

Ambivalent adjudication of admission and access to schools – striking a reasonable balance between equality, quality and legality

*Marius Smit**

1 Introduction

South Africa comprises a dual but interdependent social order, shaped by colonialism and apartheid that was largely determined along racial lines. This social structure consists of a relatively advanced, globally interconnected political economy dominated by the mainly white, fairly affluent minority, and a relatively underdeveloped socio-economic stratum comprising mainly the black majority. Since 1994 the transition from an apartheid state to an emerging democracy had a profound effect on education in South Africa. Compulsory attendance provisions, the deracialisation of schools, and the comprehensive governmental policies to transform education all aim to address the inequities and inequalities between races and communities. As a result there has been a dramatic increase in access to schools and educational institutions since 1994. Primary education in South Africa is characterised by very high rates (98,3%) of enrolment and retention with gender parity, which is on par with education systems of the developed world.¹ Completion rates of primary education have improved from 89,6% in 2002 to 93,8% in 2009.²

However, the near universal access to basic education has resulted in overcrowding and ancillary problems in a number of public schools. The increased availability of education is undoubtedly a very good development, but the disturbing reality is that approximately 80% of South African public schools

*B Com LLM Ph.D, Associate Professor, North-West University.

¹Department of Basic Education *South African country report: Progress on the implementation of the Regional Education and Training Plan* (2011) at 18-19; Statistics South Africa *General household survey 2006-2009* (2010) 15.

²Statistics South Africa *General household survey: 2006–2011* (2012) 16.

are essentially dysfunctional and do not provide effective quality education.³ One of the most pressing issues is the challenge of achieving equal quality education for the majority of previously disadvantaged learners without unreasonably and unfairly diminishing the quality of education that is provided in the few remaining functional schools.⁴

Litigation between public schools and the state (Minister of Basic Education and nine provincial government departments of basic education) have primarily revolved around admission policies⁵, pregnancy policies⁶ or the language policies of Afrikaans single-medium public schools.⁷ This discussion aims to consider the following three aspects: the right to education and the South African context of a quasi-market for quality education; case law on admission of learners to public schools; and suggestions to strike a reasonable balance between access to education and to the quality of that education.

2 The development of quasi-markets for schools

After the promulgation of the South African Schools Act⁸ in 1997 quasi-markets developed at schools as a result of factors such as open enrolment, parent preference, per capita spending, devolved budgets, compulsory school fees for the more affluent quintile 4 and 5 schools, school right-sizing and shared responsibilities between the provincial executive, school managers and governors.⁹ Woolman and Fleisch aptly explain how eliminating the race-based allocation of educational resources and the relaxation of feeder zone regulations led to the establishment of deracialised schools and a quasi-market between such

³Taylor 'Focus on: Challenges across the education spectrum' (2006) 15 *JET Bulletin* 1 at 2.

⁴Taylor 'What's wrong with South African schools?' *JET Education Services* (2008) 1 at 1-2; Mosselson 'Focus on: Whole school development. What works in school development?' (2008) 19 *JET Bulletin* 4 at 5-6.

⁵*MEC Education, Gauteng Province v Governing Body of the Rivonia Primary School* 2013 JDR 2237 (CC); *Matukane v Laerskool Potgietersrus* 1997 JOL 102 (T).

⁶*Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2013 ZACC 25.

⁷*Middelburg Laerskool en die Skoolbeheerliggaam van Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga* 2003 4 SA 160 (T); *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 3 SA 436 (SCA); *Seodin Primary School v Northern Cape Department of Education* Case No 117/2004 (NC); *Head of Department, Mpumalanga Education Department v Ermelo High School* 2010 2 SA 415 (CC).

⁸Act 84 of 1996.

⁹Woolman and Fleisch 'South Africa's unintended experiment in school choice: How the National Education Policy Act, the South African Schools Act and the Employment of Educators Act create enabling conditions for quasi-markets in schools' (2006) 18 *Education and the Law* 31 at 32-33, 45-54.

schools.¹⁰ A strong demand for 'quality' education resulted in a migration of black learners from township schools to schools at the upper end of the supply line. However, the limited spaces in such schools inevitably resulted in competition and many of these schools adopted restrictive admission policies in order to maintain the quality of education and manage their capacity.¹¹ Different notions of the extent and duty to provide public education resulted in legal disputes between the state and public schools.

3 The right to education: A brief excursus

Section 29(1)(a) of the Constitution of South Africa unambiguously stipulates that everyone has a right to a basic education which is immediately realisable.¹² The right to an education has positive and negative dimensions. The positive dimension refers to the state's positive obligation to provide and deliver education¹³ and gives everyone the right to claim without reservation basic education in spite of the state's other financial obligations.¹⁴ In *Western Cape Minister of Education v Governing Body of Mikro Primary School* the provincial department of education argued that in terms of section 29(2) of the Constitution, which provides that everyone has the right to receive education in an official language of choice at a public educational institution if practicable, everyone has the right to receive education at each and every public educational institution. The Supreme Court of Appeal rejected that interpretation and held that everyone has a right to be educated at a public school to be provided by the state if reasonably practicable, but not the right to be so instructed at each and every public school. The case of *Governing Body of the Juma Masjid Primary School v Essay NO* furthermore confirmed that the right to basic education is primarily enforceable against the state, not against private persons or entities.¹⁵ It is therefore the duty of the Member of the Executive Council ('MEC') of a provincial education department to make provision to accommodate learners at alternative schools if admission at a particular school is not possible.

4 Non-diminution principle

The negative dimension of the right to an education refers to the duty of the state to refrain from interfering with the exercise of this right and to allow for education

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 ZACC 13.

¹³ *Ex Parte Gauteng Provincial Legislature: In Re Dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC).

¹⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

¹⁵ *Juma Masjid Primary School v Essay NO* (n 12).

to take place without diminishing it unjustifiably or unreasonably. Section 3(9)(f) of the Interim Constitution contained the principle of non-diminution of rights, which precluded the state from diminishing learners' rights by removing or reducing opportunities. In *Gauteng School Education Bill* Sachs J explained the non-diminution principle in relation to language rights and the promotion of multilingualism by stating:

In whatever way these principles are applied, it is clear that they need to be balanced against each other. Thus, the non-diminution principle is important, but so is creating the conditions for the development of all official languages, the extension of rights in relation to languages previously restricted, the prevention of the use of any language for the purposes of division, and the promotion of multilingualism.¹⁶

The final Constitution retained these provisions in principle, by providing in section 6(4) that all official languages must enjoy parity of esteem and must be treated equitably. The state has an obligation to take practical and positive measures to elevate the status and advance the use of the indigenous languages in terms of section 6(2). The negative dimension of the right to basic education therefore has important implications for learners who have been receiving tuition in a certain language because the manner, content and quality of their education may not be diminished.

5 Right to education of adequate quality

The right to basic education includes not just the availability and access to education, but also the substantive right to education of adequate quality.¹⁷ The National Department of Basic Education acknowledges that the provision of quality education depends on numerous factors such as the socio-cultural environment within and outside schools; competence of school management and governance; teacher competence and commitment; and parental involvement and parenting quality to name a few.¹⁸ Strangely enough, neither the National Department of Basic Education nor any of the provincial education departments acknowledge that mother tongue education is a core determinant for quality

¹⁶*Gauteng School Education Bill* (n 14) para 74.

¹⁷Woolman and Fleisch *The Constitution in the classroom – Law and education in South Africa 1994-2008* (2009) 135-150.

¹⁸Department of Basic Education *South African country report: Progress on the implementation of the Regional Education and Training Plan* (2011) 20.

education. This does not accord with international findings that first language or mother tongue education is a key determinant for successful quality education.¹⁹

Unfortunately South African education suffers from poor quality as is evident from the results of comparative international tests. South Africa's performance in reading and literacy and in science and mathematics in the Progress in International Reading Literacy Study 2011 (PIRLS) and the Trends in International Mathematics and Science Study 2011 (TIMSS) respectively was the lowest of all the 49 participating countries. In the Southern and Eastern Africa Consortium for Monitoring Educational Quality III report of 2011 South Africa was ninth out of the fourteen African regional countries.²⁰ Another indication of the poor quality of many schools is that over the years a number of school buildings in townships have been vacated and the schools have ceased to operate because learners have moved to schools that offer better quality education in adjacent suburbs.

The National Department of Basic Education has acknowledged that the socio-cultural environment, incapacity of the bureaucracy to support schools effectively, incompetence of school management and governance, poor teacher commitment and incapacity, inadequate teaching and learning inputs, poor parenting and inadequate infrastructure are key factors that contribute to system failure.²¹

Although some noteworthy administrative and managerial measures by education departments such as the implementation of Annual National Assessments, pro-poor public spending, unification of a divided system, the National Nutrition programme, removal of financial barriers and introduction of no-fee schools, whole school evaluation, assistance and mentoring by subject specialists, further training, bursaries for educators to improve their qualifications and incentives to improve work performance (such as the National Teacher Awards, Best School awards, Dinaledi schools programme) have yielded some successes, the quality of education remains dismally low. It is clear that the core issue in education is not the demand for equal access to schools, but a quest for improved quality education for all in South Africa.

¹⁹Baker and Garcia *Foundations of bilingual education and bilingualism* (1996) 2nd ed; Skutnabb-Kangas *Linguistic genocide in education – Or worldwide diversity and human rights?* (2000).

²⁰Martin *et al* (2012) *Progress in international reading literacy: A study of primary schools in 49 countries* (PIRLS 2011); Mullis *et al* (2012) *Trends in International Mathematics and Science Study* (TIMSS 2011); Moloi and Strauss *The SACMEQ III project in South Africa: A study of the conditions of schooling and the quality of education* (2005).

²¹Department of Basic Education (n 18) 20.

6 Measures by the state to promote access to quality education

Provincial departments of education have aimed to increase access to the approximately 20% quality schools by various measures such as barring the use of admission tests, establishing special district committees to ensure fairness in the admissions processes, increasing the number of no-fee schools, relaxing the zoning requirements and feeder area restrictions, and by launching campaigns to inform parents and learners of their rights.²² Schools are required to keep a waiting list for unsuccessful applicants and to inform the parents in writing of reasons why their child was refused admission.²³ In the first case dealing with education in the new constitutional dispensation, *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* ('Gauteng School Education Bill-case'), the Education Department of Gauteng Province brought an *ex parte* application before the court to obtain clarity on the question whether an intended provision in the Gauteng School Bill, prohibiting language proficiency tests as admission prerequisites for learners, was constitutional in terms of the Interim South African Constitution.²⁴ The general concern of Afrikaans single-medium schools, which were opposed to such a provision, was that it would lead to the admission of learners who would not be able to speak or understand the language of tuition. The Constitutional Court held that the prohibition of admission tests was constitutionally valid. Sachs J explained the dilemma of equal access versus the protection of diversity (minority rights) and quality education as follows:

Thus, the dominant theme of the Constitution is the achievement of equality, while considerable importance is also given to cultural diversity and language rights, so that the basic problem is to secure equality in a balanced way which shows maximum regard for diversity.²⁵

This case determined the general tenor by which the post-apartheid government and the courts have approached the dilemma of equal access, language, minority communities and education in South Africa. The Constitution should be seen as providing a bridge to accomplish the difficult passage from state protection of minority privileges, to state acknowledgement and support of minority rights.²⁶

²²Woolman and Fleisch (n 17) at 51.

²³Sections 6(6) and (7) of the South African Schools Act 84 of 1996.

²⁴Act 200 of 1993.

²⁵*Gauteng School Education Bill* (n 13) para 34.

²⁶*Ibid.*

Understandably, the schools have responded to the great influx of learners by setting admission policies in accordance with pre-determined class sizes, physical capacity and safety requirements of the facilities and with language policies to uphold good pedagogical practices. In response some provincial departments initiated administrative measures and incentives to persuade schools to relax the restrictive admission policies. Furthermore, some provincial departments of education have on occasion disregarded the admission policies of schools by taking the law into their own hands or by misapplying the statutory provisions in order to compel some public schools to admit certain learners.²⁷

7 Racial discrimination curtailed: *Matukane v Laerskool Potgietersrus*

The deracialisation of public schools came to the fore in *Matukane v Laerskool Potgietersrus*. In this instance a primary school provided Afrikaans and English parallel-medium tuition for 646 Afrikaans-speaking, 64 English-speaking and 54 pre-primary learners.²⁸ The parents of three black children, who had been refused admission to the school, applied for an interdict declaring that the school may not refuse to admit any child on grounds related to race, ethnic or social origin, culture, colour or language. The school attempted to prove that it was full to capacity and secondly argued that the school had an exclusively Christian Afrikaans culture and ethos, which would be detrimentally affected by admitting learners from different cultural backgrounds. The school contended that discrimination on the grounds of ethnic or social origin, culture or language was not unfair *per se* having regard to, *inter alia*, sections 17, 31 and 32(c) of the Interim Constitution as well as the United Nations' Charter on Human and Peoples' Rights (articles 20 and 22) and international law.

The High Court found on the facts that the school was not full, that the school conveniently ignored the fact that it was not an exclusively Afrikaans school as it already accommodated two different cultures and languages. Although discrimination on the basis of language and culture is not unconstitutional *per se*, the Court found that the school had a racist admission policy under the guise of protecting cultural and language differentiation. The Court rejected the argument that the state has a duty to provide a minority with its own public schools where minority children could be educated in their mother-tongue and according to their own religion and culture. The Court held that the refusal to admit black learners was unfair discrimination and ordered the school to admit the learners. As a result of this verdict the process of deracialisation of public schools commenced in

²⁷ *Gauteng School Education Bill* (n 13).

²⁸ *Matukane v Laerskool Potgietersrus* (n 5).

earnest as all previously segregated schools amended their admission policies to eliminate unfair discrimination based on race, ethnicity, colour, religion and culture.

8 Ambivalent adjudication: The *Middelburg Primary School* case

Adjudication on the issue of admission to schools has been ambivalent, because although the courts have criticised instances where schools have been unlawfully compelled to admit learners through procedurally unfair state action, the consequences of such action have been allowed to continue.²⁹ A prime example of a case that illustrates ambivalent adjudication is the matter of *Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga*.³⁰ *In casu* the Mpumalanga provincial education department (the State) compelled a single-medium Afrikaans primary school to admit 20 Grade 1 learners who wanted English tuition. The issue was inordinately politicised to the detriment of education as accusations of racism in the media and political activism in the communities were rife. The school applied to the High Court to have the state's decision set aside.

Bertelsmann J found that the actions of the Mpumalanga Education Department were unlawful and in flagrant contravention of the Schools Act.³¹ However, the fact that nine months had elapsed before the matter was eventually heard by the court, had a decisive effect on the outcome of the case. The *curator ad litem* representing the interests of the English Grade 1 learners recommended that it would be in their best interest to remain at the school as such a long period had elapsed.

It is apparent that Bertelsmann J was in two minds as, on the one hand, he strongly criticised the Department of Education for following a politically motivated transformation agenda without taking the specific circumstances and interests of the affected learners into account, for unnecessarily contesting and delaying the resolution of the matter, and for not acknowledging the cultural and linguistic rights of the school community. Bertelsmann J emphasised that had the application been made sooner, he would not have hesitated to set the unlawful administrative action by the state aside. Incongruously, he decided to turn a blind

²⁹Smit 'Language rights and the best interest of the child' (2008) 71(1) *THRHR*. 38 at 48; Smit 'Case notes on: *Middelburg Laerskool v Head of Education, Department of Education, Mpumalanga Province, and Seodin Primary School v Northern Cape Department of Education*' in Beckman (ed) *Engaging the law and education in a transforming society: A critical chronicle of the South African Education Law and Policy Association (SAELPA) 1996-2005, Part 2* (2006) at 1182 - 1189.

³⁰*Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga* (n 7).

³¹*Id* 178.

eye to the unlawfulness and held that the interests of the 20 learners had to take precedence over the violation of the principle of legality.³²

This reasoning by the court is highly unsatisfactory and erroneous. Neither the detrimental effect of the unlawful administrative action by the state on the community's perception of the law, nor the reasonableness and practicability of the forced change in language policy on the traditions and ethos of the school, nor the best interests of the Afrikaans learners were considered in this judgment.³³ The most glaring error of this judgment was that it disregarded the principle of legality and allowed some learners and the state to benefit from the unlawful action. The ambivalence of this judgment seemingly affirms a judicial notion that procedural unlawfulness is, to an extent, less improper than substantive unlawfulness.

9 Precarious precedent starts a trend of unlawful state action

The *Middelburg* judgment has been strongly criticised by a number of scholars³⁴ as it set a dangerous precedent. The circuitous effect and *de facto* consequences of the *Middelburg* decision has been to reward the state in spite of the unlawfulness of its actions.³⁵ Although the Mpumalanga Department of Education received a punitive cost order against it in *Middelburg*,³⁶ this definitely did not serve as a deterrent to any of the other education departments as the Western Cape Department of Education,³⁷ Northern Cape Department of Education,³⁸ and once again the Mpumalanga Department of Education³⁹ as well as the Gauteng Education Department⁴⁰ followed suit by taking the law into their own hands. Costs orders against the state are no deterrent as the taxpayers inevitably foot the bill for these legal expenses. It seems apparent that provincial education

³²*Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga* (n 7) at 178-179.

³³Smit (n 29) at 48-49.

³⁴Malan 'Die Grondwet, onderwysowerhede en die pad vorentoe vir Afrikaanse skole' (2010) 50(2) *TGW* 261 at 265; Smit (n 29) at 48-49; Lubbe 'Afrikaans moedertaal onder beleg' (2010) 4 *Stellenbosch Papers in Linguistics* 55 at 58, 59, 69. For views in support of the *Middelburg* judgment see Woolman and Fleisch 'On the constitutionality of single-medium public schools' (2007) 23 *SAJHR* 23 at 34.

³⁵Malan (n 34) at 265.

³⁶*Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga* (n 7) at 178.

³⁷*Western Cape Minister of Education v Governing Body of Mikro Primary School* (n 7).

³⁸*Seodin Primary School v Northern Cape Department of Education* (n 7).

³⁹*Head of Department, Mpumalanga Education Department v Ermelo High School* (n 7).

⁴⁰*MEC Education, Gauteng Province v Governing Body of the Rivonia Primary School* (n 5).

departments considered the possible payment of punitive legal costs as a worthwhile expense in lieu of attaining politically or ideologically motivated policies. A pattern thus developed whereby provincial departments of education would ignore fair procedure or purposely act *ultra vires* in order to achieve their political aims.

10 *Mikro Primary* case: Supreme Court of Appeal upholds the school's policy

In *Western Cape Minister of Education v Governing Body of Mikro Primary School* the school was an Afrikaans-medium public school whose governing body refused to accede to an order of the Western Cape Department of Education to convert to a parallel-medium Afrikaans-English school.⁴¹ In December 2004, the provincial education department addressed a letter to the school principal instructing him to accommodate 21 students who required English instruction and that failure to accede to the instruction could be met with disciplinary measures against him. The school governing body immediately appealed in terms of the internal procedures against the directive only to be dismissed by the Department of Education on the first school day of 2005. Two senior officials of the Department took over the managerial control of the school on the first school day 2005, enrolled the 21 learners and appointed an educator to teach the learners.

Section 5(5) of the Schools Act provides that the admission policy of a public school is determined by the governing body of such school, subject to any applicable provincial law. An application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department. In practice this function is delegated to the school principal. Section 6(2) of the Schools Act provides that the governing body of a public school may determine the language policy of the school subject to the Constitution, the Schools Act and any applicable provincial law, provided that no form of racial discrimination may be practised in implementing the language policy.

The High Court held that the determination of the language policy of a public school is the function of the governing body and not the Department of Education. Thring J asserted that the introduction of an English stream of tuition would indeed have a profound effect on the school's ethos, administration, customs, pedagogy and '... almost every aspect of the atmosphere which pervades in the school'. The Court held that in deciding what the best interests of the children were, the principle of legality (also termed the rule of law) weighed heavier than the time period (months) that had elapsed or the inconvenience of moving the

⁴¹*Western Cape Minister of Education v Governing Body of Mikro Primary School* (n 7).

children to another school. Moreover, contrary to the decision in *Middelburg*, Thring J held that upholding the principle of legality is a fundamental prerequisite to a democratic society that will in the long run be in the best interests of all the children. The 21 learners were ordered to be enrolled at a nearby Kuilsrivier Primary School as soon as was reasonably practicable. This interpretation of the 'best interest of the child' differs as the long-term best interest of all children were considered in *Mikro*, whereas in *Middelburg* the best interests of only the 20 learners requiring English tuition were considered.

11 *Seodin Primary School* case: Erroneous precedent applied

An opposite result was however reached in the matter of *Seodin Primary School v Northern Cape Department of Education*.⁴² In this case the Northern Cape Department of Education ('the Department') imposed an order to change the Afrikaans single-medium language policy of six schools to double-medium English and Afrikaans. The applicants contended that the action of the Department was administratively unjust because: (i) the state acted *ultra vires* their powers and contrary to the provisions of section 6(2) of Act 84 of 1996 (Northern Cape) by unilaterally laying down a language policy for the applicant schools; (ii) it was procedurally unfair because the *audi alteram partem* rule was not adhered to and factors such as the financial implications and adverse consequences for the applicant schools were not considered adequately; and alternatively, (iii) the decision was politically inspired and thus *mala fide*. The applicants applied for the Department's action to be reviewed and to be declared null and void.

The full bench of the Northern Cape High Court unanimously dismissed all the arguments of the affected schools. On a technicality Kgomo JP held that none of the affected schools provided proof that their language policies had been approved in terms of the Northern Cape Education Act, 1998. In terms of this provincial Act, the language policy of a school had to be determined in consultation with the Member of the Executive Council (MEC) for Education of the province and approved by the MEC. The Applicant schools contended that their language policies had been established in terms of the School Act since 1997 and that the Northern Cape Department of Education had recognised the Afrikaans single-medium language status of the schools until 2003 (shortly before the schools were compelled to change their language policies). Even though the schools had non-racial admission policies and had learners from various races in the schools, the court was persuaded by the arguments of the state that the

⁴²*Seodin Primary School v Northern Cape Department of Education* (n 7).

schools were exclusive 'racial enclaves' that perpetuated the advantages of minority communities.

The court found that the overcrowding at the respondent schools and the relative underutilisation of the Applicants' schools, the unavailability of alternative education facilities within a reasonable travelling distance, and the number of learners requiring instruction in English were factual considerations weighing heavily in favour of the Department's decision to impose changes in language policy. The court also found that the position of Afrikaans at the respective schools would not be affected.

Referring to the main finding of the *Mikro* judgment, the Northern Cape High Court conceded that the affected learners did not have a constitutional right to receive their education in English at any of the Applicant schools. However, the Court ignored the precedent set by the Supreme Court of Appeal and chose to follow the erroneous precedent set by a lower court in the Middelburg case. Kgomo JP reasoned that by virtue of the time delay of five months since admission of the learners, they had a legitimate expectation to remain at these schools. From this position the Court made a juridically unfounded leap and held that the affected children had acquired a vested interest to remain at the various schools. There is no legal basis, precedent or principle that entitled the Court to reach this conclusion. The Court failed to consider the legal question of whether the Department of Education was entitled to impose a change in the language policies. In both the preceding cases of *Middelburg* and *Mikro* the courts held that it was unlawful for the state to impose changes of language policy on the schools. Therefore, the *Seodin* judgment is bad in law and erroneous in its non-application of the *stare decisis* principle.

12 Ermelo High School case: School compelled to review its language policy

The issue of appropriate language policy and equal access to public education ultimately reached the Constitutional Court in the matter of *Head of Department, Mpumalanga Education Department v Ermelo High School (Ermelo)*.⁴³ The school had a classroom capacity for 1120 learners but was underutilised with only 685 enrolled learners. Other schools in the district were full to capacity and the worst overcrowding was found at Lindile School, with an average classroom occupation of 62 learners per class. The Head of Department, Mpumalanga Education (HoD) informed the Ermelo High School governing body by letter that its power to determine the school's language policy had been withdrawn in terms of section

⁴³*Head of Department, Mpumalanga Education Department v Ermelo High School (Ermelo)* 2010 2 SA 415 (CC).

22 and that an interim committee was appointed in terms of section 25 of the Schools Act to take over the school governing body's function. The HoD also suspended the school principal for good measure. The Interim Committee followed the HoD's express instruction and drafted a new parallel-medium (English and Afrikaans) language policy for the school without consulting the school management, educators, parents or learners. The school governing body then launched an urgent application to set aside the state's actions.

On analysis of the statutory provisions the Court found that the state was entitled to revoke the school governing body's function, but that such action had to be done in a lawful and procedurally fair manner. However, the Court held that the state's action was unlawful because the HoD erroneously conflated the requirements of section 22(1) and of section 25 by withdrawing the function and at the same time establishing an interim committee under section 25.⁴⁴ Once a function is withdrawn in terms of section 22 it vests in the state. On the other hand, the purpose of section 25 is to provide a mechanism in terms whereof a dysfunctional governing body is temporarily replaced 'while arrangements are made for the election of another governing body'.⁴⁵ The two provisions regulate two unrelated situations and may not be selectively or collectively applied to achieve a purpose not authorised by the statute.⁴⁶ The HoD had therefore acted unlawfully by constituting the interim committee. The Court held that the HoD's action was procedurally unfair because he did not give the governing body a reasonable opportunity to make representations about the school's language policy. Moreover, the interim committee did not have the requisite power to fashion the new language policy and acted in breach of the constitutional principle of legality. This part of the Constitutional Court's analysis and reasoning is sound in law.

The second issue of this dispute was the question of whether the school's language policy accorded with the Constitutional requirements of section 29(2) which provides that:

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.

⁴⁴*Ermelo* (n 43) para 87.

⁴⁵*Id* para 85.

⁴⁶*Id* para 88.

The Court held that an ‘insular construction’ of section 29(2) of the Constitution and section 6(2) of the Schools Act, which locates the right to determine language policy exclusively in the hands of the school governing body, would frustrate the right to be taught in one’s language of choice and therefore thwart the transformative designs of the Constitution. The implication of this decision was that the school governing body had to consider not only the present school community, but also the potential learners in the broader community when determining the appropriate language policy. Unfortunately the Court in *Ermelo* failed to analyse the twin issues of the justification of the state’s action and the reasonableness of the school’s single-medium policy.⁴⁷ The Court merely intimated that the language policy was not consistent with the relevant provisions of the Constitution and the Schools Act. Despite the earlier statement by the Court that reasonable grounds will have to be determined on a case by case basis⁴⁸ with full and due regard to all the circumstances that actuated the HoD to bypass the governing body, the Court judiciously avoided the issue of reasonableness of action by merely referring to arguments on either side of the substantive issue.

The reasonableness standard is built into the first part of section 29(2) (language of choice) and depends on the context and relevant circumstances that determine the practicability of a decision, such as ‘the availability of and accessibility to public schools, enrolment levels, the medium of instruction, the language choices that learners and their parents make, and the curriculum options offered.’⁴⁹ The reasonableness standard of the second part of section 29(2) (manner of educational alternatives) requires that ‘the State must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices’.⁵⁰ However, none of these enumerated factors were analysed and the Court did not determine whether the HoD’s actions were justified and reasonable on the grounds of equity, practicability and redress. Despite having made no firm finding on reasonableness, the Court nevertheless ordered the school governing body to reconsider its language policy.

It stands to reason that the Court could have determined the reasonableness of the state’s actions by *inter alia* considering relevant factors such as the expected enrolment levels; the availability of alternative school facilities or adequate space at the school; the proximity and availability of transport; timeous notice to enable proper planning and budgeting; the value of mother tongue instruction and its effect on quality pedagogical practices; the impact of language

⁴⁷Smit “‘Collateral irony’ and ‘insular construction’: Justifying single medium schools, equal access and quality in education” (2011) 27(3) *SAJHR* 398 at 410.

⁴⁸*Ermelo* (n 43) para 73.

⁴⁹*Ibid.*

⁵⁰*Id* para 53.

choice on the administration, organisation and ethos of the school, promotion of multilingualism in view of the trend towards English monolingualism; the diminishing number of Afrikaans-medium schools and underrepresentation in terms of national demographic percentages; unfair discrimination against such schools; the levelling-up principle to improve quality and standards of all schools; and the international practice of public funding for mother tongue tuition for minorities.⁵¹

Regrettably this aspect of the *Ermelo* judgment falls short of the standard expected of the highest court in our country. The result of the ambivalence of the *Ermelo* decision has been similar to the cases of *Middelburg* and *Seodin*⁵² as the courts have allowed the English-speaking learners to benefit from the consequences of unlawful state action. Scholars such as Malherbe,⁵³ Malan,⁵⁴ Colditz and Deacon,⁵⁵ and Smit⁵⁶ have criticised the *Ermelo* judgment.

13 *Welkom High School* case: Admission refused in terms of school pregnancy policy

In *Head of Department, Department of Education, Free State Province v Welkom High School (Welkom)*,⁵⁷ the Head of the Department ('HoD'), Free State Province, was unhappy with the exclusionary effect that certain schools' pregnancy policies had on pregnant learners. The HoD took matters into his own hands and summarily readmitted pregnant learners to Welkom High School and Harmony High School. The school contested the action of the state and the matter was eventually heard in the Constitutional Court. Khampepe J (for the majority) held that the HoD of Education, Free State was not empowered by any statutory provision to summarily re-admit a learner to a school. The HoD could have relied on section 22(1) to withdraw the relevant function from the school governing body, or section 22(3) if he felt that the matter was urgent, but he did not do so. In the circumstances, the instructions issued by the HoD, which effectively required the principal to ignore the pregnancy policies of both schools, were unlawful. In a separate concurring judgment, Froneman J and Skweyiya J agreed that the HoD had acted unlawfully. They emphasised that the parties had

⁵¹Smit (n 47).

⁵²*Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys; Seodin Primary School v Northern Cape Department of Education* (n 7).

⁵³Malherbe 'Taal in skole veroorsaak nog 'n slag hoofbrekens' (2010) 3 *TSAR* 609 at 610, 622.

⁵⁴Malan (n 35).

⁵⁵Colditz and Deacon 'Die statutêre raamwerk van taalbeleid in openbare skole en die implikasies van die twee *Ermelo*-uitsprake: Kroniek' (2010) *Journal of Juridical Science* 123-139.

⁵⁶Smit (n 47).

⁵⁷*Head of Department, Department of Education, Free State Province v Welkom High School* (n 6).

failed to engage with each other in good faith, to uphold the principles of co-operative governance, and to comply with their concomitant duty to avoid litigation.

14 *Rivonia Primary School* case: Imposed admission of a learner on a waiting list

The question of whether a school governing body is entitled to determine the school's capacity for admission of learners or whether the provincial government has the authority to do so, came to the fore in the matter of *Member of the Executive Council for Education, Gauteng Province v Governing Body of the Rivonia Primary School* (*Rivonia Primary School* case). *In casu* a public school refused admission of a child to the 2011 school year on the ground that she was in 20th place on the waiting list.⁵⁸ The school governing body had determined the admission policy and set the capacity for Grade 1 learners at 120. However, the school itself applied the policy flexibly when it admitted four extra learners, thus exceeding the maximum capacity set out in its policy. The child's mother refused to accept the school's decision, and obtained the support of the provincial education department officials. After the school year had commenced, the Head of the Department ('HoD') instructed the principal to admit the learner. Before the governing body could meet to consider the instruction, officials of the department arrived at the school and summarily deposited the girl in a classroom. The *Rivonia Primary School* case is a prime example of a dispute resulting from the intense competition to gain access to schools offering quality education.

The school's governing body had prepared an admission policy, which the department had approved. The governing body determined its capacity by taking into account factors such as the number of educators, their space requirements, the number of designated classrooms, and the optimum working space. There was no suggestion that it set its capacity unreasonably or arbitrarily. The governing body of the school applied to the High Court for declaratory and interdictory relief aimed at the department's decision to override the school's admission policy on capacity, the withdrawal of the principal's admission function, and the forced admission of the child.

The provincial government contended that it was entitled to override the capacity set by the governing body and relied on section 3(3) and 3(4) of the Schools Act. However, the Supreme Court of Appeal held that these provisions are concerned with the MEC's obligation to ensure that infrastructure is provided for compulsory attendance of all children in the province between the ages of seven and 15 years old. The provisions require the MEC to determine the

⁵⁸*MEC Education, Gauteng Province v Governing Body of the Rivonia Primary School* (n 5).

infrastructural shortcomings that impede the fulfilment of that objective and to report annually to the Minister on any remedial steps being taken to remedy the problems. They have no relation to the governance of a school. The Supreme Court of Appeal (SCA) thus held that only the governing body has the power to determine a school's admission policy, including its capacity, while provincial departments are responsible for the professional management of schools and administration of admission. Cachalia JA (for a unanimous court) thus held that once the school's governing body had submitted its admission policy to the department, and the policy was accepted, it was not open to the department to override the policy.

In the appeal to the Constitutional Court the MEC for Education, Gauteng Province conceded that the school governing body had the power to determine the admission policy and capacity of a school in terms of section 5(5) and section 5A of the Schools Act. However, the MEC contended that the power of the school governing body to determine the admission policy should not be overstated and was subject to confirmation by the provincial Department of Education. The school contended that the Gauteng Education Department was not entitled to act contrary to the school's admission policy and that the Gauteng Regulations were in conflict with the national statute (Schools Act). On analysis of the statutory provisions Mhlantla AJ (for the majority of the Constitutional Court) agreed with the contentions of the state and held that while the school governing body determines admission policy, individual decisions on admission are taken only provisionally at school level, by the principal acting under delegated authority of the HoD.⁵⁹

Regulation 13(1) of the Gauteng Regulations provides that if principals, acting on behalf of the HoD, refused to admit learners to a school, they had to provide reasons in writing to the HoD and the parents. The Gauteng HoD would be required either to confirm or to set aside the decision made by a principal. A learner or parent who was dissatisfied with the decision of the Gauteng HoD was entitled, in terms of Regulation 14, to appeal to the Gauteng MEC, who then had to make a final determination.⁶⁰ The Court held that sections 5(7) to 5(9) of the Schools Act in relation to admissions indicate that the Department maintains ultimate control over the implementation of admission decisions. The Gauteng Regulations furthermore afforded the Gauteng HoD the specific power to overturn a principal's rejection of a learner's application for admission. The Court held that the Schools Act provides for flexibility with regard to school policies, which allows the MEC to consider admission refusals and overturn an admission decision

⁵⁹*MEC Education, Gauteng Province v Governing Body of the Rivonia Primary School* (n 5) para 44.

⁶⁰*Id* para 45.

taken at school level.⁶¹ The provincial department of education was thus empowered to issue an instruction to the principal of Rivonia Primary School to admit a learner in excess of the limit in the school's admission policy. The Court explained that the general position is that admission policies and capacity determination must be applied in a flexible manner and should not inflexibly limit the discretion of the provincial education department (Gauteng HoD). If there were good reasons to depart from the policy, it was always open to the principal or the Gauteng HoD to do so.⁶²

The final issue that was decided in *Rivonia Primary School* was whether the Gauteng HoD had acted in a procedurally fair manner. The Gauteng Department contended that it had consulted with the school during September to November of the previous year and that it would be overly onerous to require a further hearing in every instance. Mhlantla AJ was of the view that the timing, circumstances and about-turn decision of the Department about enrolment of the learner necessitated an open discussion with the school. The school should have been afforded the opportunity to explain the possible impact that such a decision would have on the quality of the education and the administration of the school. The Court placed strong emphasis on the relevant stakeholders to adhere to the constitutional and statutory obligation to engage in good faith before turning to the courts. The Court thus found that the HoD Gauteng did not act in a procedurally fair manner when he issued instructions and when the learner was placed in the school.⁶³

On consideration the Constitutional Court judgment in *Rivonia Primary School* cannot be faulted as it correctly interprets the statutory provisions and clarifies the legal principles that apply to matters concerning the powers of school governing bodies and the provincial department of education with regard to school admission policies. The requirement of procedural fairness and the directive of flexibility place a duty on the parties to ensure constructive engagement in terms of the partnership model envisaged by the Schools Act and the co-operative governance scheme set out in the Constitution. The case thus affirms that stakeholders should engage with each other in good faith on any disputes and that the engagement must be directed towards furthering the interests of learners.

⁶¹ *Ibid.*

⁶² *Id* at para 46.

⁶³ *Id* at para 73.

15 Summary of legal principles

The legal principles that have emerged from case law on schools admission policies can be summarised as follows:

Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a government functionary cannot simply override the policy or act contrary to it. This is so even where the functionary is of the view that the policies offend the Schools Act or the Constitution. This does not mean, however, that the school governing body's powers are unfettered, or that the relevant policy is immune to intervention or that the policy inflexibly binds other decision-makers in all circumstances. Rather, a functionary may intervene in a school governing body's policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation.⁶⁴ This is an essential element of the rule of law. Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the governing body, then the functionary must act reasonably, and in a procedurally fair manner. The proper remedies for the state to contest seemingly inequitable school policies are, first, to engage constructively in open discussion in order to resolve the issues in a spirit of co-operation and partnership. Secondly, if discussions and negotiations fail, the state should not take the law into its own hands, but should approach a court of law to resolve the dispute.⁶⁵

Although the courts have condemned the state's violation of the principle of legality in all the cases (*Middelburg, Mikro, Ermelo, Welkom and Rivonia*) except *Seodin*, the constitutional requirements of promoting equity, redressing the ills of apartheid, and taking the best interest of the learners into account, have swayed the scales in favour of changing school policies in all the cases except *Mikro*. However, the eventual *de facto* results of the *Middelburg, Seodin, Ermelo, Welkom* and *Rivonia* judgments have been that the principle of legality is undermined and that the consequences of unlawful administrative action by the state has been condoned.

In the following section four possible explanations for these ambivalent outcomes will be proffered and possible approaches to strike a reasonable balance between equality and quality in education will be discussed.

⁶⁴*Id* paras 40–43.

⁶⁵*Ibid.*

16 Discussion: Explanations for the ambivalent adjudication

It is contended that the underlying reasons for the ambivalent results on the issue of 'equal' access (admission) to schools versus school autonomy or school quality may be attributed to, first, the particular litigation strategy of the applicant schools that primarily focused on the legality issues (administrative justice issues) instead of arguing the substantive (material) issues of each case; secondly, the policy of judicious avoidance and minimalism; thirdly, the apparent consequentialist ethic of the judiciary, and finally, the non-application of the proportionality analysis.

17 Litigation strategy: Arguing the structural instead of the material issues

Table 1 provides a summary of the issues and arguments that were contested and adjudicated in the most relevant cases on disputes concerning school admission policies and state action. From Table 1 it is apparent that the parties focussed mainly on the legality (procedural and administrative justice) issues, but that many of the substantive (material) issues that determine quality of education (that is, school ethos, school administration, academic results, scope of the curriculum, pedagogical practice and implications) were not argued by the lawyers or adjudicated by the courts at all. The only substantive issues that were contested and adjudicated in most cases were facts on the issue of justification (that is, equity and redress). However, it is notable that the issue of reasonableness of state action or justification of the specific schools' decisions were not contested by the parties nor considered by the courts in the majority of cases.

Table 1: Matrix of issues adjudicated in school admission cases

| FACTORS | Cases on School Admissions | | | | | | |
|--|-----------------------------------|------------|-------|--------|--------|--------|---------|
| | Matukane | Middelburg | Mikro | Seodin | Ermelo | Welkom | Rivonia |
| PROCEDURE (structural issues, notice reasons, administrative fairness) | | | | | | | |
| Statutory interpretation | ü | ü | ü | ü | ü | ü | ü |
| Just administrative action | ü | ü | ü | ü | ü | ü | ü |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Legality | ü | ü | ü | ü | ü | ü | ü |
| SUBSTANCE (merits, material facts) | ü | ü | ü | ü | ü | ü | ü |
| Removal of unfair discrimination & redress of inequality | ü | ü | ü | ü | ü | ü | ü |
| Overcrowding, optimal us/underutilisation of public facilities | ü | ü | ü | ü | ü | ü | ü |
| Reasonableness & justification decisions | ü | ə | ü | ə | ə | û | ü |
| Effect on quality pedogogical practices (teaching learning) | ü | û | ü | û | ə | û | ü |
| Expected enrolment levels, class size & adequate physical space | ü | ə | ü | û | ü | û | ü |
| Practicablity. eg availability of alternative schools, transport | û | ə | ü | ə | ə | û | û |
| Impact on school ethos, parental support, participatory governance | û | ə | ü | ə | ə | û | ü |
| Effect on curriculum (subjects taught, quasi-market effect, scarce teachers | û | û | û | û | ü | û | û |
| Levelling-up principle: improve quality & standards of weak/poorer schools | û | û | û | û | û | û | û |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Promotion of multi-lingualism vs English monolingualism | û | ø | û | û | û | û | û |
| Value of mother tongue tuition | û | û | û | û | û | û | û |
| Legal principlesL eg, best interest of the child; non diminution of existing rights | û | û | û | û | û | û | û |

û *Issues not argued or adjudicated*

ü *Issues contested and adjudicated*

θ *Issues argued but not adjudicated*

In *Ermelo*, as well as the cases of *Middelburg*, *Seodin* and *Mikro*, the justifiability of an Afrikaans-only language policy was never argued in court.⁶⁶ The litigation strategies of the applicants in all these cases were aimed at arguing the structural (procedural) issues of legality, administrative justice and procedural fairness, rather than contending the substantive merits of reasonableness of state action, reasonableness of the language policies, justification of admission policies and pedagogical requirements for quality education.

The schools in the *Middelburg* and *Ermelo* cases were surprised by ambivalent court orders that found unlawful administrative action by the state, yet simultaneously provided unexpected remedial relief to address the substantive issues of admission and language policies. It is notable that the three cases that received positive critiques from most authors, that is, *Matukane*, *Mikro* and *Rivonia*, are in matters where the qualitative issues with regard to school ethos (that is, organisational culture, work ethic, leadership and cultural values) and the practicality of the state action or the school policy was properly contested and adjudicated.

The reluctance of the lawyers to argue the substantive issues of language-in-education cases may perhaps be attributed to the influential decision of *Gauteng School Education Bill 1995*.⁶⁷ Sachs J suggested that multi-lingualism should be

⁶⁶Woolman and Fleisch (n 17) 74.

⁶⁷*Gauteng School Education Bill* (n 14).

supported by advancing parallel- or double-medium institutions.⁶⁸ This *obiter* remark in *Gauteng* was based on the interpretation of the language provisions of the Interim Constitution. However, in view of the express mention of single-medium institutions in section 29(2) of the Constitution and the subsequent domination of English monolingualism in schools and the public realm, the *obiter* remark by Sachs J no longer seems relevant, first, because the real issue in education, both at present and for the foreseeable future, is not about equal access, but about ensuring the quality of education in accordance with the spirit of the Constitution, and secondly, because section 29(2) of the 1996 Constitution expressly provides for the possibility of single-medium schools. Given the generally poor results of the education system at this stage, the substantive issue of quality education sheds a different light on the appropriateness of English monolingualism and uncontrolled school admissions. At this stage in South Africa's history it is essential to bolster quality by ensuring that the education quality at dysfunctional schools should be levelled-up to a minimum level of adequacy without diminishing the quality at well-functioning schools.

In view of the eventual outcomes of the language-in-education and admission policy cases, the option of addressing only the structural issues at hand does not seem to be the most cogent litigation strategy to follow, because the courts will inevitably make orders to remedy the substantive (material) as well as the structural (procedural) issues. The reasonableness of school policies or state action should be argued and adjudicated from an education quality perspective. Crucial factors such as availability of competent educators and staff members, the linguistic competence of educators, the pedagogical value and effectiveness of the language of instruction, the availability of translation or linguistic support services, sufficient classrooms, physical space and school facilities, financial constraints and the quintile category of schools, the impact of administrative adjustments (administrative equity), timeous notice of policy change, pedagogical fairness and equity for all learners, the non-diminution of learners' existing rights and the extent of redress required, should all be contested in order to ensure not only equal access but improved quality of education. Litigants should provide sufficient evidence to persuade a court of the cogency of the substantive factors that determine the quality of education. From a normative point of view it would create legal certainty and generally applicable legal principles if the substantive issues of school policies, quality education and equal access were adjudicated by the courts.

⁶⁸*Gauteng School Education Bill* – 'There was nothing in those principles to guarantee the exclusivity of Afrikaans in any school. Indeed, the principle of the promotion of multi-lingualism appeared to encourage the establishment of dual- or multiple medium schools' (n 14 para 74).

18 Judicious avoidance and minimalist judgments

In an insightful article, Currie describes two approaches to constitutional adjudication that he terms Herculeanism⁶⁹ and minimalism.⁷⁰ Herculeanism is a phrase coined by Currie based on Ronald Dworkin's fictional ideal judge – 'Hercules' – who provides ambitious, comprehensive, generalised, deeply-theorised masterpieces of judgment. The landmark *Makwanyane*⁷¹ judgment on the constitutionality of capital punishment and the *Gauteng School Bill* judgment stand out as examples of Herculean judgments. Minimalism is the opposite of Herculean and depicts adjudication that is characteristically cautious, incremental, particularistic and theoretically modest. Currie explains that decisional minimalism has become the orthodoxy of the South African Constitutional Court. The reasons for favouring minimalism as 'judicious politics' are, according to Currie, that it is easier to find consensus on the shallow issue of outcome; it is a salutary acknowledgement of the limited judicial abilities and capacities available to adjudicate complex issues; it serves the liberal values of tolerance and respect; it avoids incompatible yet comprehensive theories in pluralistic societies; it favours particularity and incompleteness instead of generality as a mechanism to avoid contentious issues; and it is a means of 'negotiating the problems of counter-majoritarianism' by recognising that democratic institutions such as parliament are the most appropriate forums to debate substantive principles and controversies.⁷²

These policy considerations explain why the courts have thus far avoided detailed analyses of the reasonableness of the state action or the justification of the schools' language or admission policies. Unfortunately, the minimalist judgments that avoid contentious issues create the impression that the courts may have approached the cases with predetermined frames of mind. The inclination of our courts to give minimalist judgments has led to a similar response by legal practitioners to avoid contentious substantive issues and to argue only the particular and structural matters. The judgment by Moseneke DCJ (unanimous) in *Ermelo* is an example of minimalist adjudication as the court avoided a decision on the twin issues of reasonableness of the state's action and justification for the school's policies.⁷³ In fairness to the Constitutional Court, it probably paid scant attention to these twin issues because neither the legal

⁶⁹Currie 'Judicious avoidance' (1999) 15 SAJHR 138-165 at 139.

⁷⁰*Ibid.*

⁷¹*S v Makwanyane* 1995 6 BCLR 665 (CC).

⁷²*Id* 150.

⁷³Smit (n 47).

counsel for the school⁷⁴ nor the the Federasie van Beheerliggame van Suid-Afrikaanse Skole (FEDSAS), *Amicus curiae*⁷⁵ specifically addressed it in their arguments.

Obviously, when the courts avoid making clear decisions on substantive issues it inevitably results in legal uncertainty and ambivalence. It is hoped that the courts will provide more comprehensive, generalised, deeply-theorised legal principles when adjudicating complex issues such as equal access, school language policies and quality education.

19 Consequentialism underlying the adjudication

Although it is beyond the scope of this article to discuss moral theory, it is evident that value judgments are part and parcel of the judicial process, and that most, if not all, adjudication is based on certain moral persuasions.⁷⁶ Consequentialism is the view that normative properties and the moral rightness of an act depends only on the consequences relating to that act.⁷⁷ Hosten *et al*⁷⁸ remind us that legal theory includes a concern with moral values, political values,⁷⁹ legal values (such as justice, fairness, reasonableness, equity and impartiality) and administrative values.⁸⁰ Many criticisms have been noted against consequentialism, in its many varieties, and the most convincing is that it overlooks justice and rights, it ignores the consequences for certain people and that the end eventually justifies the means.⁸¹

The adjudication in all the language-in-education cases (*Middelburg, Seodin, Ermelo*) except *Mikro* reflect an approach by the courts that favours the consequentialist ethic (as opposed to deontological). For instance, in *Middelburg* the consequences of admitting 20 learners that required English tuition in an Afrikaans school were favourable for these learners as well as for the Education Department's political agenda to enforce transformation. As a result, in spite of

⁷⁴Respondent's Heads of argument at www.constitutionalcourt.co.za/ (accessed on 24 January 2014).

⁷⁵*Amicus curiae*'s Heads of argument www.constitutionalcourt.co.za/ (accessed on 24 January 2014).

⁷⁶*S v Makwanyane* 1995 3 SA 391 (CC) para 207: 'After all, concepts like "good faith", "unconscionable" or "reasonable" import value judgments into the daily grind of courts of law'.

⁷⁷Brink 'Some forms and limits of consequentialism' in Copp (ed) *The Oxford handbook of ethical theory* (2006).

⁷⁸Hosten *et al* *Introduction to South African law and legal theory* (1995) 237.

⁷⁹Constitution of South Africa, 1996 s 7(1) enshrines the democratic values of freedom, equality and human dignity.

⁸⁰Hosten *et al* (n 78) 237.

⁸¹Scheffler *The rejection of consequentialism* (1982); Sinnott-Armstrong 'Consequentialism' in Zalta (ed) *Stanford Encyclopaedia of Philosophy* (2011) 12

<http://plato.stanford.edu/entries/consequentialism> (accessed on 24 January 2014).

the unlawfulness of the Education Department's action, the court nevertheless found justification for these consequences. Procedural fairness becomes meaningless with a consequentialist approach because the ultimate result disregards fairness in action. Consequentialism considers the harm to persons of 'lesser' importance as long as the ultimate goal is attained. South Africa's history of colonialism and apartheid is replete with examples where the consequentialist ethic led to oppressive injustice in order to attain preconceived ideological ideals. It seems probable that the consequentialism evident from the ambivalent judgments, which have not taken a strong stand against unlawful administrative action, might in the long run have a similar detrimental effect on the South African society.

20 Applying the proportionality test of the general limitation clause

All the cases about school admission policies and school language policies unavoidably involve the competing fundamental rights of equality, basic education, language and administrative justice.⁸² Accordingly, one would expect that the courts would have applied the proportionality test of the general limitation clause (s 36) of the Constitution to deal with these dilemmas. Section 36 of the Constitution prescribes particular considerations that apply to the limitation of fundamental rights.⁸³ It has been said that the general limitation provision in the Bill of Rights of the Constitution is probably the most important section in the Constitution,⁸⁴ because it applies to all instances that involve conflicting fundamental rights. Curiously, the courts have not applied section 36 in matters concerning access to education and the rights of schools to determine their admission policies.⁸⁵

⁸²*Middelburg Laerskool v Hoof van Departement* (n 7) at 178C.

⁸³Section 36 reads as follows: (1) 'The rights in the Bill of Rights may be limited only in terms of (the) law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and purpose; (e) less restrictive means to achieve the same purpose. (2) Except as provided in subs (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

⁸⁴Woolman 'Limitation and suspension' in Chaskalson *et al* (eds) *Constitutional law of South Africa* (CLOSA) (1996) at 46-67.

⁸⁵*Middelburg Laerskool v Hoof van Departement, Departement van Onderwys, Mpumalanga* (n 7); *Western Cape Minister of Education v Governing Body of Mikro Primary School* (n 7); *Seodin Primary School v Northern Cape Department of Education* (n 7); *Head of Department, Mpumalanga Education Department v Ermelo High School* (n 7); *Head of Department, Department of Education,*

Woolman observes that the courts do not always apply the proportionality test in terms of section 36, because such a balancing process is sometimes not possible.⁸⁶ Rights and interests cannot always be valued quantitatively, but at times need to be adjudicated qualitatively by taking characteristics such as intensity, utility and aesthetics of the rights into consideration. The *Mikro* case is an appropriate example of a matter where the proportionality test of section 36 of the Constitution could have been applied fruitfully. The best interest of all the children on both sides of the dispute had to be considered. In this matter the rights of the children were not evaluated in a head-to-head comparison, but a 'balance was struck' by ensuring that the right to basic education of all the learners would co-exist. The Court determined that the long-term best interest of all the children would be best served if the state complied with the requirements of legality and the language rights of the Afrikaans learners were upheld.

If applying the proportionality test to the specific facts of the *Mikro*-case, the purpose and importance of the school's single-medium language policy, the long-term best interest of learners to receive education in their mother tongue, the protection of the cultural rights of the Afrikaans-speaking children and the prerequisite that the state should adhere to the rule of law are placed on the one side of the scale. On the other side of the scale, the English learners' right to basic education at a school and the short-term best interest of avoiding the children the inconvenience of transferring to another school is weighed. Lastly, deciding whether there is a less onerous way of dealing with the issues should be considered. The fact that a school in close proximity was available to accommodate the English learners without much disruption was the deciding factor in this equation. In this case, the benefit to the Afrikaans learners to protect their language and the school's ethos outweighed the cost to the English learners of moving to an available and conveniently located English-medium school.

The consistent and principled application of the proportionality test in situations where fundamental rights conflict is preferable, as a reasoned analysis of factors will promote a general understanding of fundamental rights and thus result in more legal certainty.

21 Conclusion

Striking a balance between equal access to education while maintaining quality of education at public schools remains a thorny issue in South Africa. In the multilingual context of South Africa, the question of whether equality in education should ideally be accomplished by assimilation of all languages of instruction into

Free State Province v Welkom High School (n 6); *MEC Education, Gauteng Province v Governing Body of the Rivonia Primary School* (n 5).

⁸⁶Woolman (n 84).

a homogenous system of monolingual (English) education or by the advancement of pluralism through a system of multilingual and single-medium mother tongue education is not yet settled. The substantive issue of pedagogical quality in view of the influx of learners to schools with limited spatial capacity has also not yet been properly adjudicated.

This brief review of the judgments on the issue of 'equal' access (admission) to schools reveals a pattern of ambivalent outcomes. On the one hand the courts have condemned the state's abrogation of the principle of legality, but have simultaneously allowed for the consequences of such unlawful administrative action to continue in practice. It is contended that the underlying reasons for the ambivalent judgments may be attributed first to the litigation strategy of primarily addressing the legality of state action (the administrative justice issue); secondly, the policy of judicious avoidance and minimalism; thirdly, the underlying ethic of consequentialism, and finally, the non-application of the proportionality analysis.

If the courts continue to hand down ambivalent decisions that do not take a strong stand against unlawful administrative action by the state, then, in the long run, the legal system and respect for the law indubitably will be undermined.