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

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APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. At the heart of this case are the constitutionally enshrined rights to a basic education and children's rights (sections 29(1) and 28 of the Constitution respectively) and the requirement that all laws be rational. The Western Cape Provincial Legislature enacted law that places these constitutional tenets in jeopardy and forsakes the bedrock principle of democratic governance of public schools.

2. The Applicant (**EE**) challenges provisions of the Western Cape Provincial Schools Education Act 12 of 1997 (**Act**). The constitutional flaws may be classed broadly as follows:

2.1. First, the Act contains provisions that unjustifiably infringe sections 29(1) and 28 of the Constitution and the requirement of rationality. These provisions introduce two new types of public schools into the Western Cape, called Collaboration Schools and Donor-Funded Schools (**DFSs**), and disciplinary institutions for learners, called Intervention Facilities.

2.2. EE's case is that provisions of the Act concerning Collaborations Schools, DFSs and Intervention Facilities are invalid (**validity challenges**). It therefore asks this Court to make a just and equitable order under section 172(1)(b) of the Constitution.

2.3. Secondly, provisions in the Act governing Collaboration Schools, DFSs and Intervention Facilities conflict with the South African Schools Act 84 of 1996 (**SASA**), which is national legislation that Parliament enacted to give effect to the constitutional right to a basic education.[1]

2.4. EE's case is that the conflict must be resolved in favour of SASA, in terms of section 146 of the Constitution. The Act's relevant provisions must therefore be rendered inoperative (**conflict challenges**).

3. The First Respondent (**MEC**) and Second Respondent (**Premier**) oppose the application. We refer to the provincial government of the Western Cape, which the MEC and Premier represent, as '**the Province**' and to the Department of Education in the Province as '**the Department**'.

4. The Third Respondent (**Minister**) has chosen to abide. She has not delivered an affidavit to explain her decision.

[1] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 55 (***Ermelo***).

5. Because the disputed provisions of the Act are lengthy, Addendum 1 to these heads of argument contains extracts of the relevant parts for ease of reference. Quotations from the statutes appear in the footnotes where necessary.

COLLABORATION SCHOOLS AND DONOR-FUNDED SCHOOLS

Provincial experiment: new species of public schools

6. The Province at first promoted Collaboration Schools as a novel apparatus for addressing the malady of underfunded and underperforming public schools, which serve marginalised communities in the Western Cape.[2] It started with an experimental pilot project in 2015 to test its efficacy.

7. In the Collaboration Schools pilot project,[3] 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.[4] The operating partners were given control of school governing bodies (**SGBs**) to support governance, management and teaching. The Department had to oversee their performance.[5]

8. The aim was to address inadequate public funding, which hinders the Department's ability to deliver on its mandate,[6] ill-equipped learners, unsuitably skilled teachers and badly functioning school leadership and management.[7] The Province claims that '*rival interest groups try to dominate*' the SGBs,[8] and that unless private sector funding and

[2] Founding affidavit (**FA**) 45-46 : 89.

[3] DFSs were not part of the pilot project.

[4] FA 45-46 : 89.

[5] Id.

[6] Answering affidavit (**AA**) 727-732 : 11-24.

[7] AA 743 : 48.

[8] AA 747 : 55.4.4.

capacitation were introduced, '*slightly better off families*' would move their children to low-fee private schools.[9]

9. The trial solution was to overhaul the governance model for ordinary public schools prescribed under SASA. Elected parents and guardians of learners lost their majority stake in the SGBs and were replaced by the operating partner, whose relationship to the Department and donor was contractually regulated.[10]

10. Despite setbacks (discussed below), the outcome of the pilot project caused the Province to introduce an amendment to the Act, to found Collaboration Schools and DFSs as new types of public school in the Western Cape. The Provincial Legislature passed the amendment and inserted section 12C, 12D, new definitions and a regulation-making power.[11] In large measure,[12] the amendment replicates the parameters of the pilot project in relation to Collaboration Schools.

Key characteristics of Collaboration Schools and DFSs under the Act

11. The foremost 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.[13] In the event of a deadlock, the parents decide disputed governance matters at a general meeting by majority vote.[14]

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[9] AA 749 : 55.8.

[10] Section 23(9) and (10) of SASA. FA 33-34 : 62-64.

[11] Into section 63 of the Act.

[12] Subject to the discussion under the next subheading.

[13] Section 12C(9) of the Act.

[14] Section 12C(10) of the Act. FA 50 : 93.4. Notably, the act does not impose a direct obligation on an operating partner to do so. In any event, the definitions section of a statute is not home to substantive obligations.

12. An operating partner is a non-profit entity which the Act envisages will use its capacity, skills and resources to empower an SGB, school management and educators for delivering quality education.[15] It is appointed by a donor.

13. Similarly, a donor may through contractual negotiations acquire up to 50% of the membership and voting rights of an SGB of DFS.[16] The MEC may, on good cause shown, grant a donor more than 50% membership of the SGB and voting rights, and notionally up to 100% membership and control.[17]

14. A donor is a for-profit entity that provides funds or property to improve education delivery at a Collaboration School or DFS.[18] According to the Province, a donor will not provide funding without being able to steer the SGB or management of a DFS.[19] It is therefore likely that a donor will seek at least a 50% share in the ordinary course.[20]

15. Under SASA, SGB composition is very different. SASA was crafted to democratise post-apartheid education.[21] SGBs are, in the main, elected.[22] The number of parents must be one more than the number of other SGB members for an ordinary public school (**parental majority rule**).[23] And only a parent, who is not in the employ of the school, may chair the SGB.[24]

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[15] Section 1 of the Act, definition of '*operating partner*'.

[16] Section 12D(7) of the Act. FA 70 : 114.4.

[17] Section 12D(9) of the Act. FA 71 : 114.6.

[18] Section 1 of the Act, definition of '*donor*'.

[19] The Province made this statement in relation to Collaboration Schools, which we submit finds equal application to DFS:

> '*These operating partners will be held accountable for improved education outcomes at the schools, both to the funder group and the WCED. The model will not work if donors are expected to provide funding to operating partners, who are required to show improved performances but have no capability of steering that outcome via the SGB or leadership of the school.*' (AA 802 : 102.5.1.)

[20] Replying affidavit (**RA**) 1763 : 95.

[21] *Ermelo* above n 1 at para 79.

[22] Section 23(1) and (2) of SASA. FA 31-32 : 54-55.

[23] Sections 23(9) and (10) of SASA. FA 33-34 : 62-65.

[24] Section 29(2). FA 34 : 65.

16. SASA also guarantees representation for elected teachers, other staff and learners in grade eight and above on the SGB.[25] It ensures direct learner representation. No other category of persons with voting rights is permitted on an SGB, as the list is exhaustive (**category exclusivity rule**). The SGB may, however, co-opt community members who can assist the SGB.[26]

17. The Act contemplates converting ordinary public schools, established under SASA, into Collaboration Schools or DFSs.[27] A Collaboration School or DFS may also be established as a new school without conversion of an existing public school.[28]

18. We identify the most pressing constitutional defects in the Act next.

Constitutional defects with Collaboration Schools and DFSs

19. The Province opposes all of EE's grounds for challenging the validity of the Act. It argues that EE has misinterpreted the Act. Despite bearing the special onus to do so,[29] the Province does not attempt to justify the limitation, if the Court finds that the provisions of the Act concerning Collaboration Schools and DFSs infringe constitutional rights.

20. Contrary to the Province's view, EE's case is not that the Department '*ought not to be permitted to introduce collaboration schools*' or DFS;[30] EE's case is that the Provincial Legislature's formulation of the Act suffers from constitutional defects. EE does not

[25] Section 23(2) of SASA.

[26] Section 23(7) of SASA. FA 33 : 61. The SGB may also co-opt the owner of a school or the owner's representative.

[27] Section 12C(1) and 12D(1) of the Act respectively. FA 46 : 91.

[28] Section 12C(3) and 12D(2) of the Act respectively. FA 52 : 94.1; 65 : 102; 71 : 115.1.

[29] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 34.

[30] AA 785 : 87.

attack the policy to introduce Collaboration Schools or DFSs in this case; it mounts a frontal attack on the empowering statute.

No guaranteed places for parents or learners on SGBs

21. While a Collaboration School reserves 50% of the seats and votes for the operating partner on the SGB, as the default position, section 12C of the Act leaves a vacuum as far as the remaining members are concerned.[31] Unlike SGBs of ordinary public schools under SASA, parents, teachers, staff and learners have no guaranteed place on a Collaboration School SGB.

22. Section 12D similarly says nothing about the role, if any, that parents, teachers, staff and learners are to play in the governance of a DFS.[32]

23. The Province's interpretation of the Act reveals the following:

    23.1. It appears to accept that the set of '*public schools*' under the Act (defined in section 1) is co-terminal with the set of '*public schools*' under SASA.[33]

    23.2. SASA provides that '*public schools*' are schools contemplated in Chapter 3,[34] which stipulates that a public school may be **(i)** an ordinary public school, **(ii)** a school for learners with special education needs, or **(iii)** a school that provides education with a specialised focus on talent, including sports, performing arts and creative arts.[35]

[31] RA 1747 : 37.

[32] FA 70 : 114.4.

[33] Section 1 of SASA.

[34] Id.

[35] Section 12(3)(a) of SASA.

23.3. But the Province argues that Collaboration Schools and DFSs are none of these three public school types; they are, instead, unique creations of the Act.[36] The Province stresses that Collaboration Schools and DFSs are not '*ordinary public schools*', and so the governance model under section 23 of SASA simply does not apply to them.

23.4. The problem with the Province's defence is two-fold: First, SASA lays down no blueprint for the composition of SGBs for public schools generally; it does so only for the *types* contemplated in Chapter 3. Secondly, if Collaboration Schools and DFSs are not ordinary public schools, the composition of their SGBs should be regulated exhaustively by the Act, but it is not.[37]

24. In *FEDSAS*,[38] the Constitutional Court (**CC**) connected school governance to '*learning and teaching*'.[39] As a constitutional requirement, '*[p]arents must be meaningfully engaged in the teaching and learning of their children*.'[40] The CC then observed that SASA '*carves out an important role for parents and other stakeholders in the governance of public schools. [SGBs] are made up in a democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school.*'[41]

25. The CC reiterates that conduct which threatens to imperil a child's education implicates the right to a basic education (section 29(1) of the Constitution) and the paramountcy of the child's best interests in every matter concerning the child (section 28(2) of the

[36] AA 795 : 100.4.3.

[37] RA 1746 : 35.

[38] *Federation of Governing Bodies v MEC for Education, Gauteng and Another* 2016 (4) SA 546 (CC) (***FEDSAS***).

[39] Id at para 47.

[40] Id. Emphasis added.

[41] Id.

Constitution).[42] The right to a basic education applies to primary school and secondary school education, up to matric.[43]

26. SGBs are organs of state.[44] They are bound by the Bill of Rights,[45] and they bear constitutional and statutory obligations to give effect to **(i)** the immediately realisable right to a basic education and **(ii)** the child's best interests which interacts with and reinforces the right to a basic education.[46]

27. We submit that a school cannot effectively be governed without direction from the empowering legislation as to *who* should govern it.

28. Supporting the fact that the Act overlooked legislating the categories of members of SGB of Collaboration Schools and DFS are **(i)** its failure to set out a process for their appointment to the SGB (election, *ex officio* or another method) and **(ii)** its silence on any *minimum proportion* of the SGB they must comprise. The latter is especially important, since the MEC may give an operating partner or donor more than 50% control of a Collaboration School or DFS SGB with no upper limit.

29. Insofar as the Act fails to specify the remaining categories of members of an SGB for Collaboration Schools and DFS, it omits critical content about the composition of an organ of state which plays an elemental role in basic education. The omission is

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[42] For the most recent exposition of this statement see *Moodley v Kenmont School* 2020 (1) SA 410 (CC) at para 2. See also And *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2014 (2) SA 228 (CC) (***Welkom***) at paras 32 and 129.

[43] *Moko v Acting Principal, Malusi Secondary School and Others* 2021 (3) SA 323 (CC).

[44] *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA) at para 20. *School Governing Body Grey College, Bloemfontein v Scheepers (Federation of Governing Bodies of South African Schools Amicus Curiae)* 2020 JDR 1285 (SCA) at para 72. *Welkom* above n 42 at para 141 (majority judgment of Froneman J and Skweyiya J, Moseneke DCJ and Van der Westhuizen J concurring).

[45] Section 8(1) of the Constitution.

[46] FA 23-25 : 28-37.

irrational and infringes the rights in sections 29(1) and 28(2) of the Constitution.[47] It also limits children's autonomy rights to participate in decisions that affect them.

Power to prescribe categories of remaining members overlooked or unlawfully delegated

30. The Province suggests that the Act leaves it up to the MEC to decide who enjoys the remaining 50% of the seats and voting rights on a Collaboration School and DFS SGB.[48] This, of course, assumes that the operating partner and donor do not receive more than 50% control of the respective SGBs.

31. However, the sections of the Act relied on (sections 21, 24 and 61(1)(cI)) cannot reasonably sustain an interpretation that the Act delegated this critical function to the MEC. But, even if that interpretation were sustainable, the absence of guidelines as to how the MEC should exercise that power would infringe the rights mentioned; and it would be an unconstitutional delegation of a plenary legislative power to the executive.[49]

32. We make three points in this regard.

33. First, constitutional values and the settled law on delegated law-making frame the debate about the meaning of the Act.[50]

34. The CC in *Executive Council, Western Cape Legislature*[51] explained that, while Parliament could not be expected to legislate the *minutiae* for implementing legislation, it could not delegate to the executive a plenary legislative power.[52] The CC in

[47] RA 1747 : 37-38.

[48] RA 1747 : 39.

[49] FA 62 : 94.41.

[50] Section 39(2) of the Constitution.

[51] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para 51.

[52] *Smit v Minister of Justice and Correctional Services and Others* 2021 (3) BCLR 219 (CC) at paras 31-35.

Engelbrecht[53] and more recently in *Afribusiness*[54] affirmed that the legislature must set the norms, provide the framework and define the subject matter of legislation.[55]

35. The SCA in *Bezuidenhout*[56] adopted the Privy Council's *dictum* about the nature of the power to make delegated legislation (including regulations):

> '*[T]he power delegated by an enactment . . . "does not enable the authority by regulation to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."*'[57] (Emphasis added.)

36. We submit that this statement of the law commends itself. The Provincial Legislature's plenary power under section 114 of the Constitution authorised and obliged it to define the *objects* of the Act and to stipulate the *means* that it had adopted for achieving those objects. It failed in the second respect by prescribing only part of the means.

37. The remaining membership categories of a Collaboration School or DFS SGB is not merely an ancillary matter. It is integral to school governance, learner representation and democratic values.

38. Secondly, sections 21, 24 and 63(cI) must be interpreted contextually and purposively,[58] as well as in the light of the law discussed above.

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[53] *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at para 26.

[54] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4.

[55] Id at para 103.

[56] *Bezuidenhout v Road Accident Fund* [2003] 3 All SA 249 (SCA).

[57] Id at para 10.

[58] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (***Endumeni***) at para 18, cited with approval by a majority of the CC in *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at fn 105. *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28.

39. Section 21 empowers the MEC to '*establish governing bodies for a public school in the prescribed manner*.' It imposes a duty on the MEC to establish governing bodies and says *how* she must do it (in terms of regulations, the Act or any other law, including SASA). But it does not specify *who* must be on the SGB.[59]

40. Section 24 empowers the MEC to make regulations as to the '*composition and functions*'[60] and the '*dissolution and recomposition*'[61] of SGBs. It was part of the original text of the Act when it was passed in 1997, and it refers to constituting an SGB with elected persons, dissolving an SGB in appropriate circumstances and reconstituting it thereafter. It does not confer the power to determine membership *categories* of an SGB. The regulations already published under this section confirm the limits of the empowering provision's ambit.[62]

41. Section 63(1)(cI) of the Act empowers the MEC to make regulations, subject to any national norms and standards, on '*the funding and governance frameworks*' for Collaboration Schools and DFS. But this too cannot reasonably mean that the MEC may fill in key variables—and not mere detail for implementing those variables—into sections 12C and 12D.

42. If it were so, then the MEC could disenfranchise parents and learners in grade eight and above when converting an ordinary public school into a Collaboration School or DFS simply by making regulations.[63] Doing so would violate the child's right to participate

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[59] RA 1751 : 56.

[60] Section 24(1)(a) of the Act.

[61] Section 24(1)(e) of the Act.

[62] The CC held in *Welkom* above n 42 at para 65 and fn 57 that, while subordinate legislation cannot be used to interpret primary legislation, it was in that instance '*instructive*' that the policies previously issued under the empowering provision at issue there were *intra vires*, as opposed to the attempt of the HoD to interfere with the SGB's policy which was *ultra vires*.

[63] Compare *Ermelo* above n 1 at para 79, where the CC described school governance (under SASA) as '*a partnership with the state, parents and educators*'.

in decisions involving her and the other learners whom she was elected to represent. Yet that is precisely what the Act permits.

43. The issue is not whether the Minister can give effect to, or protect, constitutional rights by implementing the Act in a certain way.[64] The issue is that the Act, through its omission, permits rights-infringing outcomes when interpreted objectively.[65] For, even if the MEC did allow parents and learners to remain on an SGB, their positions would remain precarious, and could change as easily as the MEC can alter regulations.

44. Further, it would be unreasonable to think that the Provincial Legislature regards operating partners and donors to be more important than the other members of a Collaboration School and DFS SGB, such that it needed to legislate only on the membership of the former while ignoring the latter.[66] Such differentiation would be irrational.[67]

45. Thirdly, if this Court finds that sections 21, 24 and 63(1)(cI) do empower the MEC to prescribe the remaining membership categories of Collaboration School and DFS SGBs through regulations, then the Act's failure to give guidelines as to how the MEC should exercise that power would itself be rights-limiting.

46. The CC has made the legal position clear in a trio of cases:

    46.1. In *Dawood*[68] the CC held that it is ordinarily insufficient for the legislature to say that a discretionary power in a statute could be exercised in a manner that does not limit constitutional rights when the breadth of the power permits

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[64] *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (***Dawood***) at para 54.

[65] *Endumeni* above n 58 at para 18.

[66] RA 1750 : 51.

[67] RA 1750 : 50-52.

[68] *Dawood* above n 64.

otherwise. Legislative guidelines are essential to promote the spirit, purport and object of the Bill of Rights and to avoid limiting constitutional rights.[69]

46.2. In *Janse van Rensburg*[70] the CC held that powers invested in the Minister of Trade and Industry could not be unfettered or unguided.[71]

46.3. And recently in *Amabhungane*[72] the CC held that parameters on the exercise of a discretionary power must be clear.[73]

47. Effectively, the Province's interpretation would give the MEC free rein to choose and change who may participate in school governance. It carries the risk of curtailing learners' rights to influence governance decisions about their education, which undermines their constitutional rights in sections 29(1) and 29(2). It could never be lawful to give the MEC such boundless and unguided power.

48. Whether the Court finds for EE or the Province on the proper interpretation of the Act's provisions on Collaboration Schools and DFS, the result is constitutional invalidity of the Act. No amount of regulation-making, however well intentioned, can cure an infirm statute.

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[69] Id at para 54.

[70] *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC). The unbounded powers conferred by the legislation were to attach and seize assets of businesses under investigation. The CC declared those provisions invalid.

[71] Id at para 29.

[72] *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC). In striking down provisions of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, the CC held that a provision which left it to the '*unbounded discretion*' of the Director of the Office for Interception Centres to prescribe what information must be kept, was unconstitutional because *'[t]here needs to be clear parameters on the exercise of discretion*'.

[73] Id at para 103.

Inadequate eligibility criteria for donors and operating partners

49. A donor is defined 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.*'

50. The Province says that no other criteria (except for providing funds to improve a Collaboration School or DFS) are needed to become a donor.[74] Yet, in the case of DFSs, a donor can—and most likely would—wield significant power and influence through its position on an SGB. (Perhaps for this reason, SASA does not permit the owner of a school to have voting rights on the SGB.)

51. The Province admits that the model will not work if donors cannot influence school governance.[75] And the Act allows a donor to acquire up to a 50% stake in governance when negotiating the DFS contract with the Department and an existing SGB, and it may, on good cause shown, be given greater control of the SGB of up to 100%.

52. But the Act does not say—apart from providing funding—what *qualifications* a donor must have to govern a DFS. The only condition in section 12D(1)(a) is that the conversion of an ordinary public school into a DFS must be that it '*will be in the interests of education at the school*' and nothing more.

53. On the Province's own version, the provision of much needed private funding and resources would almost invariably be in the interest of education at an under-resourced school.

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[74] AA 932 : 477.

[75] AA 802 : 102.5.1.

54. The Province accepts that, unlike operating partners, donors may—and probably would—be profit-making entities.[76] The rationale for requiring operating partners to be non-profit entities is to ensure that their governance '*does not become a commercial arrangement whereby operating partners are obtaining State funding and deriving profits for the services they render.*'[77] Yet the Act inexplicably lifts this restriction in section 12D for donors.

55. The absence of criteria in the Act to determine the suitability of a donor to govern a DFS—a requirement to which the Province appears to be alive in the case of operating partners—is irrational and risks imperilling the rights in sections 29(1) and 28(2) of the Constitution. We refer to the cases and principles cited in paragraph 46 above.

56. The Act also does not stipulate what the eligibility criteria are for becoming an operating partner, assuming a major (if not majority controlling) role on a Collaboration School SGB.

57. In the answering affidavit, the Province sets out a six-step process which it follows to vet prospective operating partners;[78] but, with respect, that misses the point. At issue is not how well the incumbent MEC is *implementing* the vague and non-specific Act; the problem lies in the Act's lack of legislative guidelines. The Provincial Legislature has effectively written the MEC a blank cheque, which is unconstitutional for the same reasons dealt with in paragraph 46 above.

Inadequate eligibility criteria for conversion into a Collaboration School or DFS

58. The Province has vacillated over its reasons for introducing Collaboration Schools and DFS into the education landscape. It first promoted Collaboration Schools to inject

[76] AA 828-829 : 137.

[77] AA 818 : 121.

[78] AA 818-822 : 122.

funds, capital and skills from the private sector into underperforming schools serving poorer areas. In its answering affidavit, however, it says that conversion into a Collaboration School or DFS '*is not limited to underperforming schools*'.[79]

59. EE's challenge to the lack of a rational relationship between ends and means turned on the fact that the Act did not provide any detail on how an underperforming or under-resourced ordinary public school would be identified for conversion into a Collaboration School or DFS. The Act did not clearly articulate the purpose of sections 12C or 12D.

60. It now appears that an ordinary public school with 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. The MEC would almost invariably consider private sector funding and support to be an improvement, so the question is: against what other objective standards should the MEC decide whether to convert an ordinary public school into a Collaboration School or DFS?

61. The Act provides no answer. And that, we submit, is enough to establish an infringement of the constitutional rights in sections 29(1) and 28(2), which the Province has not sought to justify.

62. That the Act says that the MEC must base her decision on reports on a school does not answer the relevant question: what must the reports reveal? The MEC's answer appears to be '*I'll know it when I see it.*'[80] The Constitution, however, does not countenance subjectivity to that degree.

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[79] AA 937 : 496.

[80] RA 1760 : 80.

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

63. The relationship between the operating partner, donor and Department is contractually regulated (there is no operating partner in a DFS).[81] And if an ordinary public school is converted into a Collaboration School or DFS, then the existing SGB is also party to the contract.[82]

64. Only after the contract to convert an existing public school has been concluded is the affected public given access to it for comment.[83] The Province accepts that this is a correct interpretation of section 12C and 12D of the Act.[84]

65. The Province claims that the lack of public participation at the precontractual stage is acceptable because **(i)** the yet unpublished regulations will prescribe the contents of the contracts, **(ii)** the contract is effectively subject to a suspensive condition until the Collaboration School or DFS is declared, [85] and **(iii)** the MEC must first consider public comments before making any declaration.[86]

66. But the Province's attempt to justify the lack of public participation on the terms of a draft contract, under which parents lose their majority say and learners are at risk of being disenfranchised, misses the point. The purpose of public consultation before the contract is concluded is to potentially influence the *terms* of the contract or the MEC's decision to enter into it.[87]

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[81] Section 12C(2) of the Act.

[82] Section 12C(2) of the Act.

[83] Fa 63 : 94.42-94.43; 74 : 115.13.

[84] AA 823 : 126.2.

[85] RA 1766 : 104.

[86] Id.

[87] In *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and other* 2008 (3) SA 208 (CC) at paras 14 to 15, the CC held that '*[e]ngagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process.*' Proper consultation may even avert disputes from arising down the line.

67. It is no answer to say that the terms of the contract will be stipulated in regulations. The Act does not say so or necessarily imply it and, in any event, three years on, there are no regulations in place. The MEC concludes these contracts with the public being in the dark as to what criteria she relies on for her decision.

68. And if the MEC, in the face of public comments opposed to converting an ordinary public school, inclines not to declare a Collaboration School or DFS, she would have to repudiate the concluded contract. That fact, on its own, might impair her ability to consider the declaration of a Collaboration School or DFS impartially. Prior public consultation would avert that predicament.

69. Prior public consultation would also enhance the democratic legitimacy of any decision to conclude the contract.[88] It is for these reasons that—

    69.1. section 12A of the Act (and section 12A of SASSA) demands public comments on the intention to merge schools before any contractual arrangements are made, in respect of schools on private land; and

    69.2. section 18 of the Act 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.

70. In requiring the conclusion of a contract before public consultation, sections 12C and 12D of the Act also deviate from the statutory scheme, which is imbued with procedural fairness and rationality.

See also *Sokhela v MCC for Agricultural Environmental Affairs (Kwazulu-Natal)* 2010 (5) SA 574 (KZB) at para 55 on the importance of prior representations for ensuring that a decision-maker is empowered to make a rational and reasonable decision.

[88] Hoexter *Administrative Law of South Africa* 3rd 558.

71. The absence of public consultation before the contracts contemplated in sections 12C(2) and 12D(1) are concluded therefore deviates from the constitutional requirement that administrative action affecting the public be procedurally fair[89] or, alternatively, that decisions are procedurally rational.[90]

Terms of the Collaboration School or DFS contract up to the contracting parties

72. As indicated, the Act does not prescribe the content of the contract or even principles for the negotiation of the essential terms, other than it must be '*in the interests of education*'. But conduct untaken under the Act could never be contrary to the interests of education. The 'condition' is therefore hollow.[91]

73. Whether the Act leaves it up to the MEC to prescribe the terms of the contract with no guidelines, or to the parties to negotiate without any statutory cardinal points,[92] does not matter – both alternatives redound to invalidity.

74. Worryingly, the Act does not regulate breach, termination or hand-over from one operating partner to another, if things do not work out, or the relationship sours or the parties simply agree to part ways.[93] All the Act provides is that if a Collaborations School contract is terminated, the MEC may, on the advice of the HoD, conclude a new one.[94]

75. In this regard, the setbacks that bedevilled the pilot project merit mention, for the Act fails to neutralise the risk of their recurrence. Three operating partners pulled out of

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[89] Section 33 of the Constitution, as given effect to in section 4 of PAJA.

[90] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC). *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) at paras 70-75.

[91] RA 1758 : 73.

[92] FA 52 : 94.3; 57 : 94.20.

[93] Section 12C(7) of the Act. FA 16 : 8; 52 : 94.1-94.2.

[94] Section 12C(7).

the pilot project, forcing the Department to scramble for replacements.[95] Oranjekloof Moravian Primary had no properly constituted SGB for a month.[96] Langa High School changed operating partner three times,[97] and it had no properly constituted SGB for almost four months,[98] requiring the support office and Department to step into the breach.[99] Forest Village Leadership Academy experienced a similar crisis, with a break of four months between operating partners.[100]

76. Further, the Act provides that if a Collaboration School or DFS terminates without a new operating partner or donor in the wings, the MEC must declare it to be the applicable type of public school.[101] The Province suggests that this automatic reversion is unproblematic.[102] But it ignores the prospect that some Collaboration Schools and DFS will have been established as new schools, without having been an ordinary public school before. In that case, there is no question of reversion.[103]

77. The failure of the Act to acknowledge and mitigate these risks is irrational and infringes the rights in section 29(1) and 28(2) of the Constitution. Effective governance is essential for delivering constitutionally guaranteed basic education. Any threat of interruption violates these rights.[104]

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[95] FA 53 : 94.8; 54 : 94.11.

[96] FA 54 : 94.12.

[97] FA 54 : 94.13.

[98] FA 55 : 94.13.3.

[99] FA 55 : 94.13.4.

[100] FA 56 : 94.14.

[101] Section 12C(8) of the Act.

[102] AA 923 : 465.

[103] RA 1768-1769 : 115-116.

[104] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 45.

Conflict with SASA

Conflicting provisions

78. Section 150 of the Constitution requires a Court to prefer an interpretation of national and provincial legislation which does not conflict, if it is reasonably possible to do so.[105]

79. The starting point is that SASA covers the field in respect of all public schools. SASA provides in section 12(3)(a) that public schools may be any one of three types, listed in paragraph 23.2 above.

80. The dispute between EE and the Province is whether 12(3)(a) of SASA, in stating that '*a public school may be*' any one of the three listed types is exhaustive.[106] EE's case is that it is. Section 12(3)(a) does not contemplate any residual category of public school, such as a Collaboration School or DFS. Where SASA lists a type of public school in section 12(3)(a), it spells out its governance model in a seamless fit.[107]

81. EE pleaded in its founding affidavit that it was reasonable to interpret section 12C and 12D of the Act as purporting to build on the base model of governance for ordinary public schools in section 23 of SASA. But the Province disavows any such relationship.

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[105] *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC), which was decided with reference to the equivalent provision in the Interim Constitution. Section 150 of the Constitution provides:

> **'*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.'*

[106] RA 1742 : 15.

[107] Sections 23 and 24 of SASA.

82. If the Court finds that sections 12C and 12D of the Act are to be read alongside section 23 of SASA, one cannot reasonably interpret away the resultant conflict, at least in three respects:[108]

82.1. First, sections 12C and 12D flout the parental majority rule.

82.2. Second, sections 12C and 12D flout the category exclusivity rule.

82.3. Third, the Province's explanation how of operating partners will function posits that they will fulfil both a governance role and a management role.[109] SASA, on the other hand, maintains a strict distinction between an SGB's governance role and the management functions of the principal, who is an *ex officio* member of the SGB only.

Resolution of the conflict

83. Section 146(2) of the Constitution sets out the method for resolving conflicts between national and provincial legislation.[110] We submit that the conflict between SASA and

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[108] The remaining conflicts are highlighted in FA 49-51 : 93.

[109] Welkom above n 42 at para 63.

[110] Section 146(2) provides:

> '*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.*
>
> *(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.*'

sections 12C and 12D of the Act should be resolved in favour of SASA for the following reasons:

83.1. SASA was enacted to democratise education to redress the legacy of apartheid on the education system.[111] It demands a uniform system to apply across the country for equitable redress.[112] Schools nationwide should transform equally with none lagging behind—that might happen if provinces enacted legislation that did not advance democratic transformation or did so at different rates or in unequal degrees.[113]

83.2. SASA's uniform framework of governance allows democratic transformation across the nation to be measurable and comparable.[114] It enables national government and provinces to make appropriate policy choices based on a shared vision of transforming the education landscape.[115] This is especially relevant in provinces that inherited schools from the former 'Self-governing Territories'.[116]

83.3. SASA records in its preamble that '*it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa.*'

83.4. Section 2(3) of SASA does not preclude provinces from legislating differently in regard to basic education, nor could it do so, as it is a concurrent competence in terms of Schedule 4A of the Constitution. But it does require that provincial legislation accords with SASA and the Constitution.[117]

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[111] FA 79 : 124-125; 81 : 131.

[112] FA 79 : 126.

[113] Id.

[114] FA 81 : 132.

[115] FA 81 : 134.

[116] FA 81 : 133.

[117] FA 80 : 127.

83.5. Section 23 of SASA, which establishes the parental majority rule and category exclusivity rule, is subject only to the other provisions of SASA. If SASA had intended it to be subject to any provincial law, it would have said so (as it does elsewhere in respect of other provisions).[118]

83.6. Unlike sections 12C and 12D of the Act, SASA does not create multiple lines of potentially conflicting accountability. There is a risk of conflict between an operating partner's loyalty to the donor and duties to the Department.[119]

83.7. The provision of basic education is a government service, which should be equal countrywide.

83.8. The National Council of Provinces approved the SASA.

84. For these reasons, we submit that sections 12C and 12D of the Act, along with the related definitions and section 63(1)(cI) should be rendered inoperative.

INTERVENTION FACILITIES

85. Sections 12E and 45 of the Act—

85.1. permit the MEC to establish so-called 'Intervention Facilities' for learners found guilty of serious misconduct;

85.2. require 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;

[118] FA 80 : 128-129.

[119] FA 82-83 : 136.

85.3. empower SGB to recommend to the Head of Department that a learner should be referred to an Intervention Facility, for a maximum of 12 months, and with parental consent; and

85.4. empower the HoD to enforce this recommendation.

A drastic and regressive measure

86. Intervention Facilities constitute a measure of a most drastic and regressive kind. In effect, these provisions allow—as a disciplinary measure—for the removal of a learner from the formal education system, and potentially from her family and community, for up to an entire calendar year.

87. In doing so, this provision risks a return to an out-dated mode of delivering residential care to children, which existed historically in the form of reform schools,[120] schools of industries[121] and places of safety.[122]

88. A comprehensive 1995 review of facilities of this kind by the Inter-Ministerial Committee on Young People at Risk (**IMC**) found that more than a quarter of children were inappropriately placed, and that there was widespread sexual, physical and emotional abuse of children.[123]

89. The IMC accordingly called for an '*urgent transformation of the existing child and youth care system*',[124] and made numerous recommendations to transform the system.

[120] 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.

[121] 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.

[122] 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.

[123] FA paras 154-156, p90. The IMC produced three key reports, attached to the founding affidavit as 'NM8', p294; 'NM9', p419; and 'NM10', p462.

[124] FA para 160, p92; Policy recommendations para 1.3.4, p475.

These included,[125] most significantly, steps to avoid the inappropriate placement of children in residential facilities;[126] the making of residential facilities a method of last resort; allowing for participation *by the young person*, the family and members of the community at every stage;[127] and the involvement of the Children's Court in making placement decisions with due regard to the developmental and therapeutic needs of children.[128]

90. These recommendations were endorsed by the South African Law Commission (**SALC**) in 1999,[129] which recommended, in accordance with developments globally, that '*residential care should always be the placement of last resort*'.[130] Many of the recommendations of the IMC and the SALC were carried through into legislation, including the Children's Act.[131]

91. Section 12E read with section 45 of the Act constitutes an unfortunate retreat from these objectives. These provisions say nothing about thorough assessment, prevention and early intervention. They do not allow the child herself to participate in deciding whether to send her to an Intervention Facility. They contain no safeguards to ensure close proximity to the child's family and community. And they require no consultation with other government departments, and entail no judicial oversight.

92. In responding to these criticisms, the MEC contends that EE '*departs from a false premise*'. She criticises EE for '*assuming*' that residential facilities will be punitive. The reason that this premise is mistaken, says the MEC, is that the '*intervention*

[125] FA para 160.1 to 160.9, p93-95.

[126] Policy recommendations paras 4.1.2.1, 4.1.2.2, 4.1.2.3 and 4.1.3, pp496-500.

[127] Policy recommendations para 1.3.4 and 2.5.2, pp 476 and 485.

[128] Policy recommendations para 5.1.1, pp513-514.

[129] See 'NM11', p576.

[130] 'NM11', p585.

[131] Under section 191 of the Children's Act in particular, former Reform Schools, Schools of Industries and Places of Safety were renamed as Child and Youth Care Centres (**CYCCs**), and formally transferred to the authority of the Department of Social Development

facilities the WCED intends to establish are, in fact, exactly what EE claims the WCED should be doing'.[132]

93. In support of this claim, the MEC relies on Draft Norms and Standards[133] that the WCED has prepared, and which it intends (or at least intended when the answering affidavit was drawn) to release for public comment. She claims that the WCED has a '*firm idea*' of what Intervention Facilities are, and what they are not.[134] She claims, in particular, that the '*probable content*' of the Draft Norms and Standards, once final and promulgated, '*will resolve all the substantive concerns that EE has about the intervention facilities*'.[135]

94. The MEC's defence of Intervention Facilities is, in other words, not based on what the Act says. It is, instead, based on what she describes as '*the true nature*' of Intervention Facilities,[136] which is to work on the basis of what she would like them to be. She contends that they will be '*short-term and inter-disciplinary*'; that they will '*ordinarily not be residential*'; that *'[t]he learner will have constant contact with their home school, and in some cases not leave that environment at all*'.[137]

95. But none of these protections is contained in the Act.

96. The MEC's general approach – of relying on her own apparently good intentions, as reflected in a draft set of norms and standards, to defend the constitutionality of *legislation* – is fundamentally flawed, for at least three reasons:

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[132] AA paras 139 to 141, pp827-828.

[133] Attached to the AA as 'DS37', p1663.

[134] AA para 179, p840.

[135] AA para 190, p844.

[136] AA para 257, p864.

[137] AA para 256, p864.

96.1. First, the process of statutory interpretation is '*objective not subjective*'.[138] It is an exercise in establishing the meaning of the words used in the statute.

96.2. It is therefore irrelevant what Intervention Facilities the WCED currently '*intends to establish*' or what its '*firm idea'* is, divorced from the language of the Act. What matters is what the statute, properly interpreted, empowers the MEC to do.

96.3. On that question, the MEC has no answer: the Act allows, without limitation, the creation of Intervention Facilities of precisely the kind that will constitute an extreme violation of the rights of learners.

96.4. Secondly, as the CC has explained, the unilateral practice of one part of the executive arm of government plays no role in the '*objective and independent interpretation by the courts of the meaning of legislation*'.[139] It is therefore irrelevant to a proper interpretation of the Act what steps the MEC may have taken based on her own interpretation of the Act. It is the Court, and not the MEC, that will determine what the Act allows.

96.5. Thirdly, and relatedly, regulations (and other forms of subordinate legislation) may not be used as an aid to *interpret* primary legislation.[140] It is the Norms and Standards (once they are promulgated) that must be interpreted consistently with the Act—not the reverse.

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[138] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18.

[139] Marshall NO and Others v Commissioner, South African Revenue Service 2019 (6) SA 246 (CC) para 10.

[140] Head of Department, Department of Education, Free State Province v Welkom High School and Another 2014 (2) SA 228 (CC) at para 65 (citing Sebola and Another v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) at para 62 and Rossouw and Another v First Rand Bank 2010 (6) SA 439 (SCA) at para 24).

97. For these reasons, the MEC misconceives the task that confronts this Court. That task is to interpret the Act, and to determine whether its provisions pass constitutional muster. Draft norms and standards, and the MEC's intentions, are irrelevant to that task.

98. On its terms, the Act allows for precisely the opposite of what the MEC describes. It allows for long-term referrals of up to a year. It allows Intervention Facilities to be residential, without restriction. And it permits the removal of the learner not only from the school environment, but also from the home. Thus, while the MEC says that '*it is not the WCED's intention to refer learners to intervention facilities for such a long period of time*',[141] her '*intention*' does not mirror the wording of the Act.

99. In any event, even if it were generally permissible to rely on subordinate legislation to cure the defects in primary legislation, the MEC plainly cannot do so in this case.

100. The Draft Norms and Standards are precisely that – a draft. They have not been published. They were prepared by Ms Schäfer in her capacity as then-MEC, and reflect her own inchoate intentions for Intervention Facilities. They say nothing about what her successors will do with their extensive and unconstrained powers under the Act.

101. In any event, EE has shown that the Draft Norms and Standards themselves suffer from fundamental defects, and do not remedy the constitutional flaws in the Act.[142]

102. In sum, the provisions establishing and providing for the referral of children to Intervention Facilities, suffer from three constitutional defects:

    102.1. First, they breach children's rights in section 28 of the Constitution, and the right to a basic education in section 29.

[141] AA para 187.2, p843.

[142] RA para 141.1 to 141.6, pp1775-1778.

102.2. Secondly, they are irrational.

102.3. Thirdly, they give rise to a conflict with SASA and the Children's Act, and, on that basis they should be declared inoperative under section 146 of the Constitution.

Breach of fundamental rights

103. The provisions establishing intervention schools constitute an unreasonable and unjustifiable limitation of the rights of learners under sections 28 and 29 of the Constitution.

104. In particular, section 12E and section 45 limit learners' rights in the following six ways.

First ground: overbroad discretion without legislative guidelines

105. The Intervention Facility provisions afford the MEC and the Head of Department an extraordinarily wide discretion to refer learners to Intervention Facilities and to run such facilities, but provide no guidance to the relevant officials as to how to exercise that discretion.[143]

106. When parliament delegates discretionary powers to the executive, it must provide adequate guidance as to how that discretion must be exercised. It is impermissible for parliament to afford an unfettered discretion, especially where constitutional rights are at stake. We refer to the three authorities cited in paragraph 46 above.

107. Section 12E, read with section 45 of the Act contravenes this fundamental constitutional principle, because it fails to provide the necessary rights-protective framework within which regulations are to be made. Instead, the MEC is given

[143] FA paras 169.1 to 169.9, pp98-100.

unfettered discretion to make regulations, without any guidance as to how that discretion ought to be exercised.[144]

108. The Act's shortcomings, insofar as it fails to provide legislative guidance as to the exercise by the MEC of her regulation-making power, are three-fold.

109. The first failure to provide legislative guidance concerns the circumstances in which it is appropriate to refer learners to Intervention Facilities at all.

110. The MEC defends the failure to specify guiding criteria as to when the HOD should refer a learner to an Intervention Facility because there are also no guiding criteria for expulsion.[145]

111. But that is obviously no answer. The absence of guiding criteria in respect of expulsion does not make it constitutionally permissible. In any event, removing a learner to a *residential* facility, outside the formal school system, is a more invasive measure than expulsion. It thus requires clearer guidance for when it is appropriate.

112. It is also no answer to say that the relevant factors are too numerous and varied to identify them in advance.[146] That is no reason to give the HOD a free hand – save for the vague criterion of '*serious misconduct*'—to send learners to Intervention Facilities. There are clearly criteria that must be considered every time the HOD considers sending a learner to an Intervention Facility. While the application of those criteria will vary from case to case, the criteria themselves should not.

[144] EE has included a challenge to general regulation-making power in section 63(1)(cL) by way of amendment. See the notice of amendment, p1852, and the amended notice of motion, p1858.

[145] AA paras 288 and 289, p872.

[146] AA para 290, p872.

113. The MEC claims that because parental consent is required, there is another guarantee that the referral will be in the child's best interests.[147] But that is not necessarily so. It is essential that ***before*** parents are asked for their consent, the HOD has applied his or her mind in a considered manner and with clearly identified criteria being considered as to whether a referral to an Intervention Facility – and particularly a residential facility – is appropriate. Parents are entitled to assume that the recommendation made to them by the HOD is a considered one.

114. The MEC also refers to '*what the WCED has in fact done*', including the form that is completed, the advice of the compulsions committee, and the like.[148] But we have explained that that is irrelevant to the proper interpretation of the Act. In any event, '*what the WCED has in fact done*' does *not* include developing a set of clear principles or criteria to be applied in each determination.

115. The second failure to provide legislative guidance concerns the definition of serious misconduct.

116. The MEC's answer to this is highly technical: she says that EE has not challenged section 9(3)(a) of SASA and section 45(9)(a) of the Act, which allow the MEC to determine by notice the behaviour that may constitute serious misconduct, or the definition which the MEC has prescribed by notice.[149]

117. But it is because there now exists the power to refer learners to residential Intervention Facilities for up to a year that guidance is necessary on the meaning of serious misconduct. In particular, the Act must stipulate to the MEC what criteria and factors she must consider when defining the meaning of serious misconduct, given that being

[147] AA para 293, p873.

[148] AA para 295, p873.

[149] AA para 299-305, pp875-877.

found guilty of serious misconduct could lead to removal from the formal education system and placement in a residential Intervention Facility.

118. The third and perhaps most important failure to provide legislative guidance goes to the circumstances in which facilities will be residential, and the circumstances in which a learner will be removed to a residential facility.

119. Residential facilities constitute the most severe limitation of a learner's rights. If they are permissible at all, this can only be in the most exceptional of circumstances. Without any form of guidance stipulating what those circumstances are, the MEC's unrestricted power to refer learners to residential Intervention Facilities is self-evidently unconstitutional.

120. The MEC appears not to appreciate the significance of Intervention Facilities being residential. Indeed, she goes so far as to suggest that '*whether a particular facility is residential or not is irrelevant from a rights perspective*'.[150] That is mistaken. When a child is sent to a residential facility, she is sent away from her home, and away from her school, as a disciplinary measure. It is the most disruptive form of disciplinary intervention conceivable.

121. Accordingly, whether a particular facility is residential is crucially relevant from a rights perspective. It determines how far the learners' section 28 and 29 rights are impacted upon.

122. In defending the breadth of her discretion, the MEC again refers to her ***intention*** under the Draft Norms and Standards—only to have residential facilities where it is impossible to have non-residential facilities.[151] But her intention is irrelevant. If the

[150] AA para 307, pp877-878.

[151] AA para 309, p878.

WCED accepts that residential facilities should be used only as a last resort, then the Act should address this.

123. In any event, as EE has shown, the Draft Norms and Standards do not in fact provide for Intervention Facilities as a last resort. They leave open the real possibility that many learners will be removed to residential facilities – even if only because of practical necessity.[152]

Second ground: disparity in the quality of education

124. Section 29(1) of the Constitution does not limit itself to the provision of a curriculum. The right to a basic education includes the right to attend a school subject to proper governance, oversight, financing regulations, and the like. Governance issues such as these are integrally connected to educational outcomes. Indeed, the CC has described the democratic and participatory nature of an SGB as advancing '*the legitimate interests of learners at school*'.[153]

125. Although section 12E provides that Intervention Facilities will offer curriculum delivery equivalent to the standard provided in legislation and policies applicable to public schools, learners in Intervention Facilities are denied all the *governance* benefits and protections of public schools, in violation of section 29(1).[154]

126. SASA vests three partners – national government, provincial government and SGBs – with responsibility for the running of public schools in a closely regulated system of checks, balances and accountability mechanisms.[155] As the CC held in *Ermelo*:

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[152] RA para 152.4, p1784.

[153] FEDSAS v MEC for Education, Gauteng and Another 2016 (4) SA 546 (CC) at para 47.

[154] FA paras 169.10 to 169.14, pp101-102.

[155] Head of Department, Department of Education, Free State Province v Welkom High School and Others 2014 (2) SA 228 (CC) at para 49.

> '*An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the SGB which exercises defined autonomy over some of the domestic affairs of the school.*'[156]

127. As SASA recognises, there is no public authority better suited to catering for the localised, context-specific needs of schools than SGBs. As '*beacon[s] of grassroots democracy*',[157] SGBs are indispensable to local governance of public schools. They are vital to giving effect to the right to basic education under the Bill of Rights.

128. We do not suggest that Intervention Facilities require an identical governance structure to public schools. It is conceivable that the Department might develop a constitutionally permissible system of governance that differs from that under SASA. It is therefore not EE's argument – though the MEC attempts to portray it this way – that the Act is unconstitutional because '*[i]ntervention facilities are not governed in the same way as public schools*'.[158]

129. Rather, the argument is that effective and democratic governance of Intervention Facilities – unlike public schools – is not statutorily guaranteed or enshrined at all. Learners who are sent to Intervention Facilities therefore have no guarantees in respect of proper governance. That is because Intervention Facilities are not public schools. The provisions regarding public school governance therefore do not apply. Learners referred to such facilities are denied the guarantee of accountable and effective governance that learners at public schools have.

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[156] Ermelo above n 1 para 56 (our emphasis).

[157] Id at para 57.

[158] AA para 311, p879.

130. The MEC says that the details of governance can be regulated in regulations.[159] But it is telling that public schools' governance requirements are carefully and comprehensively described in the legislation itself. The legislature did not see fit to leave such crucial issues to the MEC to determine. The same should be true of Intervention Facilities. There is no reason for their governance not to be legislatively prescribed and protected (in whatever constitutionally permissible way the provincial legislature sees fit).

Third ground: increased risk of stigmatisation

131. By excluding and segregating learners who exhibit behavioural or other problems from the formal education system, and referring them to institutions set up specifically and solely for young wrongdoers, learners sent to such an institution are at risk of being labelled '*delinquent*', and subjected to intense stigma and ostracization.[160]

132. It cannot be in a child's best interests to experience stigma and ostracization. Learners' section 28(2) rights are thus plainly limited. This stigma stays with learners as they seek to re-enter the education system, violating their right to basic education in section 29(1).

133. The CC recognised this concern in *FEDSAS*, where it found that '*[s]chools that are told in advance of admission that a learner has learning or remedial difficulties or is troublesome, tend to refuse that learner's admission. Schools would rather have higher achieving learners and better results.*'[161]

134. The same is true here. A child sent to an Intervention Facility, and effectively excluded from the formal education system, will inevitably suffer stigmatization and

[159] AA para 313, p879.

[160] FA paras 169.15 to 169.18, pp102-103.

[161] Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC) para 32.

ostracization. This is particularly so – as the IMC recognised[162] – where such a facility is not located within a community or designed to blend in with the community.

135. The MEC denies that this will be the effect of Intervention Facilities.[163] But again, in making this argument the MEC does not refer to protections in the Act at all. Instead, she refers to the pilot programme and the Draft Norms and Standards, which she says make it clear that despite the statutory power to remove learners to Intervention Facilities for up to 12 months, her '*intent*' is to do so for a shorter period, and that the learner will remain in contact with her home school.[164]

136. It is therefore not in dispute that the Act itself contains no protections against the stigmatization that learners are likely to suffer because of being removed to Intervention Facilities. And the MEC's intent is irrelevant. It is impermissible for the Act to leave the protection of learners' rights to the whim of the MEC of the day. The 'intent' of the current (now former) MEC cannot save the Act from constitutional invalidity.

Fourth ground: no right for the learner to be heard

137. While section 45 of the Act requires the consent of the parents, 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.[165]

138. To this extent, section 45 of the Act infringes section 28 of the Constitution, which has been held to incorporate a '*procedural component, affording a right to be heard where the interests of children are at stake*'.[166]

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[162] Policy recommendations, para 6.6.1, pp528-529.

[163] AA para 325, p882.

[164] AA paras 326 and 237, pp882-883.

[165] FA paras 169.19 to 169.25, pp103-104.

[166] AB and another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC) para 141.

139. This principle is given statutory recognition in section 10 of the Children's Act, which provides that '*every child of a sufficient 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.'*

140. The CC has repeatedly emphasised the importance of children being heard directly in matters where their rights are affected.[167] As it explained in *Pillay,*[168] '*the need for the child's voice to be heard is even more acute when it concerns children 'who should be increasingly taking responsibilities for their own actions and beliefs*.'[169] In *Pridwin*, which concerned the expulsion of children aged 6 and 10 respectively from a private school, the CC held that the children '*had a self-standing right to have their views heard…either in person or through a representative.*'[170]

141. On its terms, the Act affords no such right. It would allow for a mature, independent and autonomous seventeen-year-old learner to be removed from the formal education system, in her final year of high school, and placed in a residential Intervention Facility, without being given a chance to be heard on whether such a facility would be in her best interests.

142. The MEC accepts that learners have a constitutional right to participate in a decision to remove them to an Intervention Facility, and that the extent of that participation will depend on their age and maturity.[171] She claims – again without ever referring to the Act – that learners will have such an opportunity. She says that learners have this

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[167] See Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC) para 53; C and Others v Department of Health and Social Development, Gauteng and Others 2012 (2) SA 208 (CC), particularly the concurring judgment of Skweyiya J para 27. J v National Director of Public Prosecutions 2014 (7) BCLR 764 (CC) para 40.

[168] MEC for Education, KwaZulu-Natal and others v Pillay 2008 (1) SA 474 (CC).

[169] Pillay para 56.

[170] Pridwin para 148.

[171] AA para 331, p884.

opportunity in terms of section 10 of the Children's Act,[172] and in terms of the *Regulations relating to Disciplining, Suspension and Expulsion of Learners at Public Schools in the Western Cape* (the **WC Disciplining Regulations**).[173]

143. But neither contention has any merit.

144. Section 10 of the Children's Act will not afford an opportunity for learners to be heard, where the more specific legislation – the Act – makes no provision, and prescribes no procedure, for such a hearing.

145. And while the WC Disciplining Regulations allow for representations during the disciplinary process, they do ***not*** allow the learner to make representations specifically on the remedy of removal to an Intervention Facility. Indeed, the WC Disciplining Regulations do not even mention Intervention Facilities.

146. Without giving a child a full and proper hearing – not merely in the disciplinary proceeding, but in respect of the specific decision to refer her to an Intervention Facility – neither the SGB (in making its recommendation) nor the HOD (in implementing the recommendation) is able properly to consider the best interests of the child.

Fifth ground: no court oversight

147. EE contends that when a decision is made to refer a learner to a ***residential*** facility as a punitive measure, court oversight is required.[174] In addition, because removal to a residential facility as a disciplinary measure occurs without the child's consent, it is a

[172] AA para 333, p884.

[173] AA para 335, p884.

[174] FA paras 169.26 to 169.29, p105. *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC).

form of detention and is required by section 28(1)(g) of the Constitution '*to be a measure of last resort…for the shortest appropriate period of time*'.[175]

148. Yet the Act includes no stipulations of this kind. On the contrary, the Intervention Facility provisions allow for the removal of a child from a school, and potentially even their community and their family, without there even being review by a court. They thus expose children to the risk that their best interests will not be considered in circumstances where a decision that materially affects their well-being is taken.

149. The High Court is the upper guardian of children and, in terms of section 28(2), is required to ensure that their best interests are advanced and protected.[176] This is particularly so when there are serious risks to their liberty interests.

150. The MEC's answer to this concern is again to ask this Court simply to trust that '*most (if not all) intervention facilities will be non-residential*'.[177] But, on its terms, the Act would allow the MEC to establish *only* residential facilities, and for learners routinely to be sent to those facilities for a period of up to 12 months – whether they consent or not.

151. The MEC's comparison with boarding school is inapposite.[178] Boarding school is not a state-imposed disciplinary measure. Nor does it entail – as Intervention Facilities do – the removal of children from the formal education system altogether.

152. In short, the Intervention Facility provisions of the Act expose children to the risk that their best interests will not be considered in circumstances where a decision that materially affects their well-being and liberty is taken. The Act limits the rights of

[175] FA para 169.28, p105.

[176] H v Fetal Assessment Centre 2015 (2) SA 193 (CC) para 64.

[177] AA para 345, p887.

[178] AA para 346, pp887-888.

children in that it allows them to be sent to residential facilities as a disciplinary measure without their consent and without court oversight. And it limits their rights further in that it does not require such removal to be a measure of last resort or to be for the shortest appropriate time.

Sixth ground: compulsory return to the same school not necessarily in the child's best interests

153. EE contends that 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.[179]

154. The MEC contends that, properly interpreted, that is not the meaning of section 45(14B), and there is no prohibition on a determination being made that the learner would be better served by enrolling in a different school.[180]

155. EE accepts that if, notwithstanding its use of the peremptory '*shall*', this is the proper interpretation of section 45(14B), that would save it from invalidity. However, to the extent that the provision, properly interpreted, does require the learner always to return to her home school, then we submit that it limits a learner's right to basic education.

Limitation not reasonable or justifiable

156. Once it is accepted that the establishment of Intervention Facilities limits the rights of learners under section 28 and 29 of the Constitution, the MEC bears the burden of

[179] FA paras 169.30 and 169.31, p106.

[180] AA paras 352 and 353, p889.

justification.[181] If she cannot establish that the limitation is reasonable and justifiable in terms of section 36 of the Constitution, then '*the application must succeed*.'[182]

157. The MEC has failed to discharge this burden. In fact, having regard to the factors set out in section 36 of the Constitution, the limitation is plainly unreasonable and unjustifiable. We show this based on each of these factors in turn.

The nature of the right

158. The MEC accepts, as she must, that sections 28 and 29 are constitutional rights of exceptional importance.[183]

The nature and the extent of the limitation

159. The MEC claims that the limitation is minor, because the only flaw is that '*details are not spelled out in the WC Schools Act*' and that it is a '*procedural limitation*'.[184]

160. But this is incorrect. The limitation is of a most extreme kind, involving the complete removal of a learner from the formal public education system for an indeterminate period, possibly up to an entire year and potentially to a residential facility, for indeterminate '*serious misconduct*', and without the learner being afforded a hearing on whether such a referral is the appropriate course.

[181] Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as amicus curiae)

[182] Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC).

[183] AA para 359, p891.

[184] AA para 361, p892.

The importance of the purpose of the limitation

161. No purpose is served by failing to stipulate (i) when an Intervention Facility should be residential, (ii) when it is appropriate to send a learner to such a facility or (iii) that a residential Intervention Facility should be a last resort. No purpose is served by denying learners the right to be heard. And no purpose is served by failing to prescribe proper governance measures for Intervention Facilities.

The relation between the limitation and its purpose

162. The connection between the limitation and its purpose is tenuous at best, because the MEC has failed to demonstrate that Intervention Facilities – and particularly *residential* Intervention Facilities – are an effective means by which to provide the necessary holistic set of therapeutic and educational interventions.

Less restrictive means to achieve the purpose

163. The MEC *concedes* that there are less restrictive means for certain limitations. She accepts, for example, that there could be greater governance protections; that there could be a specific right for the learner to be heard; and that the Act could specify that learners will not return to their home school if it is not in their best interests.[185]

164. The MEC overlooks other crucial respects in which less restrictive means could be adopted, which include:[186]

164.1. prioritising, as far as possible, intervention programmes which are based within a home school environment rather than at an off-site facility;

164.2. reserving residential facilities for exceptional cases, if at all;

[185] AA para 363, p893.

[186] FA para 170.4, p108; RA para 186, p1795.

164.3. providing adequate and professional psychosocial support to all learners, particularly to those who engage in misconduct;

164.4. ensuring the implementation of intervention programmes at the earliest stage within the school community, for example by promoting learners' health and well-being; and

164.5. adopting a legislative policy of early identification and intervention to promote an inclusive and participatory learning environment for vulnerable learners.

165. The MEC's acknowledgement that less restrictive means exist, and her failure to address the availability of yet further less restrictive means, demonstrates that the establishment of Intervention Facilities under the Act is not a proportionate measure.

Irrationality

166. Legislation will be declared unconstitutional and invalid where, even if it does not unjustifiably limit rights in the Bill of Rights, there is the lack of a rational relationship between the scheme the legislation adopts and the achievement of a legitimate governmental purpose.[187] Rationality is thus '*about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved*'.[188]

167. The provisions establishing Intervention Facilities are irrational in that – even if Intervention Facilities serve a legitimate governmental purpose – there is no rational connection between that purpose and the provisions establishing Intervention Facilities. This is so in two respects.

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[187] New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) para 19.

[188] Democratic Alliance v President of South Africa and Others [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 32; Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC) para 33; Pharmaceutical Manufacturers Association of South Africa & another: In Re Ex Parte President of the Republic of South Africa & others [2000] ZACC 1; 2000 (2) SA 674 (CC)

168. One of the purposes of Intervention Facilities is to provide a curriculum equivalent to public schools, so that learner's education is not interrupted.

169. But that purpose cannot be properly or effectively achieved if Intervention Facilities are not subject to the regulatory scheme applicable to public schools, or indeed to any other regulatory scheme.

170. Intervention Facilities are not subject to the numerous requirements to which all public schools are subject, including school governance or professional management; budgeting requirements; norms and standards in relation to infrastructure and capacity or language policy. As a result, they constitute a regulatory anomaly.

171. There is no rational connection between the purpose to provide a curriculum equivalent to public schools, and the failure to provide any statutory framework for Intervention Facilities to operate as educational institutions.

172. The other purpose of Intervention Facilities is to provide therapeutic programmes to address misconduct and to rehabilitate the learner.

173. The establishment and operation of Intervention Facilities falls under the authority of the Department, without the involvement of any other departments. It does not require, or even permit, the involvement of the Western Cape Department of Social Development or the Western Cape Department of Health in that process, and it does not envisage a multi-sectoral approach.

174. The purpose of providing therapeutic programmes and rehabilitating learners cannot conceivably be achieved when that function is performed by a government department with no expertise or mandate, and when the relevant organ of state, expressly mandated to provide such services, is excluded from the process.

175. The MEC merely says that nothing in the Act '*prohibits*' the involvement of other departments and that Intervention Facilities '*will, where appropriate, work closely with those other departments*'.[189]

176. Again, this misses the point. Nothing in the Act itself ensures that Intervention Facilities will serve their purpose. It is all left to the MEC of the day to decide. That is plainly irrational.

Conflict with SASA

The provisions are in conflict

177. We submit that the provisions of the Act establishing Intervention Facilities give rise to a conflict with SASA and must accordingly be declared inoperative.

178. In short, the conflict is as follows:

179. In terms of section 9 of SASA, which regulates the suspension and expulsion of learners from public schools, a learner found guilty of serious misconduct during disciplinary proceedings may either be suspended for a period not longer than seven days or expelled. If a learner is expelled, the Head of Department must make an alternative arrangement for her placement at another public school. SASA thus limits the period of suspension of a learner to a maximum of 21 days, guarantees placement at another school in the event of expulsion; and does not permit the learner to be removed from the formal education system altogether.

180. The diversion of learners to Intervention Facilities conflicts with this framework. Unlike SASA, the Act in effect creates a period of *de facto* suspension from a public school that can extend to a period of up to 12 months (rather than a mere 7 days),

[189] AA para 368.2, p895.

removes a learner from the formal public school system for a period of up to 12 months, and places her in a facility reserved for children who have committed serious misconduct.

181. These provisions give rise to a direct conflict. They are incapable of an interpretation that would render them congruent or avoid such a conflict.

182. It is no answer for the MEC to rely on the provisions in SASA and the Act allowing her to impose another '*suitable sanction*' if she decides against expulsion.[190] Self-evidently, a '*suitable sanction*' cannot include a suspension of more than seven days. Nor can the *'suitable sanction*' be a sanction more severe than expulsion.

183. Simply put, if it is impermissible under SASA to suspend a learner for more than a cumulative total of 21 days, and if it is impermissible to expel a learner without ensuring her placement in another public school, then it plainly cannot be permissible – as a less invasive alternative – to remove her from the public school system altogether and place her in a residential facility.

184. It is also no answer for the MEC to rely – as she does repeatedly – on her Draft Norms and Standards, and to suggest that learners will not be prohibited from attending their home school (as would be the case with suspension).[191] The Act does *not* say that. On the contrary, it allows for the learner to be removed to a residential facility with no contact with her home school for twelve months.

185. This conflicts directly with SASA. These provisions accordingly give rise to an irresolvable conflict. They are incapable of an interpretation that would render them congruent or would avoid such a conflict. Section 150 of the Constitution does not assist.

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[190] AA paras 374 to 376, pp897-898.

[191] AA para 382, p899.

186. The conflict must therefore be resolved in accordance with section 146 of the Constitution.

SASA must prevail

187. We submit that the conflict between SASA and the Act must be resolved so that SASA prevails. That is because, in the words of section 146(2)(c)(v), national legislation is necessary for '*the promotion of equal opportunity or equal access to government services*' and particularly to ensure that learners across South Africa have equal access to education.[192]

188. The creation of Intervention Facilities strikes at the heart of access to public schools. These provisions allow children to be taken out of public schools and referred, for a period of an entire year, to institutions set up solely for wrongdoers who have committed disciplinary infractions. This interferes with their right of access to education. They are, in short, denied access to the government service which they had previously accessed.

189. By establishing Intervention Facilities *only* in the Western Cape, while learners across the rest of the country are protected by SASA, the Act unfairly denies Western Cape learners access to public schools, while they face prolonged disciplinary interventions.

190. The MEC is mistaken that Intervention Facilities are an '*advantage*' to learners.[193] At a very minimum, in cases of referral to a residential facility, learners are removed from the formal public school education system and placed in an isolated and exclusionary environment, together with other *'deviant learners'*. That cannot seriously be suggested as being an '*advantage*'.

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[192] FA paras 179 to 186, pp115-117.

[193] AA para 388, p900.

191. The only way to guarantee that learners across the country are ensured equal access to educational services and opportunities, even where they commit serious misconduct, is for the national legislation to prevail.

192. We therefore submit that, in the alternative to being declared constitutionally invalid, the Act should be declared inoperative to the extent of this conflict, in terms of section 149 read with 146(2)(c)(v) of the Constitution, for so long as the conflict between it and SASA remains.

CONCLUSION

193. We submit that EE invalidity challenge and conflict challenge should succeed.

194. This being constitutional litigation, we ask that the Province be ordered to pay EE's costs including costs of three counsel.

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13 July 2022