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

Case No. 7271/2024

In the matter between:

EQUAL EDUCATION	First Applicant
KUNGAZO MPHETSHULWA	Second Applicant
NCUMISA STOFILE	Third Applicant
NOMBONISO QUVILE	Fourth Applicant
NOMZAMO JULIA MACI	Fifth Applicant
XOLISWA FELICIA MAKUPULA	Sixth Applicant

and

HEAD OF DEPARTMENT: WESTERN CAPE EDUCATION DEPARTMENT	First Respondent
DIRECTOR: THE METRO EAST EDUCATION DISTRICT	Second Respondent
MEMBER OF THE EXECUTIVE COUNCIL: WESTERN CAPE EDUCATION DEPARTMENT	Third Respondent
GOVERNMENT OF THE WESTERN CAPE PROVINCE	Fourth Respondent
MINISTER OF BASIC EDUCATION	Fifth Respondent

Coram: **NUKU J**
Order made on: **17 May 2024**
Reasons delivered electronically on: **24 July 2024**

REASONS

NUKU, J

Introduction

[1] This application concerns delays experienced by learners when applying to be placed in public schools that offer basic education which are in the Metro East Education District (**MEED**) of the Western Cape Department of Education (**WCED**). The case for the applicants is that these delays constitute a violation of the constitutional rights of the concerned learners, and particularly the right to education as contained in section 27 (1) (a) of the Constitution of the Republic of South Africa, 1996 (**Constitution**) which provides that '*Everyone has the right to a basic education, including adult basic education'*.

[2] By this application, the applicants seek to put an end to the violation of the constitutional rights referred to above by seeking, in Part A of the applications which served before me, an urgent mandatory interdict directing (a) the first to third respondents to place in public schools any unplaced late applicants (**unplaced late applicants**) within 10 days from the date of the order, (b) the first to third respondents to provide remedial catch-up plans for learners placed in schools after March 2024, (c) the first respondent to investigate and report within 30 days from the date of the order, as contemplated in section 3 (5) (a) of the South African Schools Act 84 of 1996 (**Schools Act**), on the

reasons why the learners were not timeously placed at the schools to which they had applied, and (d) the first to the third respondents to pay the costs, including costs occasioned by the employment of two counsel.

[3] The application was opposed by the first to the fourth respondents (**Respondents**) on the basis that (a) the application is not urgent, (b) the application in respect of learners listed in annexure A to the notice of motion had become moot, and (c) the applicants have failed to meet the requirements for a final interdict.

[4] The Respondents drew a distinction between the relief relating to the placement of unplaced late applicants on the one hand and the relief relating to remedial catch-up plans as well as the investigation and report on the other hand. In respect of the placement relief, the Respondents conceded that the unplaced late applicants have a right to basic education as well as a right to placement at public schools. They, however, took issue with the two remaining requirements for a final interdict, namely (a) injury actually committed or reasonably apprehended, and (b) the absence of similar protection by any other remedy ordinarily obtainable. In respect of the remedial catch-up plans and investigation and reporting relief, the Respondents' position was that the applicants have not established any of the requirements for a final interdict.

[5] The application was initially enrolled for hearing on 26 April 2024 when it was struck off from the roll. It was subsequently enrolled for hearing on 29 April 2024 when I postponed it, by agreement between the parties, for hearing on 14 May 2024. The order

postponing the matter incorporated a timetable for the filing of further papers as well as the parties' heads of argument.

[6] On 14 May 2024, I heard argument and on 17 May 2024, I granted an order directing the first to third respondents to place all unplaced learners within ten days from the aforesaid date. The first to third respondents were also ordered to pay costs of the application, including the costs of two counsel. I refused the relief relating to the development of remedial catch-up plans as well as the relief requiring the first respondent to investigate and report in terms of section 3 (5) (a) of the Schools Act. The reasons for that order are set out below.

The Parties

[7] The first applicant is a non-profit organisation that operates as a social movement consisting of learners, parents, teachers, and community members advocating for equal and quality education through activism and analysis. It is actively involved in matters relating to basic education with particular focus on public schools situated in areas servicing previously disadvantaged communities. It approached this Court (i) in its own interest in terms of section 38 (a) of the Constitution, (ii) on behalf of unplaced late applicants in terms of section 38 (b) and (c) of the Constitution, and (iii) in the public interest in terms of section 38 (d) of the Constitution.

[8] The second applicant, Ms Kungazo Mphetshulwa, is the biological sister to, and caregiver of **OZM**, a seventeen-year-old minor learner who was seeking placement into grade 11 for the 2024 academic year. The third respondent, Ms Ncumisa Stofile, is the

biological mother and caregiver to **AS**, a sixteen-year-old minor learner who was seeking placement into grade 10 for the 2024 academic year. The fourth respondent, Ms Nomboniso Quvile, is the biological mother and caregiver to **SQ**, a sixteen-year-old minor learner who was seeking placement into grade 10 for the 2024 academic year. The fifth respondent, Ms Nomzamo Julia Maci, is the biological mother and caregiver of **LM**, a seventeen-year-old minor learner who was seeking placement into grade 11 for the 2024 academic year. The sixth respondent, Ms Xoliswa Felicia Makuphula, is the caregiver to **OMO**, a seventeen-year-old minor learner who was seeking placement into grade 11 for the 2024 academic year.

[9] The first respondent, the Head of Department of the WCED (**HOD**) is, in terms of the Admission Policy for Ordinary Public Schools promulgated in terms of section 3 (4) (i) of the National Education Policy Act 27 of 1996 (**NEPA**), responsible for the administration of the admission of learners to public schools in the Western Cape Province. The second respondent, the Director of the MEED (**District Director**) shares the responsibility, with the HOD, of administering the admission and placement of learners within the MEED. The Third respondent, the Member of the Executive Council of the WCED (**MEC**) was cited as a nominal respondent on behalf of the WCED and must, in terms of section 3 (3) of the Schools Act, '*ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2)*'. The fourth respondent, the Government of the Western Cape, was cited for the constitutional as well as statutory obligations it bears in respect of the provision, administration, and funding of public schools in the Western Cape.

[10] The fifth respondent, the Minister of Basic Education (**Minister**) was cited in her official capacity as the political head of the National Department of Basic Education (**DBE**) who is, in terms of section 85 (2) of the Constitution read with the NEPA, responsible for developing and implementing national education policy, as well as monitoring and evaluating all levels of education within the DBE. The Minister played no role in these proceedings.

Factual Background

[11] The first applicant has, for several years, played an active role in assisting parents of learners seeking placement in public schools in the Western Cape Province. This, it has done, by liaising with the public schools concerned as well as the relevant officials in the WCED. The first applicant sometimes refers parents and learners to Equal Education Law Clinic (**EELC**) for assistance.

[12] OZM, who had previously resided and studied in the Eastern Cape relocated to live with the second applicant in the Western Cape during December 2023. This was after her mother, Ms Nokuthula Mphetshulwa, was offered employment as a domestic worker in Johannesburg where she had to start during the first week of January 2024. At the time of her relocation, the WCED's window period for application for placement of learners had closed.

[13] On 18 January 2024, the second applicant approached several schools including Thembelihle High School, Uxolo High School and Bulumko High School seeking assistance regarding placement of OZM in a school for the 2024 academic year. She was

advised that these schools had no place to offer OZM, and that she should approach the offices of the MEED instead. She was unable to travel to the offices of the MEED due to lack of means but was fortunate to be referred to the EELC (**EELC**), who assisted her on 22 January 2024 to submit a completed placement application to the MEED. As of 25 March 2024, when she deposed to an affidavit in support of this application, she had not received any feedback regarding the application for placement of OZM.

[14] AS attended grade 9 at Homba Primary School, a public school in Khayelitsha, during 2023. The highest grade that the school offers is grade 9. On 6 April 2023, he submitted, using the online portal, an application for placement into grade 10 for the 2024 academic year, and he selected Thandokhulu High School, Manyano High School and Masiyile High School. On 5 November 2023, the third respondent received a text message from the WCED part of which read:

> '… the WCED is doing a phenomenal job under extreme pressure to make sure that all learners are placed at schools. But there are fewer school places than there are unplaced learners seeking placement. The WCED notices that AS is placed at Homba Primary School. We would advise that the learner be kept at Homba Primary School for the 2024 academic year…'

[15] On 8 January 2024, the third applicant attended at the offices of the MEED where she was advised to come the following day. Upon returning on 9 January 2024, she was told that the application by AS for placement at the schools referred to above had been rejected. She was required to complete a new application and was advised to follow up

during the week of 18 January 2024. She again visited the offices of the MEED on 22 January 2024 when she was, this time, advised to wait for a further period of ten days. When the said ten-day period elapsed without her hearing from the officials from the MEED, she again attended at their offices on 6 February 2024 to make further enquiries. She was ultimately contacted by an official from the Metro Central Education District (**MCED**) who offered AS a place in one of the schools in the MCED. She could, however, not accept the place as she understood the language of learning and teaching at the school to be predominantly Afrikaans, and AS had never been taught in Afrikaans.

[16] SQ attended Cameron Ngudle Senior Secondary School in the Eastern Cape during 2023 where she was doing grade 9. She relocated to the Western Cape towards the end of 2023 to live with the fourth applicant. This was after an unfortunate passing away of her caregiver who committed suicide. Between 15 and 18 January 2024, the fourth applicant approached several schools including Manyano High School, Masiyile High School, Bulumko High School, Luhlaza High School and the Centre for Science and Technology, all in the Khayelitsha area which is within the catchment area of the MEED seeking placement for SQ for the 2024 academic year. She was unable to get any assistance until she was referred to EELC who, on 22 January 2024, assisted her to complete and submit an application for the placement of SQ.

[17] LM, who had previously resided and studied in the Eastern Cape relocated, during December 2023, to the Western Cape to live with the fifth applicant. From 13 December 2023, the fifth applicant approached several schools including Thembelihle High School, Masiyile High School and Bulumko High School, all within the area of Khayelitsha which

falls under the MEED. She was advised that Thembelihle High School and Bulumko High School could not offer a place to LM. An administrative clerk who assisted her at Masiyile High School refused to accept LM's application for placement because the fifth applicant did not have LM's report and transfer cards. On 15 January 2024, the fifth applicant approached the WCED head office where an administrative clerk who assisted her also refused to take LM's application for placement because she did not have LM's birth certificate with her at the time. On 18 January 2024, she approached EELC who, on 22 January 2024, assisted her to complete and submit LM's application for placement.

[18] Only an unsigned affidavit was filed in respect of the sixth applicant and there was no explanation why a properly attested affidavit could not be filed. For that reason, I deal with the matter without reference to the facts contained in the said draft affidavit.

[19] Between 15 and 31 January 2024, EELC was approached by a group of about 42 parents and caregivers who required assistance with either the submission of placement applications or follow up on applications for placement that they had already submitted.

[20] On 19 January 2024, the EELC addressed an email to Mr Ryan Titus, who is employed by the WCED, providing him with details of 8 learners who applied for placement and requesting him to provide placement letters by no later than Monday, the 22nd January 2024.

[21] On 22 January 2024, Mr Lance Abrahams (**Mr Abrahams**), also employed by the WCED advised EELC that the WCED was going to correspond directly with the parents

of the 8 learners regarding the outcome of their applications. He also advised that all requests should be directed to the HOD. These learners were ultimately all placed approximately five weeks after the schools had opened for the 2024 academic year.

[22] On the same date, EELC addressed a further letter to the WCED requesting placement of about 35 learners who had not submitted their applications for the 2024 academic year. Mr Abrahams and the HOD were copied in this communication, and the former acknowledged receipt of the documents that had been submitted. He also undertook to investigate and revert as soon as possible.

[23] As of 31 January 2024, 11 learners remained unplaced, and this number reduced to 7 as of 26 February 2024. The EELC continued to receive requests for assistance from parents whose learners were unplaced. The EELC prepared the list annexed to the notice of motion as annexure “A” which lists the names of learners who were confirmed as unplaced as of 28 March 2024 as well as those who had been placed but whose parents had become unreachable. Thus, as of 28 March 2024, 19 learners were confirmed as unplaced and 12 could not be confirmed to be attending school as their parents had become unreachable.

[24] On 11 April 2024, the fifth applicant was advised by EELC that it had been advised by WCED that LM had been placed at Sinako High School on 7 March 2024. This, however, had not been conveyed to her by the WCED and as such LM had remained at home waiting to be advised about the placement. Upon learning of this placement, the fifth applicant advised EELC that she could not afford the costs of transporting LM to

Sinako High School as it is far from her place of residence. She indicated that she would have preferred either Thembelihle High School or Bulumko High School or Uxolo High School as these are within a walking distance from her place of residence.

[25] Similarly, the fourth applicant was advised by EELC on 11 April 2024 that SQ had been 'placed: in-transit' at Homba Primary School on 28 February 2024. She was advised that the term 'placed: in-transit' refers to a learner who has not taken up the place offered to him or her or where a parent has requested a transfer. She, however, had never been advised by the WCED of SQ's placement. The placement of SQ at Homba Primary School did not make sense to her as she had applied for SQ to be placed in grade 10, a grade that Homba Primary School does not offer.

[26] On 17 April 2024, the fourth applicant was advised that SQ had been offered a place at Manyano High School. On 18 April 2024, she visited Manyano High School where she was advised that SQ could not be taken in as he did not have a transfer card. She sought the intervention of EELC who prevailed on the school principal to enrol SQ despite the fact that he did not have a transfer card.

[27] On 22 April 2024, the fourth applicant, having been advised by EELC that SQ would be enrolled without the transfer card, attended at Manyano High School when the school principal confirmed that SQ is on the list of learners placed at the school. The school principal, however, advised her that SQ could not start attending classes as the school was in the process of building mobile classrooms. She was told to follow up on a regular basis. As of 27 April 2024, SQ had not been able to attend classes.

[28] As with the fourth and fifth applicants, the third applicant was also advised by EELC on 11 April 2024 that AS had been placed at Manyano High School on 19 March 2024, something which had never been communicated to her by the WCED. This was confirmed telephonically on 18 April 2024 with Mr Swartz, one of the employees of the WCED. She attended at Manyano High School on 19 April 2024 where she met with the school principal who confirmed that AS had, indeed, been placed at the school. He, however, advised her that AS could not commence with the classes as the school was in the process of erecting mobile classrooms which he expected to be completed by the weekend of 20 April 2024. On 23 April 2024, the third applicant met with the school principal who advised her that AS could still not start with the classes, despite the construction of the mobile classrooms having been completed, because the school was waiting for the number of learners to reach 20 before commencing with classes. As of 28 April 2024, AS had not been able to attend classes.

[29] The application was launched on 11 April 2024, and on that same day, the WCED provided an update on the status of the applications for placement that had been referred to it by EELC. The update had two annexures, annexure “A” and annexure “B”. In terms of annexure “A”, 11 learners had been placed; 3 had been ‘placed: in-transit’; 1 had been placed and de-registered; 2 were recorded as placements in progress and 1 had been referred to an Adult Education Training College (**AET**). In terms of annexure “B”, 30 learners had been placed; 2 had been placed and de-registered and 3 had been ‘placed: in-transit’. SQ appeared in both annexures as ‘placed: in-transit’. AS appears in annexure “A” as placed.

[30] On 26 April 2024, the Respondents' attorney provided a further update on the placement status of the learners listed in annexure "A" to the notice of motion. According to Mr Abrahams, this update confirms that 28 of the learners in annexure "A" to the notice of motion had been placed as of 26 April 2024, and in respect of the remaining 5, the WCED did not have sufficient particulars of 3 learners. Mr Abrahams further confirmed that there were 2 other learners, who were not listed in annexure "A" to the notice of motion, whose applications were in the process of being finalised.

[31] According to the first respondent, (a) the principal of Manyano High School confirmed that SQ attended school on 2 May 2024, (b) LM was offered a place at Thembelihle Primary School where he started attending classes on 3 May 2024, and (c) AS started attending classes at Manyano High School on 30 April 2024.

[32] In terms of the affidavit deposed to by the first respondent dated 7 May 2024, three learners listed in annexure "A" to the notice of motion had not been placed as at the date when he deposed to his affidavit. Two of these learners, who were 17 and 18 years old, had applied for grade 7 and were referred to be assessed for placement at an AET as they were considered overaged for placement at a primary school. The third learner who was 19 years old had also been referred for placement at an AET.

[33] The first respondent stated that the 2 learners (not included in annexure "A" to the notice of motion) and whose applications had not been finalised when Mr Abrahams deposed to his affidavit had since been finalised. He stated, however, that the WCED had

become aware of 11 learners whose applications for placement had not been finalised at the time when he deposed to his affidavit. He explained that 6 of these learners had only submitted their applications on 29 April 2024. He stated further that 'The remaining cases relate to applications where the caregivers were uncontactable and where the parents have now reached out to the Department for assistance. These applications will be processed and finalised without delay.'

[34] To sum up, 14 learners remained unplaced at the date when the first respondent deposed to the answering affidavit. Three of these learners are listed in annexure "A" to the notice of motion. Of the remaining eleven, 6 had submitted their applications after 29 April 2024 and the respondents did not provide the date/s by when the remaining 5 learners submitted their applications. This, notwithstanding, the first respondent concluded his answering affidavit by stating that 'In the circumstances, based on the updated information provided in this affidavit, no factual basis exists for an order in terms of prayer 2 of the notice of motion.' It will be recalled that prayer 2 of the notice of motion is about the mandamus directing the first to third respondents to place all unplaced learners (those included in annexure "A" to the notice of motion as well as those similarly placed as those listed in annexure "A" to the notice of motion) within 10 days from the date of the order.

[35] Regarding the relief relating to the remedial plans for learners whose placement had been delayed, the first respondent explained that each school has an academic support team that is responsible for developing individual support plans for each learner and that this is done after the assessment of the learner concerned.

[36] Regarding the relief relating to a report contemplated in section 3 (5) (a) of the Schools Act, the first respondent's response was that the provision does not oblige him to conduct an investigation and that, in any event, the provision applies in respect of learners of compulsory school going age. As none of the learners in this application are of compulsory school going age, so the response went, section 3 (5) (a) of the Schools Act does not find application.

Issues for determination

[37] Despite the lengthy factual background provided above, the position as at the date of hearing of the application was that 3 learners named in annexure "A" to the notice of motion were confirmed as unplaced, and 11 other learners not named in annexure "A" to the notice of motion were also confirmed as unplaced. This was because some of the learners had since been placed since the commencement of the litigation.

[37] It is, thus, in relation to the learners referred to in the preceding paragraphs that the applicants' entitlement to the relief in Part A must be assessed. As stated earlier, the issues that were disputed by the Respondents, and which issues require determination by this Court are:

37.1 Urgency;

37.2 Whether the applicants have satisfied remaining two requirements

for a final interdict, namely, (a) an injury committed or reasonably apprehended, and (b) the absence of similar protection by any other remedy ordinarily obtainable;

37.3 Whether the applicants are entitled to the relief relating to remedial catch-up plans in respect of learners placed after March 2024; and

37.4 Whether the applicants are entitled to the relief relating to the investigation in terms of section 3 (5) (a) of the Schools Act.

[38] A further issue that was raised by the Respondents, in their heads of argument as well as during oral argument, was that the relief sought in respect of learners named in annexure “A” to the notice of motion had become moot. It is convenient to deal with this issue first.

Mootness

[39] I had great difficulty in following the Respondents’ argument that ‘the relief sought in respect of the listed learners is moot’, considering the first respondents’ evidence that there were about 14 learners who remained unplaced as at the date when he deposed to the answering affidavit, a position which had not changed as at the date of the hearing.

[40] The dispute that had been brought for adjudication was about the placement of learners (named and unnamed) who remained unplaced as at the date of the hearing of

the application. The issue of the placement of the 14 learners remained a live issue between the parties as these learners remained unplaced as at the date of the hearing.

[41] To the extent that the Respondents sought to distinguish between learners named in annexure “A” to the notice of motion and the rest of the learners, such a distinction is artificial because the relief sought was for the placement of all learners whose applications for placement had not been finalised, and self-evidently not all the applications for placement had been finalised when the hearing took place on 14 May 2024.

[42] To the extent that Respondents sought to have their undertaking to place the unplaced learners regarded as dispositive of the matter or as the basis of withholding the relief, I deal with this aspect when considering the applicants’ entitlement to the relief. For now, it suffices to say that the undertaking did not put an end to the violation of the rights of those learners who remained unplaced when the matter was heard. That being the case, the dispute was very much alive, despite the undertaking by the Respondents.

Urgency

[43] Other than a bald assertion that the application was not urgent, the Respondents advanced no cogent reasons why the continued violation of the learners’ constitutional rights does not justify the hearing of the matter on the urgent roll. This, however, is unsurprising and, in fact, consistent with the way the Respondents have approached their responsibility towards the placement of learners, an issue I return to later in this judgment.

[44] The applicants, on the other hand, made various compelling arguments why the matter should be heard on the urgent roll. They referred this court to the decision of the Constitutional Court in ***Moko v Acting Principal of Malusi Secondary School***[1], a matter that also dealt with the infringement of a right to education. Reference was made to paras [20] and [21] where the Constitutional Court, in dealing with urgency stated:

> '[20] Vindication of his constitutional right to education – a right which, due to its transformative nature both for individuals and society as a whole, is of fundamental importance in this Country. The High Court is a forum that is substantially better suited for determining urgent matters than this Court, and it has jurisdiction to determine matters of a constitutional nature. It would therefore ordinarily be the appropriate forum for a matter of this ilk. And yet, for reasons beyond feasible comprehension, the High Court struck this matter off the urgent roll. This placed the applicant in an invidious position. Desperate to not have to wait until the supplementary examination in May 2021 or for that matter to be enrolled on the ordinary roll in the High Court, which could result in a determination of the matter many months down the line, the applicant chose to approach this Court directly for the urgent relief he seeks.
>
> [21] On the face of it, this matter concerns a potentially serious violation of the applicant's right to education. Over and above that, a lack of urgent relief could have a significant adverse effect on the applicant's future endeavours and opportunities. His life could forever be out of step by a whole year. Also, delaying the pursuance of further education until 2022, to wait for the results of the supplementary examination, could easily result in the applicant abandoning that admirable goal entirely. Even if the applicant

[1] 2021 (4) BCLR 420 (CC)

> wished to pursue a different path, a five to six-month delay in obtaining his matric results could similarly frustrate any attempt to obtain employment that requires a matric certificate. In my view, the urgency of this matter is undeniable.'

[45] By parity of reasoning, there could not have been any comprehensible reason for striking the matter off the roll in view of the fact that there were learners, whose applications were submitted during January 2024, and who were still sitting at home two months later when the matter came before me for the first time on 29 April 2024 and again on 14 May 2024. In my view, the statement by the Constitutional Court that 'this matter concerns a potentially serious violation of the applicant's right to education' is also apposite.

[46] I was, thus, satisfied that the matter is one that should be dealt with as an application that warrants dispensing with the forms and service provided for in the Uniform Rules of Court. When the matter first came before me on 29 April 2024, the Respondents had not filed their answering papers and to ameliorate the potential prejudice that would be occasioned by deciding a matter without hearing from them, I postponed the matter to 14 May 2024 to enable them to file their answering papers. Faced with a potentially ongoing constitutional rights violation, I considered that this was the least I could do to balance the learners' constitutional rights on the one hand against the Respondents' procedural right to be heard before the determination of the matter.

Have the applicants, in respect of the relief relating to the placement of learners, satisfied the remaining two requirements for a final interdict, namely, (a) injury committed or reasonably apprehended, and (b) the absence of similar protection by any other remedy ordinarily obtainable?

[47] The Respondents conceded that the applicants have established the first requirement for a final interdict, that is, a clear right. They, however, contended that at no stage have they failed to fulfil their obligation to place the learners at schools and that where they have not been able to place the learners, it was in circumstances where they were not in possession of information or documents, which information they had requested from EELC. The submission was, therefore, that it was an inability to process the applications that was the cause of the non-placement of learners and not the Respondents' refusal to do so.

[48] It was submitted further on behalf of the Respondents that an order compelling the first to third respondents to place the unplaced learners within 10 days from the date of the order is unwarranted in view of their undertaking to process and finalise the new applications without delay.

[49] It was submitted that the issue of alternative remedy does not arise in the absence of harm or injury reasonably apprehended.

[50] Regarding the irreparable harm to be suffered by unplaced learners, the submission on behalf of the applicants, as I understood it, was that the violation of the

right to basic education of those learners who remained unplaced was ongoing and that absent the intervention of this Court, the right to education of unplaced learners would continue to be violated. Thus, the applicants did not rely on past violations of the right to education but the continuing violation. Reference in this regard was made to the 14 learners referred to above in respect of which the WCED could not even give a firm undertaking with a date by which it would be able to place them. It was submitted that in the absence of an intervention by this court, the unplaced learners would not have any other remedy that would vindicate their right.

[51] During the course of the hearing I enquired from Respondents' counsel as to what would happen to the 14 learners, who on the common cause evidence remained unplaced as at the date of the hearing and the answer was that their applications would be processed and finalised expeditiously. Initially no date was given by when the said learners would be placed. On further pressing by the court, counsel for the Respondents responded that he was instructed to advise that the remaining unplaced learners would be placed the following day. This response, however, has to be viewed in light of the evidence that was placed before this court by the applicants which suggested that there had been instances in the past where the Respondents would say that they have placed a learner at a school when that learner either had not been informed of placement or had not been able to attend classes despite being placed.

[52] As submitted on behalf of the applicants, the right to education is among rights that are immediately realisable and are not subject to any qualification. Thus, the right to education of a learner is violated where the said learner has not been enabled to attend

school despite having applied for placement. The 14 learners referred to above, 3 of whom are named in annexure “A” to the notice of motion, had on the evidence before Court not been enabled to attend classes when the matter was heard and as such their right to basic education was violated. The said violation continues until such time as these learners are enabled to attend school, and this in my view, is the injury contemplated in the second requirement for a final interdict.

[53] It is difficult to follow the argument advanced on behalf of the Respondents that the applicants have not established harm or injury reasonably apprehended, when in fact the unplaced learners’ right to education continues to be violated. The argument that the Respondents were unable to process and place the learners for lack of information or documents, is also difficult to follow because there is nothing stopping the Respondents from placing the learners pending the submission of whatever documents that may be outstanding. It is the conduct of the Respondents that is responsible for this inability by seeking to first have all the necessary documents while the learners sit at home.

[54] The Respondents appear to misconceive the extent of their responsibilities when it comes to giving effect to the right to basic education as they appear to be content to sit back and wait for the provision of documents before placing the learners. The reading of the Schools Act, however, suggests that their responsibilities, especially the first respondent, go much further than just waiting for the provision of documents before placing a learner. Section 3 (5) of the Schools Act makes it clear that it should be of concern to the first respondent that any learner of compulsory school going age is not attending school such that he is empowered not only to investigate the circumstances of

the learner's absence from school but also to take appropriate measures to remedy the situation.

[55] The attitude adopted by the Respondents, and particularly the first respondent, is at odds with the responsibility that section 3 (5) of the Schools Act places on him, and which responsibility can only be regarded as one of the means by which the right to basic education can be given effect to. To be content with learners sitting at home because of outstanding documentation or information is, in my view, a clear violation of the concerned learners' right to basic education. In my view the applicants have established the second requirement for a final interdict, namely, an injury committed. That being the case, it is not necessary for them to also establish the reasonable apprehension of injury, particularly in these circumstances where the violation of the learners' rights is ongoing.

[56] In any event, in my view, the applicants have also established the reasonable apprehension of harm. This is because it took the Respondents more than two months to ensure that some of the learners whose applications had been referred to them by EELC during January 2024 were able to attend classes. These delays, the Respondents attributed to various reasons including outstanding documents to inability to each the parents or caregivers. It is worth noting that the first respondent, in the answering affidavit, explains that one of the reasons some of the learners remain unplaced is because their parents or caregivers were unreachable. This, he says without giving any indication of the attempts that were made to reach the said parents or the caregivers. It is unclear then how the Respondents, would place these learners in the absence of a court order

compelling them to do so. This also makes the undertaking given by Counsel for the Respondents ring hollow.

[57] In support of their argument that an order compelling the Respondents to place the Learners is unwarranted, Counsel for the Respondents relied on the decision of the Supreme Court of Appeal in ***Primedia v Radio Retail***[2] where the following was stated:

> '[26]… once Primedia, two days before the respondents had launched their application, and later in their answering affidavit, had given an undertaking not to disseminate false statements, the respondents could have had no reasonable apprehension that Primedia would repeat the statements – assuming that they were unlawful. An interdict is not granted for past invasions of right; it is concerned only with future infringements, and there was no evidence to suggest that the respondents had a legitimate fear in this regard. There was therefore no longer any ground to interdict the further dissemination of false statements. So, the high court ought to have not granted the respondents this relief.'

[58] ***Primedia v Retail*** is, however, distinguishable on the facts from the present matter. Firstly, ***Primedia v Retail*** was not concerned with ongoing harm whereas, as already alluded to above, this matter concerns the ongoing violation of the learners' right to basic education. Secondly, the Supreme Court of Appeal in ***Primedia v Retail*** found that there was no evidence to suggest that the respondents had a legitimate fear of future infringements whereas in this matter, as alluded to above already, the learners

[2] Primedia (Pty) Ltd t/a Primedia Instore v Radio Retail (Pty) Ltd and Others (354/11) [2012] ZASCA 32 (29 March 2012 at para [26]

who remained unplaced, especially in respect of those the first respondent says their parents or caregivers had become untraceable. For these reasons, the Respondents' reliance on the decision of the Supreme Court of Appeal in ***Primedia v Retail*** cannot assist them.

[59] The Respondents did not address the issue of lack of alternative remedy on the assumption that the applicants had not established the second requirement for a final interdict. The court is enjoined to give effective remedy where there has been a continuing violation of a constitutional right and in my view, this is one such matter. It is only a court order that can put an end to the violation of the learners' right to basic education and it is for these reasons that the order was made directing the first to third respondents to place the unplaced learners. It also became necessary to define the term "to place" given the evidence placed by the applicants that the Respondents, in some instances, had failed to ensure that the learners who they had placed had received placement letters and were also able to attend classes.

The Remedial Catch-up plan

[60] The applicants sought this relief on the basis that it is not difficult to understand that a learner whose placement has been delayed will start at a disadvantage unless he or she is assisted with a remedial catch-up plan.

[61] The Respondents have explained that there is a policy already in place called the Screening, Identification, Assessment and Support Policy (**SIAS Policy**) that expressly

contemplates a needs-based approach, and which delineates roles to be performed by various role players as follows:

a) **Teachers:**

(i) to gather information and identify learners at risk of learning breakdown and/ or school dropout.

(ii) to provide teacher-developed classroom-based interventions to address the support needs of identified learners.

b) **School-based Support Teams:**

(i) to respond to teachers' requests for assistance with support plans for learners experiencing barriers to learning.

(ii) To review teacher-development support plans, gather any additional information required, and provide direction and support in respect of additional strategies, programmes, services and resources to recommendation for the placement of a learner in a specialised setting.

(iii) where necessary, to request assistance from the DBST to enhance ISPs or support their recommendation for the placement of a learner in a specialised setting.

c) **District-based and Circuit-based Support Teams:**

(i) to respond to requests for assistance from SBST's.

(ii) to assess eligibility of requests made by SBST by gathering any additional information and/or administering relevant assessments, conducting interviews and/or site visits.

(iii) to provide direction in respect of any concessions, accommodations, additional strategies, programmes, services and resources that will enhance the school-based support plan.

(iv) to identify learners of outplacement into specialised settings, e.g. special schools, to access specialised support services attached to ordinary or full-service schools or to access high-level outreach support.

[62] In light of the SIAS Policy referred to above, it was submitted on behalf of the Respondents that the applicants have not established a right to a blanket order directing the first to the third respondents to provide individual support plans to all learners who were placed during and after March 2024.

[63] Unlike the relief relating to the placement of learners, the applicants presented no evidence to suggest that the learners whose placement had been delayed would not be provided with the necessary support to enable them to catch up with their peers. The other difficulty with this relief appears to be that it contemplates an assessment of each learner which is the same thing contemplated by the SIAS Policy. For these reasons, I concluded that that the applicants had not made out a case for this relief.

The relief relating to the investigation in terms of section 3 (5) (a) of the Schools Act

[64] By this relief the applicants sought a mandatory interdict directing the first respondent to produce an investigative report on the reasons why the unplaced learners were not placed as at the date of the order, and to furnish such report to them as well as the court within 30 days of the order. This was premised on the submission that the Respondents' confusion surrounding the true status of learner placement in the MEED renders such report essential.

[65] The further motivation for the report was that it cannot be that the WCED and the community are faced with dozens or hundreds of unplaced late applicants, yet each year the WCED refuses to acknowledge the scale of the problem and refuses to investigate it. It was further submitted that the investigative report is a proactive measure where the WCED takes positive steps to ensure that it respects, protects, promotes, and fulfils the right to basic education, and moreover, the principles of good, transparent and responsive governance contemplated in section 195 of the Constitution demand an explanation from the WCED.

[66] The Respondents resisted this relief on various grounds. Firstly, it was submitted that it is clear from the use of the word ‘may’ in section 3 (5) (a) that it *empowers* but does not *oblige* a head of department to conduct an investigation in the circumstances contemplated by the subsection. Secondly it was submitted that that power applies only in the case of learners of compulsory school age and that because none of the learners who remained unplaced were of compulsory school going age this provision is not applicable. Lastly, it was submitted that an investigative report of the kind contemplated by the applicants is not urgent. If the applicants are entitled to such a report (which is denied), it was submitted that, there is no reason the applicants cannot obtain an order to that effect at a hearing in due course, for example in Part B.

[67] I have touched briefly on the provisions of section 3 (5) of the Schools Act above and in my view, the provision is concerned with learners of compulsory school going age who are either not enrolled at a school or who fail to attend school after having been so enrolled. The relief sought by the applicants is not directed at investigating the circumstances of learners who fail to attend school after having been so enrolled.

[68] In respect of those learners who were not enrolled as at the time of the hearing, the circumstances that resulted in their failure to enroll are the subject matter of the relief that seeks their placement within a period of 10 days from the date of the order. An order was made to directing the first to third respondents to place the unplaced learners within 10 days from the date of the order. Upon Respondents complying with the aforesaid order, there would be nothing further to investigate and report on as those learners would by

then have be enrolled. It appeared to me that this relief is misconceived in the circumstances because the applicants cannot on the one hand seek the placement of the learners and on the other hand seek an investigation into the circumstances that had led to those learners failing to enroll. In any event, there is nothing to investigate because the circumstances that led to the learners' failure to register are known to both the applicants as well as the Respondents.

[69] To further demonstrate the inappropriateness of this relief, one also needs to have regard to the provisions of section 3 (5) (b) which make it clear that the purpose of the investigation is to remedy the learners' failure to attend school. As already stated above, the Respondents have already been ordered to enroll the learners and as such there is nothing that remains to be remedied. It is for these reasons that I declined to make an order directing the first respondent to conduct an investigation contemplated in section 3 (5) of the Schools Act.

[70] The applicants were substantially successful, and I could not find any reason why the costs should not follow the results. Both the Applicants and the Respondents had employed the services of two counsel, including senior counsel in the case of the Respondents. In my view the employment of two counsel was warranted.

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L.G. NUKU
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants:	Advocate L Zikalala
	Advocate N. Soekoe
Instructed by:	Ms C Stuurman (Equal Education Law Centre)
For the 1st Respondents:	Advocate E De Villiers-Jansen SC
	Advocate A Christians
Instructed by:	Ms A Marsch-Scott: State Attorney