FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5714/2010

In the matter between:

WELKOM HIGH SCHOOL 1st Applicant
THE GOVERNING BODY OF WELKOM HIGH SCHOOL 2nd Applicant

and

THE HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION: FREE STATE PROVINCE 1st Respondent
MOHANUOA LIKOMANG GRACE DLUTU IN HER CAPACITY AS NATURAL GUARDIAN OF NCEDISA MICHELLE DLUTU 2nd Respondent

AND

Case No.: 5715/2010

In the matter between:

HARMONY HIGH SCHOOL 1st Applicant
THE GOVERNING BODY OF HARMONY HIGH SCHOOL 2nd Applicant

and

THE HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION: FREE STATE PROVINCE 1st Respondent
MALEHLOHONOLO MAGGIE MOKOENA IN HER CAPACITY AS NATURAL GUARDIAN OF KATLEHO MOKOENA 2nd Respondent

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JUDGEMENT: RAMPAI J

HEARD ON: 24 MARCH 2011

DELIVERED ON: 12 MAY 2011

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[1] These are motion proceedings. The applicants in both of these matters seek certain declaratory orders concerning pregnant learners. It is their case that the first respondent does not have the authority to instruct or to compel a public school principal, as he did, to act in a manner contrary to a policy of a school governing body of a public school.

[2] The subsidiary relief they seek is to have their respective decisions taken in pursuance of such school policies confirmed, to have the respondents interdicted and restrained from taking any actions calculated to subvert or frustrate decisions taken by the applicants in accordance with the learner pregnancy policies to exclude the affected school girls.

[3] The two applications are opposed by the first respondent, the head of the department: department of education, Free State Province. The second respondent, in the Welkom High School matter, Ms M L G Dlutu and the second respondent in the Harmony High School matter, Ms M N Mokoena have filed no answering affidavit. The former was cited herein in her representative capacity as the

mother and natural guardian of her minor daughter and learner, Ncedisa Michelle Dlutu and the latter as the mother and natural guardian of her minor daughter and learner, Katleho Mokoena.

[4] The first learner in these consolidated proceedings is Ncedisa Michelle Dlutu, a teenage girl born on 14 November 1994. She was a learner at Welkom High School at all times material to these proceedings. It would appear that the learner was deflowered during or about the 21 January 2010. She was in grade 9 at the time. Seemingly she regularly attended classes for the whole of the first half of the year and the greater part of the third school term. On 16 September 2010 the principal instructed her to stay away from school and to remain at home until the end of the first term in 2011. Thereafter she was given the option to return on the first day of the second term.

[5] The leaner, then 16 years of age was effectively barred for six months from further attending school for the entire fourth term 2010 and the entire first term 2011. The

underlying reason for her send-off was her pregnancy. A condition unwelcome or unwanted by schools and its school governing body. The practical effect of that decision was only to deny her the opportunity to learn for two consecutive terms but also to deprive her of the opportunity of writing the 2010 grade 9 year-end examinations. In addition to such a setback and as if that hardship was not severe enough to make her repeat that same grade in 2011.

[6] Ncedisa and her parents were aggrieved by the decision. Her aggrieved parents complained to the education officials at a district level. The first respondent intervened on behalf of the learner on 7 October 2010. He intervened by way of a written directive (annexure WL10). He called upon the principal of the school, Mr P P Sauer, to rescind his decision (which was informed by the learner pregnancy policy of the school as adopted by the school governing body) and to allow the learner back to school. Meanwhile Ncedisa gave birth on 27 October 2010 the personal particulars of her baby do not appear on the record. On 1st November 2010, a week after she become a mother,

Ncedisa went back to school, wrote examinations and passed grade 9. Currently she is a grade 10 learner at the same school. All this was made possible by the first respondent's intervention.

[7] Katleho Mokoena is a teenage girl born on 21 January 1983. She was admitted to Harmony High School to do her secondary level of formal learning. She apparently became pregnant during or about 12 October 2009. She was in grade 10 at the time. Seemingly she regularly attended classes, sat for summer examinations and successfully passed grade 10 examinations.

[8] At the beginning of the year 2010, Katleho returned to school. She resumed her learning as a grade 11 learner. She apparently attended classes for the whole of the first and second school terms. On 12 July 2010, apparently during the winter school holidays, she gave birth. No personal particulars of her baby were divulged in the court papers.

[9] When the school reopened in July 2010 for the third term Katleho left her newly born baby home, went back to school and continued to learn. She attended classes for the entire third term and a greater part of the fourth term. It was not until or about 16 October 2010 that her steadfast school attendance was brought to a sudden standstill. The learner, then 17 years of age, was prevented from further attending school for the remainder of the year and was informed to come back in January 2011 when the schools reopened for the new year of learning.

[10] The underlying reason for her sending-off was her pregnancy. The practical effect of that decision by the applicants was that the learner was barred not only from attending school to be formally taught and to formally learn but also from writing the year-end examinations. Moreover, she would only be readmitted to school in 2011 and then obliged to repeat grade 11 for one more year.

[11] The plight of Katleho was brought to the attention of Mr R S Malope, the head of the department, by the second respondent, the learner's parent. The first respondent

intervened on the 20th October 2010 by directing the school principal , Mr M A Monnane to rescind his decision which was based on the learner pregnancy policy of the school and to allow the learner back to school (annexure R6). As a result of the first respondent's intervention the learner went back to school, sat for the grade 11 examinations and passed the grade. Currently she is a grade 12 learner at the same school.

[12] On 16th November 2010 the two schools and their school governing bodies separately launched two urgent applications which were issued under case number 5714 (2010) in case 5715 (2010) for Welkom High School and Harmony High School respectively. The whole purpose of the urgent application was to have the aforesaid school learners barred from the returning to the applicant schools thereby denying them the opportunity of taking the year-end examinations. However, no interim relief, as was originally sought by the applicants, was granted in respect of any of the two applications. Instead, a *rule nisi* returnable on 17 February 2011 was issued by agreement between the parties. Mocumie J further gave directions

pertaining to the deadlines for the delivery of the answering affidavit and replying affidavit. Those were filed in due course.

[13] Subsequently the South African's Human Rights Commission (the HRC) applied for leave to intervene in the proceedings as an *amicus curiae* for the belated filing of such an application to be condoned. The Centre for Child Law (the CCL) also brought an application for similar relief. None of the two applications was opposed by any of the parties in the main matters. Accordingly, leave was granted to the HRC and to the CCL to intervene as *amici curiae*. The former was then cited as the first *amicus curiae* and the latter as the second *amicus curiae*.

[14] On the return date the applications were postponed to the 24 March 2011. The rule *nisi* in each matter was accordingly extended. The two matters were subsequently allocated to me. On the extended return day all the applicants, the respondents and the *amici curiae* unanimously requested that the two applications be consolidated. I acceded to their request. The matters were

then argued before me. Having heard the argument I reserved judgment, postponed the application(s) to 5th May 2011 and accordingly extended respective the rule *nisi*.

[15] As regards the Harmony-case, the second applicant adopted a policy on pregnant school girls in 2008. The relevant parts of clauses of the policy were formulated as follows:

> "4.4 Taking the above into consideration the pregnant girl will be required to take a leave of absence from school from the beginning of the eight month of pregnancy.
>
> 4.5 No learner should be readmitted in the same year that they left school due to a pregnancy."

The policy was adopted by the school governing body on 27 January 2009 and apparently became immediately operative.

[16] It was the responsibility of the principal of the applicant's school to implement and enforce the policy. The policy was never forwarded to the first respondent for the information of the department or its comments or

endorsement. On the strength of the policy, the school principal decided that the learner be excluded from further attending classes for the remainder of the year 2010. The school governing body used a document released by the national department in 2007 to formulate its policy (vide annexure HAR5).

[17] The aforesaid departmental guidelines were embodied in a document entitled: "Measures for the prevention and management of learner pregnancies."

The relevant portion of the document on which the school governing body heavily relied is measure 22 which reads:

> "22. ... However it is the view of the department of Education that learners as parents should exercise full responsibility for parenting, and that a period of absence of up to two years may be necessary for this purpose. No learner should be re-admitted in the same year that they left school due to a (sic) pregnancy."

[18] The refusal of the school governing body to review Katleho's case prompted the first respondent to write as follows on the 20 October 2010:

> "If the decision to let the learner stay at home was based on the Measures for Prevention and Management of learner pregnancy, I wish to advise you to rescind it and inform the learner to return to school within 5 days of receiving this letter. My decision is informed by the following:
>
> - MG Circular N° 18 of 2010 which clearly stipulates for the learner to return to school as soon as possible.
> - Chapter 2 of the Constitution, Section 9(3) which states clearly that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language or birth. The school being an organ of the State can

therefore not discriminate against any pregnant learner.

- In terms of Chapter 2 of the South African Schools Act, Section 9(1) there are only two ways in which a learner can be involuntary excluded from attending classes, namely: suspension and expulsion after finding the learner guilty of misconduct as stipulated in the Code of Conduct.

In view of the above it is, clear that no learner should be kept from school de to pregnancy. You are therefore instructed to allow the learner back at school with immediate effect and to put in place measures to help the learner catch up with any work she might have missed whilst still at home."

[19] It was the aforegoing decision which precipitated these proceedings. Approximately a year earlier the department itself became concerned about the punitive manner in which the 2007 guidelines or measures were used by certain schools against pregnant school girls.

[20] On 23 November 2009 the acting director general in the national department of basic education addressed a letter to the first respondent in which he reiterated the policy of the national department that learners may not be expelled from schools on account of pregnancy and that such learners should be allowed to return to school as soon as they were able to do so. He lamented the significant confusion caused by the preventative measures that were released by the national department in 2007 which were intended to assist school in their effort to prevent learner pregnancy and to manage pregnancy as and when it occurs (annexure M3). The essence of the measures or guidelines was to ensure that female learners were not unfairly discriminated against on the grounds of pregnancy.

[21] The pregnancy policy document of Welkom High School was very eligible. Although I made a special request to be furnished with a legible copy, my request fell on deaf ears. Therefor I could make no specific reference to its relevant clause. However, I was given to understand that the pregnancy policies of the two schools were materially similar.

[22] This case is not, as at first blush appears, about the substance of the pregnancy policy at schools, a highly moral, emotive and prevalent phenomena at schools nowadays. The case is rather about the proper exercise of administrative power by a public functionary. The issue in the case revolves around the principle of legality.

[23] Mr Snellenburg, counsel for the applicant, submitted that no such public power(s) was conferred upon the head of the department by law. The principle of legality constrained the head of the department from exercising any public power beyond that conferred upon him or from performing any function beyond that assigned to him.

[24] The contention of the head of the department was that he was fully within his rights and authorised by law to give the instructions as he did. He added that had he folded his arms, sat back and relaxed – he would have passively sided with the governing bodies and their school and encouraged them to adhere to such a policy. He contended further that his instructions to the school principals concerned were informed by the provincial

management and governance circular 19 (2010), section 9 of the South Africans Schools Act, no 84 of 1996 and section 9 of the RSA Constitution.

[25] The pregnancy policy was in direct conflict not only with this domestic body of laws including the Children's Act, no 38 of 2005 but also with international instruments such as the Conventions on the Right of Children. The pregnancy policy was therefore not legally enforceable. So contended the first respondent:

> "2.18 Circular 18 of 2010 was to the best of my knowledge distributed to all schools and School Governing Bodies throughout the Free State Province. Copies of the circular, as is the case with all other circulars, were sent to the various districts and in particular to the district of Lejweleputswa. Each district must reproduce circulars and distribute same to the schools within its district. I do not have proof that the circular was received by applicants, but have reason to believe that it was indeed distributed in the same matter as all other circulars."

[26] The school governing bodies composed of parents of learners at the school; learners at the school who are at

least in grade eight; educators at the school; staff members other than educators at the school; co-opted member and the principal. Besides the co-opted members and the principal the rest have to be elected members. A school governing body is a democratically structured organ and designed to function in a democratic manner. Its primary function is to advance the general interest of the school it governs as well as those of its learners. In this sense, it is supposed to be a beacon of grassroots democracy in the local affairs of the school. (**HEAD OF DEPARTMENT: MPHUMALANGA DEPARTMENT OF EDUCATION AND ANOTHER v HOëRSKOOL ERMELO & ANOTHER** 2010 (2) 415 (CC) at 436 para [56 – 59]).

[27] A school governing body exercises defined autonomy over some particular domestic affairs of a school such as the admission policy and language policy of the school. The functional autonomy of a school governing body encompasses the drawing up of a code of conduct for the school. The responsibility to adopt a code of conduct for learners at the school and to discharge all other functions specifically assigned to a school governing body by the

school legislation was confirmed in **MINISTER OF EDUCATION WESTERN CAPE & OTHERS v GOVERNING BODY MIKRO & ANOTHER** 2006 (1) SA 1 (SCA) at 10, para [6] and [7].

[28] The code of conduct adopted by a school governing body for a public school embraces a great variety of policies. A school governing body cannot perform its functions to govern a school unless it adopts a variety of appropriate policies. This much, if not common cause, is certainly not open for debate. It is inconceivable that a school can be properly governed without any policies. Given the deeply divisive policies of our recent past especially those relative to education or school(s) – it must be readily appreciated that the business of formulating school policy which affects different learners differently on account of sex, race, language or culture is a very delicate matter. The adoption of appropriate school policies on pregnant female learners is a huge task which should be performed with a great deal of sensitivity, responsibility, transparency and accountability. It is particularly so since human rights are

obviously at stake whenever decisions based on such a sexist policy have to be taken and implemented.

[29] A public school together with its governing body constitute a single entity which performs a public function in terms of the applicable legislation. Therefore, they collectively is constitute an organ of state as contemplated in the national is constitution of this country. However, neither of them considered to form part of any of the three spheres of government. See **MINISTER OF EDUCATION WESTERN CAPE & OTHERS v GOVERNING BODY MIKRO & ANOTHER** *supra* 16 par [20] – [22].

[30] What emerges from the various decisions of our courts is that while the adoption of a policy guidelines is both lawful and sensible, particularly in the governing of schools, it is subject to constraints. A sound policy contains some flexible safeguards. Both the adoption and the implementation of a policy should be sufficiently flexible. This has to be so because the adverse impact of teenage pregnancy differs from one pregnant girl to the next. However, compatible a policy may be with the enabling

legislation (national measures) it is likely to be found wanting if it is rigidly applied in practice. The law requires an official (such as a principal) exercising a discretion in accordance with an existing policy to be independently satisfied that the policy is appropriate in the peculiar circumstances of the particular case. A official who elevates policy guidelines into hard and fast rules and rigidly implements such policy guidelines as absolutely binding legal rules declines to exercise a discretion entrusted to him or her.

[31] The pregnancy policy at the school was drafted on the strength of the national policy released by the National Department of Education. The measures for prevention and management of learner pregnancy were published in 2007. They were intended to achieve the following broad aims, among others:

- to clarify the position regarding learner pregnancies;
- to inform the affected learners about their rights to continued access to education;
- to support teachers in managing effects of learner pregnancies;

- to create procedures and to provide guidelines to be followed in cases where prevention has failed and pregnancy has occurred.

[32] Shortly after its inception, the policy was adopted and implemented by the school. Then the learner became pregnant. The school sent her away, the second respondent, the natural guardian and parent complained to the district office of education, the district office relayed the second respondent's complaint to the first respondent. There were attempts made on behalf of the first respondent to have the learner recalled. The school declined. The refusal by the school prompted the first respondent to instruct the principal to rescind the decision and to let the learner immediately return to school. The effect of the instructions was that the head of the department ordered the principal to disregard the policy adopted by the school governing body. The order placed the principal in an invidious position in that it required him to act in a manner which was contrary to the policy of the school governing body.

[33] I am persuaded that the action taken by the first respondent was not sanctioned by the applicable legislation. The instruction given to the principal did not, in my view, constitute proper exercise or performance of any appropriate function in terms of the school's legislation. The first respondent derives his public powers to act from the South African School's Act. The first respondent was not authorised or empowered by legislation to merely direct the principal to ignore the policy adopted by the school governing body and to act contrary to such a policy on the grounds that in more ways than one, the pregnant policy was not in harmony with the law.

[34] The conduct complained of was that the first respondent purportedly exercised a power, which he did not have in law. When a public official takes a corrective action against a school and its school governing body with the good intention of protecting a learner from the punitive impact of a school policy perceived to be unlawful, the public action itself has to be lawful. As the saying goes two wrongs, do not make a right. The maximum that the ends justify the means does not apply. Unlawfulness cannot bring about

lawful outcomes. The school governing body which drafted and adopted the pregnancy policy is an autonomous organ of state. It is an independent policy maker. The conduct of the first respondent undermines the functional autonomy of the school governing body. The first respondent's conduct, if sanctioned by a court will create uncertainty in the sphere of school governance.

[35] It was contended by the schools that the first respondent failed to adhere to the principle of legality. Moreover, undermining the autonomy of the governing body not only infringed the principle of legality but also rendered superfluous the delegation of certain functions to school governing bodies (vide section 22, South African School's Act). Indeed the first respondent was constrained by the principle of legality that, as a public functionary, he could exercise no power and perform no function other than that which the law allowed him to exercise or assigned to him to perform. In **FEDSURE LIFE ASSURANCE LTD AND OTHERS v GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL AND OTHERS** 1999 (1) SA 374 (CC) at par 56 where the court

held that it was a widely recognised fundamental principle of the rule of law that the exercise of a public power was only legitimate if it was lawfully authorised. See also **MAJAKE v COMMISSION FOR GENDER EQUALITY AND OTHERS** 2010 (1) SA 87 (GSJ) at 98, par [57] per Mokgoatleng J.

[36] The common issue before me in these two applications was really not the unlawfulness of the pregnancy policies adopted and implemented but rather the lawfulness of the instruction given. Therefore, I was not called upon to consider the substantive dimension (merits or demerits) of the pregnancy policy. Yet, that was precisely what the respondents and the *amici* wanted me to do. But there was no avenue open to me to get there. None of the respondents had filed any counter application to challenge the pregnancy policies adopted by the schools. The critical issue before me was concerned with the procedural dimension of the first respondent's action(s) – call it the legality thereof if you will. I have no doubt that in issuing the directive the first respondent was prompted by a burning desire and noble intent to ensure that invalidity and

injustice did not prevail. Mr Daffue, counsel for the respondent, asked me to take a strong viewpoint. By that I understood his argument to mean that I should adopt a robust approach, by going beyond the issue of legality, venturing into the substance and finding that the first respondent was entitled to disregard the alleged constitutionally invalid and unenforceable pregnancy policy.

[37] In the case of **MINISTER OF EDUCATION, WESTERN CAPE, AND OTHERS v GOVERNING BODY, MIKRO PRIMARY SCHOOL, AND ANOTHER** 2006 (1) SA 1 (SCA) at 10, para [6] – [7] the provincial government was concerned about the language policy of the school. The Afrikaans language was used as the only medium of teaching. The policy adversely affected the admission of children who were not Afrikaans speaking. The school would not change its language policy by converting itself from a single medium school to a parallel medium school notwithstanding a request by the department. The refusal prompted the provincial head of the department to issue a directive to the principal to admit the learners concerned and to have them taught in English.

[38] The substantial stance of the provincial government was that the language policy of the school infringed the fundamental rights of the children or learners concerned to basic education. The court found that, except in the case of a new school, the governance of the school, its admission and language policies were supposed to be determined by the school governing body subject only to the applicable national legislation and provincial law. It found that no such powers were conferred on the responsible member of the executive council (MEC) or the head of the department (HOD) by legislation save in the case of a new public school.

[39] The finding that the education officials of a provincial government were not empowered to determine the language or admission policy of a school did not mean that education officials were absolutely remediless. The refusal by the school governing body to alter the language policy of a school constituted an administrative action, which the education officials could have taken on review by a court. Should the court find a decision to have been so

unreasonable in the sense that no reasonable school governing body would, in the circumstances, have refused to change the policy, it might be reviewed and set aside by the court in terms of section 6(2)(h) of the Promotion of Administrative Justice Act, 3 of 2000. That was one of the remedies available to the respondent in this case (**MINISTER OF EDUCATION, WESTERN CAPE, AND OTHERS v GOVERNING BODY, MIKRO PRIMARY SCHOOL, AND ANOTHER** *supra* at 19, par [32] and 20, para [35] and [36]).

[40] The education officials have the power to withdraw any function of a school governing body in terms of section 22 of the South African School's Act, 84 of 1996 if and only if the governing body had ceased to perform its functions (vide sec 25). Therefore, the function of the school governing body to determine a pregnancy policy for the school may be withdrawn where a school governing has practically abdicated its responsibility to meaningfully govern the school. This extra-ordinary remedy was not available to the first respondent in any of these two matters.

[41] The facts in these two matters are strikingly similar with those in the **MINISTER OF EDUCATION, WESTERN CAPE, AND OTHERS v GOVERNING BODY, MIKRO PRIMARY SCHOOL, AND ANOTHER** *supra* case, here as there the head of the department simply issued a directive whereby the principal was instructed to see to it that the learner returned to the school and that the decision to send her away from school in accordance with the policy of the school governing body was rescinded. Bearing in mind that the principal of the school was the person in charged with the responsibility to manage the daily affairs of the school, the SCA found in the **MINISTER OF EDUCATION, WESTERN CAPE, AND OTHERS v GOVERNING BODY, MIKRO PRIMARY SCHOOL, AND ANOTHER** *supra* case that since the HOD was not a professional manager of the school, he could not manage its affairs as if he were its principal.

[42] From the aforegoing supreme appeal, it can be discerned that by acting contrary to the learner pregnancy policy of the school, the HOD effectively substituted or at least

purported to substitute his own personal views for those of the school governors. He reckoned that the core of the school policy was fundamentally punitive, discriminatory and unenforceable. He certainly contended, primarily for those reasons and perhaps more, that such a policy was inappropriate for the school. It did not all accord with the learner pregnancy policy envisaged in the provincial circular recently issued by the department of education. Perhaps the view of the HOD may prevail one day. The alleged substantive demerits of the learners pregnancy policy adopted by the school governing body and implemented by the school principal may, perhaps bring about its nullification or modification one day.

[43] As I already found, this case was not about the substantive demerits of the learner pregnancy policy of the school but rather the procedural defects of the public functionary responsible for the schools in the province. The direct order by the senior functionary to reverse, as he did, the decision of the school principal whose sole responsibility it was to professionally manage the school was procedurally flawed. The indirect order by the senior functionary to

cause the resolution of the school governors whose exclusive discretion it was to govern the school as they see fit was also procedurally flawed.

[44] The business of governing a school entailed the adoption of a code of conduct for learners at the school. The national legislation for learners concerning education imposes upon the school governing body an assortment of functions to be discharged in order to attain the basic objectives of teaching and learning **MINISTER OF EDUCATION, WESTERN CAPE, AND OTHERS v GOVERNING BODY, MIKRO PRIMARY SCHOOL, AND ANOTHER** *supra.*

[45] The HOD had no outright legislative power to determine or to abolish the learner pregnancy policy for the school all on his own against the popular and democratic will or resolution of the school governors. This was the effect of his indirect order. Similarly he had no outright legislative authority to veto the principal's decision to implement the learner pregnancy policy of the school. This was the effect of his direct order. However, misguided or invalid the

learner pregnancy policy was the department or its functionary had no unimpeded comprehensive power to override the school governors and the school managers.

[46] The mere fact that the school was a public institution, owned and funded by the state, per se did not legitimise the unprocedural state interference with the governing and managing of the domestic affairs of the school. To allow the orders to stand would have far-reaching and unforeseen repercussions on the democratic process at schools, the very kinder gardens of democracy. At schools, our society strives to plant the seeds of democracy which is why there have to be elected learners in the governing body.

[47] But we have to be realistic about it. The school governors or school managers or both may, from time to time, go astray from the path of virtue. The governors and the principals of the school have no absolutely limitless discretionary powers to run (govern and manage) the schools as they please. The policies they take are subject to the constitution, legislation, ordinances and departmental

policies (national or provincial). Where they deliberately or inadvertently act contrary to these legal precepts and in doing so violate fundamental rights of some learners but refuse to reconsider their offensive decisions or resolutions – the education officials as representatives of the state are not virtually powerless.

[48] I have earlier alluded to the remedies which were available to the respondents. Although the review remedy did not offer speedy relief regard been had to the urgent nature of these matters, the officials and the affected learners could also have approached the court as a matter of extreme urgency for an interim relief. The court as an upper guardian of children would probably have granted an appropriate interim order to enable the learners to immediately return to their respective schools, to peacefully take their important year-end examinations and to attend classes pending the final outcome of whatever line of action that could have been taken against the schools to have their allegedly offensive policies modified or nullified.

[49] The legal position was elegantly articulated in **MIKRO'S**-case, paragraph [23] per Streicher JA. I deemed it necessary to paraphrase his words in order to bring the rationale of the matter nearer home. The first respondent and the parents concerned did not avail themselves of any of these lawful remedies. Instead, the first respondent simply directed the school principal to let the learners return to their schools. The first respondent was not entitled to compel the principals to do so. Although the department endorses public school policies, the drafting and adoption of the learner pregnancy policies of the school were matters that have to be determined by the representative bodies that governed the school in question. It was their exclusive prerogative to do so.

[50] By instructing the principals to take the girls back contrary to the learner pregnancy policies of the schools, the department was substituting its preferred learner pregnancy policy for that of the school governing bodies. Since the department did not have the power to unilateratelly supplant the learner pregnancy policies

adopted by the democratic governing structures of the schools, it acted unlawfully in doing so.

[51] Even if the learner pregnancy policies were substantively unfair, flawed and plagued by countless features of invalidity, the department had no administrative power to determine amend, suspend or abolish (or to give instructions designed to attain any of these) the learner pregnancy policies for the schools. It follows from this reasoning that the directives issued by the first respondent late last year were unlawful. I am therefore inclined to declare them to be of no binding force and effect in law. To find otherwise would render the functioning of the school governing body ineffective and superfluous. The governance of the schools can fall into disarray.

[52] When the institutional autonomy of a school governing body is compromised by instructive official interventions the elementary norm and standards of teaching and learning might be seriously eroded. Similarly, many young dreams can be irreversibly shattered by the adoption of leaner pregnancy policies blindly formulated on the strength of

some selective punitive segments of the national policy guidelines which the national department itself now laments issuing. Instead of amending the 2007 national measures for prevention and management of learner pregnancies in order to eradicate its punitive features, the national department merely authorised the provincial department to issue a provincial circular to guide the schools.

[53] Given the provincial department the mandate to prepare its own homebrew of learner pregnancy policy without first amending the enabling national policy on the topic was disturbingly short-sighted. It merely compounded the problem instead of solving it. The schools ignored the provincial pregnancy policy guidelines and modelled their school policies in accordance with the national policy guidelines or measures. They selectively incorporated into their school policies segments which the provincial department, concerned parents and their affected daughters consider substantially and unfairly discriminatory, punitively and rigidly applied with total disregard of the affected learners peculiar circumstances. Obviously, I have to refrain from prematurely expressing

views on the substantive merits or demerits of the learner pregnancy policies as adopted by the schools. Suffice to say some critiques levelled against them by the respondents and *amici, prima facie* sounded as if they were not only fair but that they could probably and arguably become forceful and turnable contentions when the substance of the policies is properly before the court, if it ever comes.

[54] In the **HOëRSKOOL ERMELO & ANOTHER v HEAD OF DEPARTMENT: MPHUMALANGA DEPARTMENT OF EDUCATION AND ANOTHER** 2009 (3) SA 422 (SCA) the court confirmed its earlier *ratio decedendi* in the Mikro Primary School. I distilled the *crux* of the *ratio* to mean that the substantive virtues of the actions taken by the head of the department should not be allowed to prevail over the procedural defects. Justice is an elastic concept with two important dimensions. The one dimension thereof is procedural fairness, and the other substantive fairness. That distinction was crucial in these current matters. The battle had to be fought on the procedural front only. On

that front, the respondents lost the battle but perhaps not the real war on the substantive front.

[55] On a constitutional appeal in the case of **HEAD OF DEPARTMENT: MPHUMALANGA DEPARTMENT OF EDUCATION AND ANOTHER v HOëRSKOOL ERMELO AND ANOTHER** 2010 (2) SA 415 (CC) the court upheld the SCA decision to effect that the appellants had no legislation power to unilaterally intervene in matters pertaining to the business of governing a school. All the same the legislative power of the head of the department withdraw in terms of section 22, South African School's Act a specific function from the school governing body was endorsed on condition that reasonable grounds are shown to exist to justify such an administrative action and the correct procedure is shown to have been followed.

[56] The *amici curiae* argued that the underlying facts, namely the exclusion of pregnant girls from their schools adversely affected a whole range of fundamental rights, for instance:

- section 9 – which concerns equality before the law;
- equal enjoyment of rights and freedoms;

- prohibition of unfair discrimination on the ground of *inter alia*, pregnancy, age and birth;
- section 10 – which concerned respect for everyone's inherent human dignity;
- section 11 – which concerns everyone's reproductive rights;
- section 28 – which concerns the paramount importance of the interests of a child; and
- section 29 – which recognises everyone's sight to basic education.

[57] Closely allied to the right to education was the obligation placed on every parent to ensure that a child for whom (s)he is responsible regularly attends school from the age of 7 years until such child reaches the age of 15 years or grade 9 whichever event occurs first (section 3, School's Act, 84 of 1996).

[58] The main contention of the first *amici curiae* (HRC) was that the first respondent (HOD) in each matter before me was not only entitled but indeed obliged to instruct the school principals to act in a different manner contrary to

any policy adopted by the school governing body where such school policy was unconstitutional. The first *amici curiae* argued that its submission derived its force from firstly section 72 of the constitution which requires the state to respect, promote and fulfil the rights in the bill of rights and secondly section 41(1)(d) which requires all organs of state to be loyal to the constitution.

[59] The decision taken by the applicant, the governing body and the schools, to exclude the learners from the schools arose from the fact that the learner in each case became pregnant. Firstly, each girl was excluded from school because she was pregnant. Secondly, after she had given birth, each girl was again excluded, at least for a period, because she had been pregnant. If the learner pregnancy policies were inflexibly applied or implemented without the gathering of relevant information about: the affected girl's medical condition; her family support system; her personal scholastic capabilities; her determination to keep on attending school (without endangering her life, that of her unborn child or anyone else in her school and community)

then there is much to be said for the arguments advanced by the *amici.*

[60] In developing its arguments the first *amici curiae* contended that the approach or stance of the schools and their governing bodies was implicitly marked by an underlying negative moral judgment. The policy of exclusion in these matters was seen and labelled as a form of astracisation of the girl children in that she was, against her will and without any meaningful participation in the process, removed from the school community in a compulsory manner. It was further argued that the attempts of the school and the governing bodies to partially seek justification for the learner pregnancy policy in each of these matters on the basis of discipline suggested that by becoming pregnant a teenage girl was guilty of a misconduct which required her to be punished. The wording of the school legislation in this regard is regrettable (sec 8).

[61] The argument raised by both the *amici curiae* did not justify the conduct of the first respondent. It is indeed a constitutional imperative that all organs of state and public

schools and their governing bodies are not only required to be loyal to the constitution but also to practically respect, promote and fulfil the fundamental rights embodied in its bill of rights. These imperatives, however, do not give carte blanche powers to the state or anyone acting in the name of the state to cut corners and override rules of procedure on the grounds that (s)he has good intentions for doing so. That the first respondent acted as he did in good faith cannot be questioned. He endeavoured to prevent what he considered to be an impingement of fundamental rights.

[62] It has to be borne in mind that before the pregnant school girls were excluded, the first respondent was unaware of the existence of such policies. It is common cause that the principals did not send such adopted policies to him to be officially endorsed by his department. However, the procedure he followed was wrong. I agree that the current proceedings are not conducive for consideration of the submissions made by the *amici.* Such admissions may well be relevant should the respondents (especially the first respondent) decide to exercise the remedies still available to him and his department. No counter application pends

to justify consideration of the said submissions. The current proceedings do not turn around the constitutionality of the policy. Very strenuous efforts were made by the *amici* and the first respondent to make it an issue. But, it was not an issue.

[63] At the heart of the matter was the legality of the instructions given. Accordingly, I am of the firm view that in these proceedings the school and the governing bodies did not have the burden of justifying the substance of their policies concerning the exclusion of the pregnant school girls.

[64] The conclusion that the instructions given by the head of the department to the school principals were unlawful logically implies that everything subsequently done in compliance with such instructions falls to be undone. The word everything in this context encompasses all the actions taken by the governing bodies, the school principals and the learners as well. The practical effect of adopting such a sterile, though perfectly logical, legalistic stance would entail not only having the two girls once again painfully

removed from the two schools but also having their grade 9 and grade 11 examination results declared invalid.

[65] That their forced return, their forced exams and their forced continued learning were tainted by acts of illegality can no longer be questioned. But to reverse every tainted act now, on account of such illegal blemishes would undoubtedly hurt the minor children. The emotional hurt may be so deep and the adverse impact so severe that they drop out for good. It seems to me obvious that the strife between the head of the department and the department on the one hand and the school governors and school managers on the other hand was exacerbated by the shortcomings and inconsistencies in the national policies on the learner pregnancy policies. The girls, the casualties of the conflict, should not be made to pay a greater penalty than they already have.

[66] In the **MIKRO**-case *supra* the Afrikaans medium school did not want to change its language policy to accommodate forty minor children who were first timers in a school environment, and to give them tuition in English. The court

declared the unilateral imposition of such children (as learners) on the school unlawful. However, the Western Cape Court ordered that the learners might continue to attend the respondent school until another suitable school for their permanent accommodation was found. The provincial department was ordered to find such an alternative school and to place the young learners there before the end of that particular academic year.

[67] In the **ERMELO**-case *supra* the Afrikaans medium school did not want to amend its language policy in order to accommodate 113 learners and to give them tuition in English. The education head placed the learners at the appellant school, appointed an interim committee, instructed its members to determine (revise) the language policy of the school to enable the learners to be admitted to the school. The strife between the provincial department of education and the school about the language policy culminated in the suspension of the school principal; the disbanding of the school governing body and the appointment of an acting principal – all actions done by the head of the department. By virtue of the language policy

as amended by the interim committee, 20 learners were subsequently admitted and taught in English at the school.

[68] Those learners were still at the same school on March 12, 2009 when the supreme appeal was heard. Snyders JA in **HOëRSKOOL ERMELO** – *supra* on 426, par [13] remarked about the stance of the school:

> "[13] The appellants rushed to court to obtain interim relief pending a review of the respondents' decisions and actions, but were ultimately unsuccessful in all applications. In the result the language policy of the school has remained as amended by the interim committee. Twenty learners were admitted in 2007 in terms of the amended language policy and are being taught in English. **The appellant has undertaken that regardless of the outcome of this appeal, all learners admitted in terms of the amended language policy will receive tuition in English until the end of their school careers.**"

[69] The undertaking by the school resonated in the appeal order. The relevant part reads:

"2 (d) Learners that have enrolled at Hoërskool Ermelo since 5 January 2007 in terms of a parallel medium language policy shall be entitled to continue to be taught and write examinations in English until the completion of their school careers."

(Vide par [34]: 2(d), p 433E.)

[70] In the **MIKRO**-case *supra* a temporary relief was granted for the exclusive benefit of the affected minor learners. In the **ERMELO**-case the final relief was granted for precisely the same purpose. These orders, especially the Ermelo's, were underpinned by the admirable appreciation by the schools fortified by the vigilant determination of the judges to see to it that the adjudicated resolution of disputes did not disrupt or drastically disrupt the learners concerned. Doing so is in keeping with the constitutional command that the best interests of a child are of paramount importance in every matter concerning that particulars child (section 28(2)).

[71] That is the route I am inclined to follow in the instant matters. It is the least disruptive avenue. The learners in the **MIKRO**-case *supra* were outsiders imposed on the

school. So were the learners in the **ERMELO**-case *supra.* That of cause is not the case in the instant matters. The first learner, Ncedisa, is not an outsider. She is a learner of Welkom High School. She belongs. The second learner, Katleho, is not an outsider. She is a learner of Harmony High School. She belongs. This is an important distinguishing feature.

[72] Besides the language policies of the Mikro Primary and Hoërskool Ermelo, there was an added problem similar to both of those schools. There were concerns that the admission of the proposed number of learners from outside would blow up way out of proportion the ratio of learner per class. In these two high school matters, before me, there is virtually no class accommodation crisis. This is another important feature which distinguishes the situation here from there. The nullifying of the actions complained of will not entail the reversing of everything.

[73] In the Welkom matter, the learner was excluded from school because she was pregnant. She was sent off before she gave birth. She was ordered to stay away from

school for six calendar months, the equivalent of two academic terms. It was not averred or even suggested that there were any prenatal medical complications which informed the principal's decision. She was, therefore, sent away merely because of her pregnancy. When the founding affidavit was signed on 12 November 2010, the school was unaware that she had already given birth. The impression created by this was that the school showed no further interest in the learner after sending her away.

[74] In the **HARMONY**-case *supra* the learner was not excluded from school while she was still pregnant. Instead she was sent off after she had already given birth. She was ordered to stay away from school for about three calendar months, the equivalent of one academic term. It was not averred or even suggested that there were any post-natal medical complications on the strength of which the principal's decision was taken. She was, therefore, sent away mere because she was once pregnant. Her condition had ceased some 14 weeks or so before she was sent away.

[75] Perhaps the sending-off in the Welkom matter is somewhat understandable, I have great difficulty with the sending-off in the Harmony matter. It is obvious to me that in both of these matter the decisions of the principals were taken without meaningful consultations with the learners and their parents. Moreover, it seemed to me that those decisions were taken without the proper gathering of material information about the girls other than that they were pregnant, that they had to be sent away, that they had to miss the grade exams and that they had to repeat the grades. No plans were worked out to mitigate adverse impact of such decisions.

[76] Similarly the pregnancy policies were mechanically implemented, the exclusions period arbitrarily determined, the learners abandoned and forsaken. In response to the complaint the schools received, following the exclusions of the learners, the principals stated that the learners were treated in the same manner as other learners who found themselves in similar situations on previous occasions since the inception of the pregnancy policies. While that sort of an explanation may have sounded as an equitable

and attractive excuse for the schools, they had to remind themselves, before the send-off decisions were taken, that no two individuals are the same, that no two pregnant girls are alike and that pregnancy alone does not justify treating all such girls alike.

[77] The principle of consistency applies where two cases are materially or substantially similar. It is not debateable that the health condition of a pregnant girl has to play a crucial role in determining an appropriate stage prior and subsequent to birth of such learners' babe. This much is certainly recognised in the national measures on learner pregnancy. It follows, therefore, that unless reliable and credible medical information has been gathered not only about the mechanical profile of a pregnant learner but also about her social background, family support system and a whole range of other relevant factors – there can be no consistent implementation of the pregnancy policy.

[78] These two matters show how a policy (good or bad) may be cynically or abusively implemented. The contentions that the outcomes of the decisions were punitive have

substance. It is so that the national measures, on which the school policies were based, themselves provide for exclusion period of up to two years. However, that justify blind inheritance of such punitive elements by the schools. Lest I be misunderstood, I hasten to say that I levelled this critique against the way the policies has been implemented and not the substance of the policy has itself. That, of course, is a matter for another day.

[79] The cultivation and nurturing of a culture of rights is a relatively new way of life in our society. It requires a great deal of tolerance. Perhaps the two principals and the majority of the governors of their schools, like I, were brought up during hard times. Those who belong to my school generations or older generations will readily recall that during those decades pregnancy of a school girl was regarded as one of the worst transgressions a leaner could commit. It was seen as a symptom of serious ill- discipline. It was a punishable misconduct. The punishment was an outright expulsion from school.

[80] We have to be honest with ourselves and frankly admit that those old societal perceptions of school girl pregnancies are still well and alive in our society. Out there there is still a great deal of intolerance towards pregnant school girls. The moral prejudice to such teenagers is enormous. Ideally school girls should not become pregnant and I am certain that the two school girls concerned in these matters did not want to become pregnant, but they became pregnant because we do not live in a perfect society. Without encouraging school girl pregnancies, those who become pregnant should not be uncaringly treated as outcasts. They must be assisted to continue learning. We, and the school governors as the school principals are not angels. Perhaps the best gift that can be given to the two little babies of the two school girls is to ensure that their mothers continue to learn so that they can become better parents.

[81] These to school matters reminded me of my student days at varsity. The University of Zululand resolved to suspend pregnant students. The pregnant but married were exempted. I hasten to point out that the student residence

were strictly segregated according to gender, in those days. Pursuance to the university policy, Prof. C. Nkabinde, the then vice-chancellor, decided to send away approximately 8 or so pregnant unmarried students. The unpopular decision sparked a very serious row between the SRC and the university administration. The student body and the administration were on an explosive collision course. The SRC convened an urgent student body meeting. There was only one item on the agenda:

"The Stomach Issue".

[82] The hall at the student centre was packed to capacity. The hot debate started. Speaker after speaker strongly condemned the policy on student pregnancy, and the subsequent decision to implement it. Ideas were floated around as to what course of action the student body should follow. Some delinquent guy, sitting next to me, cynically whispered and mooted out the idea that a mass wedding be quickly arranged. The idea entailed renting 8 male students to get married to the 8 pregnant girls in order to circumvent their suspension. But, getting 8 guys to

volunteer as bridegrooms for convenience with virtually no fringe benefits was another issue altogether. The guys feared that the maternity issues might just get a little complicated afterwards.

[83] A popular and uncomplicated way-out was to go on strike to show solidarity with the pregnant girls. One guy stood up to speak against that popular general feeling. His name was "Oneway", a very popular figure on campus. So called because when he first arrived as a fresher he had a T-shirt on which the words "one way" were printed at the back. He was against the whole idea of sympathising with the pregnant girls. His argument was that he was a third year student, that for three years he had struggled to get a girlfriend, let alone a beautiful one, on campus, that notwithstanding his relentless efforts he still had no girlfriend, and that he had given up hope to catch any beauty.

[84] The reason for his desperate situation, he explained, was that all the beautiful girls packed their sling bags, put on their very best, walked out and travelled to Durban every

Friday to see their boyfriends who were medical students. He then argued that the pregnant girls should, in all fairness, go to the University of Natal and seek sympathy and solidarity from their medical boyfriends. In those days, unlike nowadays, there was no bill of rights. Discrimination was a legalised away of life. Religious and moral considerations were decisive. The UZ students were ridiculed for boycotting lectures in support of what society viewed as an morally-depraved cause.

[85] In the Ermelo case the SCA reaffirmed the ratio of its decision in the Mikro case but overruled the *obiter dictum* that the head of the department could invoke section 22 to summarily withdraw, purportedly in terms of section 25, the function of the governing body to determine the language policy of the school (vide **MIKRO** *supra*, par [37] and **ERMELO** *supra*, par [30]). The court found that section 22 could not be used in a vacuum to disband a school governing body which is still practically functional. Before section 22 can be properly used by the head of the department, he must first believe and determine that the

governing body had objectively ceased to perform its functions.

[86] It was impermissible, the court held, that the head of the department, himself should artificially render a functional school governing body dysfunctional and after paralysing it declare that it has ceased to perform its functions. It was the interpretation of section 22 in the **MIKRO**-case which the court jettisoned in the **ERMELO**-case. In these two matters before me the question of withdrawal of functions did not arise. Therefore my comments, although authoritatively informed, are *obiter dicta*.

[87] There remains one aspect to consider, namely the question of costs. The first respondent, in good faith, albeit erroneously, believed that he was not only entitled but obliged to prevent an injustice against minor children. His instructive interventions, unlawful though they were, eventually caused the applicants to have a rethink about the exclusion of the girls. The instructions were eventually heeded, whether as a result of the direct intervention by the HOD or as a result of a third party's indirect advice, is

immaterial. What is important is that his intervention precipitated the schools to reconsider their decisions to exclude the learners. The outcome were gratifying. In these circumstances, I do not consider it to be in accordance with the dictates of justice to saddle the first respondent with the burden of paying the costs. His actions were selfless and virtually prompted by the legal norm that the best interests of a child is of paramount importance in any matter affecting such a child.

[88] Mr Snellenburg urged me to order the minister of education to make and promulgate regulations in terms of section 61 of the South African School Act, 84 of 1996 to regulate, specify and encode a national policy and uniform procedure on pregnant school girls at public as well as independent schools throughout the country. Mr Daffue, Mr Van Huysteen and Ms Ngidi supported the suggestion.

[89] The purpose of the proposed regulations would naturally be to further the objects of the South African Schools Act. Moreover, and this is of cardinal importance, the proposed regulations should comply with: firstly, the bill of rights as

enshrined in the 1996 RSA constitution, including but not limited to sections 7, 9, 10, 12, 28 and 29 thereof; secondly, the provisions of the Promotions of Equality and Prevention of Unfair Discrimnation Act, 4 of 2000 and thirdly, any other applicable legislation.

[90] The proposed regulations should, among others, have due regard to: the rights of a pregnant learner before, during and after her pregnancy; the interests of the pregnant learner's unborn child; the rights of a pregnant learner's fellow learners at the school and any other relevant consideration.

[91] The two school matters before me demonstrated an urgent need for the promulgation of nationwide regulations on the learner pregnancy policy. The suggestion made a whole lot of sense. The only difficulty I had was that the responsible cabinet minister was not before me in these proceedings. I am not keen to make such an order in her absence. The Honourable Minister, Ms Angie Motshekga, will certainly appreciate the need to nationally regulate the learner pregnancy policy and the urgency of the matter.

Notwithstanding her heavy cabinet workload, I urge her to do her best to promulgate such regulations within 24 months hereof. If it can be done within a shorter period than this – so much better for the schools and the learners. In my opinion it does not always take a court order to get a responsible minister to put her shoulders to the wheel and urgently do something of national importance.

[92] Accordingly, I make the following order:

92.1 The first respondent does not have the authority to instruct or compel, the school principal to act in a manner contrary to an adopted policy of the school governing body;

92.2 The first respondent does not have the authority in law to instruct the school principal to take any action in contravention of or contrary to the learners pregnancy policy of the applicants or to the decision taken by the first applicant's principal in accordance with the learner pregnancy policy duly opted by the second applicant;

92.3 The first decision taken by the first respondent on the 16 September 2010 as contain in annexure WEL3 and a second decision taken by the first respondent

on the 2nd November 2010 as contained in annexure HAR7 were valid in law.

92.4 The respondents are finally restrained from taking any action or actions directly or indirectly calculated to defy, contravene, subvert or in any manner to undermine the decisions by the applicants taken in terms of their learner pregnancy policies.

92.5 The two learners concerned shall be entitled to attend formal classes at the schools, to remain at the schools and in their current grades and to be taught, to learn and to be examined until the completion of their high school careers.

M. H. RAMPAI, J

On behalf of first and second applicant: Adv. N. Snellenburg
Instructed by:
Horn & Van Rensburg
BLOEMFONTEIN

On behalf of respondents: Adv. J. P. Daffue SC
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On behalf of first amicus:	Adv. K J van Huyssteen Instructed by The SA Human Rights Commission JOHANNESBURG
On behalf of the second amicus:	Adv. R L K Ngidi Instructed by: The Centre for Child Law JOHANNESBURG

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