



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 298/2024

In the matter between:

EQUAL EDUCATION

APPELLANT

and

**MEC FOR EDUCATION, WESTERN
CAPE GOVERNMENT
PREMIER OF THE WESTERN CAPE
MINISTER OF BASIC EDUCATION
MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

AND

Case no: 351/2024

SOUTH AFRICAN DEMOCRATIC TEACHERS' UNION

APPELLANT

and

**MEC FOR EDUCATION, WESTERN CAPE
NATIONAL MINISTER OF BASIC EDUCATION
SPEAKER OF THE PROVINCIAL LEGISLATURE,
WESTERN CAPE PROVINCE
THE PREMIER OF THE WESTERN CAPE
MINISTER OF JUSTICE AND CONSTITUTIONAL**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

DEVELOPMENT

FIFTH RESPONDENT

Neutral citation: *Equal Education v MEC for Education, Western Cape Government and Others* (298/2024); *South African Democratic Teachers' Union v MEC for Education, Western Cape and Others* (351/2024) [2026] ZASCA 113 (3 September 2026)

Coram: PETSE, MBHA and DLODLO AJJA

Heard: 9 December 2025

Delivered: 3 September 2026

Summary: Constitutional law – ss 28 and 29 of the Constitution – Western Cape Provincial School Education Amendment Act 4 of 2018 – constitutional challenge to provisions establishing collaboration schools, donor funded public schools, intervention facilities and the Western Cape Schools Evaluation Authority (WCSEA) – whether the impugned provisions conflict with subsecs 23(1), (2), (8), (9), (10) and (12) of the South African Schools Act 84 of 1996 (SASA) regulating composition of school governing bodies – application of the conflict resolution scheme in ss 146, 149 and 150 of the Constitution considered – held no real conflict arises, the impugned provisions operate in parallel and any conflict would in any event be resolved in the province's favour – alleged governance gap in collaboration and donor funded schools – held no gap exists, the residual SASA membership categories continue to apply to such schools – equality challenge under s 9 and rationality challenge under s 1(c) raised only in reply and argument – not entertained, parties bound by their pleaded case – intervention facilities for learners found guilty of serious misconduct – challenge based on overbroad official discretion, absence of court oversight and compulsory return to the same school – held premature, as no facility has yet been established – held further that it is constitutionally permissible for the legislature to set the framework and leave operational detail to delegated legislation – no limitation of the rights to dignity, freedom and security of the person, basic education or the best interests of the child established – WCSEA – alleged infringement of the right to collective bargaining under s 23(5) of the Constitution – held that collective bargaining does not extend to bargaining over the content of legislation – both appeals dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Le Grange ADJP sitting as court of first instance, Case numbers 298/2024 and 351/2024).

1. The appeal by Equal Education under case number 298/2024 is dismissed.
 2. The appeal by South African Democratic Teachers' Union under case number 351/2024 is dismissed.
 3. There is no order as to costs.
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JUDGMENT

Mbha AJA (Petse and Dlodlo AJJA concurring):

Introduction

[1] The appellants, Equal Education (EE) and the South African Democratic Teachers' Union (SADTU), appeal against the order and judgment of the Western Cape Division of the High Court, Cape Town (the high court), delivered on 17 January 2023 dismissing their applications which were consolidated and heard together, with no order as to costs. Because of the commonality of the parties and the issues, the high court deemed it convenient to hear the applications together.

[2] Although the high court was of the view that any appeal would have no reasonable prospects of success, the high court nonetheless decided to allow the appeal in both applications on the basis that the issues raised therein concerned the interpretation of relevant provisions in various legislation concerned with public education. The high court considered these issues as novel and weighty and therefore as compelling reasons that deserved the attention of a higher court. The high court accordingly granted leave to appeal to this Court in terms of s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

[3] By a directive of the President of this Court, the two appeals by the respective appellants were consolidated and heard together. This Court records its appreciation to the parties, their respective legal representatives, the staff in the Registrar's office and relevant court staff for all their cooperation and assistance in facilitating the smooth hearing of the consolidated appeals.

[4] The constitutional right to basic education¹ of children and the paramountcy of the best interests of a child,² are at the core of both appeals. It is widely acknowledged that education is a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.

[5] Indeed the Constitutional Court has affirmed the centrality of education in our constitutional democracy by making the following observation:³

'Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are taught and learn how to live useful and fulfilled lives. So education's formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now. The indigenous and ancient African wisdom teaches that 'thuto ke lesedi la sechaba'; 'imfundo yisibani' (education is the light of the nation) and recognises that education is a collective enterprise by observing that it takes a village to bring up a child.'

[6] While lauding the obvious virtues of education, the Constitutional Court

¹ Section 29(1) of the Constitution provides that:

'Education

(1) Everyone has the right-

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'

² Section 28(2) of the Constitution provides that 'a child's best interests are of paramount importance in every matter concerning the child.'

³ *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) (*Federation of Governing Bodies for South African Schools*) para 1.

however lamented the undisputed fact and reality that teaching and learning has not been freely and widely accessible to all people at all times. In this respect, the Constitutional Court stated that:

‘All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning. At the end of a long and glorious struggle against all forms of oppression and the beginning of a democratic and inclusive society, we, filled with rightful optimism, guaranteed universal access to basic education. We collectively said ‘[e]veryone has the right to basic education, including adult basic education’.⁴

[7] The defining aspect of the right to basic education includes the following:

- (a) Unlike some of the other socio-economic rights, the right to basic education is immediately realisable. There is no limitation requiring that the right be progressively realised within available resources subject to reasonable legislative measures.
- (b) The right to basic education may be limited only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[8] Section 28(2) of the Constitution decrees that a child’s best interests are of paramount importance in every matter that concerns the child. The phrase ‘best interests of the child’ is broad, allowing for the flexible application to various circumstances involving children. It implies that in every action or decision made by legal administrative and judicial entities, the child’s welfare must be the primary consideration. However, while the child’s best interests are paramount, this does not mean that they are the sole consideration. This means that other legitimate interests must also be taken into account thus ensuring that the application of this principle is both reasonable and practical.

[9] In *S v M*⁵ the Constitutional Court held that s 28(2) serves as a ‘general

⁴ Ibid para 3.

⁵ *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC).

guideline’ rather than a ‘rule of law of horizontal application’.⁶ This underscores the importance of context in legal decision-making. Clearly, while the best interests of the child are a fundamental consideration, they must be balanced against other considerations and rights, including the rights of others and broader societal needs. This balancing requires careful consideration of all relevant factors and interests in each unique situation, ensuring that decisions are just, equitable, and reflective of the broader legal and social context.

[10] In terms of s 7(2) of the Constitution, the State bears a duty to respect, protect, promote and fulfil the aforementioned rights in ss 28 and 29 of the Constitution. The Western Cape Government, represented by the Provincial Member of the Executive Council (the Provincial MEC) as the first respondent in both appeals, avers that it has sought to meet its constitutional obligations in these regards through effecting significant amendments to the Western Cape Provincial Schools Education Act 12 of 1997 (the Act), which were brought about by the Western Cape Provincial School Education Amendment Act 4 of 2018 (the Amendment Act). Briefly, the amendments provide for the establishment of ‘collaboration’ and ‘donor funded’ public schools, ‘intervention facilities’ for learners found guilty of serious misconduct, and an independent schools evaluation authority for the Western Cape Province (WCSEA). Briefly, the Provincial MEC avers that these institutions advance, rather than impede, the rights of learners to education and are also, in their best interests.

Overview of constitutional challenge by the appellants

[11] The two appellants EE, a non-profit organisation that advocates for quality and equality in education, and SADTU, a trade union that represents educators, are challenging the constitutionality of the legislative framework establishing the aforementioned collaboration and donor funded public schools, intervention facilities and the WCSEA. The prime basis of their challenge is that the impugned provisions of the Amendment Act infringe the constitutional rights protected in ss 28 and 29 of the Constitution. The bases of the challenges can be summarised as follows:

⁶ Ibid para 13.

(a) EE submits that in relation to collaboration schools and donor funded schools, the impugned provisions result in a governance gap and fail to guarantee learners and parents representation on the School Governing Body (SGB), and fail to provide adequate criteria for conversion of another public school to either a collaboration school or donor funded school. In addition, the impugned provisions fail or omit to set an upper limit on donor representation on the SGB of a donor funded school and do not provide any criteria for the appointment of a donor to the SGB of the donor funded school .

(b) In relation to intervention facilities, EE argues that the impugned provisions give an unguided discretion to officials to refer a learner to such facilities, they require the compulsory return of a learner to his or her original (home) school, and they fail to provide for court oversight of a referral of a learner to reside at an intervention facility.

(c) SADTU argues that as regards collaboration schools and donor funded schools, the impugned provisions conflict with certain provisions of the South African Schools Act 84 of 1996 (SASA) which prescribe the composition of SGBs and that SASA ought therefore to prevail.

(d) In the alternative, SADTU argues that the impugned provisions are unconstitutional and invalid to the extent that they do not bear a rational connection to the stated purpose of improving learner outcomes and thus unjustifiably limit rights to equality and dignity of parents and learners by depriving them rights under s 28 of the Constitution. In the further alternative, SADTU argues that the impugned provisions are irrational and vague as they fail to properly identify a suitable donor and operating partner to be a member of the SGB.

(e) As regards intervention facilities, SADTU argues that the impugned provisions are inoperative as they permit the temporary removal of a learner from a school as a disciplinary measure and the referral of a learner to a residential intervention facility for up to 12 months and are, as a result, in conflict with SASA.

(f) As regards the WCSEA, SADTU argues that the impugned provisions unjustifiably infringe SADTU's and its members' rights to collective bargaining in terms of s 23(5) of the Constitution. Furthermore, they impermissibly vary the existing terms and conditions of teachers' employment in terms of the collective agreement concluded at the Education Labour Relations Council (ELRC).

Preliminary issues: Applications for condonation

[12] Before delving into the merits of the appeals, it is necessary to first dispose of two preliminary issues involving applications for condonation brought by SADTU. The first is for the late filing of SADTU's notice of appeal and the second is for the late filing of the appeal record and reinstatement of the lapsed appeal.

[13] It is so that SADTU's notice of appeal was filed two days after the due date on 28 March 2024 which was on a Thursday before the Easter weekend. The explanation proffered by SADTU's attorney is that there was a miscalculation of the deadline date, which was compounded by the early closure of this Court's Registrar's office before the Easter weekend. In my view the delay was minimal, the explanation is not unreasonable, and there is no suggestion of any wilful disregard of the rules of this Court. Importantly, the respondents have consented to the late filing of the notice of appeal. Furthermore, as was held by the high court when leave to appeal to this Court was granted, the issues to be decided herein are novel and weighty and are of public and constitutional importance as they concern the important right to education and the interests of children. The late filing of the notice of appeal must accordingly be condoned.

[14] The appeal record was initially due for lodgement on 10 April 2024 but an extension was, by agreement by all concerned, granted until 12 April 2024. Upon delivery of the record on the next day on 13 April 2024, the Registrar advised that an application for condonation was necessary. The record was ultimately lodged approximately six weeks later.

[15] SADTU's attorney has proffered a confluence of some administrative mishaps as reasons for the delay namely, their driver arriving five minutes late to lodge the record with the Registrar, a public holiday on the next day, part of the delay being due to the appointed courier having mistakenly left one of the record volumes behind, and that due to an oversight, the attorney's certificate was not signed.

[16] Although the explanation proffered for the delay is somewhat convoluted, I am of the view that it is not indicative of any wilful disregard for the rules of Court. The delay was not excessive. Importantly, and what in fact weighs in favour of granting condonation, is that SADTU's appeal has been consolidated and heard together with that of EE which was prosecuted timeously and with due and diligent observance of the rules of this Court. Furthermore, the appeals raise complex and important constitutional issues that warrant adjudication of the merits. The Court is satisfied that the interests of justice will be served if condonation is granted and SADTU's appeal reinstated. SADTU's application for the condonation for the late lodgement of the record is granted and SADTU's appeal is accordingly reinstated.

Background

[17] I deem it necessary to point out at this juncture that the then National Minister of Basic Education (the National Minister), who is cited as second and third respondent in SADTU's and EE's applications respectively, has not taken part in this litigation at all. This is underscored by the following course of events. It is undisputed that the National Minister had, prior to the institution of these proceedings engaged with the Western Cape Education Department (WCED) in respect of the Amendment Act. Having been cited as a party in these proceedings, the National Minister engaged extensively with the WCED on the many issues at the core of this entire litigation. The aim was to enable the National Minister to decide whether to join SADTU in its challenge to the Amendment Act.

[18] The National Minister raised a range of questions which were duly and comprehensively answered by the WCED. At the end of that consultative engagement, the National Minister caused correspondence to be addressed to the State Attorney acting on behalf of the provincial respondents in both applications in which she confirmed her 'candid, open and frank' engagement with the WCED. Pursuant thereto, she advised in the said correspondence that (a) she would not participate in the pending litigation, (b) she would abide the Court's decision; and (c) that she considers the intergovernmental relations consultation to have been satisfactorily concluded. As such, the National Minister did not participate further

before the high court and does not do so in these appeal proceedings. Importantly, she expressly stated that in her view the amended provisions of the Act do not offend the organisation, governance and funding principles for public schools and neither do they conflict with SASA.

[19] In adjudicating the disputes between the parties, the high court had extensive regard and gave consideration to the delivery of education in public schools in South Africa generally, and in the Western Cape Province specifically. The high court rightly noted that the quality of education in our public schools remains weak, that the majority of public schools were in a dismal state, that the majority of learners entering school for the first time are poorly equipped and that school leadership and management, i.e. SGB's and the school principals, do not function optimally.

[20] In the end the high court found, in so far as collaboration and donor funded schools are concerned, that the constitutional requirements that first, parents must be meaningfully engaged in the teaching of their children and second, that SASA carves out an important role for parents and other stakeholders in the governance of public schools, have not been undermined or disturbed by any of the impugned provisions. The high court rejected assertions that intervention facilities are unfair and held that their existence is manifestly in the best interest of children. Their manifest purpose, the high court opined, was to avoid the expulsion of a child from school, resolve her or his behavioural problems and successfully reintegrate that child into her or his school.

[21] In dealing with the 'conflict' challenge by SADTU namely, that the impugned provisions in the Act were in conflict with and that they had to yield to SASA, the high court found that in accordance with Schedule 4A of the Constitution, education is a functional area of concurrent national and provincial legislative competence. Accordingly, parliament and a province may competently legislate on education. The high court then found that the impugned provisions of the Act fell directly within the functional area of Schedule 4A and are reasonably necessary for, as well as incidental to, the effective exercise of the provincial legislature's powers in respect of the right to education. The so-called conflict challenge was accordingly rejected.

[22] The high court rejected SADTU's contention that the WCSEA affected its members' rights in any way. It found instead that WCSEA, being a policy and not a law, served a well-intended constitutional purpose and that it is a reasonable and justifiable mechanism to evaluate schools in the Western Cape Province. Its aim is to improve the quality of basic education.

[23] The Member of the Executive Council for Education (MEC) explained in detail in both her answering affidavits the facts underpinning the decision to introduce collaboration and donor funded schools and intervention facilities. These are not a subject for consideration and are largely accepted. She states that despite the government's relatively high levels of spending on public education, the quality of education in our public schools remains weak.

The state of education in public schools in South Africa generally

[24] The MEC states that every year the National Minister of Basic Education determines the national quintiles for public schools which must be used by the MEC's to identify schools that may not charge school fees. In terms of this system, schools in each province are classified into five groups from the poorest to the least poor. For example, quintile one is a group of schools in each province catering for the poorest 20 percent of schools. Quintile two caters for the next poorest 20 percent of schools while quintile five represents the wealthiest schools. As schools receive money from government according to quintiles, quintile one schools receive the highest allocation per learner, while quintile five receives the lowest.

[25] The MEC opines that the problem with this classification is that it does not always reflect a true picture on the ground as circumstances change over time as these can be affected by various social, economic or even political factors. This can be seen for example in the Western Cape Province, where circumstances of schools have changed substantially over the years such that schools that previously served wealthier communities, now serve very poor communities. Certain schools have to be classified as quintile four or five according to the policy that are serving very poor

communities, yet the perception is that they are 'wealthy'. Although such schools can apply to the MEC or Minister to change their quintile status, the reality is that this is a function of budget which has been reduced in real terms over the last number of years.

[26] In explaining the dismal state of education in public schools in South Africa, the MEC relied on a report by Marius Roodt of the Institute of Race Relations in South Africa dated May 2018 (the IRR report) wherein the crisis in education is discussed. The correctness of the contents of this report, attached to the answering affidavits has not been challenged. According to this report, children attending public schools in South Africa fare poorly in every metric and are ill-prepared for the world after leaving school. The report highlights that most tragically, those who suffer most from poor schooling are, disproportionately, black children. Furthermore, most children entering grade one in any given year are unlikely to matriculate and an even smaller proportion will complete their 12 years of schooling with a good mark in mathematics.

[27] The IRR report references a report by the Organisation for Economic Co-operation and Development (OECD) released in 2015, ranking education systems of 76 countries from around the world. The ratings were determined by examining students' performances in mathematics and science tests. Of the 76 countries assessed, South Africa's education system came 75th, with Ghana occupying the last 76th position.

[28] The IRR report also refers to studies by the Trends in International Mathematics and Science Study (TIMSS), where the norm is to test grade four and grade eight learners in proficiency in maths and science. This study found, however, that South Africa tests its grade five learners instead, which makes the country's dismal performance in these rankings even more concerning. In 2015, the performance of South African grade five learners for maths was found to be very poor. Of the 49 countries tested, South Africa came 48th, above only Kuwait. Similarly, South Africa did poorly in the grade eight maths ranking, again having subjected grade nine learners instead against performance to the other 38 countries that participated in TIMSS in 2015. South Africa was again second last, scoring only above Saudi Arabia.

South Africa's performance in science was worse once more, with the country's grade nine learners rather than the grade eight learners taking part. Of the 39 countries that participated in the 2015 TIMMS, South Africa came last. The MEC states that the TIMMS tests show definitely that there are fairly big and discernible differences in how South African learners perform, depending on which province they reside in, whether they attend a no fee state school, a fee-paying state school, or an independent or private school.

[29] Critically, the IRR report refers to research conducted by Nic Spaull which reveals that spending on South African learners had declined over the years. It shows that, between 2010 and 2017, money spent per learner per year declined by eight percent. In 2017, this had fallen to R16 435 from R17 822 in 2010. This amount was expected to decline further in 2019 to R15 963. This would be a decline of ten percent in real terms on per-learner spending, within a decade.

[30] The IRR report also highlights a disparity in results between the different quintile schools. According to this report, in 2016 less than one percent of learners writing maths in quintile one schools managed a mark above 80 percent, while more than three-quarters could only manage a mark of 40 percent or lower. Unsurprisingly, the better off quintiles had a higher proportion of learners managing 80 percent or above for maths, although the proportions were still low. For example, about 1.5 percent of learners in quintile three schools scored above 80 percent for mathematics, and three percent of learners in quintile four managed this mark. Nearly ten percent (9.7 percent to be exact) of those in quintile five managed to achieve above 80 percent for maths in 2016. According to the report, attending a quintile five school is no guarantee of achieving a good maths pass however, as more than a third of learners attending quintile five schools in 2016 managed only 40 percent or lower for maths. Of the 265 000 learners who wrote maths in 2016, just over 8 000 managed to score 80 percent or higher, some 53 percent of them having attended a quintile five school. Only 6.5 percent of learners managing a distinction had attended a quintile one school.

[31] According to the IRR report, one of the greatest tragedies in the crisis in

government schools is that it is Black children who suffer disproportionately from poor education outcomes, which is a serious stumbling block to transformation and economic growth. Compared to their Coloured, Indian and White counterparts, the outcomes of Black learners are poorer. For example, in 2016 the proportion of Black learners who passed maths with 60 percent or more was nine percent. By contrast, the proportion of White learners who passed maths with more than 60 percent was 52 percent, while the proportion for Coloured and Indian pupils were 20 percent and 40 percent respectively. In maths literacy the figures are starker: only eight percent of Black learners passed with a mark of above 60 percent, compared with 20 percent of Coloured learners, 44 percent of Indian learners and 73 percent of White learners. Figures for other subjects show similar trends.

[32] What is most disturbing is that quintile one schools have the worst educational outcomes and these are schools which the majority of Black children attend. According to data from the National Income Dynamics Survey (NIDS), nearly 40 percent of Black learners attended a quintile one school, with only nine percent attending a quintile five school. By contrast, the proportion of white learners attending a quintile five school was over 90 percent, with negligible proportions attending schools in the other quintiles. The picture that emerges is clearly that Black children are the ones who suffer the most from poor public schooling.

[33] Other studies that have been conducted also paint a bleak state of public education in South Africa. For example:

- (a) Eight out of ten grade four learners in South Africa cannot read for understanding.⁷
- (b) Six out of ten grade five learners cannot do basic maths.⁸

⁷ Howie S J, Combrinck C, Roux K, Tshole M, Mokoena G M and McLeod Palane N. (2017). PIRLS Literacy 2016 Progress in International Reading Literacy Study 2016: South African Children's Reading Literacy Achievement. Pretoria: Centre for Evaluation and Assessment. This international comparison study measured literacy levels between 2011 and 2016 and scored South Africa last in reading of the 50 participating countries. The study was based on data collected in 2016 from 12 810 grade four learners attending 293 schools across South Africa.

⁸ Human Sciences Research Council (HSRC). Trends in International Mathematics and Science Study (TIMSS). 2015. The HSRC conducted the study in 2014 in 297 schools with 10 932 learners.

(c) Fifty percent of all children who started school will not complete grade 12.⁹

Some of the fundamental problems that have been identified as contributing factors to school failure and poor educational outcomes are mainly that learners start and enter school poorly equipped to learn. In addition, there are teachers who are poorly equipped and demotivated to teach. The quality of school leadership and management ie the SGB and the principal has also been found to be wanting in certain schools.

[34] According to a Working Paper by the International Monetary Fund (IMF) dated June 2019,¹⁰ South Africa suffers from weak educational quality, despite relatively high levels of public spending on education. The study highlights that South Africa spends, on average, the equivalent of over six percent of its GDP on education which is on par with many OECD countries. However, a significant number of Sub-Saharan African countries that spend far less per learner than South Africa have far better educational outcomes. The study recognises that while South Africa has achieved significant improvement in increased school enrolment and access to education, the quality of education is significantly lagging.

[35] The IMF opines that the causes of South Africa's low quality of education are complex and multifaceted but that the aspect of distribution of resources is a contributing factor. What is clear, however, is that historical factors explain a significant part of the current status quo. The population groups that the apartheid government denied quality education to, are the population groups that have the poorest educational outcomes. Indeed, Hendrick Verwoerd as so-called Minister of Native Affairs (1950-1958) and Prime Minister (1958-1966), was the primary architect of the discredited Bantu Education, a system widely known to have been designed to restrict Black South Africans to unskilled labour and to teach learners to be 'hewers of wood and drawers of water' regardless of an individual's abilities and aspirations. Verwoerd explained the apartheid government education policy as follows:

⁹ Gustafsson M. 2011. '*The when and how of leaving school: The policy implications of new evidence on secondary schooling in South Africa*'. Working Papers 09/2011, Stellenbosch University, Department of Economics.

¹⁰ Mlachila M and Moeletsi T. 2019. '*Struggling to Make the Grade: A Review of the Causes and Consequences of the Weak Outcomes of South Africa's Education System*'. IMF Working Papers 2019/047, International Monetary Fund.

‘There is no space for him (the black South African) in the European Community above certain forms of labour. For this reason it is of no avail for him to receive training which has its aim in the absorption of the European community, where he cannot be absorbed. Until now he has been subjected to a school system which drew him away from his community and misled him by showing him the greener pastures of European society where he is not allowed to graze.’¹¹

[36] The paper highlights that at primary and secondary levels, South Africa’s education system is bimodal. Thus, the poorest 75-80 percent of learners depend on public schooling that is not performing at expected capacity and who then achieve poor outcomes. On the other hand, 20-25 percent of learners enrol in private schools and functional public schools where they achieve better academic outcomes.

[37] The paper also acknowledges that South Africa has made some good progress in the poorest and lowest performing schools, but that there is still a need for more improvement. Notably, it also records that 80 percent of South Africa’s dysfunctional schools are in townships and rural communities. Furthermore, management in these schools tend to have limited capacity and according to other literature, there are teachers in these schools who have lower subject content knowledge and there are few systems in place that can effectively hold them accountable.

Delivery of education in public schools in the Western Cape Province

[38] I now turn to consider specifically the relevant conditions and context in which education is delivered in the Western Cape Province, which is the epicentre of this entire matter. These are dealt with quite extensively by the MEC in her answering affidavits and are, for the most part, either undisputed or common cause.

[39] The MEC explains that extensive resources are required to operate and maintain a school, including funding and subsidies, infrastructure and its maintenance, movable property, teaching and learning materials, educators and other staff. As in 2020, the WCED was maintaining 1 441 schools and 68 special needs schools

¹¹ Williams P. 2013. ‘Overcoming the educational hurdles of the past’. South African Government Blog accessed at <<https://www.gov.za/blog/overcoming-educational-hurdles-past>> (Accessed on 6 June 2026).

accommodating more than one million learners. She states that learner numbers present a complex problem as these are constantly changing due to an influx of learners from outside the Western Cape Province. During 2017, an additional 17 000 of such learners were accommodated. In 2018 there were 25 388 new learners requiring an additional cost of about R375 million per year excluding the required infrastructure. The additional 25 388 new learners created a need for another 25 to 30 new schools each costing approximately R60 million to set up, totalling between R1,5 billion and R1,8 billion.

[40] The MEC states that over the past three financial years leading up to 2020, the WCED was required by National Treasury to cut its budget and was advised that it would be required to do so again in the 2020-2021 financial year as a result of under collection of revenue by the South African Revenue Service, and pressures of funding free higher education. In addition, the WCED was warned and advised to plan for scenarios of cuts between five percent and seven percent in its budgets over the next three years. The immediate effect of all this, according to the MEC, was that as at 2020 the WCED was approximately 2 000 teachers short of what was required to comply with the preferred teacher-learner ratio of 1:35. This meant that the acute shortage of funds resulted in a far higher teacher-learner ratio. Furthermore, it was anticipated that the envisaged budgetary cuts over the next three financial years would result in a real reduction of some 2 500 teacher posts.

[41] Over and above the estimated R1,5 billion and R1,8 billion that was needed to set up new schools to cater for additional 25 388 learners in 2018 alone, there were already backlogs in respect of existing infrastructure requirements and increasing infrastructure maintenance requirements. However, notwithstanding these requirements the national government cut the education infrastructure grant by R159 million for the 2020 financial year. To exacerbate the situation, there had to be redirection of massive funding to deal with the onset of the coronavirus disease in that same year.

[42] According to the MEC, more than 60 percent of schools in the Western Cape

Province are classified as non-fee schools which includes quintile one to three schools. In addition, many schools that are classified as quintile four and five and which are supposed to be wealthier, in reality serve poor communities and have large numbers of learners whose parents cannot afford school fees. Such schools find themselves in a dire position because of their own funding constraints and the impact of continued rising poverty. To mitigate the situation, in 2013 the WCED offered certain public schools serving poorer communities the option to apply for non-fee status. The aim was to assist the poorest schools in quintiles four and five in alleviating some of the funding difficulties they faced. In the 2018-2019 financial year, the WCED supported, through its own funding mechanisms, 218 quintile four and five schools that had been declared no-free schools.

[43] In addition, the WCED supports schools in quintile four and five in respect of poorer learners by means of compensation for fee exemptions. When learners are granted exemptions or partial exemptions from paying school fees, the WCED compensates the schools for the loss of those school fees. Indeed, during the 2018-2019 financial year, the WCED made available over R53 million for fee compensation which facilitated access to these quintile four and five schools by poor learners. This action also had the effect of alleviating the financial strain on fee paying schools relying on the collection of fees to pay for their daily running costs. The WCED also assisted its remaining fee charging schools serving poorer communities by topping up their norms and standards allocation to enable the schools to at least have the same income base as a no-fee school and to remain financially viable. As in 2020, 98 public schools were benefitting from this pro-poor approach and policy.

[44] The MEC states that significant and substantial resources are required for the provision of schooling more particularly in poorer communities. This includes the provision and maintenance of infrastructure and the provision of educators and other staff and other initiatives geared towards improving the quality of schooling like the safe schools programmes, the school nutrition programme, and learner transport, particularly in rural areas. During the 2018-2019 financial year, the WCED spent over R34 million on providing and reinforcing targeted security infrastructure support to

schools. The programme includes security infrastructure mechanisms such as perimeter fencing, electronic access control and so forth, as well as improving the social environment and safety at schools, including youth development and conflict management programmes.

[45] The WCED also allocated R1,3 billion to special needs education, which is a priority for the WCED, and for which there is an increasing demand. This is especially important for disadvantaged communities where there is often a lack of resources for families who must support children with special needs.

[46] A clear picture that emerges from all the aforesaid is that public schools across the Western Cape Province have to be operated and maintained with scarce and diminishing funds. Despite all of the positive and laudable initiatives and measures undertaken by the WCED, inequalities in educational provisioning still exist, and the legacy of apartheid continues to have an impact on the schooling experiences of many learners in the Western Cape Province.

[47] The policies and initiatives adopted and implemented by the WCED, as set out above, have yielded some positive results. For example, quintile one schools have increased their National Senior Certificate (NSC) pass rate from 57.5 percent in 2009 to 73.8 percent in 2017 and quintile two and quintile three school have increased their NSC pass rate from 55.8 percent to 68.7 percent and 57.4 percent to 72.2 percent respectively in the corresponding period. In the 2017 systemic test results, quintile two schools in fact outperformed quintile four schools in grades three and six mathematics. There has also been a marked improvement in the rate of bachelor passes in the corresponding period from 2009 to 2017. For example in quintiles one to three schools, there were improvements of 8.7 percent to 22.3, 9.9 percent to 19.1 percent and 11.3 percent to 22.8 percent respectively.

[48] As can be seen, the measures undertaken by the WCED, in particular by implementing the key objective of ensuring that a learner in a poor quintile one school has access to the same educational quality as a learner in a wealthier quintile five

school, has yielded visible improvements. However, despite these improvements, there is still much to be done to ensure that quality education is delivered to all learners in the Western Cape Province. Invariably, this must be accompanied by a head-on eradication of systemic inequality which is necessarily a long term project. In this regard, it was recognised that many schools across the Western Cape Province that receive inadequate funding in the past continue to struggle to perform because:

- (a) School underperformance and community poverty still go hand in hand.
- (b) The inequalities of the past still pose a constraint with the debilitating effect that generally children from poorer communities enter primary schools without the benefits of pre-school education. As a result, the remedial needs of those learners are greater than those in more affluent schools.
- (c) There is the added problem of teachers who are either not motivated or are not adequately trained and well prepared for the subjects they are appointed to teach. Furthermore, good teachers invariably leave as soon as they can for better posts at well run and adequately funded schools elsewhere.
- (d) Lastly and importantly, school leadership and governance consisting of principals and SGB's is often weak.

[49] Faced with the dismissal state of the delivery of education in public schools, the WCED identified three possible ways that the education prospects of children in the Western Cape Province can improve through the public education system. These were, first, expanding access to preschool education even before Grade R, albeit that this is not specifically the responsibility of the WCED. Second, prioritising foundation phase education. Lastly and relevant to this case, forging long-term partnerships with investment and other partners who possess skill, experience and knowledge in the field of education. Their primary goal would be to better the lives of children and to improve the management, governance and teaching and learning in schools. The MEC avers the latter objective lies at the core of the collaboration school and the donor funded school models as initiated in the Act. The primary plan entailed harnessing private sources of funding as well as expertise from the non-state sector for schools that are not performing as well as they should and converting or turning them into collaboration schools or donor funded schools which would be in the interests of

education at those particular schools.

Pilot programme on collaboration schools

[50] On 31 August 2015, the WCED adopted the Policy on the Collaboration Schools Pilot Programme in the Western Cape (the Collaboration Schools Pilot Policy) in terms whereof collaboration schools were established on a pilot basis. The policy defines ‘collaborative schools’ to mean ‘an institutional mechanism that partners underperforming schools and schools serving marginalised communities with a school operating partner committed to increasing the quality of teaching and learning in that school in order to substantially improve the school’s educational outcomes’. The policy describes the purpose of the programme as being to pilot a collaborative school operating partnership designed to improve the quality of education at public schools, demonstrate effective models of partnerships in education, develop educators and implement interventions aimed at the improvement of the quality of public education for learners from low-income communities. Importantly, it is also designed to strengthen public school governance and accountability.

[51] The MEC explains that the core element of the pilot programme is placing additional skills, resources and capacity in the form of school operating partners at the disposal of schools to empower governing bodies, school management and educators to develop structures, systems, cultures and capacities necessary to deliver quality education. The intention is to integrate the school operating partner into the school in a manner that pulls on the strength of existing governance and management structures. The operating partner would be held accountable through a clear mandate with measurable concrete and specific educational outcomes.

[52] Some of the benefits of the pilot programme were identified as being to provide an institutional mechanism through which the State and additional non-state resources, personnel and financial, can be brought to bear on the challenge of substantially improving performance outcomes in schools serving the Western Provinces’ poorer learners at the lowest performing schools. This also included integrating into the public school system schools serving poor communities and

establishing an institutional mechanism for greater equity in quality education delivery. Energy and effort would be focused at the individual school level in a way that holds State and non-state resources accountable for the outcomes that they deliver.

[53] As of August 2020 the Collaboration Schools Pilot Policy was applied at seven primary and six high schools across the Western Cape Province. Various operating partners and donors for the schools were identified. An example of a governing agreement between the WCED and a donor is attached to the answering affidavits. It records, *inter alia*, that a donor represents a group of private foundations which are working together for the purpose of supporting the pilot programme so as to develop a sustainable model for improved education outcomes for learners from low-income communities in the Western Cape Province and, which have indicated their intention to fund a pilot programme. The obligations of the donor are spelt out in detail including making a donation on the terms and conditions stipulated in the agreement and developing a project in consultation with the WCED to demonstrate how and when the donation shall be used to achieve the purpose for which it is intended.

[54] Also attached to the MEC's answering papers is a sample of a Service Level Agreement (SLA) concluded with an operating partner. This document sets out undertakings and obligations of the WCED, the operating partner, the SGB and the principal. The duties of the operating partner include acting in the best interests of the learners at the school, providing a project manager and the WCED with monthly reports reflecting *inter alia* the initiatives and interventions made at the school and their intended outcomes, and a financial report reflecting amounts paid in respect of a project. The operating partner must commit to improve performance outcomes of learners and identify and recommend measures for improving the quality of education at the school. Annexure A to the SLA identifies the context of the school which includes learners who have a severe deficit in their literacy and numeracy levels resulting in extremely low academic achievement in age-related curriculum assessment, annual national assessments and systematic testing. Annexure A also identifies the key interventions which include academic deficit redress, addressing behaviour, work ethic and life choices, governance and the parent body.

[55] The operating partners are obliged to furnish concise strategic turnaround plans which provide valuable insight into how the collaboration schools model is intended to work and the range of benefits that the operating partner will bring to the school. Some of the areas of focus highlighted in these plans attached to the answering affidavits, include transforming the lives of all learners by providing them with high quality education to enable them to realise their full potential, prioritising deep learning with emphasis on literacy and numeracy thereby positively impacting on the overall learner academic performance, holistic learner and teacher development, fostering a safe and structured school environment and development of school management and leadership roles.

[56] The MEC avers that the pilot programme had significant success. Attached to the MEC's answering affidavit is a document prepared by Mellon Educate, the operating partner for Happy Valley School, which facilitated the involvement of education specialists from Grade R to Grade 12 ensuring improvement in the school management team, educator training development and support, learner achievement, parent development and involvement and psycho-social support. The MEC also refers to another document that highlights successes in respect of another collaboration school, the Jakes Gerwel Technical School, an inclusive no fee school of excellence situated in Bonnievale where both rich and poor learners live and grow together and are all valued. The school develops every single learner that walks through its school gates according to their giftedness, interest and potential. Importantly, this school has the backing of the whole community. There is thus a visible sacrificial commitment to this vision and deep unity has been forged in the process.

[57] Also attached to the MEC's answering papers is a spreadsheet highlighting the financial impact of the collaboration and donor schools project. The document shows that since its inception in 2016 the project has attracted additional funding of R342 025 000 to the participating schools. Seventy six percent of this total has been spent on resourcing schools in respect of additional teachers, school infrastructure and learning material, professional development and administrative support. As is

apparent from the spreadsheet, this translated into an additional R7 497 spending per learner in the Western Cape Province public school system for the 2020 school year.

[58] The MEC asserts that with certain exceptions, the collaboration and donor funded schools project has yielded substantially improved learner results. A spreadsheet on results of collaboration primary schools shows a 15 percent improvement in pass marks since joining the programme. On the other hand, the provincial scores for non-collaboration primary schools increased by 3.6 percent over the same period. Collaboration high schools have collectively shown a 5.5 percent improvement in the systematic pass rate since joining the programme, while the provincial averages for non-collaboration high schools increased by 0.4 percent over the same period. The spreadsheet also evidences positive improvement in the performance of the same learners as they progress through the various grades at a particular school. A comparative study of progression of learners of the grade three classes to the grade six classes during 2016 until 2019 reveals that, in five out of six primary schools, there were improvements of between ten percent and 30 percent in the pass rates. The study shows that across the Western Cape Province the typical trend for this was 0,05 percent.

[59] The MEC concedes that in some collaboration schools the results outcome has been mixed and not as successful as set out above. The explanation given is that in the main, positive change in schools normally takes time to set in before positive results start showing. Furthermore, the building blocks of quality education include quality governance, ie leadership, new and effective teaching and learning, and the operating environment in which these must take place. However over time schools start showing improvement. The MEC avers that despite these setbacks, the pilot project had overall marked success and caused the Western Cape Government to introduce amendments to the Act, which triggered this entire litigation.

SADTU's challenges against collaboration and donor funded schools

[60] I now turn to consider in detail the specific challenges raised by the parties against the Act. For convenience, I begin with those by SADTU. The Act provides for

the establishment of two types of schools namely, collaboration schools and donor funded schools in terms of ss 12C¹² and 12D¹³ respectively. SADTU argues that the impugned provisions of the Act are inoperative in terms of s 146(2)(b)(i)-(iii) and or s 146(2)(c)(v)¹⁴ of the Constitution to the extent that they conflict with subsections 23(1), (2), (8), (9), (10) and (12) of SASA which prescribe the composition of SGB's of ordinary public schools in South Africa. SADTU argues that the conflict arises because:

- (a) First, s 23(1) of SASA exhaustively prescribes SGB membership with reference to elected members, the principal, and co-opted members (the membership rule).
- (b) Second, s 23(2) of SASA exhaustively prescribes the categories of persons capable of election as SGB members with voting rights including parents of learners at the school, educators at the school, members of staff at the school who are not educators and learners in the eighth grade or higher at the school (the category exclusivity rule).
- (c) Third, s 23(9) of SASA ensures that the category of parent members always holds the majority vote on SGB's and provide that the number of parent members must

¹² The relevant provisions read as follows:

'12C Collaboration Schools

(1) The *Provincial Minister* may identify a *public school* contemplated in section 12(1)(a) to (f) for declaration as a *collaboration school* if he or she is satisfied that such declaration will be in the interests of education at the school, having regard to relevant reports on the school, including reports on the performance of the school.

(2) Subject to subsection (1), the *Provincial Minister* may, on the recommendation of the *Head of Department*, enter into an agreement

With—

- (a) a *donor*;
- (b) an *operating partner*; and
- (c) the *governing body* of a public school,

in terms of which an existing public school contemplated in section 12(1)(a) to (f) is to be declared a collaboration school.

(3) The *Provincial Minister* may, on the recommendation of the *Head of Department*, enter into an agreement with a donor and an operating partner for the establishment of a new *collaboration school* and establish the school.'

¹³ The relevant provisions read as follows:

'12D Donor funded public schools

(1) The *Provincial Minister* may enter into an agreement with—

- (a) a *donor*; and
- (b) the *governing body* of a public school,

in terms of which an existing *public school* contemplated in section 12(1)(a)

to (f) is to be declared a donor funded public school, provided that the *Provincial Minister* is satisfied that such declaration will be in the interests of education at the *school*.

(2) The *Provincial Minister* may enter into an agreement with a donor for the establishment of a new donor funded public school and establish the school.'

¹⁴ Section 146 (2)(c)(v) of the Constitution reads as follows: 'the promotion of equal opportunity or equal access to government services; or'.

comprise more than the combined total of other SGB members with voting rights (the parent majority rule). If the number of parents is not more than the combined total of other members with voting rights, the SGB must temporarily co-opt parents with voting rights in terms of s 23(10).

(d) Fourth, in terms of s 23(8) of SASA, only democratically elected SGB members have voting rights (the democratic election rule). Co-opted members are not democratically elected but have voting rights on the SGB.

[61] SADTU then argues that s 12C(9)-(10)¹⁵ and s 12D(7)-(9)¹⁶ of the Act are in conflict with the aforementioned provisions of SASA as they afford representatives of donors and operating partners SGB membership of collaboration and donor funded schools thus violating the membership rule and the category exclusivity rule in ss 23(1)-(2) of SASA. Furthermore, s 12C(9) violates the parental majority rule as operating partners are afforded 50 percent membership with voting rights unless the MEC affords the other SGB members more than 50 percent with voting rights. SADTU submits that as a starting point parents do not enjoy the majority vote on collaboration school's SGB's.

¹⁵ Section 12C of the Act reads as follows:

'Collaboration Schools

...

(9) The membership of the *governing body* of a *collaboration school* shall comprise 50 per cent of representatives of the *operating partner*, with voting rights, and 50 per cent of the other members of the *governing body*, with voting rights: Provided that the *Provincial Minister* may, on good cause shown, declare that the *governing body* of a particular *collaboration school* shall comprise more than 50 per cent of the other members of the *governing body* with voting rights.

(10) In the event of an equality of votes at a meeting of a *governing body* of a *collaboration school* where the *operating partner* with voting rights comprises 50 per cent of that *governing body*, the matter must be determined by a majority vote at a general meeting of parents present and voting.

...

¹⁶ Section 12D of the Act reads as follows:

'Donor funded public schools

...

(7) The membership of the *governing body* of a *donor funded public school* may include representatives of the *donor*, with voting rights, up to a maximum of 50 per cent;

(8) In the event of an equality of votes at a meeting of a *governing body* of a *donor funded public school* where the representatives of the *donor* with voting rights comprise 50 per cent of that *governing body*, the matter must be determined by a majority vote at a general meeting of parents present and voting.

(9) The *Provincial Minister* may, on good cause shown, declare that the *governing body* of a particular *donor funded public school* shall comprise more than 50 per cent of the representatives of the *donor* with voting rights.

...

[62] SADTU argues that s 12D(7) and (9) violate the parental majority rule as donors can negotiate up to 50 percent SGB membership with voting rights which the MEC can increase to above 50 percent in which case parents would not enjoy majority on SGB's of donor funded schools. Another glaring conflict, so it is submitted further, is that representatives of operating partners and donors are afforded SGB membership with voting rights of collaboration and donor funded schools without being democratically elected, thereby violating the democratic election rule. SADTU submits that ss 12C(9)-(10) and 12D(7)-(9) conflict with s 23(2) of SASA as they do not guarantee parents, teachers, staff and learners of collaboration and donor funded schools SGB membership.

[63] SADTU contends that the aforementioned conflicts cannot be avoided by adopting any reasonable interpretation of the impugned provisions. SADTU therefore contends that the high court erred in failing to apply s 146(2) of the Constitution and by avoiding the conflicts by reasoning that collaboration and donor funded schools do not strictly fall within the category of 'ordinary public school'¹⁷ and therefore that the composition of their SGB's is not governed entirely by s 23 of SASA. However, despite this finding, the high court adopted a 'contextual interpretation' and held, wrongly, that they remain public schools and while 'specific aspects' of the composition of their SGB's have been altered by ss 12C and 12D of the Act, the remaining composition of their SGB must comply with s 23 of SASA. SADTU avers that in support of this finding, the high court wrongly relied on ss 12C(18) and 12D(10) of the Act which provide that the provisions of the Act and any other law regulating public schools apply to collaboration and donor funded schools.

[64] SADTU submits that the high court's reasoning in the preceding paragraph is flawed as the heading of s 23 of SASA plainly indicates that it applies to 'ordinary

¹⁷ Section 12(3)(a) of SASA provides that:

'Provision of public schools

...

(3)(a) A public school may be-

- (i) an ordinary public school;
- (ii) a public school for learners with special education needs; or
- (iii) a public school that provides education with a specialised focus on talent, including sport, performing arts or creative arts.'

public schools'. Thus, either collaboration and donor funded schools are ordinary public schools and s 23 applies in its entirety to them or, they are not in which case s 23 does not apply at all, meaning that it cannot apply in some respects but not others. SADTU submits further that 'school' is defined in s 1 of SASA as being a public school or an independent school which enrolls learners and that 'public school' is defined in s 1 as 'a school contemplated in chapter 3 which is headed 'Public Schools'. Accordingly, SADTU submits that the use of 'or' in s 12(3)(a) of SASA, which provides what a public school may be, confirms that the list of permissible schools is accordingly exhaustive. As collaboration and donor funded schools are neither schools for learners with special educational needs nor schools with a specialist focus on talent as prescribed in s 12(a)(iii) of SASA, it follows, so SADTU argues, that they are 'ordinary public schools' meaning that their SGB's must comply with s 23 of SASA.

[65] SADTU criticises the high courts' finding that s 23 does not prescribe a specific percentage of parent representation on SGB's and that this contextual interpretation does not undermine the constitutional requirements endorsed in *Federation of Governing Bodies for South African Schools*¹⁸ that first, parents must be meaningfully engaged in the teaching and learning of their children, and second, SASA carves out an important role for parents and other stakeholders in public school governance.¹⁹ SADTU submits that to the contrary, s 23(9)²⁰ requires that parents must have the majority SGB membership with voting rights. Accordingly, the high courts' interpretation undermined the role of parents and other stakeholders as it failed to guarantee them membership and instead afforded unelected representatives of donors and operating partners SGB membership with voting rights thus undermining the democratic nature of SGB's which is an essential characteristic of public governance.

[66] SADTU avers that the high courts' contextual interpretation is strained and is

¹⁸ *Federation of Governing Bodies for South African Schools* fn 3 above.

¹⁹ *Ibid* para 46.

²⁰ Section 23(9) of SASA reads as follows:

'The number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights'.

not a reasonable interpretation of the relevant provisions. Relying on the preamble of SASA, SADTU asserts that its purpose is to establish uniform norms and standards for the 'organisation, governance and funding' throughout South African public schools. Accordingly, s 2(1) of SASA states that SASA applies to 'all school education', and s 2(3) empowers provincial legislatures to enact legislation governing school education in provinces provided that such legislation is consistent with the Constitution and SASA.

[67] SADTU then submits that the high court overlooked the importance of the school governance model as prescribed in SASA and the significance of SGB's comprising democratically elected parents, teachers, staff and learners. Clearly this was an innovation of the post-apartheid legal framework aimed at transforming the South African education system to a participatory democracy in which parents, teachers and learners enjoy a greater state in school governance as a decisive break from the education system in place during apartheid. Thus, deviating from SASA's uniform norms and standards prescribing the composition of SGB's will, SADTU submits further, fundamentally alter the fabric of South Africa's public school governance which it described as a 'beacon of grassroots democracy' and will undermine the underlying principle of democracy, representation and accountability.

[68] SADTU argues that parliament intended that the carefully crafted school governance model prescribed in SASA must apply uniformly in all public schools. Furthermore, it is clear from the wording of the relevant provisions of SASA read with s 28(f) providing that the MEC must determine a formula to calculate the number of members of SGB's to be elected in each member category in s 23(2) and the preamble, all considered together with the historical context and development of the country's education system, that the school governance and in particular the SGB composition, is a matter requiring uniformity to be dealt with effectively. Accordingly, ss 23(1), (2), (8), (9) (10) and (12) of SASA provide such uniformity by establishing norms and standards, frameworks and national policies that prescribe the SGB composition of all public schools in South Africa and protecting the rights of parents, teachers, staff and learners to democratic representation on SGB's.

[69] SADTU accordingly submits that ss 23(1), (2), (8), (9) (10) and (12) of SASA prevail in terms of s 146(2)(b) of the Constitution and that ss 12C(9)-(10) and 12D(7)-(9) of the Act fall to be declared inoperative. Furthermore, the aforementioned sections of SASA also prevail in terms of s 146(2)(c)(v) of the Constitution as education is a government service and the uniform rules are necessary to 'promote equal opportunity and equal access' by affording parents, teachers, staff and learners of collaboration and donor funded schools an equal opportunity to meaningfully participate in school governance by way of democratically elected SGB's in their respective categories.

[70] SADTU places emphasis on the crucial importance of SGB's control over the governance and functioning of public schools. It submits that deviation from SASA's uniform norms and standards of SGB composition, threatened the procedural and administrative efficiency of schools. In addition, the impugned provisions are unconstitutional and invalid to the extent that they unjustifiably limit the rights of parents, teachers, staff and learners of collaboration and donor funded schools to equality and dignity in terms of ss 9, 10 and 28 of the Constitution respectively. The basis of this challenge is that the impugned provisions deprive parents, teachers, staff and learners the right to meaningfully participate in school governance through democratic SGB representation. In this regard SADTU criticises the high court's rejection of the equality challenge on the basis that it was allegedly raised for the first time in the heads of argument. The high court's reliance on the cases of *Phillips and Others v National Director of Public Prosecutions*,²¹ and *Damons v City of Cape Town*,²² for its decision also came for criticism on the basis that they were distinguishable.

[71] SADTU argues that ss 12C(9)-(10) and 12D(7)-(9) of the Act also contravene the principle of legality in terms of s 1(c)²³ of the Constitution because there is no

²¹ *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC); 2006 (1) SACR 78 (CC) para 39.

²² *Damons v City of Cape Town* [2022] ZACC 13; [2022] 7 BLLR 585 (CC); (2022) 43 ILJ 1549 (CC); 2022 (10) BCLR 1202 (CC) para 118.

²³ Section 1 of the Constitution provides that:

'Republic of South Africa

rational connection between affording donors and operating partners significant representation on SGB's and the stated purpose of improving learner outcomes. Furthermore, the impugned provisions are impermissibly vague to the extent that they fail to prescribe factors to identify a suitable donor and operating partner, or to determine when a school has to be converted to a collaboration or donor funded school.

[72] SADTU's claim of a conflict between SASA and the Act necessitates a close consideration of certain key legal principles that apply in resolving such a dispute. First, in terms of Schedule 4 Part A to the Constitution, education at all levels, excluding tertiary education, is listed as a functional area of concurrent and provincial legislative competence. Accordingly, provinces have an active and important role to play in legislating on the right to education. Section 44(1) of the Constitution vests the national legislative authority in Parliament which has the power to pass legislation over all matters save for those specifically allocated exclusively to other spheres of government. On the other hand, s 104 of the Constitution empowers a provincial legislature to pass legislation for its province within each of the functional areas listed in Schedules 4 and 5, and to pass legislation with regard to a matter that is reasonably necessary for, or incidental to the effective exercise of a power concerning any matter listed in Schedule 4 which is for all purposes, legislation to be regarded as a matter listed in Schedule 4.

[73] Second, since education is a functional area of concurrent national and provincial competence, this means that both the national assembly and provinces may legislate on education, as has happened in this case. The Premier and MEC's in a province exercise authority by implementing provincial legislation. It follows therefore that a possibility of overlapping and conflict will always exist. The position was

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

summed up by the Constitutional Court when it observed that '[t]he legislative competence of a province cannot be snuffed out by national legislation without more. The Constitution anticipates the possibility of overlapping and conflicting national and provincial legislation on concurrent provincial and national legislative competences'.²⁴ And in *Mashavha v President of the Republic of South Africa and Others*²⁵ the Constitutional Court said, 'It is inherent in our constitutional system, which is a balance between centralised government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That *will necessarily mean that there is no uniformity*' (emphasis added).²⁶

[74] Third, in *Federation of Governing Bodies for South African Schools*,²⁷ the Constitutional Court had occasion to consider the conflict - resolution scheme in ss 146, 149 and 150 of the Constitution and found that the scheme departs from the conventional hierarchy that provincial legislation may not be in conflict with national legislation. The scheme readily acknowledges and manages the potential conflict related to concurrent national and provincial law making competencies and that provincial legislation prevails over national legislation except if the latter applies uniformly countrywide, or the matter cannot be regulated effectively by the provinces, or the matter is one listed in the Constitution as requiring uniformity across the nation. Importantly, in terms of s 150 of the Constitution, in the event of a conflict a Court 'must prefer any reasonable interpretation of the legislation' over any alternate interpretation that results in a conflict. The Constitutional Court held further that the conflict resolving provisions are only triggered when there is 'real conflict'. Accordingly, if two pieces of legislation which deal with different subject matters are reasonably capable of operating alongside each other, there is no conflict and the conflict resolution provisions of the Constitution will not apply.

[75] The effect of what is stated above is that in the event a court finds a conflict

²⁴ *Federation of Governing Bodies for South African Schools* fn 3 above para 26.

²⁵ *Mashavha v President of the Republic of South Africa and Others* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC).

²⁶ *Ibid* para 49.

²⁷ *Federation of Governing Bodies for South African Schools* paras 27-28.

exists, it must embark on an analysis in terms of s 146 of the Constitution and the applicant bears the onus of establishing that a condition in s 146 is present. Section 146(5) provides that provincial legislation will prevail over national legislation if neither s 146(2) nor s 146(3) find application. Accordingly, SADTU bears the onus of showing that s 146 finds application in this case i.e. that SASA prevails over the Act herein. SADTU must therefore prove that the following conditions are met, namely: (a) in terms of s 146(2)(a) national legislation (SASA) deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually, for example the Act; (b) in terms of s 146(2)(b) SASA deals with a matter (education) that, to be dealt with effectively, requires uniformity nationally and SASA provides that uniformity by establishing *inter alia* norms and standards; (c) in terms of s 146(2)(c) SASA is necessary for the maintenance of national and economic security, and that in terms of s 146(3) SASA is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security of another province or the country as a whole or, that provincial legislation impedes the implementation of national economic policy.

[76] The last and relevant principle I wish to consider is one that applies in a case of a challenge to an infringement of constitutional rights. It is trite that there is a two-fold test for a finding of constitutional invalidity.²⁸ First, the claimant must establish that there has been an infringement of a constitutional right. If this is proven positively, the Provincial Minister must show that such infringement is justified in terms of s 36(1)²⁹ of the Constitution. The second leg ie the justification enquiry is itself governed by various principles. Important amongst these are the balancing of competing interests, the importance of the rights infringed in an open and democratic society and the extent of the limitation on policy considerations and proportionality, and so forth.

[77] In my view, if one is applying the key legal principles referred to above in

²⁸ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 44.

²⁹ Section 36(1) of the Constitution reads as follows: 'the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-...'

respect of the alleged existence of a conflict between SASA and the Act, specifically regarding legislative competence in respect of education, SADTU's argument fails outright at the level of interpretation. In this regard, s 150 of the Constitution exhorts courts to '...prefer any reasonable interpretation of the legislation...that avoids a conflict, over any alternative interpretation that results in a conflict'.

[78] My aforesaid conclusion is based on the following:

(a) Section 12(1) of SASA obliges the Provincial Minister to provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. Section 12(3) provides that a public school may be (a) an ordinary public school, (b) a public school for learners with special education needs, or (c) a public school that provides education with a specialised focus on talent, including sport, performing arts or creative arts. The fact that SASA neither defines the phrase 'ordinary public schools' nor that these three aforementioned forms of public schools are the only public schools that may be established by the MEC is, in my view, not without significance. Clearly, the word 'may' in s 12(3)(a) is capable of being interpreted either as being permissive and enabling or, an authorisation to exercise a power coupled with a duty to use it if the requisite circumstances are present.³⁰ In this context the word 'may' is empowering. Clearly, if the legislator had intended the opposite to apply, the phrase 'may not' would have been used.

(b) The use of the word 'or' in s 12(3)(a) in s 12(3) merely serves in my view to make clear that none of those categories of schools can apply simultaneously meaning for instance, that a school cannot be an ordinary public school and a 'public school for learners with special education needs'. Thus, SADTU's argument that the word 'or' is proof enough that the list of public schools in s 12(1)(a) is exhaustive, is ill-conceived.

(c) Section 2(3) of SASA provides that 'Nothing in this Act prevents a provincial legislature from enacting legislation for school education in a province in accordance with the Constitution and this Act'. Significantly, nothing in SASA indicates that schools

³⁰ *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC); (2006) 27 ILJ 2241 (CC) paras 14-16. See also *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC); 2002 (2) SACR 222 (CC) (*General Council of the Bar of South Africa Intervening*) paras 180-182.

other than the three types listed in s 12(3)(a) may not be established by a provincial government.

(d) In addition, s 12(3) of SASA reads harmoniously in my view, and not in contrast, as SADTU would have us believe, with s 12(1) of the Act which affords the MEC the discretion, out of monies allocated for this purpose, to establish and maintain a range of public schools. These include: (a) pre-primary schools, (b) primary schools; and (c) secondary schools and others. Most importantly, the Provincial Minister is afforded the power to establish and maintain '(g) any other type of school which he or she deems necessary for education'. It bears mentioning that this specific provision under the Act, is not subject to any challenge in these proceedings.

(e) Collaboration and donor funded schools which are established in terms of ss 12(1)(eA) and (eB) respectively of the Act while being public schools, are not ordinary public schools as contemplated in s 12(3)(a) of SASA. This is so because (a) operating partners and donors found in both collaboration and donor funded schools, do not feature in the context of ordinary public schools, (b) ordinary public schools are fully funded by the State; and (c) most importantly, the membership of SGB's in these two types of public schools differs from SGB's of other public schools. These schools are governed and regulated by ss 12C and 12D of the Act.

(f) The crisp point that bears emphasis is this: collaboration and donor funded schools are indeed public schools but not in the sense of being 'ordinary public schools' as contemplated in Chapter 3, s 12(3)(a) of SASA, but properly established by the MEC in terms of s 12(1)(eA) and s 12(1)(eB) of the Act. They are public schools in the broader sense of being established and funded largely by the State, being accountable to the State, and delivering education by the State. All of this must be read together with the interpretation I have placed on s 12(3) of SASA above.

(g) In any event, the impugned provisions of the Act clearly fall within the functional area of Schedule 4 Part A of the Constitution and are reasonably necessary for, as well as incidental, to the effective exercise of the provincial legislature's powers in respect of the right to education.

[79] The net effect of all I have stated is that considering the purpose, objective and context under which collaboration schools and donor funded schools were established

and how they are governed, the question of any conflict does not arise at all between the impugned provisions in the Act and the various 'rules' under s 23 of SASA that SADTU relies upon. What this means in simple terms is that ss 12C(9)-(10) and 12D(7)-(9) of the Act governing collaboration schools and donor funded schools, lie parallel and without any contradiction, to s 23 of SASA governing ordinary public schools. No contradiction of any sort arises and SADTU's challenge on this issue must accordingly fail. The high court's finding that the provincial government may provide for additional types of public schools over and above those contemplated by SASA cannot be faulted. The National Minister's stance when she opted not to join in the litigation after forming the view that the impugned provisions in the Act did not offend against SASA, was equally spot on. It is also trite that her stance, taken as national Minister of Education, is a significant factor to which some deference must be shown.³¹

[80] Even assuming in SADTU's favour that there is any conflict, which I have definitely found not to be the case, such conflict must in any event be resolved in favour of the MEC. This is premised on the application of the conflict resolution provisions and principles I have extensively highlighted above in this judgment.

[81] SADTU argues that s 146(2)(b) of the Constitution is applicable in this case and avers that the relevant provisions of SASA, in particular subsections 23(1), (2), (8),(9),(10) and (12) prevail thus rendering the impugned provisions in the Act inoperative. In support of this argument, SADTU submits that it is clear from the wording of the relevant provisions of SASA and its preamble, read with s 28 of the Constitution, and interpreted in their proper context and holistically, that the legislature believed that public school governance in particular the SGB composition, is a matter that requires uniformity in order to be dealt with effectively.

[82] In my view SADTU's reliance on s 146(2)(b) is misplaced. No cogent evidence whatsoever was placed before us to show that for education to be dealt with effectively, it requires uniformity across South Africa, and that national legislation namely SASA,

³¹ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC); (1996) 17 ILJ 821 (CC) para 337, fn 27(7).

provides that uniformity by establishing norms and standards, frameworks or national policies. On a plain reading of SASA, it does not do any of this. To the contrary, SASA allows for the establishment of other public schools outside the realm of ordinary public schools.

[83] SADTU also argues that s 146(2)(c)(v) of the Constitution is applicable. The basis for SADTU's contention is that as education is a government service, uniform rules are therefore necessary to 'promote equal opportunity and equal access' by affording parents, teachers, staff and learners of collaboration schools and donor funded schools meaningful participation in school governance by way of democratically elected SGB's as is the case in other public schools in South Africa. I do not agree. While I do share the sentiment that SGB's are indeed a vital lifeblood to proper and fulsome learning and teaching and that parents must be meaningfully engaged in the teaching and learning of their children, two important points cannot be ignored in this grand scheme, namely, (a) the composition of SGB is not on its own essential to promote equal opportunity and equal access to education and (b) most importantly, in my view, collaboration schools and donor funded schools, given their purpose, objective and context, differ in certain material respects from ordinary public schools. It accordingly follows that these schools do not demand, when viewed against other ordinary public schools, a sameness in approach in all respects, specifically in relation to the composition of their SGB's.

[84] SADTU's argument, in the alternative, that ss 12C(9)-(10) and 12D(7)-(9) of the Act are unconstitutional and invalid to the extent that they unjustifiably limit the rights of parents, teachers, staff and learners of collaboration schools and donor funded schools in terms of ss 9, 10 and 28 of the Constitution must also fail. The high court declined to deal with this issue on the basis that SADTU's pleaded case was not premised on the basis that the impugned provisions infringed the right to equality and that as a result the MEC had, understandably, not addressed the justification analysis. The high court concluded, on this aspect that, '...SADTU failed to make out a proper case on this issue in its founding papers and the constitutional challenge falls to be rejected'.

[85] I agree totally with the approach by the high court on this aspect. It is trite that parties are bound by the case that they pleaded and cannot make a new case in reply, let alone in argument as SADTU attempts to do in this case.³² What SADTU is seeking to do is to rely on a new cause of action, being the right to equality, which it did not plead at all in the founding affidavit. In support of this approach, SADTU avers that its equality challenge is not a new argument raised for the first time in the heads of argument. SADTU argues further that this is supported by all the allegations made in the founding affidavit, considered holistically. I disagree for the simple reason that mere reference to the right to equality in a founding affidavit certainly does not constitute a basis on which to found cause of action that the right to equality has been infringed. More is required to make out a case for a breach of such an important constitutional right.

[86] SADTU argues that collaboration schools and donor funded schools bear no rational connection to a legitimate government purpose. Furthermore, the MEC allegedly failed to prove a rational connection between the differentiation between parents, teachers, staff and learners of collaboration and donor funded schools and those at other public schools in the Western Province, and the stated purpose of improving learner outcomes at underperforming schools.

[87] First, no differentiation has been shown to exist. Second, the MEC has explained in detail the purpose, objective and intended outcomes of collaboration and donor funded schools. The fact that there is a marked difference in purpose, structure and objective of collaboration and donor funded schools, on the one hand and ordinary public schools on the other, cannot on that sole ground lead to any conclusion that there is a differentiation that offends s 9(1) of the Constitution. As the Constitutional Court rightly cautioned in *Sithole and Another v Sithole and Another*:³³

³² *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC); 2006 (1) SACR 78 (CC) para 39.

³³ *Sithole and Another v Sithole and Another* [2021] ZACC 7; 2021 (6) BCLR 597 (CC); 2021 (5) SA 34 (CC) para 19.

'Equality jurisprudence deals with differentiation in two ways: differentiation which does not involve unfair discrimination, and another which does. The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. However, the government may classify people and treat them *differently for a variety of legitimate reasons*. For, "[i]t is impossible to [regulate the affairs of inhabitants] without differentiation and without classifications which treat people differently and which impact on people differently". Mere *differentiation will be valid as long as it does not deny equal protection or benefit of the law, or does not amount to unequal treatment under the law in violation of s 9(1) of the Constitution*.' (Emphasis added.)

[88] The MEC has explained that the objective of establishing collaboration and donor funded schools is to add skill, capacity and educational resources to an education system that is already in desperate need for such assistance, particularly in circumstances where the State is unable to fully or adequately provide for such. It is indisputable in my view, that providing for the establishment of collaboration and donor funded schools, is clearly in pursuance of a legitimate government objective.

[89] Sight must also not be lost of the fact that, importantly, all the categories of members of the SGB as provided for in s 23 of SASA, continue to serve on the SGB of collaboration and donor funded schools. Of course, there is a differentiation relating to the inclusion of an operating partner and a donor. However, such differentiation as I have found earlier, serves a legitimate government objective namely, improving and augmenting the quality of education for learners across the Western Cape Province. How SADTU can even attempt to complain about any infringement of the right to dignity and that all of this is not in the best interests of learners, is plainly unsustainable.

[90] The Act empowers the MEC to identify a public school for declaration as a collaboration school. In making this identification, she or he must 'be satisfied that such declaration will *be in the interests of education* at the school, having regard to relevant reports on the school including reports on the performance of the school'.³⁴

³⁴ Section 12C of the Act.

In effect, s 12C of the Act makes it mandatory that such identification must advance the interests of education at the school. The reports referred to in the section, which relate to *inter alia* academic performance, effective use of available resources, the progress of all learners and so forth, provide a detailed and comprehensive basis for the MEC to determine whether a declaration would be in the interests of education at the school. Importantly, the MEC may, on the recommendation of the head of a department, enter into an agreement with a donor, operating partner and most critically the SGB of a public school in terms whereof an existing public school is to be declared a collaboration school in terms of s 12C(2). Clearly, unless all three components are amenable, a collaboration school cannot come into existence. Thus, a SGB is empowered to veto a school from becoming a collaboration school at the initial stage of the entire conversion process. The Act prescribes minimum requirements to be met for the agreement which will of course have no effect unless and until a declaration has been issued. It also bears mentioning that the MEC must in terms of s 12C(6) of the Act call for public comment in respect of any intended declaration and give due consideration to any comment received. Clearly, the democratic element of public involvement in the entire conversion process plays an important role.

[91] In light of what I have stated, SADTU's argument that ss 12C and 12D of the Act do not prescribe any eligibility criteria for the conversion to a collaboration school and donor funded school cannot succeed. Further, the requirement of the centrality of the best interests of the child resonates clearly in the entire conversion process.

[92] SADTU argues that even if it were to be found that whatever differentiation there is does indeed bear a rational connection to the stated purpose of improving learner outcomes, the differentiation nonetheless still amounts to unfair discrimination albeit not on any of the listed grounds in s 9(3)³⁵ of the Constitution. SADTU argues that the differentiation is 'indirectly based on social class (and in the South African context also race) since the respondents emphasised throughout the answering affidavit that s 12C

³⁵ Section 9(3) of the Constitution provides as follows: 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

(9)-9(10) and 12D (7)-(9) aim to improve the quality of education at the poorest WC Schools. SADTU then asserts that parents, teachers, staff and learners of collaboration schools and donor funded schools who are allegedly, “deprived of their right to democratic SGB representation, are members of poorer social classes” compared to parents, teachers, learners and staff of other WC public schools who are members of wealthier social classes and enjoy guaranteed democratic SGB representation’.

[93] SADTU’s argument on this score is difficult to understand. Suffice it to say that its premise case of unfair discrimination does not even get out of the starting blocks. I have earlier stated that factually there is indeed a difference in the composition of SGB’s between public schools on the one hand, and collaboration schools and donor funded schools on the other. However, such difference does not per se found any basis whatsoever for a claim for discrimination. I say this because *inter alia*:

(a) In terms of s 12C(9) of the Act, the SGB of a collaboration school consists of 50 percent of representatives of the operating partners and 50 percent of other members. This must be read together with s 12C(18) which provides that save as provided for in s 12C, any other law regulating public schools, in this case SASA, applies to collaboration schools. This obviously means that save for the inclusion of the operating partner on the SGB, the remaining composition of the SGB must accord with SASA. Thus only the inclusion of the operating partner and the parental majority rule are affected by the SGB governance structures provided for in the Act for collaboration schools.

(b) In relation to donor funded schools, s 12D(7) of the Act provides that the membership of its SGB *may* include the representatives of the donor, with voting rights up to a maximum of 50 percent of membership of such SGB. Clearly, the inclusion of representatives of the donor in membership of a SGB is not mandatory and in any event it may not exceed more than half the total of membership. Importantly, s 12D(10) of the Act contains the same provision as s 12C(18), relating to collaboration schools namely, that SASA is still applicable and that its provisions relating to the membership of the SGB of donor funded schools remain applicable. The result of this is that only the possible inclusion of the representative(s) of a donor and the parental majority rule

are affected by the governance structures provided for in the Act.

[94] Seen in a proper perspective and in totality, there is accordingly no deprivation or exclusion of certain categories of representation as SADTU would have it. No factual premise exists to found a claim for unfair discrimination. Significantly, SADTU has conceded that the differentiation it contends for is not based on any of the listed grounds in s 9(3) of the Constitution. In any event, SADTU's attempt to rely on social class as an analogous ground of discrimination does not withstand scrutiny. First, 'social class' has never been recognised as a ground of discrimination. Second, other than the fact that this issue is nowhere mentioned in SADTU's founding affidavit, no supporting authority or any substantive argument has been advanced for this Court to recognise 'social class' as an analogous ground of discrimination.

[95] In light of what I have found, SADTU has failed to establish any claim for unfair discrimination. Neither has SADTU succeeded in proving any unjust infringement of any rights of learners in the Western Cape Province. This accordingly makes it unnecessary for this Court to consider any reasonableness or justification for any infringement in terms of s 36 of the Constitution.

[96] SADTU attempts to argue that the impugned provisions offend the principles of legality in s 1(c) of the Constitution on the basis that there is no rational connection between affording donors such significant representation on SGBs and the stated purpose of improving learner outcomes. For reasons that I have stated above, this argument also lacks merit.

EE challenge: Collaboration schools and donor funded schools

[97] EE challenges the constitutional validity of ss 12C, 12D, 21,³⁶ 24³⁷ and

³⁶ Section 21 of the Act provides as follows:

'Establishment of governing bodies for public schools

The *Provincial Minister* shall establish a *governing body* for a *public school* in the *prescribed* manner: Provided that, instead of establishing a *governing body* for each of two or more such *public schools*, one *governing body* may be established for such public schools by him or her, which *governing body* shall also govern the *hostel(s)* of the *public school(s)* concerned, as the case may be.'

³⁷Section 24(1) of the Act provides as follows:

'Regulations relating to governing bodies

63(1)(c)³⁸ of the Act on the bases that:

- (a) They result in a governance gap for collaboration schools and donor funded schools;
- (b) They fail to guarantee learner and parental representation on the SGBs of collaboration schools and donor funded schools; and
- (c) They fail to provide adequate criteria for the conversion of another type of public school into either a collaboration school or donor funded school. In addition, and specifically in relation to donor funded schools, EE argues that the impugned provisions fail or omit to set an upper limit on donor representation and to set any qualification criteria for the appointment of a donor to the SGB of such a school.

[98] In support of the complaint that there is a governance gap in collaboration schools and donor funded schools, EE avers that whilst the Act classifies these schools as public schools,³⁹ however unlike ordinary public schools the Act introduces private entities with voting rights into the school governance. EE alleges that the voting powers of these private entities would likely dominate and determine the strategic direction of these schools, without community control.

[99] EE elaborates on the point about a governance gap as follows:

-
- (1) The *Provincial Minister* may make *regulations* as to—
- (a) the composition and functions of *governing bodies*;
 - (b) the qualifications for appointment, designation or election as, the terms of office of, and the vacation of their offices by, members of *governing bodies* and the filling of casual vacancies in *governing bodies*;
 - (c) the manner of election, functions of chairpersons, treasurers and secretaries of *governing bodies*;
 - (d) the convening of, procedure and rules at, and quorum for, meetings of governing bodies and committees of *governing bodies* and the keeping of minutes of such meetings; and
 - (e) the dissolution and recomposition of *governing bodies*.’

³⁸ Section 63 of the Act provides as follows:

‘Regulations

- (1) The Provincial Minister may make regulations and, where applicable, subject to any national norms and standards contemplated in section 146(2) of the Constitution, as to-

...

- (c) the funding and governance models for collaboration schools and donor funded public schools;’

³⁹ Sections 12(1) (eA) and (eB) of the Act provide as follows:

‘Establishment and maintenance of public schools

- (1) The Provincial Minister may, out of moneys appropriated for this purpose by the Provincial Parliament, establish and maintain the following public schools, namely-

...

- (eA) collaboration schools;
- (eB) donor funded public schools;’

(a) In respect of collaboration schools, s 12C(9) of the Act provides for an operating partner which is a non-profit entity tasked with empowering the school's management and educators, which shall receive 50 percent of the voting seats on the SGB. The MEC may, only on 'good cause shown', increase the voting power of the 'other members' of the SGB. EE then avers that because the Act does not guarantee learners and parents places on the SGB, learners and parents risk being unrepresented.

(b) In respect of donor funded schools, s 12D(7) of the Act allows the MEC to appoint a donor with similar governance powers but, generally, with no more than 50 percent of the votes. The MEC may on good cause shown allow the donor more than 50 percent of the votes, with no prescribed limit. EE avers there is thus a risk of the total exclusion of learners and parents on the SGB because the Act does not guarantee them any representation.

[100] EE argues that by creating collaboration schools and donor funded schools, the provincial legislature broke away from the established governance norms under SASA. Yet, the Act fails to provide a sufficient governance framework for these schools which in EE's view, is a violation of a fundamental constitutional right. Accordingly, without or absent defined categories for SGBs and by failing to guarantee learners' and parents' representation on SGBs of collaboration schools and donor funded schools, ss 12C and 12D of the Act unjustifiably limit the right to basic education and the right of children to participate in decisions that affect them, in terms of ss 29(1) and 28 of the Constitution, respectively. EE therefore submits that a school cannot effectively be governed without direction from the empowering legislation as to who should govern it.

[101] The MEC has raised a point *in limine* namely, that EE did not in its founding affidavit raise a governance gap as a ground of challenge against collaboration schools and donor funded schools. A perusal of EE's founding affidavit reveals the following grounds of challenge:

- (a) In respect of the alleged invalidity of s 12C
 - (i) failure to manage termination of collaboration schools contract;
 - (ii) the Act's lack of eligibility criteria for becoming an operating partner or donor;

- (iii) unlawful delegation of a legislative function to the MEC;
 - (iv) lack of public participation regarding decision to conclude a collaboration contract and
 - (v) irrationality concerning relationship between means and ends.
- (b) In respect of the alleged invalidity of s 12D (donor funded schools)
- (i) failure to manage termination of donor funded schools contract and
 - (ii) the Act's lack of eligibility criteria for donors.

[102] Over and above the aforementioned grounds, a considerable part of EE's founding affidavit is dedicated to an attack on an alleged conflict between SASA and 12C and 12D of the Act. This was premised on the proposition that s 12(3)(a) established a closed list of the types of public schools permitted under SASA. Before us, this so called conflict argument was abandoned and was not pursued further. In other words, EE now concedes that provinces do have the competence to establish schools outside the framework of SASA, including collaboration schools and donor funded schools.

[103] It is apparent from a reading of EE's founding affidavit, that no iota of allegation of any governance gap appears. The earlier comments I made in respect of SADTU on a similar aspect also find application herein. Briefly, the authorities of both the Constitutional Court and of this Court are clear: Parties are bound by the case they pleaded and cannot make new cases in reply, let alone in argument.⁴⁰ In the result, the point *in limine* is upheld. Nonetheless, I have decided to still deal with the merits of this challenge to bring certainty on this aspect of this appeal.

[104] Before I delve into the 'governance gap' issue raised by EE, I deem it necessary to repeat, albeit briefly, relevant aspects that are not in dispute. These were dealt with in detail under the SADTU challenge. First, s 12(3) of SASA identifies three types of public schools that may be created. Importantly, the section expressly names the type that *may* be created thus leaving no doubt whatsoever that it is quite possible that

⁴⁰ *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) para 49. See also fn 32.

there might be more or others than those mentioned, that could be established. The permitted ones are (a) ordinary public schools, (b) public schools for learners with special education needs, and (c) public schools with a specialised focus.

[105] Second, collaboration schools and donor funded schools are established under ss 12C and 12D of the Act and not under SASA. However, as I have stated above, s (12)(3) of SASA expressly permits the establishment of other types of public schools, collaboration and donor funded schools being prime examples. Incidentally, and quite significantly, s 12(1)(eA) and (eB) of the Act, which specifically establish these schools, is not under any form of challenge in these proceedings. Neither is s 12(1)(g) of the Act which empowers the MEC to establish ‘any other type of school which he or she deems necessary for education’. In any event, as I indicated earlier EE, no longer asserts that provinces do not have the competence to establish schools outside the framework of SASA. Thus, the high court correctly found that whilst collaboration and donor funded schools are not ordinary public schools, this did not mean that they were not public schools.⁴¹

[106] Third, s 23(2) of SASA specifies the categories of persons capable of election as SGB members with voting rights. These include: (the section uses the term ‘comprises’) (a) parents of learners at the school; (b) educators at the school; (c) members of staff at the school who are not educators; and (d) learners in the eighth grade or higher at the school (the category exclusivity rule). Section 23(9) of SASA then provides that the number of parent members must always hold the majority vote on SGB’s and that the number of parent members must comprise more than the combined total of other SGB members with voting rights (the parent majority rule).

[107] Fourth, ss 12C and 12D of the Act created a new category of representation on SGBs of collaboration schools and donor funded schools namely, operating partners and donors respectively. It is common cause that these do not feature in SASA.

[108] Although neither collaboration schools nor donor funded schools are ordinary public schools in terms of s 12(3)(a) of SASA, the Act however provides as follows:

⁴¹ *Equal Education v Provincial Minister for Education Western Cape Province and Others* (12880/2019; 4566/2019) [2023] ZAWCHC 166; [2023] 3 All SA 698 (WCC) (17 July 2023) page 15 para 22.

- (a) Section 12C(18): 'save as provided for in this section the provisions of this Act and any other applicable law regulating public schools apply to collaboration schools'.
 - (b) Section 12D(10): 'save as provided for in this section, the provisions of this Act and any other applicable law regulating public schools apply to donor funded schools'.
- There is not the slightest doubt in my view that the applicable law referred to is or includes SASA.

[109] Clearly, the effect of ss 12C(18) and 12D(10) is that they import into the Act the provisions of SASA that govern public schools, including collaboration schools and donor funded schools. Section 1 of SASA which defines 'public school' to mean a school contemplated in Chapter 3 which bears the heading 'Public School', regulates all public schools and includes within its remit s 23, which deals with membership of SGBs of ordinary public schools.

[110] In my view, the consequence of the foregoing, is the following:

- (a) Sections 12C(9) of the Act provides for 50 percent of the representatives of the operating partner, with voting rights and 50 percent of other members of the SGB, with voting rights, provided that the Provincial Minister may, on good cause shown, declare that the SGB of a particular collaboration school shall comprise more than 50 percent of the other members of the SGB with voting rights. Section 12C(10) provides that in the event of an equality of votes at a meeting of the SGB, where the operating partner with voting rights comprises 50 percent of that SGB, the matter must be determined by a majority vote at a *general meeting of parents present and voting*.
- (b) Section 12D(7) of the Act provides that the membership of the SGB of a donor funded school may include representatives of the donor with voting rights up to a maximum of 50 percent. Section 12D(9) provides that the Provincial Minister may, on good cause shown, declare that the SGB of a particular donor funded school shall comprise more than 50 percent of the representatives of the donor with voting rights.
- (c) The effect of the aforementioned provisions, properly construed and when read together with ss 12C(18) and 12D(10) is that, save to the extent that they provide for representation on the SGBs of collaboration schools and donor funded schools of an operating partner and a donor respectively, the remaining provisions of SASA apply. The consequence, effectively, is that the membership categories on the SGB's of collaboration schools are donor funded schools, as provided for in SASA, remain

intact. Section 12C(10) of the Act goes even further by recognising the ever extant important parental role in the education of their children.

[111] All of the foregoing is destructive of EE's complaint that there is any so called governance gap in collaboration schools and donor funded schools. There is no merit to EE's contention that ss 12C(18) and 12D(10) deficiently omit reference to 'ordinary' public schools. Similarly, EE's argument that these sections cannot be read or interpreted to deem the SGB membership categories of ordinary public schools to be the remaining membership categories for SGB's of collaboration and donor funded schools, cannot succeed.

[112] EE's aforesaid contention also falls at the level of statutory interpretation. First, as I pointed out earlier when dealing with SADTU's challenge, it is trite that the ordinary understanding of the words in a provision should serve as a vital constraint on the interpretative exercise, unless the interpretation would lead to an absurdity. This principle has three broad riders namely, (a) statutory provisions should be interpreted purposefully, (b) the said statutory provisions must be properly contextualised and, (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, they must be interpreted to preserve their constitutional validity. Second, a court should always favour or prefer a construction which avoids a constitutional invalidity provided that such interpretation is not unduly strained. Third, it is a courts' function to arrive at an 'interpretation that achieves the most appropriate balance between the parties, that fits most comfortably into the constitutional and statutory framework, and that requires the least intrusive addition to the text'.⁴²

[113] I am further fortified in my view that there is no so called 'governance gap' as alleged by EE by the provision of s 28 of SASA, which gives the MEC substantial power regarding the composition of the various membership categories of a SGB. This section provides that subject to SASA and 'any applicable law', the MEC must by notice in the Provincial Gazette determine, *inter alia*, the term of office of members and office bearers of a SGB, the procedure for the disqualification for removal of the SGB or the dissolution of the SGB, guidelines for the achievement of the highest

⁴² *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC); (2009) 30 ILJ 2601 (CC) para 50.

practical level of representativity of members of the SGB and most importantly a formula or formulae for the calculation of the number of members of the SGB to be elected in each of the categories in s 23(2), but that such formula or formulae must provide reasonable representation for each category and must be capable of application to the '*different sizes and circumstances of public schools*'. In addition, section 28 of SASA must be read together with s 21 of the Act which provides that subject to certain provisions, the MEC shall establish a SGB for a public school in the prescribed manner.

[114] From the foregoing, it becomes clear that it was not necessary for the Act to have referred expressly to s 23(1) and (2) of SASA. Both these sections find application on a reasonable interpretation of the Act when read with SASA. Thus, there is no lacuna exists for not specifically defining the membership categories in the Act.

[115] In any event, to the extent that there are any gaps (which I have already found there are none), these may be addressed by way of regulations which the Provincial Minister is empowered to make in respect of matters of governance. Thus, s 24 of the Act provides that the MEC may make regulations as to the composition and functions of governing bodies. Section 63(1)(c) of the Act in turn provides that the MEC may make regulations and, where applicable, subject to any national norms and standards contemplated in s 146(2) of the Constitution, as to '(c) the funding and governance models for collaboration schools and donor funded public schools'.

[116] All of the foregoing puts paid, in my view, to EE's contentions that ss 12C and 12D of the Act have a so called governance gap and that parent and learner representation is compromised in the SGBs of collaboration schools and donor funded schools. EE's claims in these regards must fail.

[117] EE alleges that the Act does not set an upper limit on the proportion of donor representation on the SGB of a donor funded school. The effect, EE argues, is that in theory a donor could get 100 percent of the votes of the SGB of the donor funded school. Therefore, there is a risk that all other members of the SGB, including parents and children, could be excluded from meaningful participation in school governance. EE submits that this not only irrational, but that it also violates the rights in ss 29(1)

and 28 of the Constitution.

[118] It is necessary to have a closer look at the relevant provisions. Section 12D(7) provides that the membership of a SGB of a donor funded school *may* include representatives of the donor, with voting rights, up to a maximum of 50 percent. Section 12D(8) provides that in the event of an equality of votes at a meeting of the SGB where the representatives of the donor with voting rights comprise 50 percent of the vote, then in such a case, the matter must be determined by a majority vote at a general meeting of parents present and voting. In terms of s 12D(9) the MEC may, 'on good cause shown', declare that the governing body of a particular donor funded school shall comprise more than 50 percent of the representatives of the donor with voting rights.

[119] Read together, it becomes clear that EE's challenge in this respect is without merit. As s 12D(7) makes clear, the membership of the SGB of a donor funded school may include representatives of the donor. Nowhere does the Act make it compulsory that the membership of the SGB should or must include the donor's representatives. The MEC has explained in her answering affidavit that in exercising the discretion to include representatives of the donor on the SGB, she will have regard to the skills and expertise of such representatives. Clearly, what is of foremost importance here is what is in the interests of the child and the child's right to education.

[120] In terms of s12D(9) the MEC may not willy nilly declare that the SGB of a donor funded school shall comprise more than 50 percent of the representatives of the donor with voting rights. The exercise of this discretionary power is clearly dependent on whether good cause has been shown. Furthermore, it bears mentioning that while the Provincial Minister may increase donor representation in terms of s 12D(9), she or he must do so mindful of the membership categories in the composition of the SGB, specifically with reference to s 23 of SASA.

[121] EE criticises the Act's omission to specify a criteria for a donor who could be on the SGB of a donor funded school. EE's argument, primarily, is that such lack of regulation could allow donors without the necessary expertise or skills to assume significant control over a schools' governance. Furthermore, this has the potential to

jeopardise the effective governance of schools and by extension, the quality of education that learners receive.

[122] In my view, this criticism is unjustified and without merit. First, as is apparent from a reading of s 12D(7) of the Act, a donor does not automatically or necessarily become a member of the SGB of a donor funded school. Second, as no eligibility criteria is imposed for any of the SGB membership categories whether under SASA or the Act, it defies any logic in my view, why there should be any criteria prescribed for a donor to be appointed to the SGB of a donor funded school. I am accordingly of the view that no criteria for a donor is warranted. In any case, a donor as per the definition of the term in the Act, is a person who funds or provides funds or property to a collaboration or donor funded school for the purpose of improving the delivery of education in the province. In my view, this is clearly self-explanatory and does not need or warrant any further elaboration.

[123] EE alleges that there is a lack of clear criteria to guide the conversion of schools to collaboration schools or donor funded schools and that the power to convert schools is unrestricted and is thus constitutionally problematic. EE argues further that such unrestricted power to convert schools has the potential to create uncertainty for school communities and places all public schools, regardless of their performances, at the risk of being converted into schools where private entities allegedly hold governance control.

[124] In my view, a simple reading of the relevant provisions in the Act does not reveal any unrestricted power being given to the Provincial Minister to convert any public school into either a collaboration school or donor funded school. To the contrary, the Act sets out a deliberate carefully circumscribed process to be followed to attain a proper and *valid* conversion. I have explained the *process* for the *conversion* of a school to a collaboration school when dealing with SADTU's challenge. Briefly, the process is as follows:

(a) The Provincial Minister must first identify a public school for declaration as a collaboration school. Importantly, in making the identification, the Provincial Minister must be satisfied that such declaration shall be in the interests of education at the school, having regard to relevant reports on the school including reports on the

performance of the school. These reports include annual reports in respect of the academic performance and effective use of available resources, reports on progress of all learners in various grades and so forth. Needless to say, these reports will provide a comprehensive basis for the Provincial Minister to determine whether the conversion will be in the interests of education at the school.

(b) The Provincial Minister may on the recommendation of the Head of Department (the HOD) enter into an agreement with a donor, operating partners and the SGB in terms whereof an existing public school is to be declared a collaboration school. Unless all three components agree, the conversion to a collaboration school cannot happen.

(c) The public must be given opportunity to comment on the intended declaration and due consideration must be given by the Provincial Minister to these comments.

[125] Section 12D(1) regulates the conversion of a public school to a donor funded school and empowers the Provincial Minister to enter into an agreement with a donor and the SGB of a public school in terms of which an existing public school is declared to be a donor funded school. The Provincial Minister is obligated to satisfy himself or herself that such declaration will be in the interests of education at the school. Section 12D(5) contains an important safeguard namely, that the Provincial Minister may not make the aforementioned declaration unless he or she has first called for public comments in respect of the intended declaration and has given due consideration to them.

[126] In light of what I have stated above, EE's challenge based on the allegation that there is no clear process provided for the conversion of a public school to a collaboration school or a donor funded school, must fail.

Intervention facilities

[127] Before I consider the specific challenges by the appellants against the impugned provisions relating to intervention facilities, I deem it necessary to give a brief overview of the context underpinning their establishment and how they will be operated.

[128] Section 12E(1) of the Act empowers the Provincial Minister, subject to available resources of the WCED, to establish an intervention facility for learners who have been

found guilty of serious misconduct. The purposes of these facilities, as set out in s 12E(2) of the Act, are to provide for therapeutic programmes and intervention strategies in order to address the serious misconduct and curriculum delivery equivalent to the standard provided in legislation and policies applicable to public schools. Section 12E(2) provides that an intervention facility may include residential care.

[129] Section 12E must be read together with various provisions in s 45 of the Act which deal with suspension and expulsion of learners at public schools. This provision creates a process for learners to be referred to intervention facilities. Thus, s 45(5) provides that if a learner has been found guilty of serious misconduct during disciplinary proceedings contemplated in ss 8 and 9 of SASA, the SGB may (a) impose suspension of the learner for a period not longer than seven school days or any other sanction contemplated in the code of conduct of the public school or, (b) make a recommendation to the HOD to either refer the learner to an intervention facility for a period not exceeding 12 months at a time if the parents consent to the referral, or expel the learner from the public school.

[130] Clearly, the impugned provisions do create an additional option for SGB's and the HOD when a learner is found to have committed serious misconduct. In addition to imposing its own sanction or recommending expulsion, the SGB may now recommend that the HOD should refer the learner to an intervention facility up to a maximum period of 12 months, if the parents consent to the referral. In terms of s 45(6) of the Act, the HOD can decide whether or not to accept the recommendation. In terms of s 45(14) of the Act, if the SGB recommends expulsion, but the HOD refuses to expel the learner, he or she can after consultation with the SGB impose a suitable sanction. That sanction may now include referral of the learner to an intervention facility in terms of s 45(14A) of the Act. Such referral shall be for a specified period which may not exceed 12 months at any one time.

[131] What emerges from the foregoing, is the following:

(a) Referral to an intervention facility can only occur if the parents, the SGB and the HOD all concur that it is in the learner's best interests. It bears mentioning that parents have no veto right over any other sanction.

(b) Section 45 of the Act sets a maximum period of referral of 12 months. In her answering affidavits, the MEC has stated that the WCED's intention is to refer learners to intervention facilities for six to eight weeks and that only in extraordinary cases will a learner be referred for longer.

(c) Section 45(14B) of the Act provides that when the specified period to attend the intervention facility lapses a learner must be admitted to the same public school that he or she attended. That is not the case when a learner is expelled. In such a case, s 45(11) provides that if the learner is still required to attend school, the HOD must arrange for the learner to attend a different school. As I will explain later, s 45(14B) provides in my view a default position in that the learner concerned would not be compelled to return to the same school if it was not in his or her best interests.

[132] Section 63(1)(cL) of the Act provides that the MEC may make regulations and where applicable, subject to any national norms and standards contemplated in s 146(2) of the Constitution, as to the norms and standards for an intervention facility. From a simple reading of this section, one immediately sees a clear legislative choice by the Provincial Legislature. It has set out the general purpose and function of intervention facilities but left the details of how they will operate to the MEC. This, in my view, is a reasonable choice that recognises the respective roles of the legislative and executive branches of government.

[133] The MEC's power to adopt norms and standards is permissive and not mandatory. Accordingly, it would be irrational and unlawful for the MEC to establish an intervention facility unless and until she enacts the norms and standards. In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of The Republic of South Africa and Others*,⁴³ the Constitutional Court held that it was irrational and unlawful to bring laws into force before the regulatory framework is in place. What this means simply is that the MEC might elect not to establish intervention facilities in which case he or she may also decide not to make norms and standards under s 63(1)(cL). However, if he or she elects to establish the intervention facility, he or she must first ensure that there are norms and standards in

⁴³ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

place to govern them. The power to establish an intervention facility in s 12E(1) of the Act is coupled with the duty to exercise it only when norms and standards to govern the intervention facilities are in place.⁴⁴

[134] The MEC explained in her answering affidavits that she has not as yet exercised her power under s 12E of the Act to establish any intervention facility. Furthermore, she will not do so until the norms and standards, currently in draft form, are promulgated. This approach accords squarely with the interpretation of s 12E read with s 63(1)(cL) as I have explained above.

[135] I highlight a few relevant points contained in the draft norms and standards:

- (a) An intervention facility will only be residential if learners would otherwise be unable to participate in the programmes stipulated in the Act, because of the distance from the learner's home. Residential facilities will be established in rural areas where a non-resident facility may not be practical.
- (b) The intervention facility will be managed by a behaviour intervention team that will include an educator, a learning support teacher, child care worker, an occupational therapist, a psychiatric nurse, a psychologist, a social worker, an administrative assistant and a driver. Each facility will have specific amenities including education areas, a psychologist's therapy room, a social worker's breakaway room, an occupational therapy room and a nursing room.
- (c) While admission following serious misconduct is determined by the agreement of the SGB, the HOD and the parents, it will be managed by a Behaviour Case Forum made up of senior officials and can include representatives from the Department of Social Development and the Department of Health.

[136] I also deem it relevant to make mention of a pilot programme that was embarked upon by the WCED with the objective of determining how it would operate the intervention facilities once the appropriate amending bill that was published for public comment, was passed into law. The plan was to conduct the pilot programme and use the knowledge gained to draft the regulations that would govern intervention

⁴⁴ *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC); (2006) 27 ILJ 2241 (CC) para 15 (the word 'may' can grant an authorisation coupled with a duty to exercise it if certain circumstances are present).

facilities in the future.

[137] The pilot programme began on 1 July 2018 and was conducted in two phases being a site based phase and an outreach phase. The existing Behaviour Support Pathway programme was used to identify learners with behavioural needs and applications for the pilot programme were considered only if the learner had already received a substantial amount of support by all relevant role players but whose behaviour remained unchanged. Clearly, the intervention facility concept is a behavioural assistance programme that is in addition to the Behaviour Support Pathway programme already in existence.

[138] The MEC states in her answering affidavits that 37 learners from both primary and high schools joined and were assisted in the initial two phases and that the programme achieved positive outcomes for these learners. She also states that because of their behavioural difficulties, schools would only provide negative attention whenever the learner misbehaved. However in the intervention facility albeit in its pilot stage, learners were encouraged and told that they were worthy and important, and that the WCED, the school and their parents were committed to assisting them to achieve their potential.

[139] According to the MEC, fifty percent of the learners successfully completed the programme and were reintegrated in the home schools where the learners are attending school and complying with the applicable codes of conduct. Importantly, the schools concerned are coping with the learners. Based on the aforesaid, which is not disputed, I am satisfied that the programme was indeed a success as learners who would otherwise likely have been expelled from school, could consequently remain in their school, improve their behaviour and improve their ability to learn. The alternative for many of these learners would have been expulsion, which would have been disruptive to their and their parents' lives without resolving the underlying behavioural problem.

EE's challenge against intervention facilities

[140] EE launched a three pronged attack against intervention facilities, namely:

(a) The Act affords the HOD or the MEC an overbroad discretion in respect of the

decision to refer a learner to an intervention facility, the definition of serious misconduct, and decisions about residential facilities;

(b) There is no court oversight required to refer a learner to a residential intervention facility albeit that it is in effect, detention and,

(c) The Act compels a learner to return to the same school upon completion of the programme at the intervention facility.

[141] To counter EE's challenges, WCED submits that its defences against EE aforesaid challenges are underpinned by two basic principles namely, (a) abstract challenges must be discouraged generally, and (b) the ever present obligation to interpret legislation to preserve, to the extent reasonably possible, its constitutionally.

[142] It is common cause that no intervention facility has yet been established. In addition, the draft norms and standards required in terms of s 63(1)(cL) have not been promulgated as yet. As I have stated earlier, the MEC has affirmed in her answering affidavit that she will establish intervention facilities only upon promulgation of the said norms and standards. The effect, obviously, is that EE cannot even by any stretch of the imagination, point to any specific instance where any child's rights have been violated. There is no evidence as yet of how an intervention facility operates, or how any learner has been referred to such a facility against their best interests. Clearly, the absence of promulgated norms and standards at this stage makes the EE's challenges to be only abstract.

[143] The WCED's reliance on the principle against abstract challenges is in my view, proper. The Constitutional Court has affirmed that courts generally treat abstract challenges with disfavour because such challenges ask courts to peer into the future and that in so doing, they stretch the limits of judicial competence. In such cases applicants pursuing such actions have a heavy burden of showing that the provisions they seek to impugn, are constitutionally unsound merely on their face.⁴⁵ The Constitutional Court has said the following about the heavy burden applicants have to discharge in such abstract challenges:

'This court is now required to analyse the constitutionality of the crime of intimidation with

⁴⁵ *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5; 2014 (5) BCLR 606 (CC); 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC) para 13.

neither the benefit of the context in which the crime was allegedly committed nor with an understanding of the interpretive approach that would have been adopted by the trial court. In such judicial twilight, if we are to be persuaded that the section is unconstitutional, then the applicants must present argument strong enough to light the path.⁴⁶

In light of what I have stated above, I agree with the WCED that the challenges raised by EE are purely abstract and that EE has not even remotely attempted to discharge the heavy burden required of it as explained above.

[144] The WCED also relies on the long established principle that statutes must be interpreted reasonably to avoid a finding that they violate the Constitution. WCED submits accordingly that, the provisions in the Act relating to intervention facilities must be read holistically and reasonably in a manner that seeks to uphold the rights of learners. I have earlier on in this judgment extensively dealt with this principle when dealing with the challenges against collaboration and donor funded schools. Briefly, the position is that where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity provided such interpretation is not unduly strained.⁴⁷ This Court is accordingly enjoined to read the relevant provisions in the Act that create intervention facilities reasonably and in a manner that upholds the rights of learners who have been found guilty of serious misconduct, and who need relevant and appropriate assistance that can and will be offered at these facilities. Having considered the purpose and context in which intervention facilities were created, and in particular the positive outcomes seen from the pilot project, it becomes difficult to argue that they are not, generally, in the best interests of learners.

[145] A closer look at EE's three complaints which I have set out above, reveals a central theme that, according to EE, the Provincial Legislature was required to regulate every detail of intervention facilities in the Act, and was constitutionally prohibited from leaving those details to be resolved by the MEC. However, our law allows legislative bodies like parliament and provincial legislatures to legislate broadly and provide a

⁴⁶ *Moyo and Another v Minister of Police and Others* [2019] ZACC 40; 2020 (1) BCLR 91 (CC); 2020 (1) SACR 373 (CC) para 29.

⁴⁷ *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening)* 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 para 24.

legislative framework on a particular subject, and leave the details to be resolved in subordinate legislation. In this instance, the Act creates the framework for intervention facilities. If the MEC wants to establish an intervention facility, the Act requires of him or her to adopt regulations to flesh out the framework and make the intervention facility operational.

[146] The Constitutional Court has affirmed this legislative architecture in various decisions. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*⁴⁸ the Constitutional Court held that where the legislature requires guidance for the exercise of public power, the guidance could be in the legislation itself or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority. In *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others*⁴⁹ the Constitutional Court considered a constitutional challenge to a section in the South African Police Service Act 68 of 1995, as amended, on the ground that it afforded a Minister an open ended discretionary power which could be abused because the relevant section did not lay down guidelines. The Court disagreed and held that in the particular circumstances of that case, it was more appropriate for the finer details on when and where to apply the measures to be provided for not in the legislation, but in the regulations or the measures themselves.⁵⁰ Significantly, the Court emphasised that instead of seeking to invalidate the Minister's powers to prescribe the measures, the correct approach would have been to challenge the prescribed regulations on their content and application. Recently, in *Minister of Finance v Afribusiness NPC*,⁵¹ the Constitutional Court restated the value and role of delegated legislation and said the following: '...the purpose served by regulations is to make an Act of Parliament work. The Act itself sets the norm or provides the framework on the subject matter legislated upon. Regulations provide

⁴⁸ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) para 54.

⁴⁹ *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC).

⁵⁰ *Ibid* paras 43-45.

⁵¹ *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC).

the sort of detail that is best left by Parliament to a functionary, usually the Minister responsible for the administration of the Act, to look beyond the framework and – in minute detail – to ascertain what is necessary to achieve the object of the Act or to make the Act work’.⁵²

[147] In light of what I have stated above, it becomes clear that it was quite appropriate for the Provincial Legislature to set out the framework and define the basic purpose of intervention facilities in the Act, and leave it to the MEC to determine the details of how they would operate. Furthermore, as EE’s specific challenges fall to be resolved through the yet to be promulgated MEC’s regulations, these challenges ought in my view, to wait for those regulations to come into force. EE will then be in a position to challenge the prescribed regulations on their content and application. In other words, EE’s challenges as they stand, fall to be dismissed on the basis that they are premature. Nonetheless even, though I have found that EE’s challenges are premature, I still deem it proper to consider their merits.

[148] EE complains that the Act grants broad discretionary powers to officials to refer learners to intervention facilities for any form of serious misconduct. However, the Act fails to provide clear guidelines as to when or whether serious misconduct warrants any referral. EE therefore argues that the impugned sections in the Act make referral to an intervention facility a potential sanction to all forms or types of serious misconduct, which is overbroad and could result in a disproportionate sanction.

[149] The principles governing challenges based on an absence of guidance, as EE attempts to do in this case, in instances where broad discretionary powers have been granted to officials either in legislation or regulations, have been resolved and are now firmly established in our law. In *Dawood*,⁵³ the Constitutional Court examined the effect of s 25(9) of the Aliens Control Act 96 of 1991 on the constitutional right of spouses to cohabit and the need for parliament, when granting government officials wide discretionary powers to refuse residence permits to foreign spouses of South Africans, where such powers touch on constitutional rights, to lay down proper guidelines. The Court held that if a foreign spouse was refused a temporary residence permit, it would limit the right to dignity. Thus, the right to dignity of spouses was limited by statutory

⁵² Ibid para 103.

⁵³ *Dawood* fn 48 above.

provisions that empowered immigration officers and the Director-General to refuse to grant or extend a temporary residence permit.

[150] The Constitutional Court found that the issue of discretion and guidance arose in the context of a justification analysis in terms of s 36(1) of the Constitution. In considering the nature of the limitation, O'Regan J concluded that it was unclear from the statute what factors were relevant to the decision. Importantly, O'Regan J stated that:⁵⁴

'Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.'

The learned Justice continued thus:

'In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by ss 26(3) and (6) is constrained by the provisions of the Bill of Rights, and, in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit.'

The limitation was serious because refusal could occur even where no justification existed.

[151] O'Regan J extolled the value of discretion saying it played a crucial role in any legal system as it allowed abstract and general rules to be applied to specific and particular circumstances in a fair manner. She then identified three instances where a broad discretion will be justified namely, (a) where the factors relevant to a decision are so numerous and varied, (b) where the factors relevant to the exercise of the discretionary power are indisputably clear and (c) where the decision-maker is possessed of expertise relevant to the decisions to be made.

[152] Importantly, O'Regan J cautioned that guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. In other words, guidance will be required in particular where there is consideration of the question whether or not a limitation of rights will be justifiable. O'Regan J then came to the

⁵⁴ *Dawood* fn 48 para 47.

conclusion that in *Dawood* such a required guidance was demonstrably absent. Furthermore, providing the required guidance was possible, and the relevant officials did not have the special expertise required.

[153] It needs to be stressed that *Dawood* is no authority for the proposition that every time a law grants a discretion then there must be guidance. On the other hand, *Dawood* teaches that:

- (a) Discretion is a vital part of any legal system and laws that grant a discretion to officials are not inherently unconstitutional.
- (b) It is only if the exercise of the discretion could limit a right that guidance may be necessary;
- (c) If the factors are too numerous to identify, or they are obvious, or the decision-maker has special expertise, it is not necessary to guide the official's discretion.

[154] In this litigation the impugned provisions, especially s 12E of the Act, confer a clear discretion on the MEC for the establishment and the power to promulgate norms and standards. What still remains to be considered is whether or not EE has shown there has been any limitation of rights of learners arising from the creation of the intervention facilities, and whether or not any guidance is accordingly required.

[155] EE argues that the Act fails or omits to provide guidance to the HOD, the SGB or the learner's parents on when they should refer a learner to an intervention facility. I have given careful consideration to the purpose, objective and context within which intervention facilities were created, and the fact that the pilot project yielded largely positive results. I am thus satisfied that referral to an intervention facility is not a limitation of any right. Learners who are referred there will not incur any burden. To the contrary they will derive a benefit as they, as learners who have been found guilty of serious misconduct, will receive the help and support they need in order to overcome barriers to their learning in an environment that is appropriate and designed to help them. More importantly, they will do so where the alternative could have been expulsion. No right of any learner referred there will in any way be limited and as a result no guidance is required.

[156] In any event, even if one could find that a referral to an intervention facility in

any way limits a learner's right, all three of the factors listed in *Dawood* are present in this case.

(a) First, the underlying purpose is obvious namely, the fact of what is in the best interests of the child. Clearly that is the primary guide underpinning the decision of the HOD, SGB or the parents concerning specifically, the referral of a child to an intervention facility. This primary guide is found in s 28(2) of the Constitution, and s 9 of the Children's Act 38 of 2005.⁵⁵ The best interests of the learner must be assessed in line with the statutory purposes of intervention facilities which appears in the Act namely, to provide therapeutic interventions, to avoid expulsion, correct behavioural problems and enable re-integration of the learners to the home school. There is thus sufficient guidance given to the HOD, SGB and parents when making the decision to refer a child to an intervention facility.

(b) Second, while the general aim of referral and the ultimate standard is self-evident, it is not possible to define all the relevant factors in the abstract. Appropriate and relevant factors will depend on the particular circumstances of the child. Section 7(1) of the Children's Act lists fourteen factors which must be considered when assessing the best interests of the child. Examples are the child's relationship with the parents and caregivers, the child's age and maturity, the need for stability, the prevention of harm and so forth. When the ultimate purpose is apparent from the Act, taken together with the aforementioned factors set out in s 7(1) of the Children's Act, no purpose would in my view be served by specifying factors in more detail. More than sufficient guidance is already provided in this regard.

(c) Third, people with the necessary expertise will be involved in making the decision to refer the child to an intervention facility. These are the HOD, SGB and parents who are experts in their own rights. The HOD is an expert in educational matters. He or she will have expert insight into whether or not a referral of a learner to an intervention facility is appropriate. The SGB includes the principal of the school, teachers, parents, staff members and the other learners who know the learner. Sight must also not be lost of the important requirement in the Act namely, that the decision to refer the child to the intervention facility must be approved by the learner's parents, who are of course experts on what is best for their child.

⁵⁵ Section 9 of the Children's Act 38 of 2005 provides:

'Best interests of child paramount'

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

[157] Based on what I have stated above, it becomes clear that the Act read with the Constitution (specifically s 28(2) and s 7(1) of the Children's Act) already creates sufficient guidance and there is no reasonable risk that a decision to refer a child to an intervention facility will limit any constitutional right. Undisputably, referral to a facility can only be taken if it is in the best interests of the child and the three aforementioned experts agree. Therefore, restating that standard in the Act would serve no purpose.

[158] I now turn to deal with EE's challenge that the Act fails or omits to define what constitutes serious misconduct. EE phrased its complaint in this regard as follows in the founding affidavit :

'169.3 Perhaps most worryingly, there is no definition or criteria for determining whether conduct amounts to 'serious misconduct' – a jurisdictional fact for the application of the provision. It is simply left to the Provincial Minister to issue a notice in this regard. The upshot is that learners risk being removed from the formal education system for up to a year for minor infractions, in violation of both section 29(1) and 28(2).'

[159] In dealing with this specific challenge, the high court found, quite rightly in my view, that what constitutes 'serious misconduct' is squarely within s 9(3)(a) of SASA which empowers the Provincial Minister to determine, by notice in the Government Gazette, the behaviour by a learner which may constitute serious misconduct. This is repeated in s 45(9)(a) of the Act. The high court found that absent any challenge against these two provisions that afforded the power to the MEC, the order sought by EE would have no consequences because the power to define serious misconduct would still exist. In my view this reasoning of the high court cannot be faulted. Effectively what EE is seeking to do is criticise what the MEC would define as serious misconduct, without challenging the section giving him or her the power to do so. In any event, the MEC has exercised the power and has published a detailed definition of serious misconduct.⁵⁶

[160] EE submits that the Act fails to provide guidance as to when or whether serious misconduct warrants referral to an intervention facility. This complaint is identical to

⁵⁶ Regulations Relating to Disciplining, Suspension and Expulsion of learners at Public Schools in the Western Cape. PN 365 of 2011 (PG 6939 of 15 December 2011) with effect from 2 April 2012. Regulation 3.

the previous one about the discretion to refer a learner to an intervention facility. I have dealt quite extensively about the issue of a broad discretion and guidelines and all of that is equally applicable to this challenge. This challenge is similarly misplaced and must fail.

[161] EE challenges the discretion to refer a learner to a residential intervention facility and argues that such referral is more intrusive than expulsion, and claims that separating a child from their home limits their rights in s 28 of the Constitution and should at most, be a last resort. Furthermore, none of the impugned sections, EE argues further, give guidance as to when or whether it would be suitable to require a learner to reside at an intervention facility.

[162] I have earlier on accepted the propriety and non-violability to any rights by the exercise of a discretion by the HOD, the SGB and parents to refer a child to an intervention facility generally. I found specifically that the discretion will be guided primarily by the interests of the child and that other factors as in s 7(1) of the Children's Act will all have a role to play. That reasoning finds equal application in this instance as well. The decision will still be guided by the interests of the learner, the manifest purposes of the intervention facilities, taken together with other various factors relevant to the particular circumstances of the child. I am satisfied that referral to a residential intervention facility will not limit any rights of the child in terms of either s 28(2) or 29 of the Constitution. In the result, no specific guidance in this respect is necessary but in any event the numerous factors already mentioned will be helpful in making the decision whether or not to refer a child to a residential intervention facility. This challenge must accordingly fail.

[163] EE contends that the Act permits the referral of learners to residential facilities without any requirements for judicial oversight. EE also submits that the parental consent required for a referral is no substitute for the constitutional needs for independent oversight when a child is removed from their home, to guarantee that the child's best interests are advanced and protected and that removal from the home must be done as a last resort. This challenge is predicated on s 28(1)(g) of the Constitution which affords children the right 'not to be *detained* except as a measure of last resort...the child may be detained only for the shortest appropriate period of

time... .' (Emphasis added.)

[164] In my view this challenge is totally misplaced as s 28(1)(g) does not apply to intervention facilities. No court or judicial oversight is therefore necessary. First, referral to a residential facility is not detention. Second, the child is not removed from their family. 'Detention' in law, means that a person's freedom of movement is temporarily restricted by authorities, typically for questioning, investigation or to prevent a crime. It is actually more than a deprivation of liberty and that is why 'detained' in s 28(1)(g) might be equated with 'imprisonment'.

[165] Referral to a residential facility is in no way equivalent to imprisonment. Section 12E(3) of the Act expressly refers to 'residential care' and not detention. Accordingly, 'care' in this context can never be equated to imprisonment. Importantly, a learner can only be sent to an intervention facility with the consent of their parents who are at liberty to withdraw their consent at any time and then have the child removed from the facility and brought back home. Clearly, this is the antithesis of detention. Significantly, there is no provision in the Act stating that the child is not permitted to leave the facility, that they will have any less freedom of movement than any learner attending a public school, or that they will face any particular sanction if they abscond.

[166] I am fortified in my view that no court oversight is necessary when a child is referred to a residential intervention facility because ordinarily this is never required whenever a parent elects to send their child to a boarding school or to go stay with a relative for a period. Clearly, that would be contrary to s 31 of the Children's Act which regulates the making of major decisions involving a child by anyone holding parental rights and responsibilities, including a decision which is likely to significantly change or to have an adverse effect on the child's living conditions, education, health, the child's well being and so forth. Section 31 of the Children's Act thus allows the parent to take those decisions after considering the child's views and wishes. As can be seen, EE'S argument directly contradicts s 31 and would require court oversight for decisions that parents can legitimately and permissibly make regarding their children. This challenge is unsustainable and must accordingly fail.

[167] EE's final challenge is that s 45(14B) of the Act compels a learner returning

from an intervention school to be admitted to the same school. EE submits that the rigidity of this provision which requires that the child to be returned to the same school, fails to take into account the possibility that returning to the same school may not be in the best interests of the child. This section provides:

‘A learner who has been referred to an intervention facility in terms of subsection 6(a) or (14A) shall, after the lapse of the specified period contemplated in those subsections, be admitted to the same public school that he or she attended prior to the referral.’

[168] In my view, EE misconceives the import of s 45(14B). The provision cannot be read to instruct the school to readmit the child even if it is not in the child’s interests to do so. Section 45(14B) must be read together with s 41(1) of the Act, which provides that ‘a public school shall admit learners and serve their educational requirements without unfairly discriminating in any way’. Section 45(14B) should therefore be understood as an instruction to the school to admit the learner should the child (and his or her parents), desire to return to the same school. The provision is definitely not a prohibition directed at the parents or the HOD from seeking admission at any other school after the lapse of the prescribed period spent in an intervention facility.

[169] Section 45(14B) serves in my view, the overarching purpose of reintegration by preventing the school from refusing to re-admit a learner after he or she has attended an intervention facility. It definitely cannot be read as purporting to remove the ordinary right of parents to decide that their child should move to a different school. Furthermore, this reading is consistent with s 28(2) of the Constitution because it puts at the fore the best interests of the child. In light of what I have stated, EE’s challenge on this score must accordingly fail.

SADTU’s challenges against intervention facilities

[170] SADTU’s challenge against intervention facilities was pleaded as follows in the founding affidavit:

‘73. Given the vague description of the nature and role of the proposed intervention facilities, there remains a real risk that such facilities will:

- 73.1 stigmatise learners that are sent to such facilities;
- 73.2 violate national legislation relating to school suspension and expulsion measures already in place; and
- 73.3 unfairly submit Western Cape learners to disciplinary interventions that their peers in

the rest of the country do not have to face.

74. Given the lengthy process of transforming the highly problematic system of reform schools of the apartheid era, SADTU is of the view that the introduction of these “intervention facilities” would be a regressive step. Resources should instead be spent on ensuring the establishment of a proper functioning inclusive education system that supports all learners without having to isolate and exclude learners from their families and communities or school environment, or to deny them the opportunity to have a normal schooling experience.
75. ...[I]ntervention facilities do not uphold the best interests of learners and has the very real potential of compounding exclusion and marginalisation. Consequently, these provisions cannot withstand constitutional scrutiny.’

[171] In reply, and also in this Court, SADTU avers that the establishment of intervention facilities is irrational. In this regard SADTU argues that:

- (a) The Act does not define ‘serious misconduct’ and does not prescribe guidelines for when a learner should be referred to an intervention facility.
- (b) The Act does not make provision for consultation with other departments with expertise in behavioural issues, and
- (c) The impugned provisions unjustifiably limit the learner’s rights to dignity, freedom and security of the person, education and children’s rights in terms of ss 10, 12, 28 and 29 of the Constitution. The complaint here is that the impugned provisions are unconstitutional to the extent that they permit the removal of learners from their schools, families and support structures and refer them to residential facilities for up to twelve months. Furthermore, they subject learners to cruel and degrading punishment that is prohibited in s 12(1)(a) of the Constitution and are not in the learners’ best interests, thereby violating s 28(2) of the Constitution.

[172] SADTU’s pleaded allegation that intervention facilities will stigmatise learners sent to such facilities, is not substantiated with any evidence whatsoever. On the contrary, having regard to the patently and undisputed positive outcomes of the pilot project, a fair amount of learners who were subjected to the programmes at intervention facilities, were successfully reintegrated into their home schools. In any event, referral to an intervention facility must always be contrasted with the alternative of expulsion which in my view will inevitably cause harmful stigmatisation.

[173] SADTU'S pleaded challenge that the Act unfairly subjects learners across the Western Cape Province to disciplinary interventions that their peers in the rest of the country do not have to face is, similarly misplaced. Such a challenge per se is no ground for unconstitutionality. The MEC has ably demonstrated that intervention facilities are to the overall benefit of learners across the Western Cape Province in that referral to an intervention facility is an alternative to expulsion and that learners will receive therapeutic programmes and intervention strategies. Importantly, they will receive the same education they would receive otherwise and, they will be reintegrated to their original school upon their return from intervention facilities. The fact that these facilities are not available in other provinces in South Africa is no valid reason for their exclusion in the Western Cape. The Constitutional Court has strongly rejected this type of approach. Thus, in *AB and Another v Minister of Social Development*,⁵⁷ the Constitutional Court stated that:

'Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all. The law...requires equal celebration, not equal marginalisation; it calls for equality of the vineyard and not equality of the graveyard.'⁵⁸

[174] SADTU's further challenge that the introduction of intervention facilities would be a regressive step and that they do not uphold the best interests of learners, similarly falls to be dismissed. These claims are not substantiated at all and considering what I have stated earlier about their purposes, they are definitely to the advantage of learners found to have committed serious misconduct who would otherwise have faced expulsion. In contrast, intervention facilities offer such learners a second chance to redeem themselves and thereafter resume their normal schooling.

[175] The pleaded challenge that intervention facilities 'will violate national legislation relating to school suspension and expulsion measures already in place' must also fail. SADTU fails to identify the national legislation and the specific provisions on which it relies on this score. I can only surmise that this relates to SASA. I have earlier on dealt

⁵⁷ *AB and Another v Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC), quoting *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 para 149.

⁵⁸ *Ibid* para 220.

with the question of conflict when I dealt with SADTU's conflict challenge in relation to collaboration and donor funded schools. I have found that there is no conflict between the Act and SASA. My reasons set out above find equal application in this instance as well. In any event, even if there would be any conflict, the Act read reasonably must prevail over any other national legislation dealing with education.

[176] Regarding SADTU's challenges brought only in reply and in this Court, all of which are purportedly based on the ground of irrationality, these, too, ought to fail primarily because SADTU failed to raise them in the founding affidavit. I have already dealt extensively with the applicable principles on this aspect. These equally apply in this instance and on this basis these challenges must fail. In any event, they have no merit.

[177] On a conspectus of the undisputed facts and evidence on how intervention facilities came about, their purpose and context and in particular the positive outcomes realised with the pilot project, it is difficult to accept SADTU's assertions that learners' rights to dignity, freedom, security of the person, education and children's rights have in any way been limited. It is striking that SADTU has not, in my view, explained or justified its stance in these regards.

[178] It has not been demonstrated that any rights have been limited in any manner whatsoever. I say so for the following reasons:

- (i) Referral can only occur when it is in the child's best interests as confirmed by the SGB, the HOD and the child's parents. Importantly, the child can only attend an intervention facility for as long as his or her parents consent
- (ii) As pointed out earlier on, the purpose of an intervention facility is not to punish but to assist the learner to overcome barriers to learning which caused the child to commit serious misconduct. The facilities will provide therapeutic programmes and intervention strategies to assist the learner to reintegrate successfully to his or her school.
- (iii) Of major importance is that a referral to an intervention facility is an alternative to suspension in which case the learner would be denied access to education during the period of suspension.
- (iv) Most intervention facilities will not be residential but those that are, will provide

‘residential care’. These will not detain children as SADTU will have us believe, but will be akin to boarding schools. At these facilities the learners will receive the same standard of education they would at an ordinary public school.

[179] As I have already found that intervention facilities do not limit any rights at all, it is not necessary to consider the question whether or not any limitation is justifiable under s 36(1) of the Constitution.

SADTU’s challenge against the WCSEA

[180] SADTU pleaded that ss 9A and 11A-11H of the Act, to the extent that they make provision for the monitoring and support for curriculum delivery and the establishment of an evaluation authority to be known as the Western Cape Schools Evaluation Authority (WCSEA), cannot withstand Constitutional scrutiny. SADTU has advanced four attacks against the establishment of the WCSEA namely, (i) it was contrary to a collective agreement; (ii) it violated SADTU’s and its member’s labour rights including the right to collective bargaining; (iii) it was contrary to the national policy specifically the Whole School Evaluation Policy (the WSE policy) which provides for a national framework for evaluation of the entire education system, and that it will lead to a duplication of functions as it constitutes, according to SADTU, an unjustified additional bureaucratic structure for monitoring and evaluation.

[181] In this Court, SADTU confined itself to a single argument namely, that the establishment of the WCSEA violates its members’ right to collective bargaining in terms of s 23(5)⁵⁹ of the Constitution because it undermines its existing collective agreement. SADTU argues that the impugned provisions vary the existing terms and conditions of teacher’s employment agreed to in terms of a collective agreement concluded at the Education Labour Relations Council (ELRC) in terms of resolution 8 of 2003 (2003 CA). Furthermore, SADTU contends that the provisions constitute an attempt by the WCED to evade the bargaining process and the product of the

⁵⁹ Section 23(5) of the Constitution provides as follows:

‘Labour relations

...

(5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).’

bargaining process, being the terms and conditions of the 2003 CA, by failing to negotiate with SADTU on matters of mutual interest.

[182] SADTU submits that the collective agreement has the status of legislation. It sought to rely for this proposition on the decision in *SA Democratic Teachers Union v Minister of Education and Others*⁶⁰ where the Labour Court declared certain regulations invalid and held that the promulgation thereof exceeded the powers of the Minister in terms of s 4(1) and s 35 of the Employment of Educators Act 76 of 1988 to the extent that they were contrary to the ELRC collective agreement. Furthermore, the said regulations varied, supplemented and imposed new conditions in teachers' employment and the Minister was not entitled to use his or her statutory powers without following the ELRC negotiating procedure. Simply put, SADTU argues that collective agreements trump provincial legislation and that the provincial legislature cannot legislate contrary to a collective agreement concluded under the Labour Relations Act 66 of 1995 (LRA).

[183] I deem it prudent to briefly consider the purpose and operation of the WCSEA. It cannot be disputed that school evaluation is a vital tool to measure performance. This refers to or concerns the evaluation of a public school as an institution and not evaluation of individual learners or learners. Its purpose is to assess how a school is performing and how its performance could be improved.

[184] The WCSEA was established to replace the national policy known as Whole School Evaluation (WSE) which was promulgated in 2001. According to the MEC, WSE was proven to be ineffective as a system of school evaluation. Experience in its implementation demonstrated that it suffered multiple flaws, including that evaluations were not focused on what really matters, being the quality of teaching and learning in the school. The reports produced in relation to its implementation were shown to be overly complicated and extremely repetitive and therefore unhelpful in improving performance. The MEC opined that the WSE policy unduly placed emphasis on ensuring compliance with Department of Basic Education's (DBE's) policies instead of assessing performance and showing how it would be improved.

⁶⁰ *SA Democratic Teachers Union v Minister of Education and Others* [2001] ZALC 144; (2001) 22 ILJ 2325 (LC).

[185] In light of the serious flaws with evaluations under the WSE policy, the WCED embarked on the WCSEA as a pilot project to investigate whether it was possible to conduct more effective and efficient evaluations. According to the MEC, the feedback from the project was extremely positive and evaluators stated that they believed that the WCSEA was providing better results. Furthermore, schools preferred its adoption and implementation. As it was clear that the WCSEA was more effective than the WSE model, the pilot project led to the amendments in the Act to create the WCSEA in order to conduct more effective evaluations.

[186] As stated earlier, the WCSEA is established in ss 11A-11H of the Act. It is an independent authority whose task is to conduct independent evaluations of schools. It is led by a Chief Evaluator appointed by the Provincial Minister. Its functions are set out in detail in s11D of the Act in terms of which the Chief Evaluator must keep the Provincial Minister informed about specific aspects of how schools are functioning. These include *inter alia* the quality of education provided at the school, educational standards and the quality of leadership and management at the school and related matters. Evaluations are usually conducted on two days' notice but can be conducted without notice, if necessary. Importantly, the Act empowers evaluators to obtain access to and evaluate a school and any classroom in a school, observe lessons and gather first-hand evidence of how teaching and learning takes place at the school. Reports must be published so that current and prospective learners and parents can see for themselves how a school is performing.

[187] According to the MEC, the results of the WCSEA model remain positive. She states that this is borne out by the positive reaction of school management teams, teachers and evaluators who prefer the new model to the old WSE model. Furthermore, there have been no objections to the shorter notification period and the independence associated with the new evaluation model. The Chief Evaluator, Ms Karen Bydell who had led the development of the new model since 2019, has confirmed that the WCSEA has and will continue to improve teaching and learning in the Western Cape. Significantly, even the Department of Basic Education (DBE) has recognised the 'sterling work that the WCED is doing to enhance the quality of school

evaluations', and has not objected to the WCED conducting an evaluation method different to the WSE model.

[188] SADTU states that it agreed to the WSE evaluation system in a 2013 Collective Agreement. As such the WCED infringed its right to collective agreement by adopting a law that creates a further evaluation authority outside the ambit of the collective agreement.

[189] However, SADTU's argument fails because it seeks to place the outcomes of any collective bargaining between employers and employees beyond the scope of constitutional legislative power. It bears reiterating that collective bargaining implies that each employer party and employee party has the right to exercise economic power against the other.⁶¹ It is intended to achieve persuasion of another party including by the economic weapons of strikes and lockouts. It is most definitely not a constitutional mechanism for law making or vetoing laws. Thus, SADTU's attempt to accord provisions of collective agreements the status of legislation is misplaced.

[190] An inconceivable consequence of SADTU's aforesaid reasoning is that no legislature be it parliament, any provincial legislature or municipal council would be able to pass any law that conflicted with the outcome of any collective bargaining process. In this context it would also give the National Minister who negotiated the Collective Agreement, the ability to limit the constitutional power of Provincial Legislatures to make laws. It would make the provincial legislature, as lawmaker, subservient to the Executive as employer.

[191] To my mind SADTU's reasoning is not only illogical but also untenable as it would make the power to legislate by parliament or provincial legislatures subservient to the results of collective bargaining. The Constitutional Court has made it clear that 'no matter how broadly the term 'collective bargaining' is construed in s 23(5), it cannot include the right of a union to bargain with a legislator on the content of law'.⁶² The Court recognised that although it may be appropriate for a public sector to consult

⁶¹ *Transport and Allied Workers Union of South Africa v PUTCO Ltd* [2016] ZACC 7; (2016) 37 ILJ 1091 (CC); [2016] 6 BLLR 537 (CC); 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC) para 46.

⁶² *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC); [2007] 9 BLLR 785 (CC); (2007) 28 ILJ 1909 (CC) para 68.

relevant unions on the subject matter of regulations that will affect the collective bargaining relationship between the employer and the unions, it cannot be said that a Provincial Legislator is obliged to bargain over the content of the law with the union. Accordingly, SADTU's reliance on *SA Democratic Teachers Union v Minister of Education and Others* is misplaced.⁶³

[192] In light of what I have stated above and bearing in mind the clear positive results yielded by the WCSEA and its obvious benefits to learners, there is no limitation of any right in terms of s 23(5) of the Constitution.

[193] In my view both the appeals by SADTU and EE fall to be dismissed. As these appeals concerned the vindication of rights under the Constitution, there will be no order as to costs.

[194] I accordingly make the following order:

1. The appeal by Equal Education under case number 298/2024 is dismissed.
2. The appeal by South African Democratic Teachers' Union under case number 351/2024 is dismissed.
3. There is no order as to costs.

B H MBHA
ACTING JUDGE OF APPEAL

⁶³ See fn 60 above.

Appearances:

For the appellant (EE Appeal):	S Rosenberg SC with U K Naidoo
Instructed by:	Equal Education Law Centre, Cape Town Webber Attorneys, Bloemfontein
For the appellant (SADTU Appeal):	N Arendse SC with A Montzinger
Instructed by:	Andrew & Co. Attorneys, Cape Town Webber Attorneys, Bloemfontein
For the 1 st and 2 nd respondents (EE and SADTU appeal):	K Pillay SC with M Bishop
Instructed by:	State Attorney, Cape Town State Attorney, Bloemfontein.