HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Reportable

Not of interest to other Judges

CASE NO: 58189/2015

8/11/17

In the matter between:

SOLIDARITEIT HELPENDE HAND NPC	First Applicant
DANEL VENTER	Second Applicant
and	
MINISTER OF BASIC EDUCATION	First Respondent
DIRECTOR GENERAL: DEPARTMENT OF BASIC EDUCATION	Second Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Intervening Party

Heard: 19 June 2017

Delivered: 8 November 2017

Coram: Makgoka J

Summary: Education – department bursary scheme requiring applicants to specialise in indigenous African languages and to commit to teach in rural areas – whether such criteria constitute unfair discrimination against white students on the basis of race in violation of section 9 of the Constitution – further, whether such criteria violate white students' right enshrined in section 29(1)(b) of the Constitution.

Right to equality in terms of section 9 of the Constitution- distinction between sections 9(2) and 9(3) as different components of the right to equality.

JUDGMENT

MAKGOKA J

Introduction

[1] The applicants, Solidariteit Helpende Hand NPC (Solidariteit) and Ms Daniel Venter (Ms Venter) seek a declaratory order that certain selection criteria of the Fundza Lushaka bursary scheme (the bursary scheme) adopted by the Department of Basic Education (the department) are unconstitutional. The impugned criteria give preference to students who:

(a) intend to specialise in an indigenous African language in the foundation phase (Grades R-3);

(b) are from rural areas and those who intend to teach in rural areas; and

(c) commit to teach at any public school to which they may be appointed by a provincial department of education.

[2] The applicants contend that the criteria discriminate against white students on the ground of their race, in violation of section 9 of the Constitution. They further allege that the requirement for students to commit to teach at any public school to which they may be appointed by a provincial education department is unreasonable in terms of section 29(1)(b) of the Constitution. Consequentially, they seek to have the criteria struck out as unlawful and unconstitutional.

[3] The relief sought by the applicants is opposed by the respondents, the Minister of Basic Education (the Minister) and the Director General for the Department of Basic Education (the director general). The respondents resist the application on the grounds that the selection criteria are fair and aimed at government policy of redressing the inequality resulting from the historical injustices, and are in line with section 9(2) of the Constitution. The Council for the Advancement of the South African Constitution (CASAC) has applied to intervene as amicus curiae to make both written and oral submissions in defence of the constitutionality of the bursary scheme. I shall shortly consider that application.

The parties

[4] Solidariteit is a non-profit company 'founded in 1949 as an answer to the Afrikaner poverty crisis of the time' with a vision to 'find solutions to address Afrikaner poverty.'[1] In the papers its main objective is stated to be 'the provision of welfare and humanitarian services in the widest sense of the word'. Its focus is said to be on poverty alleviation through the development of funds, skills and projects, including the provision of scholarships, grants and study loans. It 'recognises its role and interdependence to the Solidarity Movement Trust to achieve its objectives and thus operates from a Christian foundation and aims to

[1] See Solidariteit Helpende Hand '*Wie is ons*?' available on https:/helpendehand.co.za

create a future in which members of the Afrikaner cultural community live permanently free, secure and prosperous on the southern tip of Africa.'

[5] Ms Venter is a third year student at the Cape Peninsula University of Technology, where she is studying for a Bachelor of Education (B.Ed) in foundation phase. She has applied for financial assistance from the bursary scheme. In her confirmatory affidavit she describes herself as 'a white student who does not come from a rural area, and who does not speak an African language.'

[6] The Minister is the responsible member of the national executive envisaged in section 91(1) of the Constitution and is the executive authority and political head of the department. The director general is the administrative head of the department. Where the context dictates, the Minister and the director general will be referred to as 'the department'. CASAC is an applicant to intervene as an amicus curiae.

CASAC's leave to intervene

[7] It is convenient at this stage to consider CASAC's application for leave to intervene. CASAC also seeks condonation for the late filing of its application. Both its applications are not opposed by any of the parties. However, the decision whether it should be granted leave to intervene remains

that of the court in the exercise of its discretion. With regard to the application for condonation the explanation is that the application was brought to its attention by the court on 5 June 2017, when it was enquired whether it would consider applying for admission as amicus curiae. It launched its application on 19 June 2017. Condonation should therefore be granted for non-compliance with the time periods set out in Rule 16A of the Uniform Rules of Court.

[8] The test for the intervention of parties in constitutional matters, such as the present, was stated as follows by the Constitutional Court in *Independent Newspapers*:[2]

'In *Gory v Kolver NO and Others (Starke and Others Intervening)* this court held that in a case involving the validity of a statute an application to intervene would succeed only if the applicant had a direct and substantial interest in the subject matter of the litigation, which in that case was the validity or otherwise of the statute and if, in addition, it was in the interests of justice for the application to be granted. On that occasion we explained that, whilst a direct and substantial interest is a necessary condition for intervention as a party, it is not always sufficient ground for granting leave to intervene. The ultimate test is whether, in a particular case, it is in the interests of justice to join or be joined as a party to pending litigation.' (footnotes omitted.)

[9] In terms of its constitution, CASAC is a voluntary association and a

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[2] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) para 18.

juristic entity operating as a non-governmental organisation, established specifically to advance the Constitution by participating in litigation and advocacy in the public interest, among others. Its aims and activities include participating in public interest litigation, so as to broaden access to rights under the Constitution. CASAC has previously engaged in public interest and constitutional litigation.[3]

[10] What is more, CASAC seeks to depart from the argument adopted by the department on section 9 of the Constitution, which bases its arguments on section 9(2) in response to the applicants' argument based on section 9(3). On CASAC's interpretation, the selection criteria of the bursary scheme does not fall within the scope of section 9(2), but of section 9(3). Taking into account all relevant considerations, I am satisfied that CASAC has a direct and substantial interest in the subject matter of this litigation. The issues raised in the application fall comfortably within its thematic areas, concerning as they do, the interpretation of sections of the Constitution relating to equality and the right to access to education. On a consideration of the factors mentioned above, I conclude that it is in the interests of justice to grant leave to it to

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[3] See for example *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC); *CASAC v President of the Republic of South Africa* (CCT 83/13); *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre For Applied Legal Studies v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC); *DA v Minister of International Affairs and Cooperation and others* 2017 (3) SA 212; [2017] 2 All SA 123 (GP); *United Democratic Movement v Speaker of the National Assembly and others* 2017 (8) BCLR 1061; 2017 (5) SA 300 (CC).

intervene. I must express gratitude to CASAC for responding to the invitation to apply for intervention as amicus curiae, as well as its written and oral submissions, all which were done within constricted time frames.

[11] In the applicants' founding affidavit, it is contended that the bursary scheme is a measure designed by the state to make further education accessible, as contemplated by section 29(1)(b) of the Constitution, and as such, should be made available to everyone. The requirement that a student must specialise in an indigenous language in the foundation phase is inconsistent with section 29 in that it violates everyone's rights and in particular white students, to obtain bursaries from the department for the purpose of further education, without there being any rational government purpose for the differentiation. The same argument is made in respect of priority being given to candidates from rural areas.

[12] Further, the contention is that the selection criteria that provide that a student must be committed to teaching at any school to which he or she may be appointed by the provincial education department is inconsistent with section 29 of the Constitution in that it violates the rights of students to further education, which the State must make progressively available and accessible through reasonable measures.

[13] With regard to the equality argument the applicants contend that the requirement for specialisation in an indigenous African language in the foundation phase, and preference for candidates from rural areas, are both inconsistent with section 9(3) of the Constitution in that they unfairly discriminate directly and indirectly on the grounds of race, as they are designed to exclude white students without any rational government purpose. It is further stated, in respect of both criteria, that they 'treat white students differently' in a manner which impairs their fundamental dignity as human beings, and 'places a burden on them that is hurtful and demeaning'. The applicants assert that the impugned selection criteria discriminate against white students on the ground of race. They contend that the department has failed to show that the discrimination is not unfair, and therefore, the impugned selection criteria of the bursary scheme are in breach of the right to equality.

[14] The applicants' founding affidavit is understandably pithy, as the applicants did not have the benefit of the department's explanation for the bursary scheme and its selection criteria. A very detailed explanation was contained in the department's answering affidavit, in which reliance is placed on statistics and reports to justify the selection criteria. As it will be apparent shortly, the department asserts that the selection criteria of the bursary scheme is founded in policy. In their replying affidavit, the applicants also sought reliance on statistics and reports to rebut the department's case. In a way, the applicants' case is more

fully set out in the replying affidavit, rather than the founding affidavit. That explains the rather unorthodox structure of the judgment, in which the respondents' case is set out first.

The bursary scheme: main features, conceptualisation and rationale

[15] I turn now to the main focus of the application: the bursary scheme. The scheme was introduced by the department in 2007. It is aimed at undergraduate, graduate and post-graduate students studying for teaching qualifications. Its beneficiaries are students recruited from schools, unemployed youth, unemployed graduates and students currently at university who decide to change to the teaching profession. The bursary scheme funds students enrolled for the Bachelor of Education (B.Ed) and Post Graduate Certificate in Education (PGCE) programmes at 22 higher education institutions across the country. The department employs various recruitment strategies for the bursary scheme. The district-based-recruitment campaign is one of such recruitment strategies. The bursary scheme covers all the recipient essential expenses such as tuition, accommodation including meals, books and learning materials, and a small allowance for monthly living expenses.

[16] At undergraduate level, the recipients of the bursary scheme would have to study for a four-year B.Ed specialising in Foundation Phase (Grades R-3), Intermediate Phase (Grades 4-6), Senior Phase (Grade 7- 9) and FET Phase

(Grades 10 -12). Application for funding for a Bachelor degree implies that the applicant commits to enrol for a one-year PCGE in Education upon completion of the undergraduate degree. At graduate level, funding is offered for a one-year PCGE for graduates whose degrees include majors in 'priority areas'. In other words, in addition to specialising in one of the phases referred to above, the recipient of the bursary scheme would also need to specialise in a 'priority area' - where there are particular problems. The 'priority areas' have been identified as follows across the various phases:

(a) Foundation phase: Indigenous African Languages;

(b) Intermediate phase: Mathematics, Natural Sciences and Technology;

(c) Senior phase: Mathematics, Natural Sciences and Technology;

(d) FET phase: Accounting, Agricultural Sciences, Agricultural Technology, Civil Technology, Computer Applications Technology, Economics, Electrical Technology, Engineering Graphics and Design, Geography, Information Technology, Life Science, Mathematics, Mechanical Technology and Physical Sciences.

[17] In addition to the above, there has to be a commitment to teach in any school at which the student may be placed by a provincial education department, and 'everything else being equal,' selection should favour candidates from rural areas, candidates who wish to teach in rural areas, and candidates whose financial

position would otherwise exclude them from enrolment for a teaching qualification'.

[18] The department explains the rationale for the selection criteria as follows. It explains that one of the greatest challenges facing the education system is the production of sufficiently competent teachers who can provide quality basic education to all learners at all schools across all phases of education. According to a report compiled for the Centre for Development and Enterprise (CDE)[4] titled '*Teachers in South Africa*' prior to 1994, teacher training was conducted at public training colleges, which generally offered free training. This gave rise to a misperception that there was an over-supply of teachers, which, coupled with the absorption of training colleges into the more centrally-located institutions for higher education, led to a significant drop in teacher education enrolments, particularly among African students.

[19] The department alleges that what followed was a major teacher supply crisis: not only were insufficient teachers being produced, but the attrition rate of teachers exceeded the rate of enrolment for teacher education. It was anticipated that this would worsen, given that a disproportionate majority of teachers was reaching retirement age. The data at that stage also showed that the insufficient

[4] This is a development think-tank in South Africa, which focuses on vital development issues and their relationship to economic growth and democratic conciliation. The report was compiled by Dr Jane Hofmeyer and Dr Kim Draper, and it is attached to the department's answering affidavit. The authors have also deposed to confirmatory affidavits to the department's answering affidavit.

number of qualified teachers had dire implications for the effective development of numeracy and literacy among learners whose mother tongue was an African language. In other words, the shortage of teachers using learners' home languages as the language of learning and teaching adversely affected the ability of learners to cover all of their learning areas effectively.

[20] As to why preference is being given to students from rural areas, it is explained that most of the schools where mother tongue is one of the African languages, are situated in rural areas. In this regard, the CDE report points out that about 31 percent of all unqualified teachers are employed in Kwazulu-Natal, which, apart from the Durban and Pietermaritzburg metropolis centres, is largely rural in nature. The report makes the obvious point that better qualified teachers are not keen on accepting employment in rural areas, but prefer urban areas such as the Gauteng and the Western Cape. This, the department states, is confirmed by reports from the provincial education departments that there is an oversupply of new teacher graduates in urban areas. Rural areas report a shortage of new teacher graduates wishing to be employed at schools within these areas. According to the department's experience graduates sourced from rural areas, tend to return to their areas of origin upon completion of their studies, thereby addressing the shortage of teachers in predominantly rural areas.

[21] The main findings of the CDE report include the following:

'There is a mismatch between the qualifications and specialisations of [new teacher graduates] and the system's demand for teachers able to teach effectively in all subjects, particularly languages in all phases, mathematics in the Intermediate and Senior phases, and mathematical literacy in the FET phase. The marked shortage of [foundation phase] teachers able to use indigenous African languages as languages of instruction is deeply worrying.'

The report goes further:

'Given the dire shortage of foundation phase teachers able to teach through the medium of African languages or teach them as subjects, direct interventions are needed to grow the number of these teacher graduates. Specific interventions should include intentionally recruiting and providing bursary funding to more African home language students to become foundation phase teachers, and ensuring that the language practices at universities move beyond recruitment to put in programmes in place that develop students' capacity to use African languages as languages of instruction and teach them as subjects.'

[22] The department avers that in response to the CDE's findings and recommendations, it adopted certain measures. Among those, African languages are to be incrementally introduced in the foundation phase, and the number of teachers in the rural areas is to be increased. According to the department, in the implementation of those measures, it has identified a shortage of teachers not only in the African languages for the foundation phase, but also those who prefer to teach in rural areas. The department relies on two policies in this regard, namely the Policy on Incremental Introduction of African Languages in South African

Schools (the incremental introduction policy) and the Language in Education Policy, together with the norms and standards thereto.

[23] The incremental introduction policy was introduced by the Minister on 14 July 1997, sourcing her powers from section 3(4)(m) of the National Education Policy Act 27 of 1996 (NEPA) in terms of which the Minister is responsible for, determining national policy in education for among others, language. The policy has been implemented in Grade 1 from 2015. Every year an extra grade is added, meaning that in 2026, it will be implemented in Grade 12. The department accordingly says that to fully realise the policy, more teachers with an African language as their mother tongue will be needed.

[24] The stated aims of the policy are to: promote and strengthen the use of African languages in the school system by introducing learners incrementally to learning an African language from Grades 1 to 12 to ensure that all non-African language speakers can speak an African language; strengthen the use of African languages at home language level; improve proficiency in and utility of the previously marginalized African languages at first edition language level; raise the confidence of parents to choose their own languages for their children; increase access to languages by learners, beyond English and Afrikaans; and promote social cohesion by expanding opportunities for the development of African languages as a significant way of preserving heritage and culture.

[25] According to the department, the second policy, the Language in Education Policy, is one contemplated by section 50(4)(m) of NEPA. In its preamble, the importance of maintaining a child's home language, while providing access to and effective acquisition of additional languages, is emphasised. It is aimed at promoting multilingualism, and the development of all of the official languages of South Africa. According to the department, the policy is part of a continuous process by which language in education is developed as part of a national plan. It seeks to support the teaching and learning of all other languages required by learners or used by communities in South Africa; the promotion of all the official languages; to counter disadvantages resulting from different kinds of mismatches between home languages and languages of learning and teaching; and to develop programs for the redress of previously disadvantaged languages.

[26] The department further explains that the norms and standards regarding the language policy were published by the Minister in terms of section 6(1) of the South African Schools Act 84 of 1996 (the Schools Act). According to the department, the norms and standards aim to fulfil the State's overarching language goals in school education, in compliance with the constitutional imperatives of, among others, addressing the neglect of historically disadvantaged languages in school education.

[27] The department submits that both the incremental introduction policy and the Language in Education Policy are based on the concept of 'additive multilingualism', which, according to the department, is premised on the assumption that when a person learns a language in addition to his or her home language, that language does not replace the home language but is learned alongside it. In such an 'additive multilingualism' programme, the department alleges, the home language is strengthened and affirmed while any further language learned is seen as adding value. One of the obstacles it faces, however, is that there are not enough qualified teachers to teach in African languages.

[28] The department contends that it is its overall policy to offer indigenous African languages in the foundation phase. In order to achieve this, it needs to ensure that there are sufficient teachers who are appropriately trained to teach in such languages. Having identified a shortfall in teachers qualified to teach in African languages, it is obliged to put measures in place to address this shortfall. In its report pertaining to the policies and processes of the bursary scheme for the 2015/16 financial year, the department states that the nationally determined priority areas for 2015 in the foundation phase require preference to be given to speakers of African languages. It is pointed out that foundation phase African mother-tongue teachers are specifically needed in the system, and as many capable students in these phases as possible who are able to teach through an

African language should be funded. That concludes the department's explanation for the selection criteria.

[29] As stated earlier, the applicants impugn the selection criteria with reference to two sections of the Constitution, namely sections 9 (which guarantees equality and prohibits discrimination) and 29 (which affords everyone the right to basic and further education). The applicants assert that the selection criteria discriminate against white students on the ground of race. They contend that the department has failed to show that the discrimination is not unfair, and therefore, the selection criteria of the bursary scheme are in breach of the right to equality. I consider these, in turn. I find it convenient to consider first, the argument based on section 29.

Section 29 argument

[30] Section 29 provides:

> '(1) Everyone has the right -
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> (a) to a basic education, including adult basic education; and
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> (b) to further education, which the state through reasonable measures, was made progressively accessible and available;
>
> (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably applicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all educational alternatives, including single medium instructions, taking into account –

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

(a) do not discriminate on the bases of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.'

[31] The department's response, in summary, is this: The data at its disposal indicated that the insufficient number of qualified teachers had dire implications for the effective development of numeracy and literacy among learners whose mother tongue was an African language. In other words, the shortage of teachers using learners' home languages as the language of learning and teaching adversely affected their ability to cover all of their learning areas effectively. Responding to that challenge, the department adopted a series of strategies and policies, such as the training of more teachers in general as well as recruiting and training more teachers who are able to provide mother-tongue instruction to learners who speak African languages. The bursary scheme is one such strategy: it, among others, aims to ensure increased numbers of appropriately qualified

teachers entering the system, to encourage young people to consider teaching as a career, and to target particular scarce skills in teaching.

[32] According to the department, the bursary scheme was designed, and is regularly revised, to meet the demands for quality basic education and to ensure educational outcomes in areas that have been identified as priority areas, which are areas where particular problems have been identified. The department submits that its analysis of teacher-demand also takes into account demographic trends, learner enrolment and learner progression rate. Importantly, these criteria are revised as necessary in order to meet gaps as they are identified on an annual basis. The department contends that given its explanation, the bursary scheme is not about section 29(1)(b) of the Constitution, but a measure adopted to enable it to discharge its constitutional obligations in line with sections 29(1)(a) and 29(2) of the Constitution.

[33] In considering the applicants' section 29 contention, it must be borne in mind that the right to further education provided for in section 29(1)(b), on the one hand, is contingent. It is progressively realisable and subject to reasonable measures. On the other, the right to basic education guaranteed in section 29(1)(a) is 'immediately realisable'. See *Juma Musjid Primary School*,[5] where Nkabinde

[5] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 37.

J also emphasised the significance of the right to basic education, and its role as a vehicle for the realisation of other rights in the Constitution. She made the following observations:

'The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

Basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities.'[6]

(See also *FEDSAS,*[7] *Ermelo,*[8] *Rivonia,*[9] *and Basic Education for All.*[10]) In *Basic Education for All* the Supreme Court of Appeal recognised basic education not only as being an end in itself, but also 'a primary driver of transformation in South Africa'.[11]

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[6] Paras 43-43.
[7] *FEDSAS v MEC for Education, Gauteng and another* 2016 (4) SA 546 (CC) para 3.
[8] *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 (2) SA 415 (CC) para 45.
[9] *MEC for Education in Gauteng Province and others v Governing Body of the Rivonia Primary School and others* 2013 (6) SA 582 (CC).
[10] *Minister of Basic Education and another v Basic Education for All and others* 2016 (4) SA 63 (SCA).
[11] Para 40.

[34] Our courts have similarly identified other entitlements that give content to the right to basic education, and have sought in each instance, to determine whether a particular educational input is an essential or necessary component of the right, for example, the access to schools as a necessary condition for the achievement of the right to basic education;[12] the provision of sufficient or appropriate desks and chairs as underpinning the right to basic education;[13] scholar transport for learners who live at a distance from school and who cannot afford their own transport;[14] entitlement to textbooks;[15] and the provision of sufficient and qualified teachers.[16]

[35] In sum, I agree with CASAC's submission that the bursary scheme is consistent with the right to basic education as provided for in section 29(1)(a) of the Constitution, as well as the right to receive basic education in the language of one's choice as contained in section 29(2). Indeed, both of these provisions require the state to take positive measures to ensure that learners have access to sufficient and well-qualified teachers who are able to teach them in their language of choice. The bursary scheme is thus not only consistent with these rights, but it operates to give effect to them as well. There is therefore no merit in the

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[12] *Juma Musjid* para 43.
[13] *Madzodzo and others v Minister of Basic Education and others* 2014 (3) SA 441 (ECM) para 20.
[14] *Tripartite Steering Committee and another v Minister of Basic Education and others* 2015 (5) SA 107 (ECG).
[15] *Minister of Basic Education and another v Basic Education for All and others* 2016 (4) SA 63 (SCA).
[16] *Centre for Child Law and others v Minister of Basic Education and others* 2013 (3) SA 183 (ECG); *Linkside and others v Minister of Basic Education and others* (case no 3844/2013) [2015] ZAECGHC 36 (26 January 2015) para 2.

applicants' assertion that the bursary scheme infringes section 29. The scheme is not about the right to further education provided in section 29(1)(b), but a measure for the realization of basic education in terms of section 29(1)(a), and forms part of the State's obligation flowing from the latter sub-section. In the result, the applicants' argument that the bursary scheme unjustifiably limits white students' rights to further education is misconceived, and it merely needs to be mentioned to be rejected.

Section 9 argument

[36] I turn now to section 9 of the Constitution, which provides:

'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly and 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.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[37] The applicants located their complaint in section 9(3), the contention being that the selection criteria unfairly discriminate directly and indirectly on the grounds of race, as they are designed to exclude white students without any rational government purpose. They contend that the department has failed to show that the discrimination is not unfair, and therefore, the impugned selection criteria of the bursary scheme are in breach of the right to equality. The applicants thus seek to rely on section 9(5) to make out a case of unfair discrimination.

[38] In the written submissions on behalf of the department, the argument was based on section 9(2) of the Constitution, it being contended that the selection criteria constitute a positive measure aimed at advancing a group that has been disadvantaged by unfair discrimination in the past. Thus, according to the department, the bursary scheme falls under section 9(2), and that this operates as a defence to the applicants' section 9(3) argument. On the other hand, CASAC's submission is that the selection criteria of the bursary scheme fall outside the scope of section 9(2), and stand to be tested in terms of section 9(3).

[39] Sections 9(2) and 9(3) of the Constitution denote different components of the right to equality. The scheme of section 9 was considered by the Constitutional

Court in *Van Heerden*.[17] Writing for the majority, Moseneke J (at para 32) neatly summed up the distinction between sections 9(2) and 9(3) as follows: where discrimination is found on a ground listed in section 9(3), it will be presumed to be unfair, and the state must establish that it is fair. Legislative and other measures that fall within the scope of section 9(2), however, are not presumed to be unfair. These remedial measures 'are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole.' Put differently, section 9(2) carves out certain legislative and other measures that will not constitute unfair discrimination.

[40] It is therefore necessary to determine first, whether the bursary scheme falls under section 9(2) or 9(3). That distinction is important because, as Mokgoro J observed in a separate concurring judgment in *Van Heerden* (at para 81), if measures are incorrectly defended under section 9(2), insufficient weight will be given to the position of the complainant. The test for that determination was set out in the majority judgment (at para 37). It is a three-fold test. First, whether the measure targets a particular class of people who have been susceptible to unfair discrimination; second, whether the measure is designed to protect or advance

[17] *Minister of Finance and another v Van Heerden* 2004 (6) SA 121; 2004 (11) BCLR 1125; [2004] 12 BLLR 1181 (CC).

such persons or categories of persons; and third, whether the measure promotes the achievement of equality. (See also *SAPS v Solidarity*).[18]

[41] As already stated, the department classifies the bursary scheme as a measure falling within section 9(2). It asserts that section 9(2) operates as a defence to a claim based on section 9(3), rather than a self-standing measure to achieve substantive equality. In applying the test referred to above, the department contends the following: statistics it had provided in its answering affidavit show that the communities in rural areas who speak indigenous African languages have been disadvantaged and unfairly discriminated against in the past. Therefore, the selection criteria of the bursary scheme are meant to redress the injustices of the past and therefore qualify as 'the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination.' And, asserts the department, the selection criteria will not impose substantial and undue harm on those excluded. On the contrary, the majority of those excluded by the selection criteria will remain better off than those who benefitted from these criteria.

[42] CASAC takes a different view. Its argument is that properly construed, the selection criteria are aimed at promoting national priority areas identified by the Department, including mother-tongue instruction and the introduction of African

[18] *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 36.

languages in schools. Although one of the outcomes of the selection criteria may well be the upliftment of rural communities who speak African languages, the selection criteria are not designed to achieve this purpose.

[43] I agree broadly with this view. It must be borne in mind that the bursary scheme is not aimed at funding students who study to become teachers generally. It targets those who specialise in nationally-identified 'priority areas' across the different phases of schooling. I have listed those 'priority areas' in para 15 above. In addition, the policy documents upon which the selection criteria are based, in particular the incremental introduction policy and Language in Education Policy make plain what the policy direction of the department is. I have elaborated on these policies earlier. The common theme in these policy documents is the promotion of indigenous African languages in schools.

[44] If these policy documents are implicit, the stated overall goal of the bursary scheme is explicit, being 'to provide well-qualified teachers who are able to teach in nationally-identified priority areas and who, upon completion of their funded studies, will be placed in public school posts to fulfil their contractual obligation by teaching for the same number of years as they received the bursary'. It is clear that that the selection criteria are meant to address the 'priority areas' as identified by the department. The teaching of African indigenous language in the foundation phase is among those 'priority arrears'.

[45] For these reasons, I find CASAC's argument compelling. I therefore conclude that the selection criteria fall outside the scope of section 9(2) of the Constitution, and fall to be evaluated against section 9(3). In this regard the starting point is to determine whether there is a differentiation in the criteria of the bursary scheme. Counsel for the department argued the bursary scheme does not exclude or is not aimed at excluding any South African citizen who is willing and ready to get a qualification as a teacher and teach in a rural area, no matter their race. The differentiation is only read into the selection criteria by the applicants. This is so because if an applicant who is classified as 'white', is from a rural area, and is prepared to go back and teach in that area, and satisfies all the other criterion of the bursary scheme then that applicant will be considered for a bursary. I am of the view that there is differentiation. The criteria differentiate among others, between those who are fluent in indigenous African languages, and those who are not. What must be determined is whether the differentiation is constitutionally pliant.

[46] In *Harksen*[19] the Constitutional Court laid down the stages of an enquiry into a violation of the equality clause:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a

[19] *Harksen v Lane NO* 1998 (1) SA 300 (CC).

legitimate government purpose? If it does not then there is a violation of section 8(1). If it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner;

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2);

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

[47] At para 46 the court held that differentiation on grounds that are analogous to those listed in s 9(3) will constitute discrimination. An analogous ground is one that is 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.' The court further enumerated the following factors to be taken into account in determining whether the discrimination has an 'unfair impact':[20]

(a) The position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burden placed on those who are relatively well off;

(b) The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal;

[20] *Harksen* paras 50 and 51.

(c) The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

[48] In *Hugo*[21] the Constitutional Court contextualised the philosophical nature of unfairness contemplated in section 8 of the interim Constitution as follows:

'The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.'

[49] In *Sarrahwitz*[22] Mogoeng CJ observed (at para 51) that there are two kinds of differentiation that section 9 of the Constitution seeks to uproot from our legal landscape: the one that results in unfair discrimination; and the one that results in mere differentiation. The latter, explained the Chief Justice, requires of the State to act rationally at all times and not in an arbitrary manner. State action must

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[21] *President of the Republic of South Africa and Another* v *Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 para 41.
[22] *Sarrahwitz v Martiz N.O. and another* 2015 (4) SA 491; 2015 (8) BCLR 925 (CC) para 51.

always be designed to advance a legitimate government purpose in consonance with the rule of law and the very essence of constitutionalism.

[50] The applicants allege that criteria of the bursary scheme discriminate against white students on the ground of race. Two grounds are advanced for this proposition. First, because, none of the white students speak an African language, and second, the targeted group is from rural areas. According to CASAC, the ground of differentiation here is not race, but language. This is an attractive proposition. But ours is a society far from perfect, with its own realities. One of the painful legacies of colonialism and institutionalised racism (apartheid) is that indigenous African languages were systematically marginalised as inferior and devoid of any relevance in scholarship. The result is that there are very few white people who speak any of our indigenous African languages. Less so, with teacher-students who specialise in them.

[51] In that context the requirement for the applicants of the bursary scheme to speak an indigenous African language would generally exclude an overwhelming number of white students. Conversely, a requirement for an applicant to be 'bilingual (English *and* Afrikaans)' would be a conscious basis for the exclusion of the vast majority of African people.[23] Accordingly, I accept, on a purely

[23] This is a proposition I put to the applicants' counsel during argument, which counsel was hard-pressed to concede.

practical basis, that in the final analysis, the ground of differentiation here is race. But I do not share the applicants' argument that the preference for students from rural areas necessarily excludes whites.

[52] Considering whether the differentiation identified offends section 9, it must be borne in mind that what the section prohibits, is unfair discrimination. In other words, differentiation or discrimination per se, without unfairness, does not fall foul of section 9(3). In *Harksen*, Goldstone J in discussing factors relevant to the determination of unfairness stated:

'The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparatively serious manner. In the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.'[24]

[53] The interplay between the discriminatory measure and the person or group affected by it is of importance, as observed by Langa DP in *Walker*[25] (at para 45). And, as also pointed out by O' Regan J in *Hugo* (at para 112) the concept of unfairness in determining whether there has been a breach of the right to equality: the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive

[24] Para 52.
[25] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 46.

the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.

[54] Here, white students, represented by Solidariteit, are by no means a vulnerable group. Solidariteit represents, exclusively, the interests of white people, in particular, Afrikaners - a group that has not been subjected to discrimination in the past. Regarding the nature of the discrimination brought about by the selection criteria of the bursary scheme, I do not deem it invasive at all on white students in pursuing further education. There are other avenues through which Ms Venter and similarly-situated white students can access funding for further education, for example from Solidariteit itself. In this regard, it bears emphasis that the bursary scheme is not a general bursary fund for every student who wishes to pursue teaching as a career. It is aimed at those students who specialize in the department's nationally-identified 'priority areas'. Ms Venter does not specialize in any of those areas.

[55] The applicants' argument ignores the rationale of the selection criteria: the department has identified as a 'priority area' the shortage of teachers in African languages in the foundation phase in general, and in particular in rural areas. But more importantly, the department's priority to fulfil its obligations set out in section 29(2) of the Constitution should be borne in mind. Regarding the criterion preferring students from rural areas, the applicants' argument is premised on an

assumption that there are no white people living in rural areas. There is simply no evidence to support this. In the result, the suggestion in the applicants' founding affidavit of the impairment of the dignity and other rights of white students does not bear scrutiny, and remains a bald and unsubstantiated allegation.

[56] The applicants' general approach is encapsulated in the following extract from the written submissions on their behalf:

'Why should a black Sotho[26] speaking student be given preference above a white Afrikaans or English student? Because she comes from a rural area and speaks an indigenous African language and the DBE [the department] hopes that after that she has completed her degree she will return to the same area and teach in that language? The DBE does not even know if the Sotho speaking student comes from the area where the one Sotho school in South Africa is based. Who says the Sotho speaking student is not appointed in a post in Johannesburg or Port Elizabeth where she will not apply her indigenous African language in class? This makes a mockery of the selection criteria and clearly shows that it is irrational, illogical and absurd.'

[57] In my view, the applicants' argument is conceptually flawed, and totally misconstrues the rationale for the selection criteria of the bursary scheme. The so-called 'Sotho speaking' student is not preferred because she comes from a rural area, but because she specialises in one of the nationally-identified 'priority areas', namely an African indigenous language in the founding phase. The same

[26] I assume that reference here is made to seSotho. Throughout the applicants' papers, and during argument, indigenous African languages were insensitively referred to. For example 'Zulu' instead of isiZulu, 'Venda' instead of tshiVenda, 'Tsonga' instead of xhiTsonga. I attribute this purely to ignorance.

consideration would apply to a white student who specialises in Mathematics in the intermediate phase, or Accounting in the FET phase. She would be preferred above everyone else, not because she is white, but because she specialises in the area of study which falls within the 'priority areas' identified by the department. That the students who specialise in an indigenous African language might exclusively be black, is an incident of the department's policy of advancing indigenous African languages in the school system.

[58] The bursary scheme is not in any manner unfairly discriminatory against white students. It is aimed at addressing deep structural inequalities designed by apartheid. The fact that its criteria may create a disadvantage for some in the previously advantaged group, like Ms Venter, while benefiting a legitimately identified group of students, does not justify the conclusion sought to be drawn by the applicants that the criteria are prejudicial. In this regard, the statistics show that, quite to the contrary, proportionally speaking, white students have benefitted under the bursary scheme. The race profile of bursars in 2014 was made up as follows: African - 67 percent; Coloured - percent; Indian - percent; White -18.8 percent.

[59] Lastly, an argument similar to the one advanced on behalf of the applicants was ringingly rejected by the Constitutional Court in *Walker*, where Langa DP stated:

'The postscript to the interim Constitution refers to our "past of a deeply divided society". Differentiation made on the basis of race was a central feature of those divisions and this was a source of grave assaults on the dignity of black people in particular. It was however not human dignity alone that suffered. White areas in general were affluent and black ones were in the main impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres, including the disparities that exist in the provision of services and the infrastructure for them in residential areas. Section 8 is premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with'.

[60] As Ngcobo observed in *Bato Star*,[27] the measures that bring about transformation will inevitably affect some members of society adversely, particularly those from previously advantaged communities. I therefore agree with the submission on behalf of CASAC that although the bursary scheme does not fall within the scope of section 9(2) of the Constitution, it passes constitutional muster when analysed against the test for unfair discrimination in section 9(3) of the Constitution, as developed by the Constitutional Court. In light of these, the applicants' challenge on the ground of unfair discrimination falls to fail.

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[27] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687; 2004 (4) SA 490 (CC) para 76.

[61] To sum up on the section 9 arguments, I prefer CASAC's submission that the selection criteria of the bursary scheme are better dealt with under section 9(3) instead of section 9(2). That distinction though, does not have any practical effect on the outcome as to whether the selection criteria violates the equality clause. As pointed by Mokgoro J in *Van Heerden*, the distinction between the two subsections of section 9 is crucial only to the question of onus and focus. According to her, the main focus in section 9(2) is on the group advanced and the mechanism used to advance it. On the other hand, when assessing a measure under section 9(3) the main focus is on the complainant and the impact of the measure on him or her. Thus, the outcome is the same. This is supported by Sachs J's concurring judgment in *Van Heerden* in which he 'paradoxically' concurred in the majority and minority judgments, pointing out that the three judgments 'arrive at the same outcome by apparently different routes' and that the judgments 'appear eloquently to mirror each other.'[28]

[62] The applicants have thus failed to establish discrimination, whether the selection criteria is viewed through the lens of section 9(2) or section 9(3). Thus, even if my preference of CASAC's submissions is wrong, and it be that the bursary scheme constitutes a restitutionary measure in terms of section 9(2), the applicants' case still fall short of establishing unfair discrimination. As trenchantly observed by Moseneke J in *Van Heerden*:

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[28] Para 135.

'Our constitutional understanding of equality includes what Ackerman J in National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Another calls "remedial or restitutionary equality". Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not "reverse discrimination" or "positive discrimination" as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives'.[29] (footnotes omitted.)

Mokgoro J was emphatic in her concurring minority judgment:

'It would frustrate the goal of section 9(2) if measures enacted in terms of it paid undue attention to those disadvantaged by the the measure when that disadvantage is merely an invariable result and not the aim of the measure. The goal of transformation would be impeded if individual complainants who are aggrieved by restitutionary measures could argue that the measures unfairly discriminated against them because of their impact on them...'[30]

Connection to a legitimate government purpose

[63] It remains to be considered the applicants' contention that the selection criteria of the bursary scheme do not bear a rational connection to a legitimate government purpose. The applicants have characterized them as 'thinly veiled

[29] Para 30.
[30] Para 80.

racial preferencing selection policy'. In this regard, O'Regan J stated the following in *East Zulu Motors*:[31]

'The first question to be answered in any equality challenge is...whether the governmental action or regulation under consideration is rational. The question is not whether the government may have achieved its purpose more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.'

[64] It must be borne in mind that the Constitution has endowed the Minister with the power, and indeed, the obligation, to take steps for the realisation of the right to basic education. She is further enjoined by the Language in Education Policy and the Schools Act to formulate the policies in accordance with the requirements of the various canons of the legislative framework and the Constitution. She has done so. The department has identified 'priority areas' of which indigenous African languages in the foundation phase is one. It seeks to address that with the bursary scheme. The department has therefore demonstrated a clear government purpose underlying the selection criteria. In doing so it has highlighted two policy documents that support the need to train more teachers in African languages.

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[31] *East Zulu Motors v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) para 64.

[65] I have already referred to two policy documents upon which the criteria are based, namely the incremental introduction policy and the Language in Education Policy, as well as the over-arching aim of these policies, namely the promotion of indigenous African languages in the schooling system. The bursary scheme is a natural consequence of these policies. It is not for a court to substitute its pedagogic views and decide what the department ought to do. If the department's measures have a rational purpose which is not arbitrary the court cannot interfere with its function.[32]

[66] Having adopted these policies, it follows that the department is obliged to take steps to implement them. I have already considered the obligation placed upon the State by section 29(1)(a) of the Constitution in respect of the right to basic education in the language of their choice where the education is reasonably practicable. The inequality in the enjoyment of the right to basic education, perforce, obliges the department to take positive steps to realise that right in full and immediately, as enjoined by section 29(1)(a) of the Constitution. It also imposes a duty on the department to close the gap created by apartheid and perpetuated through an unequal schooling system. In discharging its obligation to provide quality basic education, the State is also enjoined to promote the best interests of the children as enshrined in section 28 of the Constitution. Thus, the

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[32] *Independent Outdoor Media (Pty) Ltd and others v City of Cape Town* [2013] 2 All SA 679; (SCA) para 22. Also, see *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) paras 41 and 44.

right to quality basic education, in this instance the provision of mother-tongue tuition in the foundation phase as a component of that right, forms part of that obligation.

[67] It seems to be common cause that poor learning outcomes in South Africa are to a great extent a result of poor language proficiency and utility. In their replying affidavit, the applicants allege that in 1998, Umalusi[33] introduced a compensatory measure for learners whose first language was neither English nor Afrikaans by adding an additional 5 percent to the mark obtained in the examination to compensate for the language deficit. This has not been denied by the department. According to the applicants' replying affidavit, the compensatory marks would have been withdrawn in phases in 2014 for Grade 10, in 2015 for Grade 11 and in 2016 for Grade 12.

[68] Also, in terms of section 29(2)(c), the department is required to take reasonable measures to redress the result of past racially discriminatory laws and practices. The bursary scheme is therefore aimed at promoting teaching in public schools. Therefore the aim to develop teachers to fill an identified shortage of

[33] Council for Quality Assurance Council, which sets and monitors standards for general and further education and training in South Africa in accordance with the National Qualification Framework Act 67 of 2008 and the General Education and Training Quality Assurance Act 58 of 2001. This body is responsible, among others, for the certification of national senior certificate (matric).

teachers in African languages cannot be unconstitutional. It is in fact a well-motivated measure adopted by the department.

[69] In their replying affidavit, four major propositions can be distilled. First, the applicants dispute that there is a shortage of teachers in the foundation phase whose mother tongue is an indigenous African language. They contend that the department's assertion in this regard is based on incorrect and unrealistic data. Second, they reject as unsubstantiated speculation the assertion by the department that students from rural areas will return to the same area to teach in an indigenous language.

[70] Third, the applicants assert that in terms of a survey[34] of single-medium schools by language for 2008-2012, the majority of schools are English speaking, at 81.4 percent, followed by Afrikaans speaking schools at 13.9 percent, with indigenous African language speaking schools being minimal and in some cases non-existent. The only two languages for which there are more than 25 schools countrywide are for isiZulu (85) and isiXhosa (317). Overall, the statistics show a massive decrease in the number of African language schools for the period 2008 to 2012. There are virtually no single-medium schools across the country where students can return to teach in those languages.

[34] South African Survey 2013 attached to the applicants' replying affidavit.

[71] Based on the above statistics, it was argued on behalf the applicants that the rationale for training teachers in African languages has therefore disintegrated. Accordingly, they argue, it is irrational and unreasonable to provide a bursary to equip teachers in indigenous African languages. Instead, the bursaries should be devoted to the teaching of Afrikaans and English, the two languages which have been chosen across the country as languages of teaching.

[72] Fourth, the applicants contend that the language policies relied on by the department do not present the department's full language policies. In addition to those mentioned, there are four more, of which two are of relevance: Language Across the Curriculum and English First Additional Language in Grades 1-3. It is said that the effect of these two policies is that the department has moved away from its policy of teaching in African languages in the foundation phase. Instead, the new policy is to implement English as the language of learning and teaching with effect from Grade 1 in all schools. It therefore needs teachers proficient in that language, rather than those specialising in African languages.

[73] During oral submissions, counsel for the applicants laid much emphasis on the third point: there are virtually no African language medium schools in the country and therefore, it is irrational to train teachers in those languages. There is no merit in any of these arguments. The applicants miss the point, and totally misconstrue the department's argument. The department's policy is not to create

single-medium African language schools. It seeks to promote the teaching of African languages within the existing framework of dual medium schools.

[74] This is clear from the incremental introduction policy. Nowhere is it suggested in that policy that its implementation is dependent on the existence of single-medium African language schools. Put differently, the absence of such schools does not serve as an impediment. The applicants recognise this, but argue that the policy does not make provision for more than two languages in the official allocation of time for subjects. Schools that implement African languages as a third language offering, will do so outside of the allocated language time. In my view, this relates to a possible weakness in the implementation of the policy, and has nothing to do with the policy itself.

[75] But, the more cogent answer to the applicants' assertions is this. The applicants have not challenged the constitutionality of the provisions of the national legislation from which the policies, norms and standards are derived. The bursary scheme is merely a measure in the implementation of those policies. As correctly pointed out on behalf of the department, absent such a challenge, an attack on the implementation of the policies flowing from the legislative and constitutional scheme is misplaced, and impermissible. This, of course, is on the account of the principle of subsidiarity. The department was called upon to meet a case based on unfair discrimination. The Constitutional Court has made it clear that complaints that the policies or conduct of organs of State violate the right not

to be unfairly discriminated against must be brought under the Equality Act,[35] not under the Constitution.[36]

Summary

[76] To sum up, I am satisfied that in all the circumstances, the applicants have failed to establish that the selection criteria of the bursary scheme as a measure by the department to respond to specific challenges, unfairly discriminates against white students. On the contrary, the department has demonstrated that the selection criteria have their foundation in a legitimate government policy to promote indigenous African languages in the school system. Accordingly, the application falls to be dismissed.

Costs

[77] There remains the issue of costs. The general principles with regard to costs in constitutional litigation were laid down by the Constitutional Court in *Affordable Medicines*[37] and *Biowatch.*[38] Relevant to the present case is that in constitutional litigation between a private party and the state, if the private party is successful, it should have its costs paid by the state, while if unsuccessful each

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[35] Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

[36] *See Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC) paras 96 and 434-437; *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 51; *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40*; My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) para 57*; De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and another* 2016 (2) SA 1 (CC) para 53.

[37] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

[38] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

party should pay its own costs. The applicants have sought to establish a genuine constitutional issue of some public interest. It is therefore not appropriate that they should be mulcted in costs.

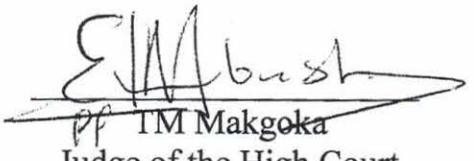
Order

[78] In the result the following order is made:

1. The Council for the Advancement of the South African Constitution (CASAC) is admitted as an amicus curiae;

2. The application is dismissed;

3. There is no order as to costs.



TM Makgoka
Judge of the High Court

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