THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1003/2023

In the matter between:

HOD: WESTERN CAPE EDUCATION DEPARTMENT	**FIRST APPELLANT**
DIRECTOR OF THE METRO EAST EDUCATION DISTRICT	**SECOND APPELLANT**
MEC FOR EDUCATION, WESTERN CAPE	**THIRD APPELLANT**

and

EQUAL EDUCATION LAW CENTRE	**FIRST RESPONDENT**
NELISWA MENZIWA	**SECOND RESPONDENT**
NWABISA MPAGEVA	**THIRD RESPONDENT**
PROMISE MHLULULWA	**FOURTH RESPONDENT**
SOMIKA THENGWA	**FIFTH RESPONDENT**
YOLANDA TOLI	**SIXTH RESPONDENT**
MANDISA MELANI	**SEVENTH RESPONDENT**

Neutral Citation: *HOD: Western Cape Education Department and Others v Equal Education Law Centre and Others* (1003/2023) [2025] ZASCA 116 (11 August 2025)

Coram: NICHOLLS and MBATHA JJA and WINDELL, BLOEM and MOLITSOANE AJJA

Heard: 11 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 11 August 2025.

Summary: Civil procedure – Uniform Rule of Court 53(1)*(b)* – ambit of the rule – whether a party seeking review relief is also entitled to be furnished with the record in terms of rule 53(1)*(b)* for non-review relief – no obligation on decision-maker to furnish a record where applicant pursues non-review relief.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Baartman J, sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the Western Cape Division of the High Court, Cape Town is set aside and replaced with the following:

'1 The application is dismissed.

2 The parties shall pay their own costs of the application.'

JUDGMENT

Molitsoane AJA (Nicholls, Mbatha JJA and Windell and Bloem AJJA concurring):

[1] This is an appeal against the judgment and order of the Western Cape Division of the High Court, Cape Town (the high court) compelling the appellants (the Department) to furnish the respondents with certain documents and information for the purposes of a review application. The appeal, which is with the leave of the high court, arises from an interlocutory application and is concerned with the extent and ambit of rule 53(1)*(b)*[1] of the Uniform Rules of Court where an applicant seeks both review and non-review relief.

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[1] Uniform rule 53(1)*(b)* provides as follows:

'(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to

[2] The first respondent, Equal Education Law Centre (EELC), is a registered non-profit organisation and a public benefit organisation which professes to address systemic inequalities in the South African education. Amongst its services, it provides an education walk-in law clinic and offers legal support to individuals and communities.

[3] At the beginning of the 2022 academic year, EELC was approached by the second to the seventh respondents acting in their capacities as parents of certain school-going learners (named unplaced learners) who were unplaced in public schools. They had allegedly been turned away by the Department which allegedly also refused them the opportunity to complete the so called 'unplaced learner forms. This situation prompted EELC to institute an urgent review application in two parts. In Part A, EELC sought relief for the placement of those learners as well as other learners who were in a similar situation as the named unplaced learners, pending the adjudication of Part B, in which EELC sought review of the failure or refusal by the Department to take a decision and other relief.

[4] The urgent application was heard on 27 May 2022. However, by that time, the named unplaced learners had already been placed. On 3 June 2022, the urgent court granted the relief sought and agreed to, by the parties in Part A, and further ordered that Part B be enrolled in the semi-urgent court roll.

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the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

. . . .

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.'

[5] It is necessary at this stage to set out in full the relief sought in Part B, as it has a bearing on the adjudication of the issue in this appeal. In Part B, EELC sought the following relief:

'1 Directing the first and second respondents to comply with their statutory and policy obligations in terms of the Schools Act, Admission Policy for Ordinary Public School promulgated in terms of section 3(4)(i) of the National Education Policy Act 27 of 1996 and the Western Cape Education Department Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools and to place all eligible learners and those of compulsory school going age, who are similarly placed, in grade appropriate public schools.

2 Declaring to be unconstitutional, unlawful and reviewing and setting *aside the failure by the first and second respondents to take a decision on the placement of the learners in the 2022 academic year.*

3 *In the alternative to 1* to the extent necessary:

3.1 reviewing and setting aside the *first and second respondents' decision to refuse the Learners placement in a public school for the 2022 academic year.*

3.2 Exempting the applicants from the obligation to exhaust any internal remedies in terms of section 5(9) of the School Act.

4 Declaring that the first and second respondents have subjected the Learners to repeated violations of their constitutional and statutory rights due to the delayed processing of their placements in grade appropriate schools in the Metro East Education District.

5 Declaring that the first and second respondents failed in their constitutional and statutory obligations to administer the admission of unplaced learners in the Metro East Education District in a lawful manner.

6 Declaring that the third respondent has failed to comply with her statutory and constitutional obligations to diligently and without delay ensure the availability of sufficient school places for every learner that lives in the Western Cape.

7 Directing the first and third respondents to furnish the First Applicant with a plan on steps that will be taken by it to ensure that sufficient school places are available for the learners at public schools by the commencement of the 2023 academic year.

8 Directing the second respondent to develop a plan to assist unplaced and late registration learners for the 2023 academic year.' (Emphasis added.)

[6] In purported compliance with rule 53(1)*(b)*, in respect of Part B of the application, the Department filed an electronic record with the registrar of the high court, in the form of a flash drive containing a microsoft excel spreadsheet with three sections. According to the Department, this record pertained to all applications for placements handled by the schools in the Metro East Education District (the MEED) for the 2022 academic year and related to information captured 'during the ordinary admissions process in the [MEED] for the 2022 academic year'. EELC was not satisfied with the record filed and contended that it was incomplete and deficient. It thus brought an application to compel compliance with rule 53(1)*(b)*, in terms of rule 30A[2] read with rule 6(11).[3]

[7] EECL's main criticism of the record was that it was furnished in the form of an excel spreadsheet, with numerous names and other data, and without an explanation of the meaning of such data and its relevance to the review application. In a letter dated 29 June 2022, addressed to the Department, EELC contended that the electronic record furnished only provided information relating to online applications and did not account for manual applications made at the schools.

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[2] Rule 30A provides as follows:
'(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —
(a) that such rule, notice, request, order or direction be complied with; or
(b) that the claim or defence be struck out.
(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.'

[3] Rule 6(11) provides that '[n]notwithstanding the a foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.'

According to EELC, the spread sheets did not describe how the information provided related to the relief sought in paragraphs 1 and 2 of Part B of the notice of motion.

[8] In the rule 30A application, EELC also submitted that the data provided lacked information detailing:

(a) the number of unplaced learners in the MEED;

(b) the number of unplaced learners forms the Department received throughout the course of the 2022 academic year;

(c) how the unplaced learners were ultimately placed;

(d) policies, circulars and /or guidelines which informed the decisions in relation to the learners' placements;

(e) whether the schools have waiting lists; and

(f) whether schools in the MEED are oversubscribed and what the learners-teacher ratio was together with the resource allocation by the Department to MEED.

[9] On the other hand, the Department contended that the record was complete, as the information placed before the Department in the admission process was that which was captured on the online system. In this regard, it asserted that the record included all online and manual applications of leaners known to the Department; all applications received by the Department; and the actual placements (or offers of placement) in respect of each learner. The Department further indicated that the electronic system they use allows the information contained on an unplaced learner form to be captured, but once that happens, there was no need to retain it. It explained that the online system enables the Department to attend to every learner who has applied for admission. For these reasons, the Department rejected the contention that the record lodged was incomplete, unusable or inaccessible.

[10] The high court found in favour of EELC and granted the following relief:

'(a) The respondents are directed, within (ten)10 days of this Court's order, to file with the Registrar and the first applicant a complete record containing all documents and all electronic records (including all documents, letters, memoranda, reports, recommendations, minutes and other materials that were before the first, second and third respondents when their respective decisions were taken), together with their full reasons, including:

(i) A record of school capacity in the [MEED] for the 2022 academic year and the learner-teacher ratio at those schools and an indication of which schools are oversubscribed in Metro East.

(ii) A record showing resource allocation to the [MEED] vis-a-vis other districts in the Western Cape for the 2022 academic year.

(iii) A report on the investigation, if any, conducted by the respondents on the allegations outlined in the applicants' founding papers that parents were turned away by district officials.

(iv) An extract of the data relevant to these proceedings together with an analysis to make the data intelligible.'

[11] The high court accepted that the Department provided some of the information sought. In this regard, reference was made to the electronic spreadsheet of all online and manual applications submitted as of 15 June 2022. It observed that EELC had to interrogate the record in order to decide on its way forward, more so, as such information would be needed by the review court in assessing the lawfulness of the decision-making process. In addition, the high court concluded that the EELC's case was concerned with systemic problems of over subscription and once that was properly understood, the information was relevant for the purposes of the intended review.

[12] The high court considered that EELC had alleged systemic failures in the admission process of the learners and that the investigation report was commissioned pertaining to allegations that the learners were turned away. It found that, if the report

existed, it '…would contain the information that was available to the decision maker at the relevant time'.[4]

[13] In my view, the high court erred in granting the application. As a starting point, the Constitutional Court, in *Helen Suzman Foundation v Judicial Service Commission* (*Helen Suzman Foundation*),[5] recognised the importance of a record in a review application. The Court referred, with approval, to *Turnbull-Jackson v Hibiscus Coast Municipality and Others*[6] in which the following was said:

'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: Set light on what happened and why; keep the light to the unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision – maker's stance; and in the performance of the review court's function.'[7]

[14] What triggered these proceedings was the plight of the seven unplaced learners, who were allegedly unplaced in public schools at the commencement of the 2022 academic year. As a result, EELC sought an order compelling the placement of the said learners and to effect certain remedial plans pertaining to the said children.

[15] An applicant in a review application is entitled to the documents and information which are relevant to the decision sought to be reviewed. In this regard, the Constitutional Court in *Helen Suzman Foundation* held that 'the record contains all information relevant to the impugned decision or proceedings'.[8] It held further

[4] Paragraph 10 of the judgment of the high court.
[5] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (*Helen Suzman Foundation*) para 16.
[6] *Turnbull-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC).
[7] Ibid para 37.
[8] *Helen Suzman Foundation* para 17.

that the '[i]nformation is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker'.[9]

[16] It is evident from Part B of the notice of motion that prayers 1, 7 and 8 concern *mandamus* relief, while prayers 4, 5 and 6 seek declaratory relief. It is thus apparent that the relief sought in these prayers has nothing to do with the review relief and are stand-alone substantive causes of actions, as preferred by EELC. This Court, in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others*,[10] held that in review proceedings, '[t]he focus is on the process and on the way in which the decision-maker came to the challenged conclusion'. This is what rule 53 seeks to facilitate.

[17] The only decisions, which were sought to be reviewed are, first, the alleged failure on the part of the Department to take a decision on the placement of the named unplaced learners in the 2022 academic year, and second; in the alternative, the contention that a decision was taken to refuse the named unplaced learners' admission to public schools in the year mentioned. Section 6(2)*(g)* read with s 1 of Promotion of Administrative Justice Act 3 of 2000 (PAJA) includes a failure to take a decision. It entitles a court or tribunal to judicially review an administrative action if the action concerned consists of a failure to take a decision.

[9] Ibid para 17.
[10] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* [2006] ZASCA 175; 2007 (1) SA 576 (SCA); [2007] 1 All SA 164 (SCA) [2006] 11 BLLR 1021 (SCA); (2006) 27 ILJ 2076 (SCA) para 31.

[18] It is apposite that to mention that this Court, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*,[11] held as follows, with regard to the failure to take a decision:

'…[w]here s 6(2)*(g)* of PAJA refers to the failure to take a decision it refers to a decision that the administrator in question is under some obligation to take, not simply to indecisiveness in planning on policy issues… It is not directed at decisions in regard to future policy…'[12]

On the other hand, s 6(3)*(a)*(iii) with reference to s 6(2)*(g)* of PAJA provides as follows:

'If any person relies on the ground of review referred to in subsection 2*(g)*, he or she may in respect of a failure to take a decision, where the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision.'

[19] In the notice of motion of the rule 30A application, EELC sought an order compelling the Department to file with the Registrar and EELC, 'a complete record containing all documents and all electronic records (including all documents, letters, memoranda, reports, recommendations, minutes and other materials *which were before the first, second and third respondents when their respective decisions were taken)*, together with their reasons'. (Emphasis added.) While the Department did furnish a record, EELC was dissatisfied with its content. In its founding affidavit, it alleged that the record was insufficient in that it did not include, among other things: (a) a breakdown of how many learners remain unplaced in schools in the MEED for all grades for the 2022 academic year, including any learners classified as 'essential' and 'non-essential' transfers; (b) information on how many unplaced learner forms

[11] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* [2010] ZASCA 1; 2010 (4) SA 242 (SCA); [2010] 2 All SA 545 (SCA) at 259 A-C (*Offit Enterprises I*). This judgment was confirmed on appeal by the Constitutional Court in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) (*Offit Enterprises II*).
[12] Ibid *Offit Enterprises I* para 43.

were received during that period; (c) policies, circulars and guidelines that informed placement decisions; (d) school waiting lists; and (e) data on oversubscription, learner-teacher ratios, and resource allocation across schools in the district.

[20] The Department consistently denied that it had refused admission to any learner whose application it had received. Its position was that, whenever it became aware of unplaced learners during the 2022 academic year, those learners were duly placed. Indeed, by the time the matter came before the urgent court all the named learners had already been placed. The Department further maintained that its online system captured all applications – both manual and online – as well as the outcomes thereof. On this basis, it contended that the record provided was complete. In the absence of a properly pleaded and substantiated allegation that the Department had failed to take a decision, there was no basis to compel the additional information in terms of rule 53(1)*(b)*.

[21] The EELC's alternative basis for review was that the Department had taken a decision to refuse the placement of the named unplaced learners. However, this was never pleaded as a factual assertion. In its founding affidavit in Part B, EELC merely invited the Department to state in its answering affidavit whether such a decision had been taken and, if so, to provide reasons. It did not allege that such a refusal had occurred. Nevertheless, the high court inferred that a refusal decision had in fact been made. That inference was unwarranted on the pleadings. The obligation to furnish a record under rule 53(1)*(b)* arises only where a decision is alleged and sought to be reviewed. It cannot be used to conduct a preliminary inquiry into whether a decision exists. On this basis alone, the high court erred in granting the relief.

[22] Crucially, what was before the high court was not the review itself, but an interlocutory application to compel production of a record. That application could only succeed to the extent that it concerned the review relief properly framed in Part B. In prayers 1, and 8 of Part B EELC sought *mandamus* relief, while prayers 4, 5 and 6 it sought declaratory relief. The relief in the latter paragraphs stand apart from the review relief, which is confined to prayers 2 and 3. Rule 53 governs the procedure for judicial review of administrative action. It does not entitle an applicant to obtain discovery for the purpose of substantiating or pursuing separate constitutional or statutory claims for declaratory or mandatory relief. The high court's order traversed this procedural boundary.

[23] In addition, EELC expressly framed the relief sought in Part B as being confined to the 2022 academic year. In its founding affidavit, it stated: '…for this Honourable Court to determine the reasonableness and legality of the [Department's] delay in placing the [l]earners as well as similarly placed learners, the complete rule 53(1)*(b)* record and reasons are required, which should include the information and documents listed in paragraph 11…'. However, the list contained in paragraph 11 includes materials that bear no relation to any alleged administrative decision subject to review. These include, for example, plans for the 2023 academic year, district-level resource allocations, and general data intended to support systemic declaratory or structural relief. Such relief is not dependent on the legality of a particular administrative decision, and therefore does not fall within the ambit of rule 53(1)*(b)*. In compelling the production of information unrelated to reviewable conduct, the high court erred both procedurally and substantively.

[24] At no stage had EELC sought to amend its notice of motion to align with the broader averments made in its supporting affidavit. When the high court dealt with

the rule 30A application, the relief sought remained confined to the review of alleged failures or refusals by the Department in respect of the 2022 academic year. The review relief, as framed in prayers 2 and 3 of Part B, is limited to that academic year and relates specifically to the named unplaced learners and others similarly placed. It was on this basis that EELC sought the production of a record under rule 53(1)*(b)*. However, the high court erred in granting relief that extended beyond the scope of that review.

[25] In particular, the order compelling discovery of an investigation report was misplaced. That report was not before the Department at the time any alleged decision was taken, and thus falls outside the scope of a rule 53 record. The high court further erred in directing the Department to generate and furnish an extract of the data with explanatory analysis, particularly where such relief was never sought. Rule 53 cannot be used to obtain discovery in support of declaratory or mandatory relief – remedies that must be pursued through appropriate procedural mechanisms.

[26] It bears emphasis that the 2022 academic year, to which the review application relates, has long since passed. On its own version, EELC acknowledges that the named unplaced learners were eventually placed. Its interest now lies in the Department's alleged delay in effecting those placements. Whether such a delay renders the review application moot is an issue that must be determined by the court seized with the merits of that review. That question is not before this Court. What is relevant for present purposes is that rule 53(1)*(b)* does not oblige a decision-maker to furnish a record where the relief pursued falls outside the bounds of judicial review.

[27] EELC in this case raises important statutory and constitutional issues relating to the right to education. It cannot be said that the application is frivolous or even

vexatious. While the application is interlocutory, I hold the view that although unsuccessful, in line with the *Biowatch* principle, the respondents should not be saddled with costs.[13]

[28] The appeal must be upheld and I accordingly order as follows:

1 The appeal is upheld with no order as to costs.

2 The order of the Western Cape Division of the High Court, Cape Town is set aside and replaced with the following:

‘1 The application is dismissed.

2 The parties shall pay their own costs of the application.’

P E MOLITSOANE
ACTING-JUDGE OF APPEAL

[13] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) 2009 (10) BCLR 1014 (CC).

Appearances

For the appellant:	E A De Villiers-Jansen SC and A G Christians
Instructed by:	State Attorney, Cape Town
	State Attorney, Bloemfontein
For the respondent:	L J Zikalala and N Soekoe
Instructed by:	Equal Education Law Centre, Cape Town
	Webbers, Bloemfontein.