

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE HIGH COURT, BLOEMFONTEIN**

Case No: 1821/2013

In the matter between

LERATO RADEBE **First Applicant**

LEHLOHONOLO RADEBE **Second Applicant**

SELLOANE MOTLOUNG **Third Applicant**

EQUAL EDUCATION **Fourth Applicant**

and

PRINCIPAL OF LESEDING TECHNICAL SCHOOL **First Respondent**

**CHAIRPERSON OF THE SCHOOL GOVERNING
BODY, LESEDING TECHNICAL SCHOOL** **Second Respondent**

DISTRICT DIRECTOR, LIJWELEPUTSWA DISTRICT **Third Respondent**

**HEAD OF DEPARTMENT, BASIC EDUCATION,
FREE STATE** **Fourth Respondent**

MEC FOR EDUCATION: FREE STATE **Fifth Respondent**

MINISTER OF BASIC EDUCATION **Sixth Respondent**

APPLICANTS' PRINCIPAL SUBMISSIONS

This Application

1. This is an application for urgent relief aimed at restoring a learner to her classroom and vindicating her constitutional rights.

Background

2. Lerato Radebe ('Lerato')¹ is a thirteen-year-old grade 8 student enrolled at the Leseding Technical High School in Thabong near Welkom. She, her parents and her three brothers are Rastafarians who observe the religious and cultural practice of wearing their hair in dreadlocks.
3. In January 2013 Lerato started grade 8 at the Leseding Technical High School ('the school'). The Principal and School Governing Body object so strongly to Lerato's expression of her religion and culture that they have unlawfully suspended her from all school activities by banishing her to the staff room during school hours, because she will not cut off her dreadlocks.
4. This conduct differentiates between Lerato and her classmates on the basis of her religion, a listed ground, and constitutes unfair discrimination. Her suspension from full participation in class has been effected without due process and is conflict with governing legislation: it is accordingly unlawful. Lerato is experiencing an ongoing violation of her basic constitutional rights to equality, dignity, control over her body, the freedoms of religion, expression, and her rights to a basic education and just administrative action.

Urgency

5. This matter is plainly urgent because Lerato, who has a right to a basic education, is being denied access thereto. Her exclusion from lessons and school activities is

¹ Who has standing in terms of section 38 of the Constitution as well as of s10 read with s14 of the Children's Act 58 of 2005 (s10 reads *every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration*, and s14 reads *every child has the right to bring and to be assisted in bringing, a matter to court, provide that matter falls within the jurisdiction of that court*).

unlawful, and also constitutes unfair discrimination on a listed ground. The injury to her is ongoing and is in violation of several of her constitutional rights.

6. Constitutional rights are implicated in this case. The Court is empowered to grant *appropriate relief*,² which is effective relief to secure the breached rights. In such cases, our Courts have the duty to fashion appropriate relief to enforce and protect the Constitution, which relief may include *a declaration, an interdict, a mandamus, or such other relief as may be required* including new remedies.³
7. The Court is asked to dispense with the usual time periods in the Rules of Court.⁴ The proper approach under Uniform Rule 6(12) was set out in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another*:⁵ the degree of relaxation of the rules must be commensurate with the exigencies of the case.⁶
8. In deciding how to differentiate between cases which warrant special treatment, and those which should be heard in the ordinary course, a Court will take into account the extent of the harm and the nature of the rights at stake,⁷ whether the

² Constitution s38.

³ *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 CC at paras 19 and 69.

⁴ The Rule reads as follows:

12(6) (a) *In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.*

(b) *In every affidavit or petition filed in support of the application under para(a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".*

⁵ *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another* 1977 (4) SA 135 (W).

⁶ *Ibid* at 137 E: *Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.*

⁷ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004); *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others* (21990/2012) [2012] ZAWCHC 189 (22 November 2012); *Ledimo and Others v Minister of Safety and Security and Another* (2242/2003) [2003] ZAFSHC 16 (28 August 2003)

applicant has been dilatory, and whether substantial redress may be obtained in an application in due course.⁸

Extent of the harm

9. Cases implicating civil liberties and democratic values are more likely to warrant departure from the ordinary rules.⁹ In *Ledimo and Others v Minister of Safety and Security and Another*¹⁰ the court¹¹ held that something more than mere financial prejudice was necessary to distinguish those cases deserving preferential treatment:

Firstly, it would not be fair to distinguish based on money, there must be something more at stake - such as where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, then the Court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants.

Delay

10. Lerato's parents have, since 10 January 2013, taken every reasonable step to protect Lerato's rights and have acted with appropriate haste and exemplary diligence. There has been no delay. In fact her father has spent so much time pursuing his daughter's right to an education that he has lost his job. Lerato's family is not wealthy. They have pursued the matter at length with the education

⁸ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

⁹ *Minister of Home Affairs v NICRO* (above note 7) concerned the voting rights of prisoners; *Mazibuko v Sisulu MP and Others* (above note 7) was about minority party vote of no confidence in the President.

¹⁰ *Ledimo and Others v Minister of Safety and Security and Another* (2242/2003) [2003] ZAFSHC 16 (28 August 2003)

¹¹¹¹ Relying on the judgment of Fagan J in *IL & B Marcos Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981 (4) SA 108 (CPD)

authorities as well as the Chapter 9 institutions in their attempt to find a resolution without resorting to the Courts.

11. Even if the Court is of the view that there has been delay:

11.1. it is not a delay which is so unreasonable or gross as to vitiate the child's right to urgent protection from this Court and to force her to await relief in the ordinary course;

11.2. such delay as there is, has been caused by her parents and the institutions which have been established to protect Lerato, who as a thirteen year old child cannot be prejudiced thereby;¹²

12. Not only has there been no delay, but the Respondents have been given a reasonable time in which to answer, and they have in fact done so.¹³

Substantial redress in an application in due course?¹⁴

13. This case concerns harm which occurs daily, to a child, and is a serious invasion of rights. Each day that passes is a day that Lerato, a growing child, is denied basic education. The invasion of her rights is manifest and cannot be cured in due course.

¹² *Macleod v Kweyiya* (365/12) [2013] SASCA 28 (27 March 2013).

¹³ The Second Applicant fully engaged with the Respondents concerning this dispute and they are accordingly aware of its nature. Respondents were given adequate opportunities to rectify the situation and were properly formally notified of the intention to launch proceedings.

¹⁴ In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (above note 8) the Court held at para 7: *It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.*

14. In every matter affecting the child, the child's best interests are paramount.¹⁵ A Court will be slow to sanction unlawful exclusion of a child from basic education, or to countenance discrimination against her on the grounds of religion. The injury to her is ongoing and will endure for many months more, should she only be heard in the ordinary course.

Legal Framework

15. The main statute regulating public schools is the South African Schools Act 84 of 1996 ('SASA'). Whilst the professional management of a public school is undertaken by its principal (under the authority of the Head of Department),¹⁶ its governance vests in a school governing body ('SGB') comprising elected parents, staff, educators and learners, as well as the principal and co-opted members.¹⁷ The composition and powers of SGBs are circumscribed by the SASA¹⁸ and are subject to oversight by the Head of Department and the MEC.¹⁹

16. SASA provides that school attendance is compulsory. A person who, without just cause, prevents a learner from attending school is guilty of an offence and is liable to a fine or to imprisonment.²⁰

17. SASA also provides for the establishment of a productive learning environment at schools through the enforcement of Codes of Conduct. Learners can be disciplined, but only after due process, and with appropriate additional protections. The right to a basic education means that learners cannot be excluded from attending school. They may be suspended as a disciplinary measure, but only by

¹⁵ Constitution of South Africa, 1996 ('Constitution') s28(2). Also see the Childrens Act 38 of 2005 at s7(1) which sets out factors which guide acting in a child's best interests. These include *avoiding or minimising further legal or administrative proceedings in relation to the child* at s7(1)(n).

¹⁶ s16 of the South African Schools Act 84 of 1996 ('SASA')

¹⁷ s23 of SASA.

¹⁸ ss16 – 32 of SASA.

¹⁹ ss22 and 25 of SASA.

²⁰ S 3(6)(b) of SASA.

Heads of Department, and only if they are guilty of serious misconduct and after due process. Punitive suspensions are limited to one week.

Codes of Conduct

18. An SGB is required to adopt a Code of Conduct for learners at its school.²¹ The method of its adoption, and its purpose, are prescribed in section 8:

8. *Code of conduct*

8.1 Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

8.2 A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

9. As the explicit purpose of a school's code of conduct is to facilitate learning, its prescripts will be tested against their value to the learning process. Provisions in a Code which regiment learners without a legitimate learning purpose are unauthorised.

Disciplinary action

10. Learners are children, whose best interests inform every decision concerning them. Children have a constitutional right to a basic education. Disciplinary measures must in the first place be educative and corrective; learners are entitled not only to due process and a fair hearing but also to appropriate

²¹ s20(1)(d) of SASA also provides that the governing body of a public school must adopt a code of conduct for learners at the school.

support and counselling.²² They cannot lightly be deprived of access to their classroom.

11. SGBs may impose a precautionary suspension on a learner suspected of *serious misconduct* (the meaning of which is to be determined by the MEC and published in the Provincial Gazette)²³, but only after affording him or her a reasonable opportunity to make representations.²⁴

12. Where, after due process, misconduct warrants sanction, punitive suspension is permitted but is limited to seven days.²⁵ Learners may be expelled from a school only by the Head of Department and only if found guilty of *serious misconduct* after proper disciplinary proceedings.²⁶ An expelled learner must be placed at another school.

Guidelines

13. The Minister has published Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners ('the Guidelines').²⁷ The Guidelines emphasise that the main focus of the Code of Conduct is to facilitate constructive learning. They set out guiding principles and values including democracy, equality, dignity, and respect for one another's convictions and cultural traditions,²⁸ and make detailed provisions for disciplining learners.²⁹ The Guidelines require Codes of Conduct to provide for freedom of expression in the following terms:

²² SASA ss 8(5)-8(9).

²³ SASA s9(3).

²⁴ SASA s9.

²⁵ SASA s9(1C)(a).

²⁶ SASA s9(2).

²⁷ Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners GN 776 of 1998 GG 18900 of 15 May 1998 ('the Guidelines').

²⁸ Section 4 of the Guidelines (above note 27).

²⁹ which is primarily corrective (ss7-14 of the Guidelines), for due process (including a fair hearing) before learners are suspended (suspensions are limited to one week) or expelled

The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learners' rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited as the disruptions of schools is unacceptable.³⁰

School Uniforms

14. The National Guidelines on School Uniforms³¹ set out the social and educational value of uniforms whilst emphasising simplicity and affordability. They expressly provide for religious and cultural diversity, and freedom of expression:

A school uniform or dress code should take into account religious and cultural diversity within the community served by the school. Measures should be included to accommodate learners whose religious beliefs are compromised by a uniform requirement.³²

15. The National Guidelines on School Uniforms require school uniform policies to accommodate learners' free expression, provided that this *does not contribute to disruption by substantially interfering with discipline or with the rights of others.*³³

(section 12.1 of the Guidelines). Expulsion triggers the HOD's duty to find an alternative school placement for the learner (section 12.3 of the Guidelines).

³⁰ Section 4.5.1 of the Guidelines (above note 27).

³¹ The National Guidelines on School Uniforms GN 173, GG 28538 of 26 February 2006 adopted by the Minister under s8(3) of SASA.

³² Section 29(1) of the National Guidelines on School Uniforms (above note 31).

³³ Section 29(3) of the National Guidelines on School Uniforms (above note 31) explains that it would be fair to prohibit *gang or party political insignia*, or t-shirts bearing vulgar

16. The power to prescribe the manner of growing, wearing and caring for hair is nowhere mentioned in the Code of Conduct or Uniform Guidelines.

17. The Constitutional Court, whilst acknowledging the value of school uniforms, has held that dress codes must be sufficiently flexible to accommodate religious and cultural practices, absent ‘real evidence’ that a departure will ‘threaten academic standards or discipline’.³⁴

Policy on Religion and Education

18. South Africa’s National Policy on Religion and Education³⁵ adopted by the Department of Basic Education, follows a ‘cooperative’ model for structuring the relationship between religion and public schools. Although South Africa is a secular state, which neither imposes nor outlaws a particular religious view, policymakers decided against rigidly separating religion from the public school agenda. Instead official policy embraces the enrichment of the school environment through free, creative, non-prescriptive sharing of religious teachings and culture, informed by the country’s cultural, linguistic and religious diversity.

19. It is in the light of this policy choice that the Respondents’ conduct should be evaluated. Expressions of the Rastafarian religion should not only be tolerated at the school: they should be welcomed.

messages; conversely section 29(4) states that schools should not impose forms of expression on learners by, for instance, requiring them to wear items *bearing a message that is in conflict with the Constitution*.

³⁴ *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), 2008(2) BCLR 99 (CC), [2007] ZACC 21 para 114.

³⁵ National Policy on Religion and Education GN 1307, GG 25459 of 12 September 2003. Formally adopted in terms section 3(4)(l) of the National Education Policy Act 27 of 1996.

Jurisprudence

20. Challenges to dress codes in schools and workplaces have come before our courts before. The jurisprudence indicates that, when evaluating policies outlawing dreadlocks a Court will investigate the relationship between the prohibition and the purpose thereof, in light of the overall purpose of the policy. In the context of schools an important consideration is whether a prohibition is rationally related to the authorised purpose of the Code of Conduct (being to promote an orderly learning environment).
21. Two months ago the Supreme Court of Appeal upheld decisions of the Labour and Labour Appeal courts that the dismissals of prison warders who refused to cut off their dreadlocks (some invoking Xhosa culture as the basis for their refusal and others citing their Rastafarian beliefs) were automatically unfair:

*Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound. That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment.*³⁶

A policy is not justified if it restricts a practice of religious belief – and by necessary extension, a cultural belief – that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense. No rational connection was established between the purported purpose of the discrimination and the measure taken. Neither was it shown that the

³⁶ *Department of Correctional Services & another and Another v Police and Prisons Civil Rights Union (POPCRU) and Others* (107/12) [2013] ZASCA 40 (28 March 2013) at para 22.

*department would suffer an unreasonable burden if it had exempted the respondents. The appeal must, therefore, fail.*³⁷

22. In setting aside the five-day suspension of a dreadlocked learner at Settlers High School, the Western Cape High Court affirmed her right to freedom of expression:

*Even if hypothetically, the growing of dreadlocks and the wearing of headgear were prohibited by the code of conduct, the failure to comply with this provision should not be assessed in a rigid manner. This would make nonsense of the values and principles set forth in the [Uniform Guidelines] and would bring it into conflict with the justice, fairness and reasonableness which underpins our new Constitution and centuries of common law. The question should be asked, in this regard, whether or not the prohibition is aimed at promoting positive discipline and whether or not non-compliance therewith justifies punishment or some other form of sanction. This requires a spirit of mutual respect, reconciliation and tolerance. The mutual respect, in turn, must be directed at understanding and protecting, rather than rejecting and infringing, the inherent dignity, convictions and traditions of the offender. Most importantly adequate recognition must be given to the offender's need to indulge in freedom of expression which may or may not relate to clothing selection and hairstyles.*³⁸

23. The Constitutional Court in *Pillay*³⁹ held that there was no evidence to suggest that her wearing a nose stud would negatively influence learning. In *Department of Correctional Services v Popcru*⁴⁰ the SCA held that there was no evidence to suggest that the warders' hair detracted in any way from the

³⁷ Ibid at para 25.

³⁸ *Antonie v Governing Body, Settlers High School, and Others* 2002 (4) SA 738 (C) at paras 16-17.

³⁹ Above note 34.

⁴⁰ Above note 36.

performance of their duties or rendered them vulnerable to manipulation and corruption.

Facts

Dreadlocks

24. Dreadlocks are formed when afro-textured hair is allowed to grow naturally into intertwined ropes. They have been worn by different cultures since ancient times, are a common choice of hairstyle for people with afro-textured hair, and can be maintained in as neat and clean a state as any other hair.

Dreadlocks in Rastafarianism

25. Religious and cultural expression through hairstyle and headgear is common. There are several references in the Bible to hair as a source of strength and an injunction not to cut it. Rastafari rely on Numbers 6:5 but similar references can be found at Judges 16:13 and 16:19, Leviticus 21:5, Ezekiel 44:20 and 1 Samuel 1:11.

Cannabis in Rastafarianism

26. Cannabis is not used by Rastafarian women and children.⁴¹

Lerato is Rastafarian

27. Lerato lives with her parents and her two younger brothers.⁴² She and her immediate family are practising Rastafarians. Her parents are long-standing

⁴¹ *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (3) BCLR 231 CC at paras 19 and 55; *Department of Correctional Services v Popru* (above note 36) at para 20.

members of the Rastafari House of Niyabhangi. Lerato identifies herself as Rastafarian. Her paternal grandmother attends a Roman Catholic Church, and Lerato sometimes accompanies her. Lerato's family are tolerant of other religions and do not object to her attending different churches with friends or family.

28. Lerato's dreadlocks are neat and clean and can be tied or plaited tidily away from her face when she attends school. Her hair did not cause problems during her primary school years, spent at the nearby Moramaphofu Primary School in Thabong.

Lerato's unlawful exclusion from school in 2013

29. The events of this year are summarised in the chronological table annexed to these Heads.

Periods during which Lerato has been unlawfully excluded from school

30. Lerato was formally admitted to the school, and together with her age-mates she started highschool on 9 January 2013. She was first excluded on 17 January, the seventh day of school, when she was sent home.

31. After she had missed a further seven school days, her father heard on the radio that the school did not have the right to exclude her. He sent her back to school on 29 January, but she was only able to attend classes for five school days before she was again sent home on 4 February. Her father sent her back to school the following day, but on 7 February SGB members physically removed her from school and took her to her mother. When she again attempted to attend school on 12 February she was not permitted to enter the premises.

⁴² Assertions to the contrary in the answering affidavit are inadmissible hearsay.

32. On Monday 25 February Lerato went back to school but was the following day removed from her class and has been required to spend classroom hours in the staffroom ever since.

33. Lerato has accordingly been permitted to attend class for only thirteen days in 2013.⁴³

Lerato's father's attempts to resolve the situation

34. The Second Applicant Lehlohonolo Radebe, ('Lerato's father') has engaged tirelessly with the Respondents and with two Chapter 9 Institutions in an attempt to secure her basic rights:

- a) Both parents engaged with First and Second Respondents on 10 January, and explained that Lerato's dreadlocks are an expression of her religion and culture. They attended a further meeting on 11 February.
- b) Between 10 January and 7 February Lerato's father engaged with Messrs Leepo, Havenga and Shabangu of the Third Respondent's District Office, both in person and through Mr Motaung of his church.
- c) On 8 February he met the Third Respondent (District Director Mr Mokgobo) who appeared sympathetic but who the following week took the side of the First and Second Respondents.
- d) When Lerato was denied access to school on 12 February her father approached the Chapter 9 Institutions (the Cultural and Human Rights Commissions), and awaited their assistance and feedback.

⁴³ January 9,10,11,14,15,16,29,30,31 and February 1,5,6 and 26.

- e) After a further week, on 22 February, he approached the Sixth Respondent but was referred back to the Fifth Respondent, where on 26 February he requested assistance from a Director in the Provincial Department, Mr Ndlebe.
- f) Fourth Respondent and an official under the Fifth Respondent met with Lerato's father on 26 March; they questioned his religion but did not resolve the situation. The school term ended on this day.
- g) When the schools re-opened on 9 April and Lerato's exclusion continued her father phoned the Third Respondent who indicated that Lerato would be permitted to return to class. When however a week later she was still being excluded from class, he sought further assistance and came across the Fourth Applicant, the NGO Equal Education, which sent a letter of demand to the First to Fifth Respondents.

Submissions arising from the facts

Unfair Discrimination

35. By preventing her from attending class, and requiring her to sit in the staff room, the Respondents are treating Lerato differently from every other child her age who was admitted to grade 8 at Leseding Technical High School in 2013. The differentiation is on grounds of her religion. As religion is a listed ground, discrimination on this ground is presumed unfair.⁴⁴
36. The unfair discrimination against Lerato on the basis of her religion and culture is a breach of her constitutional right to equality.

⁴⁴ *Harksen v Lane* 1998 (1) SA 300 (CC)

37. Alternatively, the requirement of the First and Second Respondents that Lerato cut off her dreadlocks constitutes indirect discrimination against members of the Rastafarian religion and culture.

Unlawfulness

38. Lerato was admitted to Leseding Technical School. The practice of requiring Lerato to spend her school days in the staff room, thereby preventing her from participating in school activities, is unlawful for the reasons set out below.

39. School attendance is compulsory.⁴⁵ Public schools *must admit learners and serve their educational interests without unfairly discriminating in any way.*⁴⁶ Admission policies are determined by the school's governing body,⁴⁷ and admission refusals can be appealed to the MEC.⁴⁸

40. Learners can be suspended or expelled from school.

41. The governing body has the power to suspend a learner: precautionary suspension pending a hearing may not exceed seven days;⁴⁹ punitive suspension may not exceed five days in the Free State.⁵⁰

42. Suspensions are subject to due process, extensively regulated in the Act.⁵¹ In addition to their usual natural justice rights, learners, because they are children, have the right to be accompanied by a parent and in certain instances to intermediaries.

⁴⁵ Principals (FSSEA only) and HODs must investigate non attendance (SASA s3(5); FSSEA s29); parents or any other person who prevents attendance may be prosecuted (SASA s3(6); FSSEA s30)

⁴⁶ SASA s5; FSSEA s17(5)

⁴⁷ SASA s5(5)

⁴⁸ SASA s5(9)

⁴⁹ Extensions of the seven days must be approved by the HOD: SASA s9(1B)

⁵⁰ FSSEA s34(1)(a)

⁵¹ SASA ss8(5)-(8)

43. Only the HOD⁵² has the power to expel a learner. The power is constrained by the twin requirements that the learner must have been found guilty of serious misconduct after a fair hearing.⁵³ The MEC is obliged to determine, by Notice in the Provincial Gazette, what constitutes *serious misconduct* as well as an appropriate disciplinary procedure.⁵⁴ (It appears that the Free State MEC has not done this).
44. The HOD must place a learner who has been expelled in an alternative school, in order to realise the learner's right to a basic education. If the learner appeals against the expulsion to the MEC, the HOD must determine a method of giving the learner access to education pending the outcome of the appeal.⁵⁵
45. Children in South Africa have the right to a basic education. The corollary is that school attendance is compulsory.
46. No provision in law empowers a person to send a child home from school, thereby depriving her of education, unless that child has been lawfully suspended.
47. No provision in law empowers a person to exclude a child from her classroom and to require her sit in the staffroom during learning hours, for weeks, thereby depriving her of education.
48. Not only are these actions not authorised, they are expressly sanctioned and defined as an offence punishable by imprisonment or a fine.⁵⁶

⁵² Head of Department; referred to as the Head of Education in the FSSEA

⁵³ SASA s9(2); FSSEA s34(2)

⁵⁴ SASA s9(3); FSSEA 34(5)

⁵⁵ Factors relevant to the exercise of this power are laid down at SASA s9(6).

⁵⁶ SASA s3(6); FSSEA s30.

49. No provision in law empowers a person to remove a child from a school which has admitted her, and to transfer her to a different school, unless:

- a. she has been lawfully expelled from that school, or
- b. she is awaiting the outcome of an appeal to the MEC against her expulsion.

50. Lerato has not been expelled. Her purported transfer to Thotagauta and/or to Unitas is unauthorised and unlawful.

51. In the FSSEA suspension is defined as the *temporary prohibition of a learner to attend a particular school*.⁵⁷ The prohibition on Lerato's attendance at school between 17 and 28 January 2013, and on 4 and 7 February 2013 constituted unlawful suspension. Her exclusion from her classroom over the past eleven weeks also constitutes an unlawful suspension, alternatively is simply unlawful by virtue of the provisions of the Constitution, SASA, the FSSEA and subordinate legislation.

52. Lerato's unlawful exclusion is in breach of her constitutional right to a basic education, and to just administrative action.

53. To the extent that the Fourth Respondent purports to have transferred Lerato to Thotagauta School in Thabong or to Unitas School in Welkom, such purported transfer is similarly unlawful and invalid as it is nowhere authorised by law.

⁵⁷ It would be a strained interpretation of 'attend' if being forced to sit idle in the staffroom qualified. Compulsory school attendance must encompass the right to participate in school activities, defined in SASA as *any official educational, cultural, recreational or social activity of the school within or outside the school premises*.

54. A body exercising public power ‘may exercise no power and perform no function beyond that conferred upon them by law’.⁵⁸ This is the principle of legality, which is an incident of the rule of law.
55. A further principle of the rule of law is that the exercise of public power may not be arbitrary, but must be rational.⁵⁹ The test for rationality is whether there is ‘a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at.’⁶⁰
56. Transferring Lerato to another school is in any event in breach of her right to equality: in transferring her, the Respondents differentiate between her and other children in grade 8 at Leseding Technical High School, on the grounds of her religion, a listed ground, thereby constituting unfair discrimination.
57. As her continuing unlawful exclusion deprives Lerato of a basic education, First and Second Respondents are guilty of the offence established by SASA section 3(6)(b) and the FSSEA section 30.

Other Constitutional rights implicated

58. Dignity: the policy punishing Lerato for practicing her religion degrades her and other Rastafarians and palpably invades their dignity. First to Third Respondents have repeatedly disrespected First to Third Applicants’ religion and culture and their right to family life by questioning their sincerity, purporting to act as arbiters of their authenticity, and by suggesting that the family is ‘imposing’ their religion and culture on Lerato.

⁵⁸ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999(1) SA 374 (CC) at para 58.

⁵⁹ *Pharmaceutical Manufacturers Association of SA and another in re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paras 33 and 85.

⁶⁰ *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC) at para 37.

59. Freedom and security of the person: sanctioning Lerato for allowing her hair to grow naturally is an invasion of her right to security in and control over her body.⁶¹ It also discriminates against her on the basis of her ethnicity.

60. Requiring Lerato to cut off her dreadlocks is in violation of her freedom of expression,⁶² and of religion, belief and opinion⁶³ as well as of her right to enjoy her culture and practice her religion.⁶⁴

Further prejudice

61. First and Second Respondents have sought unfairly to exploit a difference of religious opinion between Lerato's father and her paternal grandmother, fomenting conflict in her family. This is against Lerato's best interests.

62. Lerato's father lost his job: his persistent efforts to protect his rights and those of his daughter and family required frequent absences from work while he attended meetings at the school and sought assistance from the District and others. The consequent drop in family income is similarly not in Lerato's best interests, nor is it in the interests of the family's other two minor children.

The requirements for the grant of a final interdict

63. The three requisites for the grant of a final interdict are:⁶⁵

a) a clear right on the part of the Applicant (that is, a right clearly established);

⁶¹ Constitution s12(2)(b)

⁶² Constitution s16.

⁶³ Constitution s15.

⁶⁴ Constitution s31(a).

⁶⁵ *Setlogelo v Setlogelo* 1914 AD 221 at 227. See also Herbstein and van Winsen The Civil Practice of the Supreme Court of South Africa 5ed at 1456-7; Erasmus Superior Court Practice at E8 1-15.

- b) an injury actually committed or reasonably apprehended; and
- c) the absence of any other satisfactory remedy available to the Applicant.

A clear right

64. Lerato has a clear right to a basic education. She must therefore be permitted to attend class.

65. Lerato has a clear right to equality. Her exclusion from her classroom at Leseding Technical High School differentiates on a listed ground. It constitutes unfair discrimination on the ground of religion and culture, which is proscribed. She must therefore be permitted to attend class together with her classmates who were admitted to grade 8 at the school in January 2013.

66. Lerato has a right to administrative action which is lawful, reasonable and procedurally fair. Her exclusion from her classroom is unlawful because it is nowhere authorised by law. It is unreasonable because no good purpose is served thereby, educational or otherwise. It is procedurally unfair because no hearing has been held, and no due process observed.

67. Lerato therefore has a clear right to be restored to her classroom, together with her classmates, and to remedial teaching to help her to catch up missed lessons.

An injury actually committed or reasonably apprehended

68. The injury of removing Lerato from her classroom has been committed and is continuing. Her return has been made conditional upon her abandoning her dreadlocks, which are a symbol of her religious and cultural identity – this injures her dignity on an ongoing basis.

69. With each passing day the injury intensifies as the effects of missed learning accumulate. Important foundational learning is being lost in important areas such as mathematics, sciences and languages.

The absence of any other satisfactory remedy available to the Applicant

70. Approaching the courts in the normal course will not address the urgency caused by the ongoing injury and the invasion of basic rights.

71. Requiring Lerato to attend a different school itself constitutes differentiation on a listed ground amounting to discrimination. This limitation of her right to equality is unjustified.

Alternative relief: The requirements for interim relief *pendente lite*

72. The requirements for an interim interdict are:⁶⁶

- (a) a *prima facie* right, or, if such right is open to some doubt,
- (b) a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and she ultimately succeeds in establishing her right;
- (c) a balance of convenience that favours the granting of interim relief, and
- (d) the absence of an alternative satisfactory remedy.

⁶⁶ *Setlogelo v Setlogelo* 1914 AD 221 at 227. See Herbstein and van Winsen The Civil Practice of the Supreme Court of South Africa 5ed at 1456-7.

73. As to (a) and (b), Lerato has a *prima facie* right. Manifestly, the harm to her if relief is not granted, and she is ultimately successful, is irreparable because it involves her missing classes and enduring an invasion of her dignity and rights.

74. As to (c), when considering the balance of convenience, the court will weigh the prejudice which the Applicant is likely to suffer if the interim relief is refused, against the prejudice to the Respondent if it is granted.⁶⁷ The prejudice to the First Applicant whilst she remains excluded, or if she is forcibly moved to another school, is manifest. On the other hand, allowing her to rejoin her classmates will cause no prejudice to the Respondents.

75. As to (d), the absence of an alternative satisfactory remedy, the Second to Fourth Applicants have attempted to persuade the Respondents to re-admit Lerato to class.⁶⁸ Instead the Respondents have purported to unlawfully transfer her, and they have threatened her father with criminal prosecution.

76. The Applicants have no alternative remedy. Awaiting a hearing in the normal course extends and deepens the harm. An unlawful transfer to another school perpetuates the discrimination by continuing to differentiate on religious grounds. Until Lerato is restored to her classroom she remains vulnerable and dispossessed of her rights.

Conclusion

77. The Applicants ask for the Orders set out in the Notice of Motion, alternatively for the grant of prayers 6 to 8 as urgent interim relief *pendente lite* pending the expedited hearing of the full application.

⁶⁷ *Dorbyl Vehicle Trading & Finance Company (Pty) Ltd v Northern Cape Tour & Charter Service CC* [2001] 1 All SA 118 (NC).

⁶⁸ Affidavit of Justin de Jager, paras 7-13 at pages 51 and 52; para 15-16 at pages 52-53; annexure JDJ1 at pp55-57.

Suzanna Harvey
Counsel for the Applicants
Cape Town, 16 May 2013

CHRONOLOGY

Date (2013)	Event
9 January	Lerato is called out of assembly on her first day of high school because of her dreadlocks
10 January	Her parents attend a meeting at school and told to cut her dreadlocks; their explanation that they are Rastafarians does not persuade the school otherwise
10 January	Her father asks the District office for assistance which requests a copy of the school's Code of Conduct and informs him that the SGB is within its rights
11-24 January	Daily visits by Lerato's father to the District office fail to secure assistance for Lerato
11 January	Radio Lefika interview the school and report that the school recognised the grandmother, and not the father, as the guardian
14 January	Radio Lesedi reports that dangerous chemicals are the reason for disallowing dreadlocks
17 January	Lerato sent home from school after her paternal grandmother was summonsed and instructed to sign the Code of Conduct. She was told she would not be allowed back until she cut her dreadlocks
17 January	Motaung (of the church) writes to Havenga of the District to report that Lerato had been sent home due to her faith
17-28 January	Lerato stays home as instructed and misses school
28 January	Radio reports school not permitted to exclude the learner: the parents should give the school a letter from their church.
29 January (Friday)	Lerato goes to school and attends class (for one week)
1 February (Friday)	School gives Lerato a letter summonsing her grandmother to a meeting on Monday. She is told not to tell her parents
4 February	Lerato's grandmother is told by the school that Lerato should not come back unless she cuts her dreadlocks. She is given a letter dated 23 January 2013 transferring Lerato to Thotagauta school
5 February	<i>Daily Sun</i> erroneously reports that situation has been resolved
7 February	SGB chairperson, deputy chairperson and treasurer physically remove Lerato from school and direct her to take them to her mother's workplace, where they leave her in tears
7 February	Lerato's father goes to the District office and meets Mr Shabangu who informs him that the SGB is within its rights

8 February	Lerato's father meets District Director Mokgobo who agrees the child must be allowed to attend school; he undertakes to speak to the SGB and to revert the following day but does not
10 Feb (Sunday)	District Director Mokgobo visits family at home and asks why they are imposing their religion on their child
11 February	Parents summonsed to meet the SGB and are informed that they are not proper adherents of the Rastafarian religion according to the Chairperson's google research
12 February	Lerato is excluded from the school premises by the security
12 February	Lerato's father requests assistance from the Commission for the Promotion and Protection of Cultural, Linguistic and Religious Communities ('the Cultural Commission')
13-14 February	The Cultural Commission tells Lerato's father that it is awaiting a response
15 February	Lerato's father approaches the SAHRC for assistance
18 February	SAHRC receives a letter from the Principal in response to its telephonic query stating that Lerato's recognised guardian is Roman Catholic
22 Feb (Friday)	Lerato's father approaches the Minister of Basic Education through his private secretary seeking assistance but is again referred to the MEC
25 Feb (Monday)	Lerato is sent back to school by her family; she attends class
26 February	Lerato is sent to sit in the staff room where the SGB chairperson interrogates her alone
26 February	Lerato's father approaches Mr Ndlebe (Director: Education Management & Governance, Department of Basic Education)
27 February	Ndlebe says that the matter has been referred to the MEC
27 Feb – 14 March	While the family awaits the response from the MEC, Lerato presents herself for classes in her classroom every day, but is required to sit idle in the staff room and is excluded from school activities.
14 March	Lerato's father delivers a letter from his church to the Principal who refuses to accept it
25 March	Lerato is approached by District office officials Leepo and Havenga who interrogate her alone about her Rastafarianism
26 March	Lerato's father called from work to meet the Director and Chief Director together with Legal Services who question his religion and state that Lerato was seen at the Roman Catholic church with her grandmother

28 March	SAHRC writes a letter to the Principal, but gets unfavourable reply
26 March – 9 April	School holidays
29 March	Lerato's father loses his job as a result of poor attendance at work whilst attending to his daughter's exclusion from education; the family now has only one breadwinner
9 April	Lerato reports to class on the first day of term and is sent to the staffroom as before, and for every subsequent day
10 April	Lerato's father phones the Chief Director Mokgobo requesting an outcome; he is told that the school has been instructed to allow Lerato back to class but that these things take time and to expect a call on Friday 12 April
11 April	SAHRC writes to Head of Department but gets unfavourable reply
12 April	No call received by Lerato's father from Mr Mokgobo
15 April (Monday)	Lerato's father's call to Mr Mokgobo is deliberately dropped. He travels to Bloemfontein seeking help, where he is referred to Equal Education
24 April	Equal Education Law Centre writes to the Respondents demanding that Lerato be restored to her classroom
3 May	The Head of Department writes back to say that Lerato is not sincerely a Rastafarian and that she has been placed at a school seven kilometers distant in Welkom
10 May	Urgent application filed in Free State High Court

APPLICANTS' LIST OF AUTHORITIES

Legislation

Constitution of South Africa, 1996

South African Schools Act 84 of 1996

Free State School Education Act 2 of 2000

Childrens Act 38 of 2005

Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners GN 776 of 1998 GG 18900 of 15 May 1998

The National Guidelines on School Uniforms GN 173, GG 28538 of 26 February 2006 adopted by the Minister under s8(3) of SASA.

National Policy on Religion and Education - GN 1307, GG 25459 of 12 September 2003. Formally adopted in terms section 3(4)(l) of the National Education Policy Act 27 of 1996.

Judgments

Antonie v Governing Body, Settlers High School, and Others 2002 (4) SA 738 (C)

Carephone (Pty) Ltd v Marcus NO & Others [1998] 11 BLLR 1093 (LAC)

Department of Correctional Services & another and Another v Police and Prisons Civil Rights Union (POPCRU) and Others (107/12) [2013] ZASCA 40 (28 March 2013)

East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999(1) SA 374 (CC)

Harksen v Lane 1998 (1) SA 300 (CC)

Ledimo and Others v Minister of Safety and Security and Another (2242/2003) [2003] ZAFSHC 16 (28 August 2003)

Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another 1977 (4) SA 135 (W)

Macleod v Kweyiya (365/12) [2013] SASCA 28 (27 March 2013)

Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others (21990/2012) [2012] ZAWCHC 189 (22 November 2012);

MEC for Education, KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC), 2008(2) BCLR 99 (CC), [2007] ZACC 21

Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC)

Pharmaceutical Manufacturers Association of SA and another in re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Prince v President of the Law Society of the Cape of Good Hope and Others 2002 (3) BCLR 231 CC

Setlogelo v Setlogelo 1914 AD 221