Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 15908/2020

Before: The Hon. Mr Justice Binns-Ward

Hearing: 20 October 2021
Judgment: 26 October 2021

In the matter between:

SANGO MELIKHAYA HESEWU First Applicant
FELICIA LENOHOLO HESEWU Second Applicant

and

SCHOOL GOVERNING BODY, SUNNINGDALE PRIMARY SCHOOL First Respondent
MINISTER FOR EDUCATION: WESTERN CAPE Second Respondent

JUDGMENT
(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J:

[1] The applicants, who reside at West Beach in the Blouberg area of Cape Town, applied as a matter of urgency for the following relief:

1. The review and setting aside of the decision of the first respondent, which is the school governing body of Sunningdale Primary School, made on 1 July 2020,

refusing their application for the admission of their daughter to the school as a learner in Grade R;

2. The review and setting aside of the decision of the second respondent, who is the Minister of Education for the Western Cape, dismissing their appeal against the refusal by the first respondent of their application for their daughter's admission to Sunningdale Primary School;

3. An order declaring that the first respondent's admission policy '*allowing or preferring only learners of Sunningdale Primary School to have an address designated by the City of Cape Town "Sunningdale" and/or those who have siblings at Sunningdale Primary School to be invalid, unlawful and inconsistent with the Constitution*';[1]

4. A direction that their daughter be admitted and enrolled at Sunningdale Primary School as a Grade R learner for the 2021 school year.

[2] The notice of motion set the application down for hearing on the urgent roll on Friday, 27 November 2020. Very shortly before the enlisted date, however, the applicants removed the matter from the roll, without tendering wasted costs, and indicated that they would instead pursue the relief sought in the ordinary course. By the time the matter was removed from the court's urgent roll the first respondent had already delivered its answering papers, and the second respondent, who elected to abide the decision of the court, had delivered an affidavit for the assistance of the court explaining her decision to turn down the applicants' appeal against the decision of the school governing body. The respondents' papers had obviously been prepared under the constraints of the shortened time periods stipulated by the applicants when they gave notice of their intention to apply for relief as a matter of urgency.

[3] The evidence does not disclose as much, but it appeared to be common ground, when the matter was argued, that the applicants were successful in enrolling their daughter in Grade R for 2021 at another school close to their home. Accordingly, they no longer required a setting aside of the decision of the governing body not to grant their daughter admission to Sunningdale Primary. The applicants, however, delivered replying papers in March 2021, in which they indicated their intention to pursue the application only in respect of the declaratory order sought that the first respondent's admission policy was invalid,

[1] I quote from the notice of motion.

unlawful and inconsistent with the Constitution. They averred that they that they were pursuing the application for that relief '*in the public interest*'. The averment was plainly made with the provisions of section 38(d) of the Constitution in mind.[2]

[4] The applicants thereby purported in their replying papers to convert an application that had been brought by them in their own interest, in their capacities as the parents and guardians of their minor child, into one brought in the public interest. I indicated at the hearing that this was unacceptable. Apart from the fact that it is a trite that an applicant must make out its case in its founding papers and is not permitted to do so in its replying papers, the broader potential impact of a determination of the question in the abstract as one to be determined in the public interest, rather than only in relation to the applicants' application for their daughter's admission to the school, which was the basis upon which the founding papers were drafted,[3] would require wider notice. If the issue were to be approached as one to be determined in the public interest, the national minister and quite probably also the statutory bodies that advise her on matters of policy, including the formulation of admissions policy for public schools,[4] would be necessary parties. Entertaining the application on a different basis to that in respect of which the provincial minister provided an explanatory affidavit would also be unfair to the second respondent. A notice in terms of Rule 16A of the Uniform Rules would also need to be given, for it is very conceivable that other school governing bodies and organisations with an interest in education might wish to be heard. The application is accordingly being considered on the basis it was brought, that is as an application brought by the applicants in their own interest.

[5] Sunningdale is a suburb immediately adjacent to West Beach, where the applicants live. It appears from the Google Maps included in the papers that the two suburbs adjoin each other along the R27 West Coast Road that runs parallel to, and a kilometre or so inland

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[2] Section 38 of the Constitution provides:

'*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –*

a) anyone acting in their own interest;
b) anyone acting on behalf of another person who cannot act in their own name;
c) anyone acting as a member of, or in the interest of, a group or class of persons;
d) anyone acting in the public interest; and
e) *an association acting in the interest of its members.*'

[3] That much is made clear in para 8 and 9 of the founding papers.

[4] The Council of Education Ministers, the Heads of Education Departments Committee and the National Education and Training Council. See paragraph [16] below in this regard.

from, the Bloubergstrand beach. West Beach, as its name suggests, is closer to the beach, and Sunningdale is on the inland side of the R27.

[6] The Sunningdale Primary School is situated in Sunningdale. The text of the impugned admissions policy suggests that the school was established in 2012 'for first time admissions and enrolment in 2013'. It is an '*ordinary public school*' within the meaning of the South African Schools Act 84 of 1996.[5] It is therefore a school established in terms of the second respondent's obligation, in terms of s 12(1) of the Act, to '*provide schools for the education of learners out of funds appropriated for this purpose by the provincial legislature*'.

[7] The second respondent's aforementioned statutory duty to provide public schools reflects the obligation placed on the state in terms of s 29 of the Constitution to provide at least basic education to everyone in the country.[6] To the same end, the Schools Act makes school attendance compulsory for all children between the ages of 7 and 15, or when the child reaches the ninth grade, whichever occurs first.[7] Mr *Njeza*, who appeared for the applicants, accepted, correctly so in my view, that it is a necessarily implied feature of the second respondent's aforementioned duty that she ensure an equitable distribution of public schools so as to facilitate fair and effective access to education to local communities throughout the Province. As far as practically possible, children should not have to travel unduly long distances to their nearest school.

[8] In my judgment it is also implicit in the nature of the statutory obligation that the provincial minister must ensure that the schools that are established have sufficient capacity to meet the basic educational needs of local communities. So, whereas s 12(3) of the Schools Act obliges the members of provincial executive councils to '*ensure that there are enough school places so that every child who lives in his or her province can attend school*', it would not be good enough if the school places provided were in places where it would be unduly difficult for affected learners to get to.

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[5] As distinct from a public school for learners with special education needs or one that provides education with a specialized focus on talent, including sport, performing arts or creative arts. See s 12(3) of the Schools Act.

[6] The Schools Act has been described as '*a sequel*' to the obligations imposed on the State by s 29'; see *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 (14 October 2009); 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) in para 54.

[7] Cf. *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 38.

[9] These observations find support, I think, in the criticism directed by the Constitutional Court at the Mpumalanga provincial education authorities in *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 (14 October 2009); 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) on the facts of that case for their failure to make adequate provision for local communities in the establishment of schools in the town of Ermelo.[8] It was by reason of that failure that it became necessary for 113 black pupils of the town who sought English medium education, but for whom no classroom space was available at English medium schools in the area, to be accommodated on an exigent basis in an Afrikaans medium school with spare infrastructural capacity. The governing body sought to exclude them on the basis of the school's commitment to Afrikaans medium instruction that was incorporated in its admissions policy.

[10] In the current matter, the evidence is that there are several schools in the Blouberg area, including a few independent schools. Sunningdale Primary School appears to be the only public school in Sunningdale and there is also at least one in West Beach. The Sunningdale Primary School offers Grade R facilities, whilst the primary school in West Beach does not. However, there is a primary school in another area adjacent to West Beach that does offer such facilities, and where a place was available for the applicants' daughter when their application to enrol her at Sunningdale was unsuccessful. The other school, Bloubergrant Pre-Primary School, which is 1 km from the applicants' home, is actually slightly more proximate than the Sunningdale Primary School. There is no evidence to suggest that there is a material difference in the quality of the education available at these two public schools, nor is there any evidence that the demographic composition of the learners enrolled at the two schools differs materially.

[11] Sunningdale Primary School has four Grade R classrooms. Provincial policy determines that there should be a maximum of 30 learners in a Grade R class. The school's capacity to admit Grade R learners is therefore capped at 120. The school received at least 200 applications for admission to Grade R for the 2021 school year. It was able to accept only 117 of them. The remaining three places were kept open to allow for the contingency that 3 learners from the 2020 Grade R classes would require to repeat the grade.

[12] The evidence is that applications are numbered in chronological order of receipt. There is a dispute between the applicants and the first respondent as to where in the

[8] At para 103-104.

numerical order of applications the application for the applicants' daughter ranked. The applicants allege that they were number 51 in order, whereas the first respondent says that the application was 191. Applying the rule in *Plascon-Evans*,[9] the court is bound, in any determination of the matter on paper, to accept the respondent's version unless it is obviously far-fetched and untenable, which is not the case in this instance. The particulars of the applicants' application are in any event captured on a pro forma list on which the number 191 is pre-printed at the relevant place. The probabilities therefore in any event support the first respondent's version. According to the first respondent, 152 properly completed applications for places in Grade R were received before the applicants' application was lodged.

[13] '*School governing bodies are a vital part of the democratic governance envisioned by the Schools Act. The effective power to run schools is indeed placed in the hands of the parents and guardians of learners through the school governing body*.'[10] The Constitutional Court has held that s 20 of the Schools Act, which provides for the functions of all governing bodies, must be construed to impose upon such bodies the management of the school '*not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community <u>in which the school is located</u> and in the light of the values of our Constitution*'.[11] The construction recognises the relevance of public schools as facets of the communities in which they are located. It acknowledges the relevance of a connection between location and community.

[14] The point was emphasised in para 99 of the judgment in *Hoërskool Ermelo*, where Moseneke DCJ explained that the governing body was obliged to determine its policies not only with regard to the interests of the school's enrolled learners but also those of the '*of the community in which the school is located and the needs of other learners*'. In speaking of the '*needs of other learners*', the learned deputy chief justice was dealing in that case with the effect of the absence of adequate classroom capacity to accommodate other learners living in the area in which the school concerned was situated. In that case the governing body was required to reassess its policies having appropriate regard to the school admission capacity problem faced by the broader local community assessed in the context of dwindling enrolment numbers and consequent spare capacity at the school concerned.

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[9] *Plascon-Evans Paints (Tvl) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51 (21 May 1984); [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A), at 634E-635C (SA).

[10] *Hoërskool Ermelo* para 79.

Id para 80.

[11] Underlining supplied.

[15] Section 5 of the Schools Act regulates admission to public schools. Section 5(1) provides that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. Section 5(5) provides that, subject to the other provisions of the Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of the school. The provisions of s 5 of the Schools Act are replicated in all material respects in s 41 of the Western Cape Provincial School Education Act 12 of 1997.

[16] The admission of learners to public schools is also addressed in the National Education Policy Act 27 of 1996. That Act empowers the national minister of education to determine national policy on various matters including the admission of students to '*education institutions*', such being defined to mean '*any school contemplated in the South African Schools Act, 1996*'. Policies formulated under the National Education Policy Act are required by s 4 of the Act to be directed at '*the advancement and protection of the fundamental rights of every person guaranteed in Chapter 2 of the Constitution and in terms of international conventions ratified by Parliament*'. The Act's provisions make it clear that policies made under the Act are the product of a consultative process with a range of stakeholders, including the Council of Education Ministers, the Heads of Education Departments Committee and the National Education and Training Council.

[17] The national minister has published a national policy in respect of admission to ordinary public schools.[12] Its expressed purpose is to provide a framework to all provincial departments and governing bodies of public schools for developing school admission policies. It provides that provincial heads of department are responsible for the administration of learners to public schools. A part of that responsibility is the duty to coordinate the provision of schools and the administration of admissions of learners to ensure that all eligible learners are '*suitably accommodated*'. Governing bodies are required to make a copy of their school's admission policy available to the head of department. The evidence is that the first respondent duly made Sunningdale Primary School's admission policy available to the head of department.

[18] The national admissions policy also lays down requirements in respect of the documentation that must accompany an application for a learner's admission. It was certain shortcomings in this regard and the time taken to rectify them that occasioned some delay to

[12] In GN 2432 of 1998, published in GG 19377 of 19 October 1998.

the applicants in the current matter in submitting a compliant application. In ordering the receipt of admission applications, Sunningdale Primary School ranks the applications in order of compliant applications. There was nothing exceptionable about that in my judgment.

[19] The national admissions policy allows heads of departments, after consultation with representatives of governing bodies, to determine feeder zones '*in order to control the learner numbers of schools and co-ordinate parental preferences*'. The policy provides that '(s)*uch feeder zones need not be geographically adjacent to the school or each other*'.

[20] Paragraph 34 of the national admissions policy provides as follows:

If a feeder zone is created-

(a) preference must be given to a learner who lives in the feeder zone of a school or who resides with his or her parents at an employer's home in the feeder zone;

(b) a learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed;

(c) a learner who lives within the feeder zone of a school A must be referred to the neighbouring school B, if school A is oversubscribed. If school B is oversubscribed, an alternative school within a reasonable distance must be found by the Head of Department. If that is not possible, school A must admit the learner;

(d) the preference order of admission is:

(i) learners whose parents live in the feeder zone, in their own domicile or their employer's domicile;

(ii) learners whose parent's work address is in the feeder area; or

(iii) *other learners: first come first served.*

[21] The Western Cape Department of Education has chosen not to determine feeder zones. The second respondent pointed out in her explanatory affidavit that the Department is astute to the fact that there are pro's and con's to feeder zones. Her evidence regarding the perceived advantages and disadvantages of feeder zones generally, and in respect of Sunningdale in particular, went as follows:

37. It is quite common for the admission policies of public schools to give preference to applicants who reside in a defined area proximate to that school.

38. These proximity requirements are not ones which are imposed by me or the WCED. As noted in the school's answering papers, the WCED has elected not to impose so called 'Feeder zones' for all public schools. However, individual public schools are permitted to give preference to learners from a geographical area proximate to the school, should they so wish (and provided this does not result in unfairness or indirect discrimination).

39. I note that in general the use of "catchment areas" or "feeder zones" for school admission decisions raises complex policy-based considerations:

39.1 On the one hand, proximity to the school is undoubtedly an important consideration for learners. This means that learners spend less time commuting, and the school becomes a centre of community life. This in turn allows learners and their parents or guardians to become fully immersed in the school community. Using a geographical area also serves as a useful objective selection criterion. This avoids the situation in which schools use vague or more subjective criteria to 'cherry pick' only the top academic, sport, or cultural achievers. Such a system may also lead to the perpetuation of systemic disadvantage.

39.2 On the other hand, using proximity as the main admission criterion can in many cases lead to indirect discrimination and the perpetuation of racial disadvantage. This occurs in cases in which the vestiges of structural apartheid mean that some areas are still dominated by one racial group. If proximity is used as a determinative criterion in these areas, then the inevitable result will be that the learners at the school will reflect the demographics of the area, leading to minimal levels of integration.

40. The WCED and I navigate these considerations by leaving it to individual schools to determine the extent to which a catchment area is a determinate if selection criterion, or not. In the circumstances the WCED does not impose feeder zones as a requirement for all schools. But that does not mean that we

shun the idea of proximity as an important selection criterion for <u>many</u> schools.

41. *<u>In this case</u> there was no basis for me to doubt (based on the appeal before me) that the benefits of using proximity as a criterion outweigh the risks. There was simply no suggestion that this catchment area led to any form of indirect discrimination.*

42. *I note that in the papers before this Court the Applicants now suggest that residents of Sunningdale are 'rich and white' (founding affidavit, paragraph 36.2); and that restricting the admission to Sunningdale is discriminatory 'because [it] is a suburb which is essentially inhabited by white South Africans' (founding affidavit, paragraph 45).*

43. *I fully appreciate the concern that apparently neutral geographical boundaries can in some cases be abused to effect a discriminatory result. If this is done, the WCED and I act decisively against such an admission policy. This is not, however, a case in which such an argument can be raised:*

    43.1 ***<u>First</u>**, as a matter of process, this basis was not raised by the Applicants in their appeal to the SGB, or in their appeal to me. If the Applicants believed that this was a factor which would influence my decision, they should have raised it in their appeal before me. Having chosen not to do so, it is not open to them to criticise my decision for not taking this consideration into account.*

    43.2 ***<u>Second</u>**, as a matter of substance, there is with respect no objective basis for the Court to accept the evidence regarding the demographic makeup of Sunningdale, as opposed to the area of West Beach (where the applicants stay). An analysis of the school's admissions statistics does not bear out any suggestion that it employs admission requirements to favour learners of one race or another. All indications are that the area is middle class and more integrated than many other areas.*

44. *I also fully appreciate that geographical catchment areas for schools can in some cases appear, at first blush, to operate harshly. Many children who live*

relatively close to a school may fall just outside of the geographical catchment area. I would, however, note the following:

44.1 ***First****, In all cases in which there is a catchment area, its boundaries must be clearly defined somewhere. This will always mean that some perspective learners will fall just beyond the catchment area. This is unfortunate, but unavoidable.*

44.2 ***Second****, The WCED liaises with schools to co-ordinate catchment areas of different schools. This is reflected in the school's answering papers, which evidence that the WCED and principals of local schools meet to discuss the extent of their respective catchment areas. Under this arrangement, the West Beach area (where the Applicants reside) falls under the catchment of Blouberg Ridge Primary School (answering affidavit, para 45-47). Although Blouberg Ridge does not currently have a Grade R class, there are several other Grade R facilities in the area. These include Bloubergrant Pre-Primary School.*

45. In these circumstances I was satisfied that the catchment area set in the school's admission policy was a reasonable, lawful and fair measure. As it happens, the Applicants reside outside of the Sunningdale area. Although they are near to the school, they are even closer to Blouberg Ridge Primary School (which is 1.6 kms away on public roads), and the Bloubergrant Pre-Primary School (which is 1 km away on public roads).

[22] The second respondent testified that the Western Cape Department of Education left it to the individual governing bodies of the public schools in the Province to determine as part of the schools' admission policies whether to determine feeder zones for their respective schools. I think it would be fair to say that the second respondent's evidence in this regard falls to be understood within the context of an appreciation by her that the Department is charged with an oversight role that would include being satisfied, when a school submits its admissions policy to the Head of Department, as required in terms of the national policy on admissions, that the submitted policy does not offend against the requirements of the Schools Act or any applicable national or provincial policy and does not have a discernibly adverse impact on the Department's responsibility to ensure that all eligible learners in the Province are 'suitably accommodated'. It is any event evident from the second respondent's treatment

of the applicants' appeal to her against the school's decision not to admit their daughter that she was satisfied that there was nothing unlawful or unacceptable in the pertinent terms of the admissions policy of Sunningdale Primary School.

[23] The impugned provisions of Sunningdale's admissions policy read (linguistic warts and all) as follows:

> *... It is the School's policy that the following preference be afforded to applications:*
>
> *7.3 First, except for Grade 1, a learner must have passed and met the requirements of the grade immediately below the grade into which admission is sought.*
>
> *Children admitted to Grade R are automatically admitted to Grade 1 (if they have met the minimum academic requirements) and need to provide the school with one term's written notice if the Grade 1 place will not be accepted. No applications for Grade 1 will be necessary, in this case.*
>
> *7.4 Second, preference will be given to a learner whose Parent(s) legal Guardian(s) lives at an address designated by the City of Cape Town as Sunningdale within a 0-3 km radius of the school, and for whom SPS is the nearest English speaking public primary school measured by public road to the residence of the learner. Parent(s)/legal guardian(s) of such a learner must provide evidence and adhere to the following:*
>
> - *He, she or they is/are the owner(s) of the property by way of a title deed reflecting the same address*
> - *He, she or they is/are in possession of a signed lease agreement in his/her/their name(s) (not a sublease) in respect of the property.*
> - *Should the term of lease be of a negligible period, then it is in the sole discretion of the Principal to decline the application on such grounds.*
>
> *7.5 Third, preference will only be given to siblings if the admissions criteria has been met, i.e. address falls within the geographical area of 0-3 km and is Sunningdale and the application has been received within the stipulated admissions dates. This includes Grade R as Grade R is not compulsory.*
>
> *7.6 Four, the language of learning and teaching of SPS is English 1st Language and Afrikaans 2nd Language and thus it will be required that the learner is*

proficient in English and have a suitable level of Afrikaans as per the grade applied for.

7.7 Five, should the admission criteria be met and there is an oversubscription of applications, these will be assessed based on the order of the date on which the fully completed application and all supporting documents were received.

The applicants' attack is directed at paragraphs 7.4 and 7.5 of the school's admission policy, which determine a feeder zone and give preference to applicant learners who have a sibling already at the school. On a literalist reading of paragraph 7.5, it seems to add nothing to the feeder zone preference, but Ms *Gabriel*, who appeared for the first respondent conceded that in practice preference was given to the application of any learner who had a sibling already at the school irrespective of whether the applicant lived within the geographical limits of Sunningdale.

[24] The applicants' counsel initially sought to argue that it was outside the powers of a school governing body to determine a feeder zone. He relied in support of that contention on the provisions of the abovementioned national policy on public school admissions, which expressly refers to the authority of a head of department to determine feeder zones. He submitted that it followed that because such authority had been expressly invested in heads of department it had therefore been implicitly excluded from the ambit of matters a governing body could include in its policy. Later in his argument, he appeared to abandon that argument when he submitted that in the current case, and by implication in all comparable cases, a governing body that wished to delimit a feeder zone for admissions purpose should do so by adopting a fixed radius from the school as the boundaries for such zone, as opposed to fixing it with reference to a geographic boundary in terms of a town planning layout. In my judgment there is no merit in either of the contentions.

[25] As to the first of them, s 5(5) of the Schools Act provides in unqualified terms that a public school's governing body determines the school's admissions policy. It was not open to national minister in a policy declared in terms of the National Education Policy Act to derogate from the substantive provisions of the Schools Act, and I have no reason to think that by para 33 of the policy, from which I quoted in paragraph [19] above, she had any intention to do so. On the contrary, it is the heads of departments' authority to determine feeder zones that is qualified because they may exercise it only after consulting the affected school governing bodies.

[26] As to the second contention, the second respondent has pointed out, realistically, if a feeder zone is determined, its boundary has to be delineated at some point. Mr *Njeza* suggested it should be done by drawing a circle around the school with a given radius of 3 or 5 kilometres. That is indeed one possible way of delineating the boundary, but, depending on the circumstances, it could be quite irrational. What, for example, if three of the quadrants of the notional circle were unpopulated, or certain of them much less densely populated than the others? What if parts of the circle coincided with the feeder zone of an equivalent school in the adjoining area? One can readily conceive of several methods of delimiting a feeder zone. Any of them would be unexceptionable so long as it was rational. The applicants have not demonstrated that there is anything unreasonable or irrational about the delimitation of the school's feeder zone consistently with the boundaries of the suburb in which it is situated. The Grade R enrolment figures suggest that the delimitation on that basis allows for the enrolment of all the applicants from the Sunningdale area and that the spaces left over are taken up by learners admitted from the surrounding suburbs. There is no indication that the facilities of the school are not fully available to the community to which it is local. If the Grade R application figures are anything to judge by, Sunningdale Primary appears to be a very popular school with far more applicants for admission than its capacity can accommodate. Its admissions policy nevertheless allows it to accommodate all the applicants for Grade R admission from its feeder zone plus many from homes in adjoining areas outside the zone.

[27] The applicants described Sunninghill as '*inhabited mainly by rich and white people*'. Elsewhere in their founding affidavit the applicants alleged that the feeder zone had the effect of excluding children from Parklands, another adjoining suburb, that was said to have a significant population of blacks and lower income earners. They allege that some parts of Parklands are closer to the school than some parts of Sunningdale that fall within the feeder zone. The implication in their evidence in this regard was that the refusal of their daughter's admission application was a manifestation of racial discrimination on the grounds that the admission policy's delimitation of the feeder zone with reference to the municipal boundaries of the suburb had an indirect discriminatory effect on racial lines.

[28] The first respondent disputed the applicants' allegations in this regard. The deponent to the first respondent's answering affidavit denied the applicants' allegation that Parklands North, which is the part of Parklands closest to Sunningdale, was '*demonstrably black and of lower income*'. She also denied that Sunningdale was '*demonstrably inhabited by rich, white*

people'. She pointed out that West Beach, where the applicants live, was '*also not a predominantly lower income area*'.

[29] The second respondent, as appears from the passage from her explanatory affidavit quoted above, is of the view that '*(a)ll indications are that the area is middle class and more integrated than many other areas*'.

[30] None of the parties has provided empirical evidence concerning the demographics of Sunningdale or West Beach. As mentioned, the various areas mentioned adjoin, or are in close proximity to, one another, and there is no objective evidence to establish that there is a material, or indeed any, difference in the socio-economic status or ethnic mix of the people who live in them.

[31] On my counting, 65 of the 117 learners admitted for 2021 were from outside Sunningdale. Thirty-four of the 65 learners admitted from outside Sunningdale were siblings of learners already enrolled at the school and 23 of the 52 admissions from within the Sunningdale feeder zone were siblings of older children already attending the school. Four of the admissions from outside the feeder zone were from West Beach. All but one of the admissions from West Beach were of the white demographic. Of the 52 learners admitted from the suburb of Sunningdale, nine were not white. And of the 65 admitted from outside Sunningdale, 27 were not white. Forty-eight of the 117 learners admitted to Grade R were from Parklands or Parklands North, 25 of them were not white. Twenty-three of the learners from the Parklands areas had siblings at the school. [13]

[32] Mr *Njeza* argued that one was able to deduce from the demographic composition of the Grade R classes for 2021 that Sunningdale was predominantly inhabited by the white demographic. The figures support that proposition, and assuming it to be sound it would also support the conclusion that the school demographic broadly represents the current make-up of the local community of the area that the school was put there to serve.

[33] But the admissions statistics show that the majority of entrants to Grade R came from outside Sunningdale, and that 41.5% of them were not white learners, a significant proportion of which came from Parklands. There is simply no objectively verifiable evidence to support an allegation of racially based exclusion or unfair discrimination. On the contrary, the

[13] The statistics in this paragraph have been taken from the information provided in the schedules annexed as AA5 and AA6 to the first respondent's principal answering papers. The information has apparently been reviewed by the Western Cape Education Department, and there has been no suggestion that it is materially inaccurate.

undisputed evidence is that school's admissions policy is subject to regular review in consultation with representatives of several other primary schools in the surrounding area and the Western Cape Education Department to ensure that, in an appropriately integrated manner, it effectively serves the educational needs not only of the Sunningdale community, but also of the broader Blouberg community, including Parklands and West Beach.

[34] The evidence points ineluctably to the fact that the applicants' application for their daughter's admission failed because it was submitted comparatively late relative to the competing applications. For that reason it would have met with a similar fate in any application system in which a feeder zone determined by a head of department in terms of the national policy in respect of admission to ordinary public schools was applicable. This is so because the order of preference fixed under first respondent's admissions policy mirrors in all material respects that applicable in admissions policies to which paragraph 34 of the national policy pertains (i.e. those determined by heads of departments, rather than by governing bodies). The only difference is the absence in the national policy of any provision in respect of sibling admissions.

[35] The sibling preference is racially neutral. There is also a rational basis for it, as pointed out in the second respondent's explanatory affidavit. The Minister stated that many schools include an admission criterion that favours learners who have older siblings already at the school. She offered three reasons in support of the cogency of such a policy: (i) that it contributed towards making public schools a centre of the community and encouraged parents to become involved in the life of the school, which becomes less likely if parents' attention is divided between different schools attended by their children, (ii) it avoids the pressure on parents who could otherwise have to drop and collect children at or from different schools, which may have different school hours and (iii) it can be beneficial for children from the same family to be at the same school and to share a familiar environment.

[36] Unsurprisingly, not much was advanced in oral argument in support of this basis for the attack on the first respondent's admissions policy.

[37] For all the foregoing reasons I have concluded that the applicants have not made out a case for an order declaring the first respondent's admissions policy to be unconstitutional.

[38] The first respondent's counsel argued that in the context of the applicants' daughter having been enrolled in Grade R at a nearby school, the applicants' interest in the first respondent's admissions policy had become an abstract one and the declaratory relief that it

sought would have no impact on their legal rights and interests. With reference to *Ex parte Nell* 1963 (1) SA 754 (A), Ms *Gabriel* submitted that in the circumstances the court should exercise its discretion against entertaining the application for a declaratory order, irrespective of its possible merit.

[39] The applicants undoubtedly had a relevant interest when the proceedings were instituted, and in my view the question is whether in the subsequently altered situation in which the issue of their daughter's admission to Sunningdale Primary School has become moot the court should enter into the question of the constitutional compatibility of the governing body's admission policy. Ordinarily, it is a question that falls to be dealt with as a preliminary issue. I have reserved addressing it to the end of the judgment because I was of the view that notwithstanding its arguable mootness, the subject matter of the declaratory relief sought by the applicants was potentially one of more general interest that could usefully be determined in the current litigation.[14] I consider that it would be in the interests of justice to give a definitive judgment on the issues raised by the applicants. Doing so would, in my view, be of practical benefit by way of guidance to the first respondent and the Western Cape Education Department as well as to parents applying for admission to schools with comparable policies, of which I gather from the second respondent's explanatory policy there are many. I say that fully appreciating that each case turns on its own facts, and in no way meaning to detract from the duty of a school governing body and the supervising department of education to be mindful of the peculiar needs and interests of the local community when it devises and regularly revises its admissions policy.

[40] Lastly, consideration must be given to the question of costs. The relief sought by the applicants was of a constitutional nature.

[41] The general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs; *Biowatch Trust v Registrar, Genetic Resources* [2012] ZACC 14 (3 June 2009); 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 21-25, following *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 138. In *Biowatch* loc. cit., Sachs J identified a three-fold rationale for the rule: (i) that the prospect of adverse costs orders should not have unduly chilling effect on persons

[14] Cf. *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11 and *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12 (17 June 2020); 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) at para 48-59 and 109 -117 and the other authorities referred to there.

seeking to assert their constitutional rights; (ii) the serving of the public interest by the enrichment of 'the general body of constitutional jurisprudence'; and (iii) as the state bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution, if there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.

[42] It has, however, repeatedly been stated by the Constitutional Court that what has become generally known as 'the *Biowatch* rule' is not an inflexible one. In *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3 (27 March 1997), 1997 (2) SA 897 (CC) 1997 (6) BCLR 692 at para 30, Ackermann J writing for the Court observed '*In my view one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the state, particularly where the constitutionality of a statutory provision is attacked, lest such orders have an unduly inhibiting or "chilling" effect on other potential litigants in this category. This cautious approach cannot, however, be allowed to develop into an inflexible rule so that litigants are induced into believing that they are free to challenge the constitutionality of statutory provisions in this court, no matter how spurious the grounds for doing so may be or how remote the possibility that this court will grant them access. This can neither be in the interests of the administration of justice nor fair to those who are forced to oppose such attacks.*' That passage has been cited in a number of subsequent judgments of the Court. In *Hotz and Others v University of Cape Town* [2017] ZACC 10 (12 April 2017); 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC), which arguably represents the most benevolent application of the *Biowatch* rule to date, it was still acknowledged that it does not operate inflexibly. Litigation that is frivolous or vexatious was given as an example where there may be a deviation from it.

[43] Litigation may be characterised as vexatious not only when it is instituted with the intention just to vex the opposing party, but also where, no matter how bona fide the instituting litigant, it has put the other side to unnecessary trouble and expense which the other side ought not to have to bear. Compare in this regard *In Re Alluvial Creek* 1929 CPD 532 at 535, which has been cited with approval on innumerable occasions (including by the Constitutional Court in *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] ZACC 19 (4 November 2010); 2011 (2) BCLR 121 (CC) ;

2011 (4) SA 42 (CC), at para 76, n. 72). In the current matter I consider that the applicants' challenge to the first respondent's admissions policy was so lacking in substance that it would be unjust for the first respondent to be expected to carry the expense of successfully opposing it. While it raised an issue of practical interest in the abstract, the applicants' allegations in support of their constitutional challenge were wholly unsubstantiated.

[44] I am mindful that in *Hotz*, it was held that the 'nature of the issues' rather than the 'characterisation of the parties' is the primary consideration in the application of the *Biowatch* rule, but I do not understand the judgment to imply that in considering the 'nature of the issues' the substance, or lack thereof, of the basis upon which they are raised by the unsuccessful litigant is an irrelevant consideration. I also do not read the judgment to hold that the character of the parties is never something to be taken into account in making an order as to costs that would be fair and just in a constitutional case.

[45] Whilst the governing body of a public school might qualify as an organ of state (cf. *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34 (3 October 2013); 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC)),[15] I do not think the first respondent is the type of organisation that Sachs J had in mind when stating the third of the three-fold rationale for the *Biowatch* rule. In my view, it is fairly clear that the learned judge there had in mind manifestations of the state that were funded by public purse. In the current matter the state contributes only 3% of the funding required to run the Sunningdale Primary School, and the indications are that the expenses of the governing body in meeting the litigation instituted by the applicants would have to be met entirely from funding provided by the learners' parents or guardians and come from monies that could otherwise be applied by the parent body for maintaining and improving the school's resources and the betterment of the standard of schooling offered by it. The costs incurred by the Department of Education in respect of the comprehensive explanatory affidavit put in by the Minister are a quite distinguishable matter. The Department is more identifiably the relevant organ of state with responsibility in a matter like this 'for ensuring that the law and state conduct is constitutional'. In a case of this sort it is what Sachs J would call 'the correct door'.

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[15] In *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* [2013] ZACC 25 (10 July 2013); 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) at para 124, the Court spoke of the Schools Act having created 'a partnership' between 'between public school governing bodies and the state'.

[46] For all the foregoing reasons an order will issue in the following terms:

1. The application is dismissed.
2. The applicants are liable, jointly and severally, for the first respondent's costs of suit, including the wasted costs incurred in respect of the aborted enlistment of the application for hearing on 27 November 2020.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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Applicants' attorneys:	**Venfolo Lingani Attorneys Inc** **Cape Town**
First respondent's counsel:	**P. Gabriel**
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