IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT 103/2012

In the matter between

THE HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION, FREE STATE PROVINCE	Applicant
and	
WELKOM HIGH SCHOOL	First Respondent
GOVERNING BODY OF WELKOM HIGH SCHOOL	Second Respondent
and	
HARMONY HIGH SCHOOL	First Respondent
GOVERNING BODY OF HARMONY HIGH SCHOOL	Second Respondent
and	
EQUAL EDUCATION	*Amicus Curiae*

EQUAL EDUCATION'S WRITTEN SUBMISSIONS

INTRODUCTION

1. This case raises two related but different questions.

2. The first question is whether the head of a provincial education department ('HOD') may instruct a school principal not to give effect to a pregnancy policy made by the school's governing body ('SGB') that learners who are pregnant or have given birth to a child be sent home for a period of up to a year because he believes the policy is unlawful or unconstitutional.

3. The second question is whether in legal proceedings brought by a school or its SGB against the HOD for relief to the effect that the HOD may not issue such instructions for so long as the SGB's pregnancy policy has not been rescinded by the SGB or set aside by a court in appropriate proceedings for judicial review, the HOD is entitled to raise the unlawfulness or unconstitutionality of the policy as a defence.

4. Equal Education, a non-governmental organisation working to improve the South African schooling system, believes both these questions should be answered in the affirmative.

5. HODs are obliged by section 7(2) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') to protect, respect, promote and fulfil the fundamental rights of pregnant learners in the Bill of Rights, including:

    - their right not to be unfairly discriminated against on the grounds of gender and pregnancy in section 9(3)

- their right to human dignity in section 10
- their right to bodily and psychological integrity in section 12(2)
- as children, their own best interests being of paramount importance in every matter concerning them in section 28(2), and
- their right to education in section 29(1).

6. Issuing instructions to school principals under the authority conferred by sections 16(3) and 16A(3) of the South African Schools Act 84 of 1996 ('SASA'), is a permissible and effective way of giving effect to HODs' obligation under section 7(2) of the Constitution.

7. If HODs are permitted to raise what they consider to be the unlawfulness or unconstitutionality of SGBs pregnancy policies as a defence is legal proceedings brought by SGBs aimed at compelling HODs to abide by those policies until they are rescinded by the SGBs or set aside by a court in appropriate proceedings for judicial review, the court dealing with what are tantamount to enforcement proceedings brought by the SGBs will be enabled to adjudicate the underlying, justiciable dispute between the SGBs and the HODs about the lawfulness and constitutionality of the pregnancy policies. That in turn will enable the judiciary: to bolster the rule of law,

which is a long-standing principle of our law[1] and is now a founding value listed in section 1(c) of the Constitution; and further to protect, respect, promote and fulfil the fundamental right of access to courts in section 34 of the Constitution.

FACTUAL BACKGROUND

Welkom High School / Ms D

8. On 20 November 2008 the Welkom High School SGB adopted a policy on the 'management of learner pregnancy'. The SGB implemented the policy from 1 January 2009.[2] The policy provides that if a learner becomes pregnant then she may not return to school the year in which the child is born regardless of the month in which the child is born, the learner's grade or the learner's age, and if the child is born in December of a year she may not return to school until the second January following the birth.[3]

9. In September 2010 the principal of Welkom High School informed the mother of Ms D, a 15 year old grade 9 learner who was pregnant and due to give birth in December 2010, that the Welkom High SGB had decided

---

[1] See *R v Abdurahman* 1950 (3) SA 136 (A)

[2] Radebe founding affidavit 1 (volume) :10 (page) :5.6 (paragraph)

[3] Annexure WEL2 1:29

she could not attend school from 16 September 2010 until the second term in 2011 when she could continue with grade 9.[4]

10. Following a complaint by Ms D's family, on 20 October 2010 the Head of the Department of Education in the Free State Province ('the HOD') directed the principal of the Welkom High School that he should allow Ms D to return to school.[5] The HOD's reasons included that requiring that Ms D stay away from school because she was pregnant:

    10.1. amounted to unfair discrimination on the ground of pregnancy in breach of section 9(3) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'); and

    10.2. was inconsistent with section 9 of SASA, which provides that the only circumstances in which a learner can be precluded from attending school are if the learner is suspended or expelled in accordance with that section for serious misconduct.[6]

[4] Radebe founding affidavit 1:13-14:7.1-7.6; annexure WEL3 1:31

[5] Radebe founding affidavit 1 :16:7.16; annexure WEL10 50

[6] In neither of the present cases has the school and or the SGB alleged pregnancy is serious misconduct warranting suspension under section 9 of SASA, which in any event allows SGBs to suspend learners for very limited periods of time only

11. As a result of the HOD's intervention Ms D was allowed to return to school pending the outcome of the current litigation.[7] She gave birth on an unspecified date in October 2010.[8] At the end of 2010 she wrote and passed the grade 9 examinations and she was promoted to grade 10 at Welkom High School.[9]

Harmony High School / Ms M

12. On 27 January 2009 the Harmony High School SGB adopted a policy on 'pregnant girls', which provides that a pregnant learner must leave the school at the beginning of the eighth month of pregnancy and may not be readmitted in the same year.[10]

13. On 12 July 2010[11] Ms M, a 17 year old grade 11 learner at Harmony High School, gave birth to a child. During October 2010[12] Ms M and her mother were informed by the school that Ms M would not be readmitted for the remainder of 2010.[13]

---

[7] Radebe founding affidavit 1:17:7.18-19

[8] Malope answering affidavit 2:71:13.3

[9] Malope answering affidavit 2:58:2.5

[10] Kometsi founding affidavit 4:197:5.6; annexure HAR2 4:2.11:4.4-5

[11] Malope answering affidavit 4:244:10.2

[12] Malope answering affidavit 4:244:10.3

[13] Kometsi founding affidavit 4:200-202:7.1-7.5

14. On 20 October 2010 the HOD addressed a letter to the Harmony High School principal instructing that, for the same reasons as those given by the HOD in the letter to the Welkom High School principal discussed in paragraph 10 above, Ms M be allowed back to school immediately.[14]

15. The principal allowed Ms M to return pending the outcome of the current litigation.[15] At the end of 2010 Ms M wrote and passed her grade 11 examinations and she was promoted to grade 12 at Harmony High School.[16]

The litigation

16. On 12 November 2011 both schools and their SGBs instituted similar motion proceedings in the Free State High Court against the HOD and the guardians of the two learners. They sought declarators that the HOD did not have the authority to give the school principals instructions to act contrary to the SGB's pregnancy policies or to the SGB's decisions pursuant that pregnant learners stay away from school.[17] They also sought orders that the SGBs' decisions to exclude Ms D and Ms M be

[14] Annexure HAR6 4:219

[15] Kometsi founding affidavit 4:205:9.3-4

[16] Malope answering affidavit 4:244:10.1

[17] Notices of motion (Welkom) 1:2-3:3.1-3.2 and (Harmony) 4:189-190:3.1-3.2

implemented forthwith and that the HOD be interdicted from contravening, subverting or defying those decisions.[18]

17. In answering papers[19] the HOD defended his decision to require that the learners be readmitted, restating the reasons given in his letters to the school principals and in addition referring to section 28(2) of the Constitution,[20] section 29 of the Constitution[21] and the Children's Act 38 of 2005.[22] The HOD referred to section 16 of the SASA, subsection (3) of which provides that the principal of a public school undertakes it professional management 'under the authority of the Head of Department'.[23] The HOD said: 'I verily believe I was entitled to issue the instructions which I did as applicants' policy does not have any legal basis. If I did not act, I would have given effect to an illegal policy and would not have acted in the best interests of the learner.'[24]

---

[18] Notices of motion (Welkom) 1:3:3.3-3.4 and (Harmony) 4:190:3.3-3.4

[19] In this paragraph we provide the record references to the answering papers in the Welkom matter. The answering papers in the Harmony matter contain similar allegations

[20] 'A child's best interests are of paramount importance in every matter concerning the child.' See also the HOD's notice in terms of Uniform Rule 16A 2:107-108:4

[21] Section 29(1) provides: 'Everyone has the right- (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.' See the HOD's notice in terms of Uniform Rule 16A 2:108:5

[22] Malope answering affidavit (Welkom) 2:65:26-27

[23] Malope answering affidavit (Welkom) 2:68-69:10

[24] Malope answering affidavit (Welkom) 2:65:2.28

18. On 10 February 2011 the South African Human Rights Commission ('SAHRC') filed applications to intervene as *Amicus Curiae*[25] in both matters together with a detailed affidavit[26] explaining why it contended the SGBs' exclusion of pregnant learners from schools unconstitutionally infringed sections 9, 10, 11, 12, 28(2) and 29(2) of the Constitution and in some cases was in conflict with the compulsory attendance rule in section 3 of the SASA.[27] The SAHRC was admitted as *Amicus Curiae*.[28]

19. On 21 February 2011 the Centre for Child Law applied to intervene as *Amicus Curiae* in the Harmony High School matter[29] in order to make submissions about constitutional issues concerning the conduct of the school and the SGB and its pregnancy policy.[30] The Centre was also admitted as *Amicus Curiae*.[31]

20. In their replying papers[32] the schools and their SGBs declined to engage with the HOD and the *Amici Curiae* about their allegations that the

---

[25] Applications for leave to intervene (Welkom) 2:110-113 and (Harmony) 5:272-275

[26] Mushwana affidavits (Welkom) 2:123-143 and (Harmony) 6:330A-350

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

[28] High Court judgment 7:405:13

[29] Application for leave to intervene 5:277-280

[30] Du Toit affidavit 5:285-287:13 and 5:289-291:22

[31] High Court judgment 7:405:13

[32] In this paragraph we provide the record references to the replying papers in the Welkom matter. The replying papers in the Harmony matter contain similar allegations

pregnancy policies and the decisions based on them were unlawful and invalid, saying they did not have to do so because the HOD had not applied or brought a counter-application for judicial review. The real issue for decision, they contended, was whether the HOD had the authority to instruct the school principals not to enforce the SGBs' policies. They alleged the HOD could not do so because under SASA the SGBs not the HOD had the authority to govern the schools (presumably a reference to section 16(1) of SASA), which included the authority to make the policies (presumably a reference to section 8 of SASA).[33]

21. The applications were heard together and, in the result, the schools and their SGBs succeeded both in the High Court[34] and the Supreme Court of Appeal ('SCA').[35]

22. The HOD now applies for leave to appeal against the judgment and order of the SCA, which amended the relevant part of the High Court's order to read: 'In each case, for as long as the pregnancy policy remains in force, the first respondent [the HOD] is interdicted and restrained from directing

[33] Radebe replying affidavit 3:156-158:3.2.10 and 3:163:7

[34] High Court judgment 12 May 2011 7:398-456

[35] *Head of Department: Department of Education, Free State Province v Welkom High School and Another; Head of Department: Department of Education, Free State Province v Harmony High School and Another* [2012] 4 All SA 614 (SCA) ('SCA judgment')

the school principal to act in a manner contrary to the policy adopted by the school governing body.'[36]

23. The SCA thus held that, as long as the SGBs' pregnancy policies remained in force, the HOD could not issue instructions to the school principals the effect of which was to countermand the policies and the SGBs' decisions based on them that the two learners should stay away from school. The SCA reasoned that even if the HOD was right that SGBs did not have the power to make the pregnancy policies and the policies were unconstitutional,[37] on the authority of *Oudekraal*[38] the policies and the decisions based on them were valid until set aside by a competent court in appropriate proceedings brought by the HOD and the HOD had not brought any such proceedings.[39]

24. In the course of its judgment the SCA further held that, in the current proceedings, the HOD was precluded from questioning the lawfulness or constitutionality of the SGBs' pregnancy policies and the SGBs' decisions based on them. The SCA reasoned that unlike the affected learners, the HOD was not compelled to perform or refrain from performing any act in consequence of the pregnancy policies and consequently, also on the

---

[36] SCA judgment para 29

[37] SCA judgment para 27

[38] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ('*Oudekraal*') para 23

[39] SCA judgment paras 22-23

authority of *Oudekraal*,[40] he was not a person permitted to raise a 'collateral challenge' to their validity.[41]

THE PREGNANCY POLICIES AND THE SGBs DECISIONS BASED ON THEM ARE INDEED UNLAWFUL AND UNCONSTITUTIONAL

25. It is submitted the pregnancy policies and the decisions based on them are indeed unlawful, unconstitutional and invalid for the reasons given by the HOD in the letters to the SGB's discussed above and the further reasons given by the SAHRC in its affidavits in these proceedings.

26. In short, by making policies that pregnant learners had to stay away from school for months or in some cases more than a year, and in implementing those policies in the present cases, the SGBs:

    26.1. defeated the provisions of section 9 of SASA and usurped for themselves a power to suspend learners that they did not have; and

    26.2. unconstitutionally infringed the learners' rights under numerous provisions of the Bill of Rights including sections 9(3),[42] 10, 12(2), 28(2) and 29(1) of the Constitution.

---

[40] *Oudekraal* para 32

[41] SCA judgment paras 12-16 and 19-20

[42] Equal Education contends the pregnancy policies constitute unfair and double discrimination on the basis of both gender and pregnancy as they punish (through exclusion from school) female learners for falling pregnant

27. Equal Education does not contend that SGBs cannot make pregnancy policies at all. Legally and constitutionally acceptable polices would make it clear that learners cannot be expelled or suspended from schools due to pregnancy, enable pregnant learners to be kept at school as long as medically possible and encourage learners who have given birth to return to school as soon as possible.[43]

THE ASPECT OF *OUDEKRAAL* RELIED ON BY THE SCA IN THE PRESENT CASE

28. We submit the HOD's application for leave to appeal against the SCA's judgment and order in the present case raises for decision the correctness of the principle laid down in *Oudekraal* that unless and until invalid administrative action (here, the pregnancy policies) is set aside in judicial review proceedings, the principle of legality requires that all organs of state accept such action as valid and give effect to it.

29. The *Oudekraal* case arose from an administrative decision to approve the establishment of a new township taken by a provincial Administrator in 1957, which the SCA found was unlawful and invalid from the outset for

---

and in so doing victimises young girls. This perpetuates the sexist societal stereotype that females bare the full weight of responsibility where pregnancy occurs. EE submits that the discrimination on the basis of gender in the pregnancy context is even more egregious when viewed in light of the prejudicial societal dynamics that lead to young girls falling pregnant, which include skewed power relations, lack of organised sexual counselling in schools, non-availability of condoms and, sometimes even impregnation by teachers

[43] Cf. Malope answering affidavit (Welkom) 1:61:2.13-2.15.

the reason that it permitted subdivisions and land use in criminal disregard for the Muslim graves and kramats on the site.[44] The question for decision was whether the municipality to which the engineering services diagram for the township was presented for approval many years later, was entitled to refuse to process it because it believed (correctly) the approval of the township was invalid.[45]

30. The SCA held that the municipality could not do so, for the following reason. It said one of the aspects of the rule of law 'is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it'.[46]

31. The SCA did not cite any authority for this principle, although earlier in its judgment it gave the following pragmatic reason for it: 'Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all

[44] *Oudekraal* paras 25-26

[45] *Oudekraal* para 26

[46] *Oudekraal* para 37 (at 246H-247A)

administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'[47]

32. It is respectfully submitted that this principle is not sound and should not be followed for the following six reasons.

33. First, the principle is irreconcilable with the element of the doctrine of objective invalidity that a court's order declaring administrative action invalid does not invalidate it. Administrative action is either objectively valid or invalid from its inception depending on whether it is or is not inconsistent with the Constitution or vitiated by an administrative-law irregularity. The fact that a dispute concerning invalidity may only be decided years afterwards, does not affect the objective nature of the invalidity.[48]

34. Secondly, is irreconcilable with the authorities and decided cases discussed and applied by the SCA in its recent judgment in *Motala*,[49] which state that

---

[47] *Oudekraal* para 26 (at 242A-B)

[48] Cf. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 27

[49] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) ('*Motala*') paras 11-14

even court orders, granted outside the jurisdiction of the court or in violation of a statute, may be ignored with impunity by organs of state.[50] If, as we submit, the HOD was right in thinking that by making and implementing the pregnancy policies the SGBs defeated the provisions of section 9 of SASA and usurped for themselves a power to suspend learners which they did not have, the following reasoning in *Motala* applies with equal force in the present case: 'In my view, as I have demonstrated, Kruger AJ was not empowered to issue, and therefore it was incompetent for him to have issued, the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect (*Schierhout v Minister of Justice* 1926 AD 99 at 109). Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing.'[51]

35. Thirdly, there is a contradiction in the SCA's reasoning in *Oudekraal* itself which undermines the pragmatic reason for the principle (which is quoted in paragraph 31 above). Although that reason is based on the adverse

[50] See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 6

[51] *Motala* para 14

impact on the proper functioning of a modern State 'if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question', the ensuing discussion in the *Oudekraal* judgment makes it plain that it is only organs of state which must give effect to invalid administrative action until it is set aside. Other persons (i.e. 'subjects') may ignore invalid administrative action and raise its invalidity 'collaterally' as a defence in criminal or civil enforcement proceedings, irrespective of the adverse impact of their doing so on the proper functioning of the State.[52] As appears from *Photocircuit*,[53] a case cited with approval in *Oudekraal*,[54] the reason why such collateral challenges are permitted in enforcement proceedings is the legality of the measure sought to be enforced is central to determining the entitlement of the party seeking enforcement. As the excerpts from *Boddington*[55] quoted in *Oudekraal*[56] make clear, the ability to raise such defences is a requirement of the rule of law.[57]

36. Fourthly, the SCA's statement that the principle that organs of state must give effect to invalid administrative action until it is set aside, is an aspect

---

[52] Something well illustrated by the facts and outcome in *S v Smit* 2008 (1) SA 135 (T)

[53] *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others* 1993 (2) SA 245 (C) 252J-253E

[54] *Oudekraal* para 33

[55] *Boddington v British Transport Police* [1998] 2 All ER 203 (HL)

[56] *Oudekraal* para 32

[57] See also *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA) para 20

of the rule of law, does not withstand closer scrutiny. The rule of law does not require that invalid administrative action be given effect to. Quite the contrary. The rule of law requires the uniform application of the principle of legality and the doctrine of objective invalidity. Fidelity to the rule of law requires organs of state should be permitted to respond in the same way as other persons to invalid administrative action.

37. Fifthly, where, as in the present case, the reason for the invalidity of administrative action is that it unjustifiably infringes one or more rights in the Bill of Rights in the Constitution, the obligation imposed by section 7(2) of the Constitution on all organs of state to respect, protect, promote and fulfil the rights in the Bill of Rights is better served by a principle which allows an organ of state faced with unconstitutional administrative action within its sphere of responsibility, to exercise its administrative powers and perform its administrative functions so as counteract the unconstitutional administrative action. If as a result the originator or a beneficiary of the administrative action disputes the organ of state's claim of unconstitutionality, it is always open to the originator or beneficiary to institute appropriate proceedings against the organ of state e.g. for declaratory and if necessary interdictory relief, as the schools and SGBs did in the present case. The organ of state can then raise the unconstitutionality of the administrative action as a defence, i.e. mount a

collateral challenge to the administrative action, as the HOD did in the present case. In that way the dispute will be adjudicated in accordance with the rule of law and the right of access to courts in section 34 of the Constitution.

38. Lastly, the principle operates inflexibly irrespective of the context, including 'the materiality of the breach of the constitutional rights or just administrative action in a particular case'.[58] The relevant contextual factors include: the nature and importance of the steps the public official was required to take or not to take; the nature and seriousness of the illegality or constitutional problem that the actions were aimed at addressing; whether the illegality or unconstitutionality is clear or there is a bona fide dispute about it; and the most effective manner to use state resources to protect the rights and interests of those adversely affected by the illegality or unconstitutionality.

ALTERNATIVELY, A PARED-DOWN *OUDEKRAAL* PRINCIPLE

39. In the alternative to our main submission that the *Oudekraal* principle that organs of state must give effect to invalid administrative action until it is set aside, is not sound and should not be followed, we submit the principle should be confined to administrative action by the organs of state

[58] Cf. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) ('*Bengwenyama*') para 86

themselves or their predecessors in law. In other words, the principle should be that organs of state must give effect to their own invalid administrative action, or the invalid administrative action of their predecessors in law, until it is set aside.

40. This pared-down *Oudekraal* principle will preclude organs of state from 'flip flopping'. It will require that they establish, to the satisfaction of the court in judicial review proceedings, both their *locus standi* (i.e. that they have an interest in the bringing of proceedings to review their own prior decision or that their doing so is in the public interest)[59] and that the case is a proper one for the granting of review relief[60] (with or without any amelioration under the court's 'just and equitable' remedial power in section 8 of the Promotion of Administrative Justice Act 3 of 2000[61]).

41. The application of a pared-down *Oudekraal* principle will not non-suit the HOD in the present case because the invalid administrative action (the making and implementation of the pregnancy policies) was taken other organs of state (the SGBs).

---

[59] Cf. *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) para 14

[60] *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) para 30; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) paras 22-32

[61] *Bengwenyama* paras 84-85

IN ANY EVENT, THE SCA MISAPPLIED *OUDEKRAAL* IN THE PRESENT CASE

42. It will be recalled that one of the SCA's reasons for dismissing the HOD's appeal, was that, unlike the affected learners, the HOD was not compelled to perform or refrain from performing any act in consequence of the pregnancy policies and, therefore, he was not a person permitted to raise a 'collateral challenge' to their validity.[62]

43. It is submitted the SCA was wrong in finding the HOD was not compelled to perform or refrain from performing any act in consequence of the pregnancy policies. Under section 16(3) of SASA the HOD is responsible for the professional management of the school by the principal. Section 16A(3)(a) of SASA empowers to HOD to give instructions to the principal, and further provides that they take precedence over the principal's duty to assist the SGB in the performance of its functions and responsibilities. But for the SGBs' pregnancy policies and consequent decisions in relation to the two pregnant learners, the HOD would have been entitled to instruct the principals to ensure that the learners, both of whom had been admitted to the schools, be permitted to attend school. The adoption and application of the pregnancy policies by the SGBs, the SCA held, prevented the HOD

[62] SCA judgment paras 12-16 and 19-20

from issuing such instructions to the principals.[63] It follows that the HOD was indeed compelled to refrain from performing an act (issuing such instructions) in consequence of the pregnancy policies.

44. At the very least, therefore, in the present proceedings, in response to the declaratory and interdictory relief sought against him by the schools and the SGBs, the HOD should have been permitted to challenge 'collaterally' (i.e. place in issue) the lawfulness or constitutionality of the SGBs' pregnancy policies and the SGBs' decisions based on them.

45. The effect of the SCA's approach to this case was that it looked only at the issues of legality and administrative justice of the HOD's conduct which had to be resolved, to the exclusion of the issues of the legality and constitutionality of the SGBs' pregnancy policies which arose just as sharply. For the same reasons as this Court gave in in *Ermelo*, it is unreasonable and unjust to look at only one of these two 'scrambled issues'.[64]

ANDREW BREITENBACH SC

THABANI MASUKU

COUNSEL FOR EQUAL EDUCATION

12 FEBRUARY 2013

---

[63] SCA judgment para 22

[64] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) paras 39-40

EQUAL EDUCATION'S AUTHORITIES

R v Abdurahman 1950 (3) SA 136 (A)

Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) SA 325 (SCA)

City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA)

National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others 1993 (2) SA 245 (C)

Boddington v British Transport Police [1998] 2 All ER 203 (HL)

Kouga Municipality v Bellingan 2012 (2) SA 95 (SCA)

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC)

Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA)

Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA)

Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA)

Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC)