per cent of the other members of the governing body, with voting rights: Provided that the Provincial Minister may, on good cause shown,

[12] Secondly, s 12 D and 12 E of the Provincial Act introduce the donor-funded schools[4] and the intervention facilities[5].

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declare that the governing body of a particular collaboration school shall comprise more than 50 percent of the other members of the governing body with voting rights.
(10) In the event of an equality of votes at a meeting of a governing body of a collaboration school where the operating partner with voting rights comprises 50 per cent of that governing body, the matter must be determined by a majority vote at a general meeting of parents present and voting.
(11)-(14)
(15) The employment of educators and non-educators by a governing body contemplated in subsection (13) is subject to the Labour Relations Act, 1995, and the Basic Conditions of Employment Act, 1997 (Act 75 of 1997);
(16) Despite section 60 of the South African Schools Act, the State is not liable for any act or omission by a collaboration school relating to its contractual responsibility as the employer in respect of staff employed in terms of subsection (13).
(17)
(18) Save as provided for in this section, the provisions of this Act and any other applicable law regulating public schools apply to collaboration schools. Donor funded public schools 12D.

(1) The Provincial Minister may enter into an agreement with—
(a) a donor; and
(b) the governing body of a public school, in terms of which an existing public school contemplated in section 12(1)(a) to (f) is to be declared a donor funded public school, provided that the Provincial Minister is satisfied that such declaration will be in the interests of education at the school.
(2) The Provincial Minister may enter into an agreement with a donor for the establishment of a new donor funded public school and establish the school. 9 5 10 15 20 25 30 35 40 45 5

[4] Donor funded public schools 12D. (1) The Provincial Minister may enter into an agreement with—
(a) a donor; and
(b) the governing body of a public school, in terms of which an existing public school contemplated in section 12(1)(a) to (f) is to be declared a donor funded public school, provided that the Provincial Minister is satisfied that such declaration will be in the interests of education at the school.
(2) The Provincial Minister may enter into an agreement with a donor for the establishment of a new donor funded public school and establish the school.
(3)-(6)
(7) The membership of the governing body of a donor funded public school may include representatives of the donor, with voting rights, up to a maximum of 50 per cent;
(8) In the event of an equality of votes at a meeting of a governing body of a donor funded public school where the representatives of the donor with voting rights comprise 50 per cent of that governing body, the matter must be determined by a majority vote at a general meeting of parents present and voting.
(9) The Provincial Minister may, on good cause shown, declare that the governing body of a particular donor funded public school shall comprise more than 50 per cent of the representatives of the donor with voting rights. (10) Save as provided for in this section, the provisions of this Act and any other applicable law regulating public schools apply to donor funded schools.

[5] Intervention facility 12E.
(1) Subject to the available resources of the Western Cape Education Department, the Provincial Minister may establish an intervention facility for learners who have been found guilty of serious misconduct.

[13] The distinction between Collaboration Schools and ordinary public schools under SASA is that an operating partner has 50% of the seats and voting rights on the SGB. The MEC may, on good cause shown, grant it more than 50% of the voting rights[6]. In the event of a deadlock, the parents decide disputed governance matters at a general meeting by majority vote.

[14] The Provincial Act also envisage an operating partner, appointed by a donor, as a non-profit entity which will use its capacity, skills and resources to empower a SGB, school management and educators for delivering quality education. Similarly, a donor may through contractual negotiations acquire up to 50% of the membership and voting rights of an SGB of a Donor Funded Schools.[7] .

[15] A donor is defined in the Provincial Act as a for-profit entity that provides funds or property to improve education delivery at a Collaboration School or Donor Funded Schools. According to the MEC, a donor will not provide funding without being able to steer the SGB or management of Collaboration Schools which would equally apply to Donor Funded Schools.

(2) An intervention facility shall provide for therapeutic programmes and intervention strategies, in addition to curriculum delivery, in order to address the serious misconduct.
(3) A learner who has been referred to an intervention facility shall be given access to education in the manner determined by the Provincial Minister.

[6] Section 12D(9)

[7] Section 12D(7)

[16] Under SASA, the composition of the SGB is different. SGBs are, in the main, elected[8] and the parents must be one more than the number of other SGB members for an ordinary public school (the parental majority rule).[9] And only a parent, who is not in the employ of the school, may chair the SGB. SASA also guarantees representation for elected teachers, other staff and learners in grade eight and above on the SGB. The SGB may, however, co-opt community members who can assist the SGB.

[17] The Provincial Act contemplates converting ordinary public schools, established under SASA, into Collaboration Schools or Donor Funded Schools.[10] A Collaboration School or Donor Funded School may also be established as a new school without conversion of an existing public school.[11]

The Validity Challenges

[18] Turning to the constitutional challenges. EE, supported by SADTU, argued the Provincial Legislature's formulation of the Act suffers from constitutional defects. The

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[8] Section 23(1) and (2) of SASA provide as follow:

(1) Membership of the governing body of an ordinary public school comprises: (a) elected members; (b) the principal, in his or her official capacity; (c) co-opted members.

(2) Elected members of the governing body shall comprise of member or members of each of the following categories: (a) Parents and learners at the school; (b) educators at the school; (c) members of staff at the school who are not educators; and (d) learners in the eighth grade or higher at the school.

[9] Sections 23(9) and (10) of SASA.

[10] Section 12C (1) and 12D (1) of the Act respectively.

[11] Section 12C (3) and 12D (2) of the Act respectively.

purported defects appears to be the following: (i) there are no guaranteed places for parents or learners on SGB's; (ii) the power to prescribe categories of remaining members on the SGB was overlooked or unlawfully delegated; (iii) inadequate eligibility criteria for donors and operating partners; (iv) inadequate eligibility criteria for conversion into Collaboration Schools or Donor Funded Schools; (v) no participation on the proposed contract to convert an ordinary public school; and, (vi) the terms of the Collaboration Schools or Donor Funded School contract are left to the contracting parties. (the last challenge was not persisted with during argument.)

[19] It is common cause that prior to the institution of these proceedings the National Minister of Education ("the Minister") engaged with the WCED in respect of the Amendment Act when it was still in Bill form. Further engagement took place between the Minister and the WCED after these applications had been instituted. According to the papers filed of record, the Minister raised a number of issues from e WCED in order to make an informed decision whether to join the proceedings against the attack of the Amendment Act. The Minister, through her attorneys, addressed correspondence to the WCED at the end of that process wherein the attorneys recorded the following:

> "1. *Our client has requested us to convey her thanks to your client for the candid, open and frank manner in which your client engaged the IGRFA process to clarify a range of concerns raised, about inter alia the Western Cape School Evaluation Authority ("Authority"), collaboration and donor funded schools, as well as intervention*

facilities, that feature in the recently amended Western Cape Provincial School Education Act, 12 of 1997.

2. *The engagement was embarked upon to primarily resolve the IGRFA dispute that was raised during May 2019. The consultative process was also aimed at assisting our client to form a view about whether to engage the litigation initiated by SADTU and Equal Education under case numbers 4566/2019 and 12880/2019, respectively in the Western Cape High Court.*

3. *As you are aware, the engagement process made provision for our client to consider your client's comprehensive response to a long list of questions raised by our client about the Authority, the new types of schools and intervention facilities catered for by the recent amendments.*

4. *Our client's considerations of your responses, assisted by legal advice, has caused her to form the view that: the amended provisions of the Provincial Act do not offend the "organisation, governance and funding" principles for public schools espoused by the South African Schools Act, 84 of 1996, nor in her opinion does it conflict with National Legislation regulating basic education in South Africa.*

> *5. In the circumstances, our client will: (a) not participate in the pending litigation; (b) abide the Court's decision; and (c) considers the IGRFA consultation with your client to be satisfactorily concluded."*

[20] From the abovementioned, it is obvious the National Minister has formed the view the Provincial Act does not offend the organization, governance and funding principles for public schools as envisaged by the South African School's Act 84 of 1996 (SASA) and neither is it in conflict with national legislation regulating basic education in South Africa. Accordingly, the National Minister has been satisfied that the intergovernmental consultation had been concluded satisfactorily to not participate in these proceedings and abide the decision of this Court.

No guaranteed places for parents or learners on SGB's at Collaboration Schools;

[21] Section 12 C (9) provides that: '*The membership of the governing body of a collaboration school shall comprise 50 per cent of representatives of the operating partner, with voting rights, and 50 per cent of the other members of the governing body, with voting rights: Provided that the Provincial Minister may, on good cause shown, declare that the governing body of a particular collaboration school shall comprise more than 50 percent of the other members of the governing body with voting rights'* The main complaint is, the subsection fails to regulated exhaustively the remaining categories of members of an SGB, and the governance model under s 23 of SASA is not applicable. Counsel for EE contended that the omission is irrational and infringes the rights in s 29(1)

and 28 (2) of the Constitution as it limits the children's autonomy rights to participate in decisions that affect them. This argument is unconvincing.

[22] It is correct that Collaboration and Donor Funded Schools under s 12 C and 12 D do not fall in the strict sense of the word under the category of "*an ordinary public school*" as contemplated in s 12 of SASA. But that does not mean it is not a public school. In Chapter 3 of SASA, s 12 (3) clearly stipulates that a public school may be (my underlining) (i) an ordinary public school (ii) a school for learners with special education needs, or (iii) a school that provides education with a specialized focus on talent, including sports, performing arts and creative arts.

[23] Although, specific aspects have been altered by s 12 C and 12 D of the Provincial Act, Collaboration and Donor Funded Schools are still by its very nature public schools. Section 12C (18) is clear, "*Save as provided for in this section, the provisions of this Act and any other applicable law regulating public schools apply to collaboration schools.*" The importance of this provision cannot be ignored and speaks for itself. To the extent that specific aspects have been altered by s 12 C and 12 D of the Provincial Act, the remaining composition of the SGB must happen in accordance with SASA as it falls under *'any other applicable law regulating public schools'*. It follows that on a contextual reading of the Provincial Act and s 23 (2) of SASA, teachers, parents, staff and learners have a guaranteed place on the SGB's of Collaboration and Donor Funded Schools, subject to the inclusion of the operating partner, the possible inclusion of the donor and that parent members do not compromise the majority on the SGB. The constitutional requirement as

engraved in Federation of Governing Bodies for SA Schools v MEC for Education (FEDSAS)[12], that: firstly, parents must be meaningfully engaged in the teaching and learning of their children; and secondly, SASA carves out an important role for parents and other stakeholders in the governance of public schools, has not been undermined or disturbed. Moreover, s 23 of SASA does not prescribe a specific percentage of parent representation on the SGB. FEDSAS is also no authority for such a proposition. Accordingly, no breach has occurred that limits children rights to participate in decisions that affect them in terms of s 29(1) and 28 (2) of the Constitution as

The power to prescribe categories of remaining members overlooked or unlawfully delegated:

[24] Under this heading it was argued, for the Provincial Act to be constitutionally complaint, it was obliged to define the objects of the Act and to stipulate the means for achieving those objects by stipulating the remaining membership categories of SGB's at Collaboration and Donor Funded Schools. The failure to do so render the empowering provisions constitutionally flawed. Furthermore, it contended that the composition of SGB's at these schools cannot be regarded as a mere ancillary matter whereby the MEC is given the power to make regulations in that regard as the MEC could disenfranchise parents and learners in grade eight and above when converting an ordinary public school

[12] See 2016 (4) SA 546 (CC) (FEDSAS).

and thus undermining their constitutional rights in terms of s 29(1) and 29(2) of the Constitution.

[25] Section 28 provides that subject to SASA and "*any applicable provincial law*," the MEC must, by notice in the Provincial Gazette, determine: (a) the term of office of members and office-bearers of a SGB; (b) the designation of an officer to conduct the process for the nomination and election of members of the SGB; (c) the procedure for the disqualification or removal of a member of the SGB or the dissolution of a SGB, for sufficient reason in each case; (d) the procedure for the filling of a vacancy on the SGB; (e) guidelines for the achievement of the highest practicable level of representativity of members of the SGB; (f) a formula or formulae for the calculation of the number of members of the SGB to be elected in each of the categories referred to in section 23 (2) but such formula or formulae must provide reasonable representation for each category and must be capable of application to the different sizes and circumstances of public schools; and (g) any other matters necessary for the election, appointment or assumption of office of members of the SGB.

[26] From the above-mentioned, s 28 of SASA, does give the MEC substantial scope as to the composition of the various membership categories of a SGB. Furthermore, the Provincial Act, allows the MEC to make regulations in respect of various aspects of the SGB. Section 21 of the Provincial Act, provides that subject to certain provisos, "*The Provincial Minister shall establish a governing body for a public school in the prescribed manner.*" Section 24 provides that the MEC may make regulations as to, *inter alia*, the

composition and functions of governing bodies and s 63(1)(cI) provides: "*the Provincial Minister may make regulations and, where applicable, subject to any national norms and standards contemplated in section 146(2) of the Constitution, as to (cI) the funding and governance models for collaboration schools and donor funded public schools*." Despite these powers, the contention that the MEC could disenfranchise parents and learners is unpersuasive. The MEC does not and cannot exercise unrestrained power. He or She is constrained to act lawfully in accordance with SASA and the Provincial Act. Furthermore, the power of the MEC, within the legal framework of the Provincial Act, to make regulations on the composition of SGBs cannot be regarded as unique. In fact, it accords with the powers that is afforded to the MEC in terms of s28 of SASA.

[27] The remaining membership categories of a Collaboration School or Donor Funded School can therefore not be seen as ancillary matters for the MEC to determine without any guidance from the legislation. The categories of the remaining members of the SGB are regulated by SASA. The Provincial Act and SASA are the prime guide to the object and extent of the MEC's power to determine the composition of the various membership categories of a SGB. The powers to make regulations, in this instance do not travel wider than the purpose and object of the Provincial Act or SASA. There is no delegation of a plenary legislative power as no such delegation in arise in the present instance[13].

[28] It is also not correct that the MEC could disenfranchise parents and learners when making regulations. The MEC is bound by the SGB membership categories in SASA. It

[13] See Bezuidenhout v Road Accident Fund [2003] 3 All SA 249 (SCA) at para 10.

follows that the complaint that the Provincial Act impermissibly gives the MEC free rein to choose and change who may participate in school governance is without merit and must fail.

Inadequate eligibility criteria for donors and operating partners

[29] According to EE, the absence of any criteria or qualifications to determine the suitability of a donor to govern a Donor Funded School and to stipulate the eligibility criteria to become an operating partner on a Collaboration School, is irrational and risks imperilling the rights in sections 29(1) and 28(2) of the Constitution, as an unqualified, unvetted and inappropriate partner may took control of the SGB.

[30] EE's concerns are flawed. SASA do not impose any eligibility criteria for election of members of a governing body in public schools. That is a matter to be regulated by s 28 of SASA whereby the provincial MEC is given the power to determine it by notice in the Provincial Gazette. Furthermore, the definition of "*operating partner*" makes it clear who can become an operating partner. The Provincial Act defines a "donor" as: "*A person contemplated in section 12C (2)(a) or 12D (1) who provides funds or property to a collaboration school or a donor funded school for the purposes of improving the delivery of education in the province.*" From the above-mentioned it is evident there can be no risk of unqualified, unvetted and inappropriate operating partners that is going to control SGB's because the donor must be a '*non-profit organisation*' that has "*capacity, skills or resources*" that can be placed at the disposal of a collaboration school "*to empower the*

governing body, school management team and educators at the school to develop systems, structures, cultures and capacities necessary to deliver quality education."

[31] Moreover, a donor does not automatically or necessarily become a member of the governing body and cannot, as suggested by EE assume a major role, if not the majority controlling entity on the SGB. Section 12D (7) of the Provincial Act is clear "*the membership of the governing body of a donor funded public school may include representatives of the donor".* Membership of a donor is therefore not obligatory of the SGB whereas that of parents, teachers and learners are in terms of s 23 of SASA. The voting rights of the representatives of a donor is also limited *"to a maximum of 50 per cent."* The fear that the representatives of donors may impermissibly dominate a SGB by majority voting rights is therefore ill-founded. The MEC has also explained that in exercising the discretion to include representation of the donor on the SGB, regard will be had to *inter alia*, the skills and expertise of the donor. No evidence was advanced by EE to seriously challenge what the MEC stated.

[32] The concern that the MEC may increase the voting percentage of an operating partner, at Collaboration Schools to possibly 100%, on good cause shown, is also unwarranted. The MEC's decision to declare that the governing body of a particular collaboration school shall comprise more than 50 percent of the other members of the governing body with voting rights cannot be based on irrational and or unreasonable grounds. It must be premised on '*good cause'* and legitimate grounds. Furthermore, s12C (10) provides that in the event of an equality of votes at a meeting of a governing body of a collaboration school where the operating partner with voting rights comprises 50 per

cent of that governing body, the matter must be determined by a majority vote at a general meeting of parents present and voting rights.

[33] It follows that the complaint under this heading cannot succeed.

Inadequate eligibility criteria for conversion into Collaboration Schools or Donor Funded Schools

[34] According to EE, the Provincial Act, does not articulate clearly the purpose of sections 12C or 12D and fails to provide any detail or enough answers on how an underperforming or under-resourced ordinary public school would be identified for conversion into a Collaboration School or Donor Funded Schools. EE is also concerned that adequate or higher levels of performance or LSM demographic would be eligible for conversion if, in the MEC's opinion, it would be in the interests of education, hence the argument a rational relationship in the Provincial Act between ends and means had not been achieved which amounts to an infringement of the constitutional rights in ss 29(1) and 28(2).

[35] In the answering affidavit, the following was advanced to answer the above challenge. In identifying a public school for declaration as a Collaboration School, the MEC must "*be satisfied that such declaration will be in the interests of education at the school, having regard to relevant reports on the school, including reports on the performance of the school*" (section 12C). The relevant reports in terms 12C (1) include the following: (a) annual reports in respect of academic performance and the effective

use of available resources; (b) reports on the progress of all learners in the grade in a school; (c) the reports of the Schools Evaluation Authority as contemplated by section 11D of the Provincial Act. According to the MEC, the above-mentioned reports provide a detailed and comprehensive basis to determine whether a declaration would be *"the interests of education at the school".* Furthermore, the MEC, may, on the recommendation of the Head of Department, enter into an agreement with: a donor; operating partner; and the governing body of a public school in terms whereof an existing public school is to be declared a Collaboration School (section 12C(2)).

[36] A Collaboration School can therefore not come into being unless all three entities are amenable to an agreement. This also means that if there is no support from the SGB for a Collaboration School, it may veto a school from becoming a Collaboration School at this initial stage of the process. Furthermore, the minimum requirements for these agreements are to be prescribed by the Provincial Minister (s12C (4)) and these agreements will have no effect until a declaration is issued. But importantly, the MEC must also call for public comment in respect of the intended declaration and give due consideration to any comments received (s 12C (6)). It is only on having considered the public comments received and the conclusion of an agreement, that the MEC may, by notice, in the Provincial Gazette, declare the public school concerned to be a Collaboration School (s 12C (5)). It is correct that the Provincial Act does not expressly refer to underperforming schools. But it is clear that when read with the definition of "operating partner", the clear objective is to target schools that are in need of improvement. The complaint that ss 12C or 12D fails to provide any detail or enough answers on how an

underperforming or under-resourced ordinary public school would be identified for conversion into a Collaboration School or Donor Funded Schools, is therefore unconvincing. The suggestion that the MEC did not answer all the relevant questions as her answers appears to be *'I'll know it when I see it'* is equally without merit. On a contextual reading of the Provincial Act, the identification for a Collaboration School or Donor Funded School can only take place if it will advance the interests of education, including the best interest of the minor child. It follows the challenge under this heading falls to be dismissed.

No participation on the proposed contract to convert an ordinary public school

[37] EE took issue that the Provincial Act makes no provision for public participation or consultation with relevant stakeholders in the lead up to the decision to conclude a collaboration school contract. According EE, the parents have no opportunity to participate in the formulation of the terms of an agreement or in any debate as to whether there should be a collaboration school at all. Instead, they are presented with a fait accompli, where only their comments are sought after the fact.

[38] EE's complaint is thus whereas SASA, in terms of s 12A demands public comments on the intention to merge schools before any contractual arrangements are made, in respect of schools on private land; and s18 requires closure of public schools to be conducted in terms of section 33 of SASA, which also demands public comments on the intention to close a school before any agreement between the MEC and SGB about assets

and liabilities is concluded, ss 12C and 12D of the Provincial Act deviate from the statutory scheme, which is procedural unfair and irrational.

[39] I disagree. The steps required to convert an existing ordinary school to a Collaboration School have been fully set by the MEC. It is correct the MEC needs to identify a public school for declaration as a Collaboration School. But that power is only given to the MEC if she/he is satisfied that such declaration will be in the interests of education at the school, having regard to relevant reports on the school, including reports on the performance of the school. Secondly, it is only on recommendation of the Head of Department that the MEC may enter into an agreement with: (a) a donor; (b) an operating partner; and (c) the government body in terms of which the public school is to be declared a collaboration school. In the case of a new school the agreement is entered into with the (a) donor and (b) the operating partner only. The reasons that no public participation required at the stage of concluding the agreement have been fully explained. According to the MEC, regulations will prescribe the contents of that agreement and the agreement itself has no binding legal effect until a declaration has occurred. What is important here is the declaration of a public school as a Collaboration School cannot occur unless the MEC has called for public comment in respect of the intended declaration and given due consideration to any comments received. The effect of all of this is, in the conversion of existing schools, the public will be informed of: (a) the intended declaration; (b) the grounds for the intended declaration; and (c) the terms of the agreement with the operating partner of a school that is to be declared a collaboration school. From the abovementioned, the concern by EE that the MEC will conclude contracts with the public

being in the dark about the terms thereof is misplaced. On the contrary, the views of the public will inform the intended declaration, which includes the terms on which the declaration will occur. It is ultimately only on that declaration that the agreement will take effect.

[40] Section 12D (5) governs the position in relation to Donor Funded Schools which provides that:

> *"(5) The Provincial Minister may not make a declaration contemplated in subsection (4) unless he or she has called for public comment in respect of the intended declaration and given due consideration to any comments received."*

[41] Counsel for the MEC, has argued that from the abovementioned it is trite that the public have a legitimate right to be heard in respect of the intended declaration of a school as a Collaboration School or as a Donor Funded School and contended that the Provincial Act meet that threshold. For the latter proposition it relied on a recent decision in Associated Portfolio Solutions (Pty) Ltd and Another v Basson and Others [14] where the SCA held: (a) section 33 of the Constitution provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair; (b) section 3(1)(a) of Promotion of Administrative Justice Act No 3 of 2000 ("PAJA") incorporates the procedural fairness requirement by providing that "*administrative action which materially*

[14] 2021 (1) SA 341 (SCA) at par 26.

and adversely affects the rights and legitimate expectations of any person must be procedurally fair"; (c) what is fair in the particular circumstances will depend on the context of each case. But the core of the right comprises the giving to the affected person of adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; and a clear statement of the administrative action.

[42] The argument by Counsel for the MEC is highly persuasive. There is no legal basis for the proposition that public consultation in order to influence the terms of the contract is procedurally unfair. The cases of SANRAL v City of Cape Town[15] and DA v President of the RSA[16] on which EE relied upon is of no assistance on this point.

[43] EE's reliance on other provisions of the Provincial Act are also of no assistance to its case because: firstly, s 12A requires public comment on an intention to merge schools which is distinct from public comment on the terms of a contract; and secondly, s 18 requires public comment on the intention to close a school which again is distinct from public comment on the terms of a contract. It is correct that in both instances the public comment occurs before the contractual arrangements are made, but the opportunity given for public comment does not concern the terms of the contract which does not

[15] 2017 (1) SA 468 (SCA) at paras 70-75
[16] 2013 (1) SA 248 (CC).

constitute administrative action. For these stated reasons, it follows that this challenge must also fail.

SADTU's Challenges against Collaboration and Donor Funded Schools.

[44] The challenges pleaded by SADTU was grounded in the following: First, that there was no proof that the model or concept of Collaboration Schools and Donor Funded Schools would yield better results or are justified thereby resulting in an imbalanced education system. Secondly, that the Provincial Act empowers the MEC to impose donors and operating partners on the SGB, without the SGB's agreement and that no proper guidance is provided for doing so. Thirdly, that by having operating partners serve on the SGB, the Provincial Act is: (a) inconsistent with SASA; (b) unconstitutional; and (c) undermines democratic ideals and fourthly, that teacher appointments in Collaboration Schools conflict with national legislation.

[45] In its heads of argument SADTU's has now advanced the following new case: First, that the Provincial Minister has failed to prove a rational connection between the establishment of Collaboration and Donor Funded Schools with undemocratic SGBs and the stated purpose of improving learner outcomes in underperforming schools. SADTU has argued that the differentiation between learners, educators and parents of Collaboration and Donor Funded Schools and learners, educators and parents of ordinary public schools in the Western Cape is not rationally connected to a legitimate government purpose.

[46] Secondly, that even if it is found the differentiation does bear a rational connection to a legitimate government purpose, the differentiation nevertheless amounts to unfair discrimination. According to SADTU, the differentiation is based on the ground of social class which is an analogous ground to those listed in section 9(3) of the Constitution. Thirdly, that the limitation is not justifiable under section 36 of the Constitution.

[47] In terms of s 9 of the Constitution, (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. And, (2) equality includes the full and equal enjoyment of all rights and freedoms. It is now well established where the equality clause is invoked on the ground that law or conduct differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, there are three stages to the enquiry to determine whether there is a violation of s 9(1). The first stage of the enquiry is to ask, does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 9(1)[17]. In Sithole and Another v Sithole and Another[18] at paragraph 19, the Constitutional Court held that:

> *'Differentiation lies at the heart of equality jurisprudence in general. Equality jurisprudence deals with differentiation in two ways: differentiation which does not involve unfair discrimination, and another which does. The*

[17] Harksen v Lane NO 1998 (1) SA 300 (CC): see also Sithole and Another v Sithole and Another para 20.
[18] 2021 (5) SA 34 (CC) at par 19.

principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. However, the government may classify people and treat them differently for a variety of legitimate reasons. For, '[i]t is impossible to [regulate the affairs of inhabitants] without differentiation and without classifications which treat people differently and which impact on people differently'. Mere differentiation will be valid as long as it does not deny equal protection or benefit of the law, or does not amount to unequal treatment under the law in violation of s 9(1) of the Constitution."

[48] However, *a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the state objective could have been achieved in a better way."*[19] Put differently, "*it is irrelevant that the object could have been achieved in a different way.*"[20]

[49] The second, leg of the enquiry is whether the differentiation amounts to unfair discrimination? This requires a two-stage inquiry. Does the differentiation amount to *"discrimination"*? If it does on a specified ground, then discrimination will have been established. If the differentiation amounts to *"discrimination"*, does it amount to *"unfair discrimination"*? If found to have been on a specified ground, then unfairness will be

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19 Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) at para 36.

20 Ibid.

presumed. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(2) of the Constitution.

[50] The third stage is, if the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause of s 36 of the Constitution.

[51] In my view, SADTU's arguments as framed in its Heads of Argument falls to be dismissed. It is trite that in a constitutional challenge, where there is a justification to be relied on, it is the organ of state responsible for the administration of the statute, in this instance the MEC, that must put up the factual and policy considerations on which the limitation is based.[21] In the present instance, the MEC had not addressed a justification analysis because SADTU's case was not premised on the basis that the provisions of the Act dealing with Collaboration Schools and Donor Funded Schools (sections 12C and 12D) infringe the right to equality. The legal principles on this issue are trite. Parties are bound by the case that they pleaded. They cannot make new cases in reply, let alone in argument. Parties must stand or fall by their founding papers[22]. The Constitutional Court confirmed in Phillips and Others v National Director of Public Prosecutions Phillips[23] that

[21]Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC) at par 19. See too: Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development 2014 (2) SA 168 (CC).

[22] Pilane and Another v Pilane and Another 2013 (4) BCLR 431 (CC) at para 49.

[23] 2006 (1) SA 505 (CC) at para 39.

it is impermissible for a party to rely on a constitutional complaint that was not pleaded. Most recently, the Constitutional Court in Damons v City of Cape Town[24] confirmed that *"[h]olding parties to pleadings is not pedantry", but is vital to upholding the rule of law because "every … party likely to be affected by the relief sought must know precisely the case it is expected to meet*." Having regard to the abovementioned, and the stages of enquiry to consider, SADTU failed to make out a proper case on this issue in its founding papers and the constitutional challenge falls to be rejected.

The Conflict challenge.

[52] According to chapter 4, part A of the Constitution, education is a functional area of concurrent national and provincial legislative competence. It follows Parliament and a Province may legislate on education. In the Province it is the Premier and MECs that exercise authority by implementing provincial legislation. In Federation of Governing Bodies for SA Schools v MEC for Education, Gauteng[25] it was held that '*The legislative competence of a province cannot be snuffed out by national legislation without more. The Constitution anticipates the possibility of overlapping and conflicting national and provincial legislation on concurrent provincial and national legislative competences.*' The latter obviously implies that *provinces have legislative powers and can legislate separately and differently which obviously mean there will be no uniformity.*[26]

[24] (2022) 43 ILJ 1549 (CC) at para 118.

[25] 2016 (4) SA 546 (CC) at par 26.

[26] Mashavha v President of the Republic of South Africa and Others 2005 (2) SA 476 (CC) at par 49

[53] In terms of section 150 of the Constitution[27], this Court is obliged when interpreting the Provincial Act, to give preference to a reasonable interpretation that avoids conflict, as opposed to one that results in conflict. Moreover, only when there is a "*real conflict*" the conflict-resolving provisions of the Constitution are triggered and if two pieces of legislation which deal with different subject-matters are reasonably capable of operating alongside each other, the conflict-resolution provisions of the Constitution are not triggered as there is no conflict.[28]

[54] With these helpful guidelines, the conflict to resolve is whether s 12(3) of SASA in stating that '*a public school may be*' any one of the three listed types is exhaustive. SADTU says, s 12(3)(a) does not contemplate any residual category of public school such as a Collaboration School or Donor Funded Schools. According to SADTU, if ss 12C and 12D of the Provincial do conflict with SASA then in terms of s 146 (2)[29] of the Constitution

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[27] Section 150 of the Constitution provides as follows:

> "**150 Interpretation of conflicts**
> When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict."

[28] Telkom SA SOC Ltd v Cape Town City and Another 2021 (1) SA 1 (CC) at par 37 and Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC).

[29] The relevant provisions of Section 146 of the Constitution provides as follows:

146 Conflicts between national and provincial legislation

(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a)The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

the resolution of the conflict falls to be determined in favour of the national legislation, which will render ss 12C and 12D and related sections of the Provincial Act inoperative.

[55] The MEC, in terms of section 12(1) of SASA is obliged to provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. In terms thereof a public school may be: an ordinary public school; a public

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(b)The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing-

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for-

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(2) National legislation prevails over provincial legislation if the national legislation is aimed at

(3) preventing unreasonable action by a province that-

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

school for learners with special education needs; or a public school that provides education with a specialized focus on talent, including sport, performing arts or creative arts.

[56] The SASA does not define the term 'ordinary public school'. Neither does it suggest that the three named forms of public schools are the *only* public schools that may be established by the MEC. In fact, s 2(3) of the SASA provides that: "*Nothing in this Act prevents a provincial legislature from enacting legislation for school education in a province in accordance with the Constitution and this Act.*" There is also no indication in SASA that schools other than the three types listed therein, may not be established by Provincial Governments.

[57] In a Province, it is the Premier and MEC that exercise authority by implementing legislation. In view of the jurisprudence of the Constitutional Court[30] it follows that the possibility of overlapping and conflicting national and provincial legislation on concurrent provincial and national legislative competences is not per se unconstitutional. Moreover, there need not be uniformity on matters in respect of which the provinces have legislative powers. They are permitted to legislate separately and differently.

[58] In fact, the MEC is afforded in terms of s 12 of the Provincial Act, discretionary powers, to establish and maintain a range of public schools, out of monies appropriated for this purpose by the Provincial Parliament, which, amongst other things, include: (a) pre-primary schools; (b) primary schools; (c) secondary schools; (d) intermediate

[30] See footnote 25 and 26

schools; (e) combined schools; (f) schools for learners with special education needs; and (g) *any other type of school which he or she deems necessary for education*. Collaboration Schools and Donor Funded schools, while public schools, are not ordinary public schools as contemplated by SASA and the Provincial Government may provide for additional types of public schools over and above those contemplated by SASA.

[59] In my view, the impugned provisions of the Provincial Act fall directly within the functional area of Schedule 4A and are reasonably necessary for, as well as incidental to, the effective exercise of the Provincial Legislature's powers in respect of the right to education. The challenge on this issue must accordingly fail.

Intervention facilities

[60] In terms of s 12E read with s 45 of the Provincial Act, the MEC may establish an intervention facility for learners who have been found guilty of serious misconduct. It further requires the MEC to determine guidelines on the behaviour that constitutes serious misconduct, the disciplinary processes to be followed, and the provisions of due process safeguarding learners' interests. It also empowers the SGB to recommend to the Head of Department (HOD) that a learner, with parental consent, could be referred to an Intervention Facility for a maximum of 12 months. The HOD may enforce the recommendation.

[61] According to EE and SADTU, Intervention Facilities are regressive and too drastic as a disciplinary measure; it is an outdated mode of delivering residential care to children,

which existed historically in the form of reform schools,[31] schools of industries[32] and places of safety[33].

[62] Furthermore, the provisions constitute an unreasonable and unjustifiable limitation of the rights of learners under sections 28 and 29 of the Constitution in the following six ways: First, it is overbroad and afford the MEC and the Head of Department an extraordinarily wide discretion to refer learners to Intervention Facilities and to run such facilities, with no guidance to the relevant officials as to how to exercise that discretion. Secondly, it allows for disparity in the quality of education as learners in Intervention Facilities are denied all the governance benefits and protections of public schools. Thirdly, intervention Facilities increase the risk of stigmatization and cannot be in a child's best interests by excluding and segregating learners who exhibit behavioural or other problems from the formal education system. Fourthly, although the consent of the parents are required, it does not provide an opportunity for the child to be heard when a decision to refer the child to an Intervention Facility is taken. It also does not afford any opportunity for learners to appeal against their removal to an Intervention Facility. Fifthly, when a decision is made to refer a learner to a residential facility as a punitive measure, court oversight is required because removal to a residential facility as a disciplinary measure occurs without the child's consent, it is a form of detention and is required by

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[31] Defined in the Child Care Act 74 of 1983 as schools maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act or transferred thereto under the Child Care Act.

[32] Defined in the Child Care Act as schools maintained for the reception, care, education and training of children sent or transferred thereto under the Child Care Act.

[33] Defined in the Child Care Act as including any place suitable for the reception of a child into which the owner, occupier or person in charge is willing to receive a child.

section 28(1)(g) of the Constitution '*to be a measure of last resort…for the shortest appropriate period of time*'; and lastly, section 45(14B) is unconstitutional to the extent that it requires that learners 'shall' be admitted to their former school in all cases, and allows learners no choice as to whether to re-enter the school from which they were effectively suspended for a prolonged period, and no scope for a consideration by the Department whether the best interests of the child under section 28(2), or the child's educational rights under section 29(1), will be best served by returning to the school community.

[63] The MEC has described the Intervention Facility framework as follows: The intervention facilities are an addition to a larger and detailed system dealing with learners' behavioural problems that exists in the WCED. The system is known as the Behaviour Support Pathway. The philosophy is to identify behavioural problems as early as possible, and for those close to the learner to intervene as early as possible. The pathway provides for escalation to higher levels of authority if the interventions at lower levels do not resolve the problem. The Behaviour Support Pathway is guided by the National School Safety Framework; the National Policy on Screening, Identification, Assessment and Support (SIAS); and the Education White Paper 6 of 2001, Special Needs Education Building an Inclusive Education and Training System. According to the MEC, SIAS "*advocates a shift from a system where learners are referred to another specialized setting other than the school nearest to their home*". It emphasizes that "*[t]he child must be viewed within his or her context*", to consider the extent to which "*the home and school context, are impacting on his or her accessing education, remaining enrolled and*

achieving to his or her optimum potential". This means that: Support should no longer focus only on the diagnosis and remediation of deficits in individual learners through individual attention by specialist staff. The SIAS shifts the focus to a holistic approach where a whole range of possible barriers to learning that a learner may experience (such as extrinsic barriers in the home, school or community environment, or barriers related to disabilities) are considered. The aim is to design support programmes in such a way that the learner gains access to learning.

[64] The MEC states that the WCED endorses this philosophy and its approach to behavioural interventions, including intervention facilities, is guided by it. The Behaviour Support Pathway proceeds through four phases. The more serious the behavioural need, the higher the problem is escalated within the pathway. The first step is for the teacher, parent or guardian to identify a learner experiencing behavioural barriers to learning. According to the MEC, teachers have an ethical and legal obligation to identify these barriers to learning. The teacher will identify them in the Learner Profile, under the heading "*Areas needing ongoing support*".

[65] Secondly, once a teacher identifies the problem, she assumes the role of case manager. She completes a support needs assessment as a tool to identify the learner's strengths and needs, and tries to solve the behavioural problem in the classroom environment. Particular attention is given to "*behavioural and social competence*" – the ability to interact and work with others. The teacher will try and resolve the problem through consultation and involvement with the learner's parent or caregiver.

[66] Thirdly, if the problem is not resolved in the classroom, the learner's needs are escalated to the School Based Support Team (SBST). Each school must have an SBST. The SBST will use designated form and based on that information, the SBST develops an Individual Support Plan (ISP) for the learner. The support could involve additional classroom support, additional learning support, or assistance from a school nurse. The ISP is reviewed once a term. The SBST can request additional support from the District-Based Support Team (DBST). Again, the parent or guardian is involved throughout. In exceptional cases, the SBST can fast track the learner directly to the next phase.

[67] Fourthly, if the SBST cannot overcome the learner's barriers to learning, it must escalate the problem to the District-Based Support Team (DBST). It completes the necessary form requesting intervention. The DBST assesses the needs of the learner, the school and the teachers by completing the DBST checklist. Based on that, it develops the DBST Action Plan for the learner. The DBST will then decide whether the learner requires low, moderate, or high level support. If the DBST determines that a low level of support is needed, the matter will ordinarily be referred back to the SBST, together with additional support to the learner, the teacher and the school. If the DBST determines that a learner requires moderate support, it could include referral to a psychologist, therapist or social worker, or to special programmes. The DBST could also refer the learner to the Department of Social Development (DSD) for referral to courses or camps. It would also involve support for the teacher, and the implementation of the learner's ISP. Parental consent must be obtained.

[68] If the DBST decides that a learner needs a high level of support, then the learner's case is referred to the Behaviour Case Conference. The Behaviour Case Conference (sometimes referred to as the District Behaviour Committee) is a multi-disciplinary forum chaired by the Head of Specialised Learning and Education Support. It may include a Senior Education Psychologist; a District Social Work Supervisor; a Senior Learning Support Educator; a Senior Therapy Co-ordinator; a Safe Schools District Coordinator; Circuit Manager; and a DSD or Designated Child Protection Organisation Social Work Supervisor. The Behaviour Case Conference will determine a more intensive intervention plan that may include, Specialised Behaviour Outreach Team intervention, which will ultimately be referral to an intervention facility when established.

[69] According to the MEC, the intervention facilities will be better resourced, and more formalized than the current outreach model. A learner could be referred for this intervention without going through a disciplinary process. It is also referred to as a *high level intervention* where Youth development programmes could include, after school programmes, holiday programmes, youth camps and peer mediation. The Specialised programmes offered by Special School and or Resource Centres for short-term intervention programmes, not exceeding 12 months; Programmes offered by other Government Departments or Community Resources; Referral to Child and Youth Care Centres (Child in Need of Care and Protection and/or Child in Conflict with the Law); or Referral to the programmes within the Department of Health that render services to children and adolescents.

[70] According to the MEC, the support for learners can be ongoing in different forms according to the learner's needs and is not one-off interventions. A learner can also follow this pathway without ever being disciplined by the school. When established, intervention facilities will also assist learners with behavioural barriers to learning who are never recommended for expulsion. The purpose of the support pathway is to identify behavioural barriers at the earliest possible stage so that they can be addressed before they further hamper the learner's access to learning, or require disciplinary proceedings. The intervention facilities are another form of high-level support that will be appropriate in certain cases.

[71] The MEC also recorded that it is possible that a disciplinary process will supersede, or run in parallel to this process. If a learner is found guilty of serious misconduct and recommended for expulsion by the SGB, the HOD may decline to expel the learner, and instead refer him to the DBST for therapeutic support and report back to the HOD, or refer the learner to the DSD for drug counselling. That is currently the case, even without the intervention facilities. The option introduced by the Amendment Act for the HOD, with the support of the SGB and parents, to refer a learner to an intervention facility (with their parent's consent), is just another way for a learner to receive the behavioural support they need. The referral still happens within the Behaviour Support Pathway, and the learner's needs will be tracked within that system.

[72] The MEC has reiterated that Parental consent is always required; the best interests of the child is always the underlying principle; the goal is inclusion and restorative

support; It does not replace other legislative mechanisms to support children – including those under the Children's Act and the Child Justice Act; and Intervention Facilities are not a solution to all behavioural problems – they are simply an additional option available that will be suitable in appropriate circumstances.

[73] The nub of the challenge by EE is that the Provincial Legislature failed to regulate the proper detail of Intervention Facilities in legislation, and it was constitutionally prohibited from leaving those details to be resolved by the MEC. No Intervention Facility has been established. The challenge is therefore on the face of the Provincial Act, as the full legislative scheme has not been enacted. Counsel for the MEC is thus correct that this is nothing more than an abstract challenge. In Savoi and Others v National Director of Public Prosecutions and Another[34] the CC held at para 13 that "*[c]ourts generally treat abstract challenges with disfavour*" because they "*ask courts to peer into the future, and in doing so they stretch the limits of judicial competence.*" In an abstract challenge like this, the applicants "*bear a heavy burden – that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face.*"[35] The bedrock of our constitutional jurisprudence is that statutes must be interpreted to avoid a finding that they violate the Constitution[36].

[34] 2014 (5) SA 317 (CC) at para 13.

[35] Ibid.

[36] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC)

[74] Both EE and SADTU contend that it is unconstitutional for the Provincial Act to leave the details of Intervention Facilities to be set in binding norms and standards. They stress all the protections must, be contained in the legislation or the Provincial Act is unconstitutional. Counsel for the MEC argued that as a matter of law, the contention by EE and SADTU is unfounded. I agree. The Guidance through norms and standards, as in this instance could be in legislation or in regulations. In Dawood and Another v Minister of Home Affairs and Others[37] the CC made it clear at para 54: "*Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.*"

[75] the Constitutional Court in Dawood, *supra*, held that the power to refuse a temporary resident permit to a spouse of a South African limited the right to dignity. The limitation was unjustifiable, not because, it would never be permissible to refuse a temporary resident permit, but because the legislation did not provide guidance to the official who had to take that decision. It was the absence of guidance to the individual decision-maker that was the problem. Furthermore, in Dawood, the officials had to make decisions in the absence of guidelines even on temporary resident permits, but in the present instance the Provincial Act will provide guidance and the cannot lawfully establish an Intervention Facility unless and until he/she enacts norms and standards. From the abovementioned, it follows that the principle that where guidance for officials is required, it can be given in legislation or, where appropriate, in regulations stands.

[37] 2000 (3) SA 936 (CC) at para 54.

[76] The latter principle is however not limited to giving guidance to officials. The CC considered a constitutional challenge to provisions of the South African Police Service Act 68 of 1995 concerning integrity testing in the matter of Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others Helen Suzman Foundation[38]. The provisions allowed the Minister of Police to "*prescribe measures for integrity testing of members of the*" Directorate for Priority Crime Investigation. The applicant argued that this was "*an open-ended discretionary power which could be abused because the section does not lay down guidelines on when and where the measures may be applied.*"[39] The CC disagreed. It held that "*[t]here is simply no basis for the assumption that the measures prescribed by the Minister will necessarily be intrusive.*"[40] Moreover, it was "*more appropriate for the finer details on when and where to apply the measures to be provided for not in the legislation but in the regulations or the measures themselves.*"[41] Ultimately, the CC held: "*Instead of seeking to invalidate the Minister's powers to prescribe the measures, the correct approach would be to challenge the prescribed regulations on their content and application.*"

[77] Having regard to the abovementioned stated principles the questions, as advanced by counsel for the MEC are now: firstly, was it appropriate for the Western Cape Provincial

[38] 2015 (2) SA 1 (CC)

[39] Ibid at para 43.

[40] Ibid at para 44.

[41] Ibid at para 45.

Legislature to decide that it would set the basic purpose of Intervention Facilities, but leave it to the MEC to determine the details of how they would operate?; Secondly, if it was appropriate, could the challenges by EE and SADTU to the Provincial Act be resolved through those norms and standards?; and lastly, if so, should the challenges not wait for the norms and standards to be enacted to determine whether or not there is a constitutional breach.

[78] In my view, having regard to the stated principles, the Western Cape Provincial Legislature's decision to leave the regulations to the MEC to determine the details of how Intervention Facilities should operate was not constitutionally impermissible. Furthermore, in Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others[42] the CC held that: "*a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself.*" The power to delegate the details to the Executive is therefore necessary for effective law-making[43] and 'ordinarily, the purpose served by regulations is to make an Act of Parliament work. The Act itself sets the norm or provides the framework on the subject matter legislated upon. Regulations provide the sort of detail that is best left by Parliament to a functionary, usually the Minister responsible for the administration of the Act, to look

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42 [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 51.

43 Ibid.

beyond the framework and "in minute detail" to ascertain what is necessary to achieve the object of the Act or to make the Act work.[44]

[79] The only limit our courts have drawn on the delegation of power to the executive is plenary law making power and that is the authority to pass, amend or repeal an Act of Parliament.[45] In these matters, this is not the case.

[80] To sum up. In view of what has been stated, the second and third question must be answered in favour of the MEC. The legislative scheme that will provide guidance is incomplete. It is therefore impossible to determine whether there is a limitation of rights. EE's and SADTU's challenge will only be ripe when the Norms and Standards are enacted. It is only then that there is a threat of limitations of rights that could justify judicial scrutiny.

[81] In my view there are only three legitimate challenges of the Norms and Standards on Intervention Facilities cannot cure by regulations. The three are: (i) The complaint about the definition of serious misconduct; (ii) the complaint that a learner must have the right to be heard. If that right must be in legislation then it speaks for itself the challenge is not premature; and, (iii) the complaint that learners must return to the same

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44 See Minister of Finance v Afribusiness NPC [2022] ZACC 4.

45 **Smit v Minister of Justice and Correctional Services and Others** [2020] ZACC 29; 2021 (3) BCLR 219 (CC); 2021 (1) SACR 482 (CC) at para 31.

school. That rests on the interpretation of s 45(14B) whether it compels the return of learners in all circumstances.

The definition of serious misconduct;

[82] The pleaded challenge is "*there is no definition or criteria for determining whether conduct amounts to 'serious misconduct' – a jurisdictional fact for the application of the provision. It is simply left to the Provincial Minister to issue a notice in this regard.*"

[83] The answer as to what constitutes serious misconduct is squarely sourced within the provisions of s 9(3)(a) of SASA[46] and s 45(9)(a) of the Provincial Act[47]. There is no challenge against those provisions. Absent an attack against those provisions that afforded the power to the MEC, the order sought by EE and SADTU would have no consequence because the power to define serious misconduct would still exist. Moreover, the MEC has exercised the power and has published a detailed definition of "serious misconduct".[48] While EE criticizes the decision, it does not challenge it. EE cannot

[46] 9 Suspension and expulsion from public school (3) The Member of the Executive Council must determine by notice in the Provincial Gazette – (a) the behaviour by a learner at a public school which may constitute serious misconduct; (b) disciplinary proceedings to be followed in such cases; (c) provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings.

[47] 45. Code of conduct, suspension and expulsion at public schools. **–** (9) The Provincial Minister shall determine by notice in the Provincial Gazette – (a) the behaviour by a learner at a public school which may constitute serious misconduct; (b) disciplinary proceedings to be followed in such cases; (c) provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings.

[48] Regulations Relating to Disciplining, Suspension and Expulsion of Learners at Public Schools in the Western Cape, reg 3.

complain about the lack of guidance to define "serious misconduct", but not challenge the actual definition. Despite calling this defence highly technical, EE is well aware that litigants must properly identify the legislative provision they challenge.[49] If EE had challenged s 9(3)(a) of SASA, the National Minister may well have opposed. In my view that is the end of this challenge.

A learner must have the right to be heard

[84] On this issue the MEC's argument is that learners already have the right to be heard. This point was not persisted with during argument. It is obvious that the legal obligation to hear a child exists in the Constitution, PAJA and the Children's Act.

A learner must return to the same school.

[85] Section 45(14B) of the Provincial Act provides that: "*A learner who has been referred to an intervention facility in terms of subsection (6) (a) or (14A) shall, after the lapse of the specified period contemplated in those subsections, be admitted to the same public school that he or she attended prior to the referral.*" EE interprets this provision to mean that the learner *must* be admitted to the same school, even if it is not in the child's best interests.[50] There can be no qualm, if s 45(14B) meant that, a child had to return to the same school, even contrary to her best interests as determined by her parents and

[49] See PriceWaterhouseCoopers Inc and Another v Minister of Finance and Another 2021 (3) SA 213 (GP) at paras 22-26 (applicant cannot challenge a related section that it did not mention in its notice of motion).

[50] EE Heads at para 153.

the HOD, it would limit s 28(2) of the Constitution and it would be a legitimate complaint by EE. The argument by the MEC that EE had misread the section is not without substance. According to the MEC, the section must be read as a direction to the school that it must admit the child. It is not a direction to the parents, the HOD, or the learner that the child may not be admitted to another school. It was argued that the word "shall" here is a "*directory verb*", not a "*categorical imperative*".[51] It is directing that, if the parents want the child to be admitted, he/she "*shall*" be admitted. It is not purporting to remove the ordinary right of parents to decide that their child should move to a different school.

[86] I am persuaded by the latter argument. To read it in that manner is also consistent with s 28(2) of the Constitution. It is also the reading adopted in the Draft Norms and Standards. Under those Norms and Standards, the learner will always remain in contact with their home school, and the goal will be to reintegrate the learner to the school. And, at the end of the intervention, the Behaviour Case Forum may determine that the learner should be referred to a different school. The reasoning of the MEC is sound. EE rightly accepts that, if s 45(14B) can be interpreted this way, then its challenge should fail. I accordingly accept it and the challenge cannot be successful on this issue.

[87] It follows, the challenges, as discussed above, should also be dismissed because they are premature. EE and SADTU must wait until the Norms and Standards are enacted

[51] Maharaj and Others v Rampersad 1964 (4) SA 638 (A) at 644B.

and if they are still of the view it does not adequately protect the rights of the learners, they can challenge them.

Breach of Fundamental Rights

[88] Under this heading, EE had advanced six challenges based on the right to basic education and the rights of the child, primarily the right in s 28(2) of the Constitution. The first is the Provincial Act, affords the HOD or the MEC an *overbroad discretion* in three respects; – the decision to refer a learner to an Intervention Facility, the definition of serious misconduct, (which was already discussed) and decisions about residential facilities; Secondly, there will be a *disparity in the quality of education* because Intervention Facilities do not have adequate governance protections; thirdly, Intervention Facilities create *a risk of stigmatisation*; fourthly, the Provincial Act does not specifically afford *the learner a right to be heard* (this issue was already discussed); Fifthly, there is no *court oversight* required to refer a learner to a residential Intervention Facility; and lastly, which was also discussed above, the WC Schools Act compels a learner to *return to the same school.*

[89] Counsel for the MEC argued that when assessing EE's complaints about an absence of guidance, it must be borne in mind that statutes should be interpreted purposively and that this can provide adequate guidance; where there is no risk of a rights violation guidance is not required; and guidance is not necessary where the factors are too numerous, or sufficiently obvious, or where the discretion is given to an expert. For the

latter propositions reliance was placed on the Dawood[52] matter. In that matter the CC held that cohabitation was part of a marriage relationship, and therefore the right to dignity. If a foreign spouse was refused a temporary residence permit, it would limit that right because its effect was that the couple would be separated.[53] The statute allowing refusal therefore limited the right.

[90] The CC then considered whether the limitation was justifiable. It was in the limitations analysis that the issue of discretion and guidance arose. In considering the nature of the limitation, the CC concluded that, properly interpreted, it was unclear from the statute "*what factors are relevant to the decision*". The CC recognised that it could be justifiable to refuse a permit – for example if the spouse had a criminal record – but the problem was that the legislation allowed a permit to be "*refused where no such grounds exist*."[54] That is why the limitation was serious – because refusal could occur even when no justification existed.

[91] In assessing the purpose of the limitation, the CC held that discretion "*plays a crucial role in any legal system*" because it "*abstract and general rules to be applied to specific and particular circumstances in a fair manner*".[55] Three instances were recognised where a broad discretion will be justified:[56] The first is, where the factors relevant to a

[52] supra
[53]para 39.
[54] para 49.
[55]para 53.
[56] para 53.

decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance; Secondly, where the factors relevant to the exercise of the discretionary power are indisputably clear; and thirdly, where the decision-maker is possessed of expertise relevant to the decisions to be made. The CC the held that "*when necessary, guidance … as to when limitation of rights will be justifiable*" must be given in legislation or regulation.[57]

[92] In Dawood's case, there was no guidance and the officials had no special expertise and ultimately the CC held that the limitation was unjustifiable.

[93] Counsel for the MEC argued that Dawood is not authority for the proposition that, every time a law grants a power that might limit a right, there must be guidance because, discretion is a vital part of any legal system, laws that grant discretion to officials are not inherently constitutionally flawed and if the factors are too numerous to identify, or they are obvious, or the decision-maker has special expertise, it is not necessary to guide an official's discretion.

Overbroad discretion without legislative guidelines:

[94] Counsel for EE argued that the Intervention Facility provisions afford the HOD and MEC extraordinary wide discretion to refer learners to such a facility without the Provincial Act providing any guidance to the HOD and the SGB when they should refer a learner to

[57] para 54.

an Intervention Facility. And that s 12 E read with 45 of the Provincial Act are in contravention a fundamental constitutional principle as it fails to provide the necessary rights- protective framework within which regulations are to be made.

[95] The main issue here is whether learners who are referred to Intervention Facilities suffers a limitation of a right. If, not then it does not require guidance. According to the MEC the learners do not incur a burden but receive a benefit. They will receive the help and support that they need in order to learn, in an environment that is appropriate and designed to assist them. And it will do so where the most likely alternative is expulsion.

[96] According to Dawood, it is only decisions that can limit rights that require guidance, for instance, refusing a temporary residence permit, or confiscating currency, or recording a private conversation, etc. Decisions that only promote rights do not require guidance. On the facts before me, referral to an Intervention Facility cannot be regarded as rights limiting. The pilot project outcome as recorded by the MEC illustrates that. The programme achieved positive outcomes for the learners. For many learners, it was the first time they were receiving positive attention. The MEC, recorded that because of their behavioural difficulties, schools would often provide only negative attention when the learner misbehaved. The intervention facility told the learners that they were worthy and important, and that the WCED, the school and their parents were committed to assisting them to achieve their potential.

[97] In its first two phases, the pilot programme assisted 37 learners. They have included both primary school and high school learners. Even where the programme does

not succeed in reintegrating the learner, it provides a much better sense of what the learner's barriers to learning and other needs are so that he or she can get the help they require. So far, approximately 50% of learners successfully completed the programme. The WCED defines success as reintegration in the home school, as the alternative for them would often have been to be moved to another school or out of the school system altogether. Three case studies to demonstrate the positive impact that intervention facility can have for a learner were provided. Learner A was sifted into the Base Programme due to severe behavioural meltdown of a violent nature at school. He also had suicidal tendencies as well as sexually inappropriate behaviour. He was suspended several times from school for assaulting learners. The school shifted from a punitive orientation to a restorative approach with his family and the learner. The learner was successfully re-integrated back into his school after a term spend in the Base programme. Family work led to reconciling with the principal and a restorative approach to Learner A. Work with the family was also done to work through the death of Learner A's brother in a gang-related incident as well as the imprisonment and release of another brother whom Learner A and the family feared. After more than a year, Learner A is still in school with No incident reporting that was flagged at district or school Level or family for more intervention.

[98] Learner C presents a similar success story: Learner C presented with a flat emotional profile on entry to the programme. Through the programme he became more socially aware and engaging. Work was done with his dad and the principal to mediate conflict between the two parties. This contributed significantly to a better relationship

with Learner C. A review of his medication was done and this was increased. The impact of this was immediate. School reported a stabilizing effect on his melt downs. He focused better in class and was more on task in class. The intervention with his class teachers to accommodate his body breaks supervision during break time helped in the co-regulation of Learner C to prevent behavioural incidents. Learner C during and at exit of the programme had no meltdowns at school. His home life was also reported to be better with virtually no incidents of bullying his two sisters. Learner C is more receptive to guidance from the adults in his life and is not being influenced by peers as before. The close working relation with the CBST in case managing contributed to the successful outcome of Learner C's behaviour stabilizing.

[99] In view of the above, whether or not the learner is referred, no right will be limited. But even if a referral constitutes a limitation, the three factors as discussed in Dawood are in any event present. The underlying purpose of Intervention Facilities is to support the best interests of the child and that is be assessed in line with the self-evident statutory purpose of Intervention Facilities, to avoid expulsion, correct behavioural problems, and enable re-integration. In my view that is more than sufficient guidance. It also accord with the guidance given by s 28(2) of the Constitution, and the guidance given by s 9 of the Children's Act[58] which bind the SGB and the HOD when they consider referring a learner to an intervention facility.

[58]Section 9 reads: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

[100] Secondly, it is self-evident, whether it will be appropriate to refer a learner to an Intervention Facility will depend on the particular circumstances of the child. Each case will be different. To define the relevant factors in the abstract will be impossible, when the ultimate purpose is so clear. Furthermore, the decision not to list factors is not unusual. It is the same decision that Parliament and the Western Cape Provincial Legislature took when assigning the power to SGBs and HODs to expel a learner. The factors to consider were too numerous, while the goals were so clear, that stating specific factors was inappropriate. It is therefore not an unusual legislative choice to grant an unguided discretion to an expert.

[101] Thirdly, three independent experts are involved in taking the decision. The HOD is the most senior official in the WCED and an expert in educational matters. The decision also requires the consent of the SGB. The SGB includes the principal of the school, teachers, parents, other staff and other learners. They too will have expert insight into whether referral is appropriate. The Provincial Act further requires the decision to be approved by the learner's parents. To sum up. The Provincial Act read with the Constitution and the Children's Act, in my view creates sufficient guidance that there is no reasonable risk that a decision to refer a child to an Intervention Facility will limit a constitutional right. It can only be taken if it is in the best interests of the child. Restating that in the Provincial Act would serve no purpose. And seeking to guide the three experts who must agree before a learner's can be referred would only straightjacket the proper exercise of a broad discretion.

Residential Facilities

[102] EE argued that residential facilities constitute the most severe limitation of a learner's rights and the MEC's unrestricted power to refer learners to residential Intervention Facilities is self-evident unconstitutional. I disagree. EE did not challenge the existence of residential Intervention Facilities. It accepts that it is constitutional to have residential facilities, provided there is guidance on when they are established, and when learners are sent there. It is difficult to understand how it can limit rights if the HOD decides that a particular facility will be residential or non-residential. EE does not explain why the designation of a particular facility as residential or non-residential on its own limits any right. Furthermore, the discretionary powers afforded to the HOD, the SGB and the parents do not limit rights. In any event, the decision will still be made by experts and be guided by the best interests of the learner, and the manifest purposes of intervention facilities. Moreover, residential facilities will only be established where non-residential facilities are impractical. The challenge must fail

Disparity in the quality of education

[103] EE's argument here is that effective and democratic governance of Intervention Facilities, unlike public schools, is not statutory guaranteed or enshrined at all. The argument was advanced that: (a) effective and democratic governance is part of the right to basic education; (b) the Provincial Act does not "enshrine" democratic governance; and (c) therefore Intervention Facilities limit the right in s 29(1)(a) of the Constitution.

[104] This argument is without merit. First, it is indicative on a proper reading of s 12E (2)(b) which provide that "*curriculum delivery equivalent to the standard provided in legislation and policies applicable to public schools*", promote the right to basic education. If governance is an element of the right, then this command should be interpreted to include a requirement that governance at Intervention Facilities comply with legislation and policies applicable to public schools. Otherwise, "*curriculum delivery*" would not be equivalent to public schools. In my view s 12E(2)(b) does what EE ask for, the Western Cape Legislature made public schools' laws and policies applicable to Intervention Facilities. Furthermore, it appears from the Draft Norms and Standards that it is possible to give effect to that legislative command. They provide greater governance protection than learners enjoy in ordinary public schools. Each learner will remain in admitted at their home school, and each intervention facility will be attached to an ordinary public school. Both schools have SGBs. In addition, a Behaviour Intervention Team will manage the Intervention Facility, and the Behaviour Case Forum will provide district oversight.

Increased Risk of Stigmatisation

[105] According to EE, Intervention Facilities will result in stigma and ostracization as learners will be required to be removed from their school, which is contrary to the best interests of the child, and their right to a basic education, because the "*stigma stays with learners as they seek to re-enter the education system*".

[106] This argument is unsustainable. The manifest purpose of Intervention Facilities is to avoid expulsion, resolve behavioural problems, and successfully reintegrate children

into their school. The alternative is expulsion which comes with its own risk of stigmatization and ostracization and, more importantly, will not solve the underlying behavioural problems for learners particularly for those who may be at the end of their school career. As the pilot project has shown, Intervention Facilities are meant to avoid that. It is difficult to understand why EE complain about Intervention Facilities while accepting expulsion as a valid form of sanction. Furthermore, the Draft Norms and Standards show that EE's fear of stigmatised and ostracised learners has no foundation in fact as interventions will ordinarily last only a few weeks or months; the learner will have constant contact with their home school or – in the case of an outreach facility – will never leave their home school; and the Behaviour Intervention Team works with the teacher and principal at the home school, and focuses specifically on reintegration. To take measures to benefit children with behavioural problems cannot limit s 28(2) or s 29(1)(a) of the Constitution. In fact, it promotes the fulfilment of those rights.

No court oversight

[107] EE contends that a child can only be detained with court oversight and that the Provincial Act permits a child to be referred to a residential facility without court approval. This challenge rests primarily on s 28(1)(g) which affords children the right "*not to be detained except as a measure of last resort, in which case … the child may be detained only for the shortest appropriate period of time*".

[108] The MEC has accepted that, if a child is in fact detained for more than a very short period, there must be court oversight. The MEC argued that the challenge must fail because referral to a residential Intervention Facility is not detention.

[109] There can be no doubt that detention as contemplated by s 28(1)(g) is analogous to imprisonment, not referral with parental consent to a residential educational facility. Detention for a child is necessarily different from detention for an adult because a child's life is regulated by their care-givers. If parents decide that a child should stay with his aunt for a month, or should go to boarding school for a term, the child must go even if they do not want to. That does not mean they are "detained" as contemplated in 28(1)(g). It would be absurd to require court oversight every time a parent determines where a child should reside.

[110] In argument counsel for the MEC referred to the Human Rights Committee which interprets the International Covenant on Civil and Political Rights[59] wherein it holds that a requirement to attend school does not even meet the lower threshold of a "deprivation of liberty", let alone detention. General Comment 35 explains that "*normal supervision of children by parents or family may involve a degree of control over movement, especially of younger children, that would be inappropriate for adults, but that does not constitute*

[59] South Africa has ratified the ICCPR and is relevant for interpreting the Constitution under s 39(1)(b).

a deprivation of liberty".[60] It goes further – "*the ordinary requirements of daily school attendance*" also do not "*constitute a deprivation of liberty*".

[111] Our Parliament enacted two statutes that give effect to s 28(1)(g). It is the Child Justice Act[61] and the Children's Act: The Child Justice Act's definition of detention "*includes confinement of a child prior to sentence in a police cell or lock-up, prison or a child and youth care centre, providing a programme referred to in section 191 (2) (h) of the Children's Act*". Those are only child and youth care facilities which include a programme for "*the reception, development and secure care of children awaiting trial or sentence*".[62] In the present instance, Intervention Facilities do not meet that requirement. It follows, referral to an Intervention Facility does not constitute "*detention*" under the Child Justice Act.

[112] Similarly, the Children's Act provides for the Children's Court to refer children to a "*child and youth care facility*". But a child and youth care facility expressly excludes residential Intervention Facilities. Section 191(1) defines child and youth care facilities as "*a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a residential care programme suited for the*

[60]Human Rights Committee General Comment No. 35: Article 9 (Liberty and security of person) (16 December 2014) at para 62, fn 176.

[61]That appears both from its preamble, and its objects (s 2(a)). The preamble refers expressly to s 28(1)(g) and states that one of the Act's aims is "providing for special processes or procedures for … detention … of children".

[62]Children's Act s 191(2)(h).

children in the facility". But it specifically excludes from the definition: "*a boarding school*"; "*a school hostel or other residential facility attached to a school*"; and "*any other establishment which is maintained mainly for the tuition or training of children other than an establishment which is maintained for children ordered by a court to receive tuition or training"* On a plain reading the Children's Act, too, does not apply to Intervention Facilities.

[113] Moreover, s12E(3) says only that a facility "*may include residential care*". It never suggests that learners will be confined or detained. The term residential care has its obvious meaning – it will be permissible for a facility to allow learners to live there and be cared for; the learner can be sent there only with the consent of their parents. And their parents can withdraw that consent at any time and remove the child from the facility, unlike in a detention center, in the true sense of the word.

[114] Furthermore, att non-residential Intervention Facilities, learners will return to their homes every day, just like any other learner. There is no reason to interpret the Act to mean that a Facility with residential care is any different. Learners are permitted to stay there, but are not confined there. They would be able to leave whenever their parents choose, and according to the rules of the facility, just like a boarding school. If a child leaves an Intervention Facility, they do not commit an offence. They cannot be arrested. It may be a disciplinary offence to leave without notice or permission of your parents, but that again is just like any boarding school.

[115] From these stated facts, a referral to a residential facility cannot be seen as a detention. The absence of that oversight by a court of law is not a constitutional violation.

[116] I now turn to SADTU's rights challenges. According to SADTU Intervention Facilities are not in the best interests of learners and that Intervention Facilities are unfair. However, SADTU failed to explain why Intervention Facilities are not in the best interests of learners. On the undisturbed facts by the MEC, the existence of Intervention Facilities is manifestly in the best interest of children. They will only be sent there when their parents, the SGB and the HOD agree to it. Furthermore, the Facilities are designed to help learners, and to punish them. The WCED recognizes that the misconduct is the result of a barrier to learning and that the learner needs support to overcome it. The Facility offers that support. That is obviously in the best interest of the learner. The more dramatic approach would be expulsion or suspension. That will not fix the underlying problems and will not be in their best interests of the learners. There is also nothing unfair about Intervention Facilities for all the reasons already stated above.

[117] SADTU in its heads of argument also complaint that Intervention Facilities "*are contrary to the democratic and constitutional principles underlying the National public school system*" and that there are arbitrary differentiation contrary to s 9(1); and unfair discrimination contrary to s 9(3) of the Constitution. According to SADTU, Intervention Facilities violate s 9(1) because learners in the Western Cape "*are subjected to forms of serious discipline that learners in other provinces are not subjected to*".

[118] SADTU's arguments are ill-conceived. First, it is not permissible to argue that a provincial statute differentiates because it only applies in that province. The same type of argument was rejected by the Constitutional Court in Weare and Another v Ndebele NO and Others[63] The applicant argued that a provincial gambling law violated s 9(1) because it treated people in KwaZulu-Natal differently from people in the other provinces. Gambling – like education – is an area of concurrent national and provincial competence. The Court held that absent a s146 challenge[64], you cannot criticise a provincial law because it only applies in that province:

> "*There can be no objection in this case to the KwaZulu-Natal legislative regime simply on the ground that it is different to that in other provinces. This is not to say that the situation in other provinces may not be referred to when challenging provincial legislation. But the fact that there are differences between the legal regimes in provinces does not in itself constitute a breach of section 9(1).*[65]

[119] The same applies in this matter. The Western Cape Legislature can only legislate in the Western Cape. It does not have to justify under s 9(1) why it has regulated all schools and educators in the province in the same way. The way to challenge differences between provinces is through s 146 of the Constitution.

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[63] 2009 (1) SA 600 (CC)

[64] para 69.

[65] para 70.

[120] Secondly, SADTU is correct that the test under s 9(1) is whether there is a rational connection between the differentiation and a legitimate government purpose.[66] But, as the Constitutional Court held in Prinsloo v Van der Linde[67] "*a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the state objective could have been achieved in a better way.*" Put differently, "*it is irrelevant that the object could have been achieved in a different way.*"[68] It follows that Intervention Facilities are rationally connected to a legitimate government purpose. The purpose is to avoid expulsion and instead provide "*therapeutic programmes and intervention strategies in order to address the serious misconduct*". As the pilot programmes make clear, they will achieve that aim with remarkable success.

[121] The attack by SADTU of unfair discrimination under s 9(3) is unclear. It failed to identify a ground of discrimination, and does not explain why that unlisted ground should found a claim for discrimination. It does not identify the burden imposed, and makes no case that any discrimination is unfair. It follows these complaints falls to be dismissed.

Western Cape School Evaluation Authority (WCSEA)

[122] WCSEA is an independent entity with the sole focus of evaluating school performance in the Province in order to improve the quality of basic education. According to the MEC, tt is based on international best practice, careful preparatory work, and an

[66] **Harksen v Lane NO and Others** [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 42.

[67] **Prinsloo v Van der Linde and Another** [1997] ZACC 5; 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) at para 36.

[68] Ibid.

honest assessment of the flaws with the current system. Its goal is to "*raise standards and improve learning outcomes*" and to "drive school improvement through evaluating quality and practices in all schools". It will "*identify and share focused and innovative local programmes*" and publish its report "*to create more transparency and accountability so that the public can interrogate them and hold schools accountable for improvement.*"[69] It will "*assess the true quality of education*" in the Western Cape, with a strong focus on what really matters – "*the quality of teaching and learning in the classroom*".

[123] According to the MEC, tt is, in every sense, precisely the type of government innovation that the Constitution requires to turn the promises in the Constitution into reality. It is common ground, the National Minister and the DBE have no objection to the WCSEA and have even described the WCED's efforts to improve school evaluation as "*sterling*". The only entity that objects to the WCSEA is SADTU. It objects because the WCSEA does not comply with a collective agreement it and other unions concluded with the DBE in 2003. It argues that this Collective Agreement prohibits the Western Cape from taking measures to improve the quality of education in the Province. It argues that agreements struck between unions and employers can trump democratic legislation.

[124] SADTU also holds the view, contrary to the DBE, that there is a conflict between national legislation and the Provincial Act. It contends that school evaluation can only be regulated by national policy, and that the national policy trumps a provincial law.

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[69] Ibid.

[125] SADTU, in reply sought to advance new arguments. In short, SADTU seek to place its own interests and the interests of its members at the forefront of its challenge.

[126] It is common cause that WCSEA was established to replace the national system known as Whole-School Evaluation(WSE). The National Policy on Whole-School Evaluation (WSE) was promulgated in 2001. The system was implemented in the Western Cape in 2006. WSE evaluates schools and not learners, or the education system as a whole. According to the MEC, WSE is an ineffective system of school evaluation. The experience in implementing the WSE Policy demonstrated that it suffered from multiple flaws, including that evaluations tried to do too much and were not focused "*on what really matters - the quality of teaching and learning in the school.*"; the reports were "*overly complicated and extremely repetitive*", and therefore unhelpful in improving performance; The WSE Policy emphasised ensuring compliance with DBE policies, not with assessing performance and how to improve it. Schools were given so long to prepare for the school visits that "*it was difficult to be sure that the school was being evaluated in its actual state*".

[127] Only some teachers were evaluated, and they were given advance notice. Again, this meant "*the school was not being evaluated in its true state.*" The complexity of the reports, and the rarity of visits meant that recommendations were seldom implemented. Reports were not made available to parents and learners so they could assess how their schools were performing. Each of the numerous criteria was evaluated on a five-point scale. The result was that "*the vast majority of schools were given the 'safe' rating of 3*

out of 5". This was interpreted as "satisfactory", even though there was room for improvement.

[128] According to the MEC, it was only the WECD that believed the WSE Policy needed improvement. The DBE recognized many of these flaws in 2015 – but did nothing to change the WSE Policy. The English OFSTED system – on which WSE was based – was significantly overhauled in 2005 to more closely reflect how the WCSEA now operates. The MEC states that the majority of provinces barely complied with the WSE Policy at all. For 2018/19, four provinces conducted zero evaluations. One only conducted 2. The Western Cape was the only province that complied with its reporting obligations under the WSE Policy. Accordingly, in 2016 the WCED decided to test whether there was a better way to evaluate schools. It developed a new, simplified model of school evaluation. It focussed on only 5 areas of performance, not nine. It graded each question on a four-point scale. And it required 50% of time to be spent on lesson observation.

[129] From October 2016 to the end of 2017, the WCED employed this new model in a pilot programme. Over the various stages, the WCED evaluated 58 schools. The feedback was extremely positive. Evaluators stated that they believed the new instrument was providing better results. Schools also preferred the new method and the MEC records that it was clear that the new instrument was more effective than the WSE model.

[130] The WCED therefore resolved that, from 1 April 2018, it would implement this new model across all its schools. While it would continue to collect the data under the WSE Policy, that would be only to report to the DBE. Schools would get the new, improved

reports. The pilot project led to the amendment to the WC Schools Act to create the WCSEA in order to conduct these new, more effective, evaluations.

[131] The WCSEA is established in ss 11A to 11H of the Provincial Act. It is an independent authority whose task is to conduct independent evaluations of schools. The WCSEA is led by a Chief Evaluator appointed by the Provincial Minister. The WCSEA's functions are to inform the Provincial Minister about specific aspects of how schools are functioning. Evaluations are usually conducted on two days' notice, but can be conducted without notice if necessary. Evaluators can obtain access to and evaluate a school and any classroom in a school, observe lessons and gather first-hand evidence of how teaching and learning is occurring at the school. The reports must be published so that current and prospective learners and parents can see for themselves how a school is operating. The Provincial Minister has the power to make regulations for the WCSEA, including how it should conduct evaluations.[70] The Regulations came into force on 11 April 2019.[71] The first Chief Evaluator was appointed on 1 October 2019.[72] The WCSEA has been operating since then.

[132] The current model assesses just five areas most important for school performance: Learner achievement; Teaching and learning; Behaviour and safety; Leadership and management; and Governance, parents and community. It further requires a score out

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70 WC Schools Act s 11H.

71 Western Cape Schools Evaluation Authority Regulations, 2019 published as PN 47 in Provincial Gazette 8079.

72 SADTU AA at para 136: SADTU Record p 127.

of 3 on each criterion and is significantly simpler than the WSE evaluation. It is orders of magnitude simpler than the template for evaluations under the WSE.

[133] The results of the new model remain positive. School management, teachers and evaluators all prefer the new model to the WSE. The Chief Evaluator is confident that the WCSEA "*has already, and will continue, to improve teaching and learning in the Western Cape.*"[73] Even the DBE recognised the "*sterling work that [the WCED] is doing to enhance the quality of school evaluations*".[74] It has not objected to the WCED conducting a different method, and the WCED has agreed to continue to report to the DBE, but based on its new system.

[134] SADTU, has advanced four attacks on the establishment of the WCSEA: It was contrary to a collective agreement; It violated SADTU's and its members' labour rights, including their right to collective bargaining; It was contrary to a national policy; and It will lead to a duplication of functions. No mentioned is made that WCSEA violates the right to equality. In SADTU's founding affidavit s 9 is one of multiple constitutional rights referred to in the introductory section including ss 10, 12, 14, 16, 23, 28 and 29 but SADTU failed to explain why the WCSEA limits the right to equality, or even which part of s 9 it limits.

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[73] SADTU AA at para 137: SADTU Record p 127.

[74] SADTU AA at para 140: SADTU Record p 128.

[135] In its heads of argument, SADTU seeks to advance a claim based on the right to equality. The only references for pleading this claim are in the replying affidavit. SADTU by now must know it is simply impermissible to do so.

[136] SADTU appears to have abandoned the claim that the WCSEA violates other parts of s 23 of the Constitution and now argued that WCSEA violates only its right to collective bargaining. SADTU's sole argument in the Founding Affidavit is that because the establishment and operation of the WCSEA is contrary to the Collective Agreement, it limits the right to collective bargaining in s 23(5).

[137] According to the MEC, The WCED does not dispute that the system of school evaluation under the WCSEA contradicts the system in the Collective Agreement. The whole purpose of establishing the WCSEA was to create a better method for evaluating schools. But the conflict is irrelevant because the WC Provincial Legislature had the constitutional competence to enact a law contrary to the Collective Agreement. SADTU's argument that collective agreements trump provincial legislation and the provincial legislature cannot legislate contrary to a collective agreement concluded under the LRA, is simply wrong in constitutional law. Collective agreements do not constrain the powers of provincial legislatures. Section 104(1)(b)(i) of the Constitution is clear – a provincial legislature has "*the power to pass legislation for its province with regard to – any matter within a functional area listed in Schedule 4.*" The only limits on their powers are those contained in the Constitution. SADTU offers no authority for the proposition that provincial legislatures are constrained by collective agreements. There is no such authority. The

right to collective bargaining is not a right to legislate through collective agreements. Section 23(5) provides: "*Every trade union, employers' organisation and employer has the right to engage in collective bargaining.*" The heart of collective bargaining is for employees and employers to seek to reach an agreement.

[138] Ultimately, collective bargaining "*implies that each employer-party and employee-party has the right to exercise economic power against the other*".[75] That is what collective bargaining is intended to achieve, the persuasion of another party, including by strikes and lock-outs. That works in the context of labour relations. But SADTU seeks to substitute agreements reached through a collective bargaining process for the democratic process laid down by the Constitution. It seeks to make the democratically elected Provincial Legislature subservient to the economic agreements of employers and trade unions.

[139] In the present instance, it would allow the Executive branch (as employer) to dictate the limits of the legislative powers of the Provincial Legislature. Even worse, it would allow the National Minister to determine the limits of the Provincial Legislature's powers. It is simply impermissible to do so. That would fundamentally undermine the separation of powers. It is the Legislature that makes laws, and the Executive that

[75]Transport and Allied Workers Union of South Africa v PUTCO Limited 2016 (4) SA 39 (CC); 2016 (7) at para 46. See also National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another 2003 (3) SA 513 (CC) at para 43.

implements them. The Constitutional Court recently confirmed, collective agreements are subject to the law, and the Constitution,[76] not the other way round.

[140] Secondly, SADTU is not without a remedy. If it wishes to enforce rights under the Collective Agreement, it is free to do so through the mechanisms created by section 24 Labour Relations Act. That is a process entirely within the jurisdiction of the CCMA and the Labour Court.[77] Those are issues that do not concern this Court.

[141] SADTU has also, in reply argued that collective agreements constitute subordinate legislation and therefore can trump provincial legislation. Despite being a new case that was not made in the founding papers it can be summarily dismissed because it is a conflict argument, not a rights argument. A conflict between a national regulation and a provincial law, must be resolved in terms of s 146 of the Constitution. If it is a rights argument, then it would subject not only provincial laws, but also national laws to collective agreements. The claim has therefore nothing to do with s 23(5) of the Constitution. Moreover, the Constitution specifically deals with when national subordinate legislation can prevail over provincial legislation. Section 146(6) of the Constitution provides: "*A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.*" Even if the Collective Agreement is a "law", it could never prevail over the Provincial Act. The Collective Agreement was never

[76]National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others 2022 (6) BCLR 673 (CC).

[77] LRA s 157(1), read with s 24(7).

tabled in the NCOP, and so could never prevail over the Provincial Act. It is therefore not necessary to conduct a s 146 conflict analysis between the Collective Agreement or the Provincial Act. For these sated reasons the Collective Agreement cannot prevail.

Right to Equality.

[142] SADTU's case seems to be based primarily on s 9(1) of the Constitution, which provides that: "*Everyone is equal before the law and has the right to equal protection and benefit of the law.*" SADTU argues that establishing the WCSEA creates a "*differentiation [that] does not bear a rational connection to a legitimate government purpose.*" The differentiation is between educators in the Western Cape and educators outside the Western Cape. This argument cannot succeed. Section 9(1) cannot ground a complaint that a province only legislated in that province. Furthermore, WCSEA is rationally connected to the legitimate government purpose of evaluating schools and all the uncontroverted evidence the WCSEA system evaluates schools far better than the WSE method.

[143] SADTU's various complaints are also baseless and do not found a complaint of irrationality. It is not permissible to argue that a provincial statute differentiates because it only applies in that province. The same type of argument was rejected by the Constitutional Court in Weare.[78] The WC Legislature can only legislate in the Western Cape. It does not have to justify under s 9(1) why it has regulated all schools and

[78] ibid

educators in the province in the same way. The way to challenge differences between provinces is through s 146. The obvious purpose of the WCSEA is to evaluate schools. SADTU accepts that is a "*legitimate government purpose*". The WCSEA achieves the goal of evaluating schools. Therefore, it is rational. It is of course possible to evaluate schools "*in a different way*". There may even be "*a better way*". But that is entirely irrelevant under s 9(1).

[144] Furthermore, it is not for the Western Cape to justify why it evaluates schools differently from other provinces. But even if it is, the distinction is rational. For all the reasons given already, the WCSEA is a "better way" to evaluate schools than those used in other provinces. That will, in turn, improve basic education in the province. Even the National Department recognizes the real benefits to the WCSEA over the existing WSE model.

[145] SADTU's criticism of the WCSEA is also unfounded. There is nothing vague about the WCSEA system; the complaint that WCSEA is different from the National Framework does not show an irrational differentiation. SADTU argued the WCSEA will "*jeopardize progression and improvement of the basic education system as a whole*". But this is mere speculation, unsupported by any facts and unfounded. It is far more plausible that the WCSEA will improve school evaluation, and improve basic education in the Western Cape.

[146] SADTU complaint that the Western Cape "*ought to have awaited the adoption of the revised National Policy.*" In my view having regard to the dismal state of education as explained by the MEC and which SADTU did not challenged, the Western Cape was

justified in adopting a new system. But whether the Western Cape should have waited to see if the National Minister would act, could never found a review under s 9(1).

[147] SADTU further alleges that educators will have to "*learn an entirely new system, and comply with two separate systems*". It also alleges that the WECD "*will need to comply with two separate evaluation systems*". That is simply wrong. The WECD has made it clear that there is only one system of school evaluation in the Western Cape. It will report its results to the National Department, but it will only conduct one form of evaluation. Educators need only comply with that single system. All an ordinary educator need to do is to do their job as best they can.

[148] SADTU also suggested that an evaluation system must be "uniform". But the system is uniform within the Western Cape, and is a far superior system to the national one. The WECD is only tasked with providing and improving education in the Western Cape. It cannot be irrational for it to prefer a system that better achieves that goal over an inferior system that has no benefit for the province. It follows the claim under s 9(1) must be dismissed.

Unfair Discrimination

[149] SADTU attempt to found an unfair discrimination claim under s 9(3) of the Constitution. It was advanced as follows: *Although the differentiation is not on a listed ground, it amounts to unfair discrimination considering the serious impact that the provisions have on WC learners and educators and in particular the unjustifiable*

infringement of their fundamental constitutional rights, including the right to dignity, the right to education, children's rights and SADTU's right to collective bargaining.

[150] This does not disclose a claim under s 9(3). For SADTU to allege discrimination on an unlisted ground, it would have to: (i) Identify the ground of discrimination. SADTU does not do so. It never says what the ground of discrimination is. (ii) Explain why that ground should be regarded as a basis for discrimination. That requires a showing that "*the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner*". It is not enough to say that this particular discrimination impacts on educators' constitutional rights. SADTU must show why differentiation on this ground should be treated as discrimination. SADTU does not do so. The Constitution anticipates that education will be regulated differently in different provinces. Differences in regulation because of differences in provincial legislation cannot constitute discrimination. (iii) Explain how the differentiation imposes a burden on the basis of the ground. SADTU cannot do so because the WCSEA imposes no additional burden on educators or learners. Learners will only benefit from the improved evaluation of their schools. So too will educators who will work at schools with a more effective and more efficient evaluation system. For all these reasons stated there is no discrimination on any ground. There is also no limitation of any right.

[151] SADTU's real gripe is that the WCSEA will evaluate its members' performance in classrooms on two days' notice. The WCED has a right to monitor how its employees

perform. It has a duty to evaluate how educators are teaching learners in the Province's classrooms, and to seek to improve the quality of teaching where it can. That is all the Provincial Act empowers the WCSEA to do, without interfering in individual performance evaluations.

[152] SADTU has also argued that s 58(aA) makes it an offence to interfere with the WCSEA. In fact, the offence is to "*hinder or obstruct the Chief Evaluator, a Lead Evaluator or an Evaluator in the performance of his or her functions in terms of this Act*". SADTU has not separately challenged this section. If it is acceptable to establish the WCSEA, it must also be justifiable to prohibit people from preventing it from performing its duties. Without that prohibition, educators could undermine the WCSEA without consequence. This is not as SADTU wants to argue, contrary to the principles of evaluation. It simply ensures that the WCSEA is able to do its job.

[153] To sum up. WCSEA serves a well-intended constitutional purpose. Any limitations on rights are minimal and cannot be avoided if the purpose is to be achieved. It is a reasonable and justifiable mechanism to evaluate schools in the Province.

Conflict with National Policies

[154] SADTU's case is that the establishment of the WCSEA was contrary to the national WSE Policy because it created an additional layer of evaluation. This complaint has no merit. The WSE Policy is a policy, not a law. The Provincial Act is a law, not a policy. A national policy can never prevail over a provincial law. SADTU has also now argued that

"*SASA, NEPA and WSE confirm that monitoring and evaluation of education requires uniformity throughout South Africa.*" Accordingly, was asserted that the Provincial Act is inconsistent with these statutes. It simply refers to a range of provisions of SASA and NEPA that it argues jointly create some demand for national uniformity. On a proper look at the actual sections SADTU refers to, there is no such demand and therefore no conflict: Section 2(1) and (2) of SASA states only that the Act "*applies to school education*", and that "*an MEC must exercise any power conferred upon them by or under this Act, after taking full account of the applicable policy determined in terms of [NEPA]*'. That gets SADTU nowhere. Ironically, SADTU rely on ss 3(3), 3(4) and 8 of NEPA. But those sections have been interpreted to be *against* the idea that national policies trump provincial laws. Section 8 takes the argument nowhere because it merely obliges the National Minister to monitor and evaluate standards of education provision. The National Minister can do that, even if provinces evaluate schools in different ways. Section 5A(2)(b)(iii) of SASA is completely irrelevant. It concerns norms and standards for school infrastructure, school capacity, and the provision of learning and teaching support material. It has nothing to do with school evaluation. The reference to "*curriculum and extra-curricular choices*" is equally meaningless. Tellingly, SADTU does not argue that the WCSEA violates the norms and standards the National Minister has promulgated under s 5A.

[155] SADTU has refers to s 58(1)(a) and (c) of SASA, which do not exist. Presumably it is a reference to s 58C(1)(a) and (c), which require MECs to "*ensure compliance with*" various standards. But none of those standards have anything to do with evaluating schools. The closest is the reference in s 58C(1)(c) to item 2(2) of Schedule 1 of the

Employment of Educators Act. But that concerns "*the performance of educators*", not the performance of schools. Those are separate issues and the WCED does comply with national standards for evaluating educators. Finally, it references the WSE Policy and the IQMS. But – again – those are policies, not law and cannot trump provincial legislation. Accordingly, there is simply no conflict. The establishment of the WCSEA is entirely consistent with the Constitution and the challenge to the Provincial Act relating to the establishment of the WCSEA falls to be dismissed.

Allowance of alcohol on school premises

[156] It is only SADTU that has raised this challenge. Section 45A (1) of the Provincial Act provides as follows:

> *(1) Unless authorised by the principal for legitimate educational purposes, no person may bring any dangerous object, alcoholic liquor or illegal drug onto school premises or have in his or her possession any dangerous object, alcoholic liquor or illegal drug on school premises or during any school activity.*
>
> *(1A) Subsection (1) does not apply to the lawful consumption of alcoholic liquor by a person other than a learner at a school activity that is held off school premises."*

[157] It is clear from the plain wording of section 45A(1) that: It prohibits any alcohol liquor: (a) being brought onto the school premises; (b) any alcoholic liquor being in the possession of any person on school premises or during any school activity, unless authorised by the school principal for legitimate educational purposes**.**

[158] The second subsection of the provision makes clear that the prohibition does not apply to the lawful consumption of alcoholic liquor at a school activity that is held off school premises, provided that it is not by a learner. Section 45B of the Provincial Act provides for an exception to the prohibition of alcohol liquor on school premises during school activities, the following aspects of which are clear:

[159] It is evident that the prohibition of the sale or consumption of alcohol at a school activity or on school premises remains in section 45B and provides only for an *exception to this prohibition* by permitting the HOD to authorise a governing body or principal in the case of the staff function to permit the consumption or sale of alcohol on school premises or at school activities. The exception therefore only arises on application of the school itself.

[160] The HOD will consider each application on its merits and take a decision. In the event that any difficulties are presented by the authorisation granted, provision is made for its withdrawal, including on an urgent basis. But more importantly, very stringent criminal penalties are provided for in instances of a breach of the prohibition or any condition that has been imposed; the sanction in such instances is that a fine may be imposed not exceeding R 600,000.

[161] SADTU argues that section 45B of the WC Schools Act "*contradicts several national, provincial and City policies, strategies and constitutional jurisprudence.*" But it provides no evidence at all for this assertion and nor does it pursue many of these arguments in reply. SADTU relies on the best interests of the child, which is a principle that it asserts, the WCED must "*have regard to*". However, SADTU tenders no evidence that the Provincial Minister has failed to have regard to the best interests of child. SADTU asserts that the Constitutional Court has held that the control of the availability of alcohol is a recognised means of combatting its adverse effects.

[162] SADTU relies on paragraph 24 of Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)[79]. But that paragraph does no more than to affirm that: (a) children have a right to proper parental care; (b) it is universally recognised in the context of family law that the best interests of the child are of paramount importance; (c) while the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the State to create the necessary environment for parents to do so; (d) the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28.

[163] SADTU argued that "*despite*" the plain wording of section 45B of the Provincial Act, "*the real power and control of the use and sale of alcohol at schools appear to lie with the school governing body or principle, as the case may be, who may permit the use*

[79] 2003 (2) SA 363 (CC).

and sale of alcohol at schools or at school activities for any person." This assertion is plainly inconsistent with section 45B (1) and (2) of the Schools Act. According to SADTU, section 45B (2) of the Provincial Act is of particular concern in the context of the Western Cape where schools are plagued by the adverse consequences of alcohol abuse but does not engage with this in the context of the limitations imposed by section 45B(2) of the Provincial Act. No case for a rights infringement has been made out by SADTU. The high watermark of the challenge appears to be "*while SADTU acknowledges the importance of increasing school revenue, it does not justify allowing the use and sale of alcohol on school premises in view of the significant risk of harm to learners.*" SADTU accepts that the objective of increasing school revenue is a legitimate government objective. It disagrees only with the means by which this is done. But fail to explain by virtue of the limited ambit of section 45B of the Provincial Act: There is a significant risk of harm to learners; there will be exposure to learners at schools; learners will be exposed to intoxicated adults and or the constraints imposed in section 45B are inadequate to cater for their concerns. In view of these reasons the claim must accordingly fail.

[164] SADTU further argued that section 45B is irrational to the extent that it jeopardises the safety of learners on school premises and is contrary to the learners' best interests. However, SADTU presented no evidential basis at all for this claim. SADTU also contended argues that section 46A is "*unacceptably vague and irrational*" to the extent that it does not provide criteria or guidelines to assist the HoD in exercising his/her discretion. No detail is provided by SADTU as to the basis for this assertion. The plain wording of the Provincial Act in s 46B expressly provides that: The HoD must have due

regard to policies of the Western Cape Government regarding alcohol harms reduction; The approval is subject to: (a) the Western Cape Liquor Act, 2008, and any conditions imposed in terms of that Act; (b) any conditions set by: the SGB; the principal in the case of a staff function; and the Head of Department. The approval is subject to the requirement that the consumption and sale of alcoholic liquor on school premises or at a school activity held on school premises are not permitted during school hours.

[165] Furthermore, The HOD: (a) may issue guidelines to schools for the consumption or sale of alcoholic liquor on school premises or at a school activity in accordance with this section; and (b) must issue guidelines to schools regarding the presence of learners when alcoholic liquor is consumed or sold on school premises or at a school activity in accordance with this section. Importantly, SADTU has not raised any challenge in respect of this provision BUT challenges section 145B as being impermissibly vague. For these reasons the principle of legality does not invalidate section 45B.

[166] In conclusion, all the challenges brought by EE and SADTU cannot succeed and falls to be dismissed. This being a constitutional challenge, I will apply the Biowatch principle as to costs.

[167] In the Result the following order is made.

1. The challenges brought by EE and SADTU is dismissed.
2. The Biowatch principle relating to costs applies and each party to pay its own costs.

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LE GRANGE, ADJP

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