REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

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

Case No: 22507/2012
In the matter between:

BEAUVALLON SECONDARY SCHOOL	**First Applicant**
SCHOOL GOVERNING BODY OF	
BEAUVALLON SECONDARY SCHOOL	**Second Applicant**
BERGRIVIER NGK PRIMARY SCHOOL	**Third Applicant**
SCHOOL GOVERNING BODY OF	
BERGRIVIER NGK PRIMARY SCHOOL	**Fourth Applicant**
BRACKENHILL EK PRIMARY SCHOOL	**Fifth Applicant**
SCHOOL GOVERNING BODY OF	
BRACKENHILL PRIMARY SCHOOL	**Sixth Applicant**
DENNEPRAG PRIMARY SCHOOL	**Seventh Applicant**
SCHOOL GOVERNING BODY OF	
DENNEPRAG PRIMARY SCHOOL	**Eighth Applicant**
KLIPHEUWEL PRIMARY SCHOOL	**Ninth Applicant**
SCHOOL GOVERNING BODY OF	
KLIPHEUWEL PRIMARY SCHOOL	**Tenth Applicant**
KROMBEKSRIVIER NGK PRIMARY SCHOOL	**Eleventh Applicant**
SCHOOL GOVERNING BODY OF	
KROMBEKSRIVIER NGK PRIMARY SCHOOL	**Twelfth Applicant**
LK ZEEMAN PRIMARY SCHOOL	**Thirteenth Applicant**
SCHOOL GOVERNING BODY OF	
LK ZEEMAN PRIMARY SCHOOL	**Fourteenth Applicant**
LAVISRYLAAN PRIMARY SCHOOL	**Fifteenth Applicant**
SCHOOL GOVERNING BODY OF	
LAVISRYLAAN PRIMARY SCHOOL	**Sixteenth Applicant**
PROTEA PRIMARY SCHOOL	**Seventeenth Applicant**
SCHOOL GOVERNING BODY OF	
PROTEA PRIMARY SCHOOL	**Eighteenth Applicant**
REDLANDS PRIMARY SCHOOL	**Nineteenth Applicant**

SCHOOL GOVERNING BODY OF	
REDLANDS PRIMARY SCHOOL	**Twentieth Applicant**
RIETFONTEIN NGK PRIMARY SCHOOL	**Twenty-First Applicant**
SCHOOL GOVERNING BODY OF	
RIETFONTEING NGK PRIMARY SCHOOL	**Twenty-Second Applicant**
RONDEVLEI EK PRIMARY SCHOOL	**Twenty-Third Applicant**
SCHOOL GOVERNING BODY OF	
RONDEVLEI EK PRIMARY SCHOOL	**Twenty-Fourth Applicant**
URIONSKRAAL NGK PRIMARY SCHOOL	**Twenty-Fifth Applicant**
SCHOOL GOVERNING BODY OF	
URIONSKRAAL NGK PRIMARY SCHOOL	**Twenty-Sixth Applicant**
VALPARK PRIMARY SCHOOL	**Twenty-Seventh Applicant**
SCHOOL GOVERNING BODY OF	
VALPARK PRIMARY SCHOOL	**Twenty-Eighth Applicant**
WANSBEK VGK PRIMARY SCHOOL	**Twenty-Ninth Applicant**
SCHOOL GOVERNING BODY OF	
WANSBEK VGK PRIMARY SCHOOL	**Thirtieth Applicant**
WARMBAD-SPA PRIMARY SCHOOL	**Thirty-First Applicant**
SCHOOL GOVERNING BODY OF	
WARMBAD-SPA PRIMARY SCHOOL	**Thirty-Second Applicant**
WELBEDACHT UCC PRIMARY SCHOOL	**Thirty-Third Applicant**
SCHOOL GOVERNING BODY OF	
WELBEDACHT UCC PRIMARY SCHOOL	**Thirty-Fourth Applicant**
THE SOUTH AFRICAN DEMOCRATIC	
TEACHERS UNION	**Thirty-Fifth Applicant**

and

THE MINISTER OF EDUCATION	
FOR THE WESTERN CAPE	**First Respondent**
THE WESTERN CAPE	
EDUCATION DEPARTMENT	**Second Respondent**
THE MINISTER OF BASIC EDUCATION	**Third Respondent**
THE MINISTER OF JUSTICE AND	
CONSTITUTIONAL DEVELOPMENT	**Fourth Respondent**

JUDGEMENT: 31 JULY 2013

BOZALEK J:

[1] On 16 October 2012 the Western Cape Minister of Education (*'the Minister'*) announced his decision to close twenty schools in terms of s33 of the South African Schools Act, 84 of 1996 (*'the Act'*). The Minister's decision gave rise to these review proceedings which were preceded by an urgent application seeking an interdict against the closure of the schools pending the outcome of the review of the Minister's decision. The interdictory relief was argued and an order in favour of the applicants was granted in December 2012. What now falls to be determined are the review proceedings.

[2] Of the twenty affected schools eighteen were originally cited as applicants together with their school governing bodies (*'SGB'*), two schools having accepted their closure. One of the original eighteen schools, Tonko Bosman Primary school, and its SGB are no longer numbered as applicants following difficulties in obtaining instructions. The thirty-fifth applicant, all of whom were represented by Mr Arendse SC together with Mr Fergus, is the South African Democratic Teachers Union (*'SADTU'*). The relief sought by the applicants in the review proceedings was an order reviewing and setting aside the decisions of the Minister to close the affected schools with effect from 31 December 2012 and, in the alternative, an order declaring s33(2) of the Act unconstitutional.

[3] The Minister and the Western Cape Education Department (*'the department'*) were cited as first and second respondent and were represented by Mr Fagan SC who appeared together with Ms van Huyssteen. Both these

respondents opposed the interdictory review and declaratory relief sought. The Ministers of Basic Education and Justice and Constitutional Development were also cited as the third and fourth respondents as a consequence of a challenge to the constitutionality of s33(2) of the Act. The fourth respondent did not enter the fray but the third respondent, represented by Mr Masuku, defended the constitutionality of s33(2) and filed an opposing affidavit.

BACKGROUND

[4] Before setting out the issues which arose in the review application it is appropriate to sketch the process which culminated in the closure decisions. Regard must first be had to s33 of the Act which stipulates the process which must be followed by a Provincial Minister of Education (a Member of the Executive Council) before making any such decision. To the extent that it is material it reads as follows:

> CLOSURE OF PUBLIC SCHOOLS
>
> *[1]* The Member of the Executive Council may, by notice in the *Provincial Gazette,* close a public school.
>
> *[2]* The Member of the Executive Council may not act under subsection (1) unless he or she has –
>
> a) informed the governing body of the school of his or her intention so to act and his or her reasons therefore;
> b) granted the governing body of the school a reasonable opportunity to make representations to him or her in relation to such action,
> c) conducted a public hearing on reasonable notice, to enable the community to make representations to him or her in relation to such actions and;
> d) given due consideration to any such representations received.

[5] Following certain guidelines for the closure of non-viable schools (*'the guidelines'*) the department required its various district officers to identify

schools which were no longer educationally viable and should be considered for closure by the Minister. In terms of the guidelines possible reasons for closing a school include low levels of learner enrolment, inadequate curriculum provisioning, limited school access, unsuitable schooling infrastructure, poor retention of learners, an inability to attract and retain educators and difficulties relating to the location of schools on private property. The head of the department considers each such application and if, after investigation and consideration by a range of senior officials within the department, he or she approves the application then he or she recommends the school closure to the Minister. If, after consideration, the Minister approves the recommendation a letter is sent to the SGB by the Minister in accordance with the provisions of s33(2)(a) of the Act advising of his intention to close the school and setting out his reasons for such intention. These reasons were then, briefly stated, generally in the following terms: *'dwindling learner numbers, 'learners do not benefit maximally by multi-grade teaching', 'eradication of multi-grade teaching', 'high drop-out rate', 'the learner numbers have been dwindling and there is enough provisioning at neighbouring schools for all the learners', 'consistent under performance in the NSC examination as well as (certain) Grades', 'learners do not benefit maximally by multi-grade teaching', 'there is no feeder community', 'the school building is under-utilised', 'gradual decrease in learner numbers causing educators to be in excess', 'enough provisioning at neighbouring schools', 'unsuitable accommodation', 'poor LITNUM results of the school and the school is no longer viable'.* In a few instances the precise decline in learner numbers was stipulated or the underperforming grades were identified and in several cases

it is stated that there is enough provisioning at neighbouring schools or that *'there are other schools in the area that can accommodate the learners'*.

[6] The initial letter advises the SGB that it has a reasonable opportunity to make representations to the Minister in relation to his intention to close the school which can be done either orally at a meeting with the department to be arranged or in writing within a stipulated period or using both methods. A meeting between the SGB, of which the school principal is an ex-officio member, and departmental officials would almost invariably take place in which the members of the SGB were able to and did make representations about the proposed closure and, with varying degrees of success, engaged with such officials regarding the issues. The minutes of such meetings were generally kept by the department's officials and formed part of the record in the case of each school.

[7] Having regard to the representations received through this process the department prepared a further report, generally with the recommendation that the Minister approve the continuation of the process to close the school. Again this process involved consideration of the report and recommendation by a series of senior officials within the department. Where the Minister approved the recommendation to this effect a letter would be written to the SGB advising that the department would arrange a public meeting to receive further representations regarding the closure of the school. A notice was then published in the Provincial Gazette giving notice of the school closure, the reasons therefor, explaining the requirement of a public meeting to enable the community to make representations in relation to the matter and giving

adequate notice of the time and place of the meeting. In every case the meeting was held within the affected community. The notices also stated that written or oral representations regarding the proposed closure could be made and gave details in this regard.

[8] Each public meeting was chaired by a senior departmental official with other officials generally present. An interpreter was provided and representations were invited in any of the three main prevailing languages. The proceedings were in each instance video-recorded and transcribed. At the commencement of each meeting the chair advised those gathered of the purpose of the meeting, restated the reasons for the proposed closure of the school and invited representations. A feature of each of these introductions was that the chair invariably advised that the departmental officials were there to receive and hear representation and not to engage in a debate. Thereafter every person who wished to speak was given an opportunity to do so and to hand up written submissions in support of their representations if they so desired. After each such meeting the proceedings were transcribed, minutes were prepared of the meeting summarising the nature of the representations and identifying the person making the representations and the capacity in which they spoke. Thereafter the departmental official who chaired the meeting prepared a report on the public meeting which *inter alia* again summarised the representations made by or on behalf of interested parties together with recommendations concerning the proposed closure of the school.

[9] A further report would be drawn up giving comprehensive data on the school considered for closure and on the proposed receiving school. This

data, included literacy and numeracy evaluation of the performance of the learners in the school (the LITNUM results) was downloaded from the department's CEMIS system. The department then prepared a final report, incorporating the two aforesaid reports, the transcribed record of the public hearing and the minutes thereof together with a concluding recommendation. That report was considered in turn by six (6) senior officials of the department who were free to add their comments and agree or disagree with the recommendation before the entire report was placed before the Minister.

[10] Once the Minister had made his decision in those cases where he accepted a recommendation to close the school, letters were sent either by the Minister or the head of the department to the chair of the SGB, the school principal and the parents and guardians of the learners at the affected school advising of the closure of the school with effect from 31 December 2012. Where appropriate the letters stated that if necessary transport to the receiving schools would be furnished and offered the department's assistance with any queries of difficulties arising. The Minister's decisions to close the schools appeared to have been taken on or about 15 October 2012, the processes in respect of each school running on a similar time frame i.e. commencing in April 2012 and culminating in mid-October of the same year.

[11] On 16 October 2012 the Minister released a lengthy media release dealing *inter alia* with the process which had been followed, the Learner Placement Plan for schools that were to be closed and support plans for schools that were not closed. He announced the outcome of the process in relation to each of the 27 affected schools and his statement represented the first occasion on which he expressed the *'considerations'* which gave rise to

his decision to close the schools, apart from the initial reasons furnished at the earlier stages of the process. Of the 20 schools closed 2 were in the Metro Central district, 2 in the Metro North district, i.e. urban Cape Town schools, 5 in the Cape Winelands district, 2 in the West Coast district and 9 in the Eden and Central Karoo district.

[12] The applicants' case is that the school closures were unlawful and unconstitutional and, leaving aside grounds which were later abandoned, was based on the following grounds cited in the founding affidavit:

1. they did not take account of the best interests of the child;
2. section 33 of the Act is unconstitutional;
3. the procedure in s33 was not followed;
4. there was no consultation or meaningful consultation with parents, the SGB's, educators and school principals;
5. the public hearings were conducted by departmental officials who predetermined the outcome;
6. the public hearings were a sham;
7. there were no placements plans or meaningful placement plans in place;
8. there were no safety plans in place.

Apart perhaps from the sixth ground the last four grounds were not pressed in argument on behalf of the applicants

[13] Certain grounds of review in terms of the Promotion of Administration of Justice Act, 3 of 2000 (*'PAJA'*) were relied on namely that the decisions were procedurally unfair (s6(2)(c)), a material or mandatory procedure or condition prescribed by an empowering provision was not complied with

(s6(2)(b)), irrelevant considerations were taken into account or relevant considerations not considered (s6(2)(e)(iii)), the decisions were not rationally connected to the information before the decision-maker or the reasons given for it (s6(2)(f)(ii)(cc) and (dd)), the decisions were so unreasonable that no reasonable person could have made them (s6(2)(h)).

[14] In the cases of Beauvallon Secondary school (*'Beauvallon'*) and Lavisrylaan Primary school (*'Lavisrylaan'*) the applicants complained that the reasons initially given by the Minister for the proposed closure of the school differed significantly from those cited in his statement of 16 October 2012. He had failed to explain the change in his reasoning. Finally, the applicants relied on a large number of school-specific grounds including numerous alleged errors of fact made by the Minister in his decision-making process in relation to most if not all the schools and in many cases relating to the issues of multi-grade teaching and whether the numbers at various schools could be said to have dwindled or declined.

[15] On receipt of the record the applicants filed a supplementary founding affidavit in which they formalised and expanded upon their constitutional challenge to s33 of the Act. Amongst the points made therein were the following: The departmental officials who chaired the public meetings did no more than record them with the result that the public hearings were completely inadequate as a means of providing the communities with a reasonable opportunity to engage on the proposed closure of the schools. In this regard it was stated that in many instances the dogged adherence to the stated purpose for the public hearing by the departmental officials, namely, to only receive representations and not to debate the issues, resulted in the

presiding officer refusing to provide clarity or detail on the stated reasons for the closure when requested to do so by attendees at the public hearings. This, it was stated, was contrary to the department's own guidelines. For the rest, the applicants merely expanded on the grounds of review initially cited in their founding affidavit.

[16] On 21 December 2012 the majority of the Full Bench which heard the interdict application (Desai J and Baartman J, Davis J dissenting) granted the applicants an interim order interdicting the closure of the various schools and made various orders ancillary thereto the purpose and effect of which was to allow those schools to continue functioning as normal. The Court directed further that the interdict was to remain in force until the final resolution of these review proceedings, inclusive of all appeals.

[17] Some detail of the applicants' allegations regarding their grounds of review is appropriate. Regarding the initial reasons cited for closure of the schools in the letters to the SGB it was said that these were simply too short and in no way reflected the complexity of the decisions involved in potentially closing any schools. It was submitted that they should at the very minimum have matched the length of the departmental report made to the Minister recommending the closure of the schools, including the annexures. The complaint was further made that in some cases the reasons were vague *'on their face'* with the result that the school representatives did not know what the claim meant and consequently could not rebut it. It was said, furthermore, that the brevity of the reasons led to fatal misunderstandings and miscommunication. In support of this allegation it was stated that if one had

regard to the transcripts of the public meetings one sees page after page of emotional parents of community leaders describing the importance of the school, the history of the school or how happy the learners are at the school. In this regard the applicants submitted that those persons quite reasonably believed that they were making valid submissions to the Minister and that the respondents were at fault in not advising that these arguments would be dismissed as *'emotional'* and that the affected parties should rather use the meeting to brainstorm plans, for example, *to 'increase learner enrolment'*.

[18] The applicants contended that the Minister's closure decisions were arbitrary and irrational in that there were no legitimate reasons why some schools were kept open and others closed. This submission was made against the backdrop of certain schools being kept open whilst others, whose circumstances were said to have been similar, were closed. Further contentions were that no identifiable pattern or clear system of decision-making could be identified hence, it was submitted, the Minister had acted in an arbitrary fashion when making the closure decisions. Reliance was placed on the Minister's failure to consult with SADTU before making the closure decision, the contention being that this was an unprecedented step and that SADTU alone, as opposed to individual teachers, had the resources and expertise to make informed long term commentary on the closure of schools.

[19] As far as the constitutional challenge was concerned the applicants continued to maintain that the procedure followed by the Minister was flawed and had failed to comply with s33(2)(a) in that the schools had not been given the substance or the *'gist of the case against them'.* To the extent that this was permitted by s33(2) it was contended the provisions were

unconstitutional. Secondly the applicants contended that s33(2) was unconstitutional by virtue of the Minister being accorded an overbroad discretion inasmuch as he was not required to take into account the effect of a closure decision on the government's ability to meet its obligation to provide basic education in terms of s29(1)(a) of the Constitution, whether learners could be accommodated at other schools; had access to transport, access to other schools, whether a school closure could affect learners' safety or security or, generally, whether the closure would have any impact on the ability of learners to access their right to receive basic education.

THE ISSUES

[20] In the course of argument the following main issues presented themselves:

1. whether the closure decisions amounted to administrative action as contemplated in PAJA and were thus susceptible to review on a wide range of grounds or whether they constituted *'executive action'* and were thus exempt in terms of PAJA and only reviewable on the limited grounds of legality;
2. the challenge to the constitutionality of s33 of the Act;
3. across the board grounds of review relating mainly to procedural fairness including whether the s33 closure process was irredeemably flawed because the initial reasons given for the proposed closure were inadequate for lack of detail or clarity, because SADTU was not granted a hearing to the closure decisions being made and, finally, because the closure decisions were arbitrary or irrational ;

4. the school-specific grounds of review including the question of the consequences of any variation between the reasons initially given for the proposed closure of a school and the reasons finally given.

I propose to deal with the issues in the order outlined above.

ADMINISTRATIVE OR EXECUTIVE ACTION

[21] On behalf of the Minister and the department Mr Fagan submitted that the closure decisions were open to review only on the constitutional principle of legality providing for the control of public power.

[22] In the context of a review of the State President's executive power the constraining principle of legality was described as follows in *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) at para [81]:

> *'It is therefore clear that the exercise of the power to dismiss by the President is constrained by the principle of legality, which is implicit in our constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'*

Thus in the exercise of executive power a decision-maker must also act in good faith and must not misconstrue his or her powers. See *President of the Republic of South Africa and Others v South African Rugby and Football Union and Others* 2000 (1) SA 1 (CC) (1999)(10) BCLR 1059) at para [148].

[23] Mr Fagan contended further that the Minister's closure decisions could not be reviewed on the various grounds of review set out in PAJA since those decisions did not amount to administrative action within the meaning ascribed

to that concept in PAJA. In this regard he relied upon the exemption contained in s1(b)(bb) which states that administrative action does not include:

> *'(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in s121(1) and (2), s125(2)(d) …. of the Constitution.'*

Section 125(2)(d) of the Constitution lists the areas of executive authority of the provinces and reads in part as follows:

> *'(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by –*
>
> *……*
>
> *(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;*
>
> *…….*
>
> *(d) developing and implementing provincial policy;*
>
> *.....*
>
> *(g) performing any other function assigned to the provincial executive in terms of the Constitution or any Act of Parliament.'*

[24] Mr Fagan argued that the school closure decisions by the Minister were policy decisions made pursuant to policy initially developed by the National Department of Education and adopted by his department relating to the rationalisation or closure of small or non-viable schools and further that the closure decisions amounted to the implementation of such policy. At a national level this policy was contained in a document entitled '*Guidelines for the Rationalisation of Small or Non-Viable Schools'* which formed the basis for the similarly entitled guidelines adopted by the department.

[25] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) Nugent JA observed that what

constitutes administrative action has always eluded complete definition stating:

> *'The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications.'*[1].

He added that:

> *'At the core of the definition of administrative action is the idea of action (a decision) "of an administrative nature" taken by a public body or functionary. Some pointers to what that encompasses are to be had from the various qualifications that surround the definition but it also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity.'* [2]

[26] It is worthwhile reminding ourselves that s33 of the Constitution provides as follows:

> *'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'*

[27] In *Greys Marine* Nugent JA also stated (at page 325 para B):

> *'There will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect: but the execution of policy is not equivalent to its formulation. The decision in the present case was not one of policy formulation but of execution.'*

[28] In P*ermanent Secretary, Education and Welfare, EC v Educollege (PE)* 2001 (2) SA1 (CC) the Court, per O' Regan J stated as follows at para [18]:

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[1] At para [21]
[2] At para [22]

> *'…In President of the Republic of South Africa and Others v South African Rugby Football Union and Others this Court held that, in order to determine whether a particular act constitutes administrative action, the focus of the enquiry should be the nature of the power exercised, not the identity of the actor. The Court noted that senior elected members of the executive (such as the President, Cabinet Ministers in the National sphere and members of executive councils in the Provincial sphere) exercise different functions according to the Constitution. For example they implement legislation, they develop and implement policy and they prepare and initiate legislation. At times the exercise of their functions will involve administrative action and at other times it will not. In particular the Court held that when a senior member of the executive is engaged upon the implementation of legislation, that will ordinarily constitute administrative action. However, senior members of the executive also have constitutional responsibilities to develop policy and initiate legislation and the performance of these tasks will generally not constitute administrative action.'*

[29] The definition of administrative action in PAJA includes, primarily, *'exercising a public power or performing a public function in terms of any legislation'.* Only then does the exemption for executive authority covering the implementation and development of policy follow. Significantly what is not exempted from the provisions of PAJA through the definition of administrative action are the areas of executive action covered by s 125(2)(b) and (g) of the Constitution viz the implementation or performance of any function in terms of national legislation, where authorised: significantly, education is listed in the Schedule 4 referred to in s125(2)(b).

[30] Inasmuch as the closure decisions were effected by the Minister in terms of s33 of the Act all the primary indicators are that they fall within the definition of administrative action in PAJA. In my view simply because a policy background to certain decisions is present or decisions are taken pursuant to

a policy does not follow that such decisions amount to *'developing and implementing provincial policy'* within the parameters of s125(2)(d) of the Constitution.

[31] Having regard to the criteria set out in *South African Rugby Football Union* the fact that the closure decisions were ultimately effected by the Minister, a Member of the Executive Council, is clearly a relevant factor. The source of the power, s33 of the Act, is clearly another. What is also material is that each school closure decision was the culmination of a lengthy and involved administrative procedure which s33(2) requires. That administrative process involves a range of senior departmental officials interacting with the affected schools and stakeholders with each one of those officials' actions and recommendations feeding into the Minister's eventual decision. The nature of the power and its subject matter, namely the closure of public schools with its far-reaching consequences for persons affected thereby, are additional factors pointing strongly in the direction of the decisions being subject to the full range of review grounds set out in PAJA. Further, whilst there is undeniably a policy linkage and background to the closure decisions this is outweighed by the statutory source and nature of the power which the Minister exercised in effecting the closures. Finally, an important consideration in the determination of whether the Minister's closure decisions constituted administrative action are their implications for fundamental constitutional rights, principally the right to education and the paramouncy of the rights of a child as expressed in s28(2) and s29 of the Constitution. Having regard to all these factors I consider that the closure decisions were administrative action proper and as such subject to review in terms of the full range of grounds set out in PAJA.

THE CHALLENGE TO THE CONSTITUTIONALITY OF SECTION 33 (2) OF THE ACT

[32] Before considering the merits of the procedural and substantive grounds of review it is necessary to emphasize the importance of the rights which the applicants seek to assert in this review. The right to basic education in terms of s29(1)(a) of the Constitution is a foundational right not least because of our country's history of a grossly unequal and racially discriminatory education system much of which still endures today and the legacy of which will no doubt bedevil our society for decades to come. Reinforcing the importance of this right is the fact that the disputed decisions directly affect hundreds if not thousands of children whose best interests, in terms of our Bill of Rights, are of paramount importance in these circumstances. The importance of the right to education was addressed by the Constitutional Court in *Governing Body of the Juma Musjid Primary School v Essay NO*[3] where the Court stated inter alia that *'… access to school – an important component of the right to a basic education guaranteed to everyone by s 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.'*

[33] As mentioned there were two legs to the applicants' challenge to the constitutionality of s33(2) of the Act. In the first place it was argued that should the Court find that s33(2) of the Act limits the scope of s33 of the Constitution by interpreting the former to require that schools subject to a possible closure need not be given the substance of the case against them, then s33(2) itself

[3]2011 (8) BCLR 761 (CC) at paras 36 – 44

must be held to be unconstitutional and invalid inter alia on the basis that such a restriction is unjustifiable.

[34] Mr Arendse did not press this ground too strongly, in my view correctly so. Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and to be given written reasons where their rights have been adversely affected by such action. Those rights are reinforced by the provisions of PAJA, *inter alia* sections 3 and 5, which, I have found, apply to the closure decisions and, *a priori*, to the process leading up to such decisions. Some of these provisions are both echoed and expanded in s33(2)(a) of the Act which requires reasons to be furnished for the decision-makers proposed closure of a school. The scope of those initial reasons remains to be determined but that is clearly not a matter which touches on the constitutionality of s33(2). It is rather a matter of interpretation which must be consonant with the constitutional right to just administrative action in terms of s33 of the Bill of Rights.

[35] The second leg of the constitutional challenge turns on what is said to be the Minister's unjustifiably wide discretion to close schools after following the procedure set out in s33(2) and its failure to place any substantive limits on the Minister's powers. Mr Arendse argued that in the absence of any guidance the Minister was not required to take into account a wide range of important considerations including whether affected learners can be accommodated at other schools or have access or transport to other schools, the effect of a school closure upon their safety and security and upon their right to education or the government's ability to meet its obligations to provide

basic education. Reliance was placed on the following dictum in *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para [54]:

> *'It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a matter that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given.'*

[36] There is no suggestion by the applicants that s33(2) infringes the right to just administrative action merely because it allows for the closure of schools. It is, furthermore, in my view self-evident that the closure of a public school may be necessitated by a wide range of considerations and that attempting to list them in legislation would be a pointless exercise. A decision to close a school must be preceded by the giving of reasons to the SGB which triggers an administrative process subject to PAJA. Clearly any school closure decision may not unjustifiably infringe on the basic constitutional rights of affected parties which are implicated by any such closure most notably the right to education. In this context it is a misconception to consider that the Minister's discretion is unconstrained. Inevitably a decision to close a school will be constrained by the requirement that proper regard must be had to every affected learner's basic rights, most notably the right to basic education. That right can potentially be compromised in numerous respects by such a closure, for example, by infringing his or her right to a safe and secure schooling environment or the right to receive education in the official language or languages of one's choice in public educational institutions where that is reasonably practicable.

[37] In resisting the constitutional challenge on behalf of the (national) Minister of Basic Education, Mr Masuku submitted that the Minister's discretion under s33(1) may not be exercised in a manner that violates constitutional rights or neglects the State's duty to provide for basic education. He contended further that the discretion afforded the Member of the Executive Council (*'MEC'*) is not constitutionally offensive inasmuch as the reasons that may result in an MEC exercising the power to close schools may vary widely depending on the circumstances of each school or the specific needs of each province. It is the broadness of the discretion, he submitted, that gives the necessary flexibility to the Minister to judge each case on its merits rather than seeking to mechanically comply with a set of legislative guidelines.

[38] In my view the applicants' reliance on *Dawood* is misplaced. In that very case the Constitutional Court stated that (at para [53]:

> *'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-makers is possessed of expertise relevant to the decisions to be made.'*

All these factors are present to a lesser or greater degree in the decision to close a school. The factors relevant to a school closure are numerous and varied and it would be invidious to require them to be identified in advance. To a large extent the factors relevant to the exercise of the discretionary power

are clear; an affected learner's right to basic education and other basic rights may not be substantially undermined or prejudiced by a school closure decision, due regard being had to the benefits that such a closure may have for the overall effective performance of the educational system within the constraints of a limited budget. Although the Minister is not necessarily someone possessed of special expertise in the field of education, his or her decision on a school closure will invariably be informed by a wide range of expertise from the senior officials involved in the process leading up to such a decision.

[39] In the circumstances I conclude that the challenge to s33 on the basis that it affords the Minister overbroad discretion is unfounded and the constitutional challenge in this respect must fail too.

WERE THE SCHOOL CLOSURE DECISIONS INVALID FOR LACK OF PROCEDURAL FAIRNESS?

[40] The applicants advanced a series of general review grounds which, it was argued, if upheld would be fatal to the procedural fairness of the process in the case of each and every school closure. The first such ground was the failure to grant a hearing to SADTU prior to the closure decisions. Reliance was placed on s3(1) of PAJA which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, as well as s2, which sets out the components of the procedural fairness including the right to adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.

[41] At a preliminary level, however, it should be noted that the definition of administrative action requires that the decision in question *'adversely affects the right of any person and which has a direct, external legal effect'*. Whilst not claiming that SADTU's own interests were affected, Mr Arendse submitted that SADTU represents the interests of the majority of educators at the schools proposed for closure, whose interests were indeed affected. He pointed moreover to the national guidelines for the closure of small and non-viable schools which recommend that the department engage with the unions. They state that:

> *'The consultation process must also extend to parents, NGO's, traditional leaders, broader communities, farming unions, teacher unions and school governance structures. Teacher unions must be engaged in the various bargaining councils.'*

By contrast the department's guidelines state only, by way of background:

> *'…. any decision to close a school must be administratively fair, rational and reasonable and should be made only after consultation with all relevant stakeholders and after consideration of the relevant facts.'*

[42] Mr Arendse contended that SADTU was clearly a stakeholder as envisaged in the guidelines. However, apart from the fact that the guidelines adopted by the department do not specifically identify the need for consultation with trade unions, by their very nature they are not binding upon the department. In any event within the context of the process leading up to the school closure decisions no substantive case is made out for obligatory consultation with SADTU failing which the process is rendered administratively unfair. When regard is had to the Rule 53 records of the school closures it is clear that SADTU was well aware of the process over the months and played a full role therein. Representatives of SADTU spoke in

that capacity at public meetings held in in respect of various schools and appear to have been responsible for distributing a pro-forma objection to each school closure. The form of the objection envisaged its member educators at each school filling in the name of the school and submitting the document as a written representation to the department or the Minister in terms of the s33(2) process.

[43] No prior demand appears to have been made by SADTU to the department or the Minister claiming a right to be consulted prior to any closure decision. Further, it is common cause that in November 2012 after such decisions were taken the department consulted with the relevant educator labour unions, including SADTU, before finalising the placement plans for the educators and other public service personnel who were affected. It is also common cause that no educator, whether a member of SADTU or not, faced the loss of his or her post as a result of any school closure. In each case provision was made for the educators to follow the children to the appropriate receiving schools. Most importantly, in laying out the detailed process to be followed by the Minister prior to making any school closure decision, s33 itself contains no requirement that a trade union or trade unions must be consulted.

[44] For these reasons I consider that the rights of SADTU, even as a representative of affected educators, were not adversely affected by the proposed school closures thereby rendering the process envisaged by s33(2) procedurally unfair from an administrative law point of view. Even if I am incorrect in this conclusion to the extent that there may have been procedural unfairness vis-a-vis SADTU this falls well short of constituting a separate and independent ground of review for the school closure decisions.

WAS THE SECTION 33(2) PROCESS ADMINISTRATIVELY UNFAIR FOR LACK OF ADEQUATE REASONS FOR THE PROPOSED SCHOOL CLOSURES?

[45] I have set out earlier the applicants' complaints concerning the alleged paucity of reasons initially furnished in respect of the proposed closures. It is contended further that the initial reasons were simply too short in the context of the complex array of factors that determined the decision to close a school. The complaint is also made that many of the range of complex policy factors which informed the Minister's decision were simply not conveyed to the schools which in many instances were unfamiliar with the policies of the department and the factors that drive government decisions. It was further argued that the reasons did not refer to the schools in any specific way, did not give any specific facts or standards which the school was required to meet or set out any specific policy considerations which applied to each school. It is also contended that the vagueness arose because the reasons contained hidden or obscured balancing processes. In this regard reliance was placed on one of the reasons given in the case of many of the schools, namely, that learners did not benefit maximally by multi-grade teaching. It was pointed out that multi-grade schooling was widespread and that there were obviously further reasons why that school was chosen. It was contended that the Minister should, in his reasons, have disclosed the policies of the department including the policy concerning multi-grade teaching.

[46] The starting point in relation to this ground of review are the provisions of s33 of the Act. They provide simply that the Minister must furnish the SGB's with his or her reasons for his or her intention to close the schools and they

make no reference to underlying or background policy. Then there are the requirements of PAJA, notably s3(2)(a), which provides that a fair administrative procedure depends upon the circumstances of each case. Section 5 of PAJA deals with reasons for administrative action but, unlike the process envisaged in s33(2), contemplates reasons after the administrative action has been taken and in any event sheds no light on what constitutes adequate reasons.

[47] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para [45] the Court stated:

> *'What will constitute a reasonable decision will depend on the circumstances in each case, much as what will constitute a fair procedure will depend on the circumstances of each case.'*

[48] In *Premier Mpumalanga v Executive Committee of the Association of State Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) the Constitutional Court held as follows (at para [41]):

> *'In determining what constitutes procedural fairness in a given case, the Court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well-recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'*

[49] In assessing the adequacy of the Minister's initial reasons it is important to bear in mind the nature of the process in which they were given. At that stage no decision to close any school had been taken. All that the Minister harboured was an intention to close the schools. Following his communication of his intention and his reasons to the SGB a process of

inviting and receiving representations was triggered which could potentially result in a large amount of further information, views and relevant material becoming available. In these circumstances, it appears to me, if the Minister's reasons erred on the side of brevity, then this was understandable. Put simply the Minister could not have identified, in his initial letters to the SGB's, full and final reasons for closure or not of the schools since those decisions had yet to be taken and had first to be informed by the process of representations and giving them proper consideration. All that could be furnished were simply initial reasons for possible closure. In this context it was not surprising that the Minister's media statement of 16 October 2012, published at the end of the s33(2) process, included further aspects which weighed with him in coming to the decision to either close or not close a particular school.

[50] Furthermore, when regard is had to the detail of the process as revealed in the Rule 53 record, it becomes apparent that those reasons furnished by the Minister in his initial letter to the SGB's were, by and large, the very reasons which had come to the fore in the department's own internal process of identifying which schools qualified for potential closure. That process was initiated by an application completed by the director of the relevant education district and two other senior officials in accordance with the department's guidelines for the closing of non-viable public schools. Those documents contained considerable basic information regarding the particular schools as well as a section providing for primary reasons for closure. The reasons given in such reports were invariably succinct such as, in the case of Redlands Primary School, *'multi-grade set up', 'learners number 74 from grade 1 – 7'* and *'poor LITNUM (literacy numeracy) results'.* This form was

then attached as an annexure to a relatively brief report to the Minister concerning the proposed closure of the school in which such reasons were generally given as the *'primary reasons'* for closing the school. These were either a repetition of the same reasons although in some cases an additional reason relating to *'weak leadership'* at the school is mentioned. The point is that, by and large, the SGB's were given the very same succinct reasons which were generated internally within the department and put before the Minister as reasons for a possible closure. It is thus not a case of reasons being truncated or withheld from the affected schools.

[51] Also relevant is that the principal of each school serves as an ex officio member of the SGB and would obviously have a vital interest in the proposed closure of his/her school. One would expect that the principal of every school would be familiar with departmental policy on the closure of small and non-viable schools, or at the very least to obtain that policy from the department upon notification of the school's possible closure. Certainly there is no suggestion in the applicants' affidavits that the department's policy on the elimination of multi-grade teaching or the closure of small or non-viable schools was kept secret. Reference is indeed made in the applicants' founding affidavit to the national guidelines for the rationalisation of small or non-viable schools with no indication that there was an undisclosed policy on the part of the department. In addition those principals who were members of SADTU would have been in a position to draw upon the resources of SADTU in regard to its knowledge of departmental and national policy in this area.

[52] It is significant, furthermore, that the applicants' case as set out in its founding affidavit made little if anything of the alleged paucity of the reasons

given in the Minister's initial letters giving notice to the SGB's of his intention to close certain schools.

[53] Notwithstanding submissions to the contrary, when one has regard to the minutes of the meetings held between departmental officials and SGB members there is little if any indication of the SGB's being unclear as to the reasons for a proposed closure. It is clear from the minutes of the meetings held with the SGB's as well as from the transcripts of the school meetings and the written representations made by interested parties that many of the applicant SGB's had at their disposal extensive information, including information about the proposed learner placement plans and applicable policy considerations. In particular the departmental policy in terms of multi-grade teaching appears to have been well known to the schools and communities concerned and submissions in this regard were made during the public participation process. Those meetings provided an ideal opportunity for the SGB's to seek clarification, if they needed this, of the Minister's reasons or of policy considerations. In certain cases this was provided by the officials at the commencement of the meeting without being asked. A case in point is Rietfontein School where the departmental official explained, after re-stating the Minister's reasons for the proposed closure, that multi-grade teaching was to be eliminated as a result of which learners should perform better academically.

[54] The initial written reasons furnished to each SGB were brief. Arguably they might have benefitted by the addition, where applicable, of a brief explanation of the department's policy regarding multi-grade teaching, centralising learners at larger schools, the reality of budget constraints and

optimum use of teachers. On the other hand had the reasons in respect of each school been buried in policy explanations, their thrust might have been lost or obscured with detrimental consequences for the process of making and receiving representations. As it transpired, the reasons given, brief as they were, elicited a flood of representations and responses including material of an academic nature concerning multi-grade teaching, personal testimonies and input from NGO's operating in the education sector.

[55] The sufficiency of the reasons are, in my view, indivisible from the process as a whole. When one considers the effectiveness of the process two features stand out: firstly, the process of obtaining representations from SGB's and the school community produced a large volume of material and information and views, all of which was collected and considered by a range of departmental officials and by the Minister. Secondly, not only did more information come to light but departmental officials and the Minister were, in seven out of twenty-seven cases, evidently persuaded thereby not to close the school and, in some instances, to institute alternative plans to support the school. These factors are, in my view, powerful testimony both to the effectiveness of the s33(2) process and the thesis that the reasons initially furnished, although succinct, did not operate as a stumbling block to the making of meaningful representations.

[56] Mr Arendse relied on a series of cases namely *Du Preez and Another v Truth and Reconciliation Commission*[4], *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156

[4]1997 (3) SA 204 (A)

(C), *Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W) and Crooke v *Minister of Home Affairs and Others* 2000 (2) SA 385 (T) in support of his argument that, in the absence of the substance or gist of the case against the schools (or, more accurately, for the closure of the school), the applicants were denied a fair and meaningful opportunity to make representations. There can be no quarrel with the fundamental ratio of this line of decisions but each of them recognises that the amount and content of the information or '*case against*' the affected party must depend on the circumstances of the particular situation or process. Thus in *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 HL, quoted with approval in Du Preez's case, Lord Mustill stated as follows (at 106 d - h):

> *'What does fairness require in the present case? …(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their applications to decisions of a particular time. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'*

[57] It is must also be borne in mind that the department and the Minister did not embark upon a disciplinary process of closing errant schools but rather one of rationalisation in which the Minister was required to have regard to the education system in given areas in the interests of the entire community and learner body rather than simply the interests of individual schools.

[58] In *Earthlife Africa* the Court held that fairness ordinarily requires that an interested party be given access to relevant material and information in order to make meaningful representations. On the other hand this could not be equated to a right to complete discovery. The remarks by the Court in *Earthlife* were made in the context of a situation in which the applicants were afforded an opportunity to comment or make representations on a draft environmental impact report but not on the final report in which new information was contained. In the present case it is unclear precisely what further information or policy the applicants consider was lacking which constituted *'adverse information and adverse policy considerations'* in the absence of which they were denied the substance or gist of the case against them. That the national department's policy guidelines for the rationalisation of small or non-viable schools were available is borne out by the fact that it was referred to in one of the annexures to the applicants' founding papers as well as a letter from Bergrivier Primary School SGB making representations against the closure of the school.

[59] To sum up, the responses of the SGB's and the school community reveal, in my view, no particular difficulties in their understanding of the gist of the case which led the Minister to form the intention to close the school. The reasons furnished to the SGB's and the school community were to all intents

and purposes precisely the same reasons which were generated in the departmental reports and placed in front of the Minister and which led him to form his initial intention. Whilst the process of giving these reasons could conceivably have been improved by furnishing a short background setting out the departmental policy concerning the closure of schools and other relevant policy, the failure to do so did not in my view impede the making of effective representations or amount to a factor so material that the brevity of the reasons can be elevated to a substantive ground of review irrespective of the merits of the decision or process in all other respects.

ARBITRARY AND CAPRICIOUS DECISIONS?

[60] The third general ground of review relied upon by the applicants was that the Minister's closure decisions were taken arbitrarily and capriciously inasmuch as certain schools were kept open and others not despite their circumstances being markedly similar, this as a result of a lack of clear and consistently applied criteria. Examples were given: in certain cases school closures were deferred on the basis that those schools could put in place ad hoc measures but not in other cases; in certain cases traffic safety concerns relating to learners was a factor in the closure and in others was not. Multi-grade teaching was cited as a reason for closure of all the rural schools but some schools which showed that this form of teaching could be successful were kept open whereas others were not. In one instance a school's good results and the appreciation which the community had for it was sufficient to displace the intention to close the school whereas in other cases, it was contended, this factor was disregarded by the Minister. I do not understand it to be the applicants' case that the Minister or the department's plans to effect closures of schools were in themselves irrational. Overall, however, it was

submitted, there was a wide and unpredictable variance in the decisions relating to similarly placed schools and this evidenced a lack of a rational basis for the closure decisions.

[61] To evaluate this ground of review regard must be had to the Minister's undisputed description of the nature of the decision which he was called upon to take. He stated as follows:

> *'A decision to close a public school entails the consideration of a range of complex factors against the background of a carefully designed educational policy in the province, as well as the limited resources available to the WCED. The deliberative process that is required is no different in this province from any other province, whose education departments also regularly close some schools whilst opening new schools or increasing the classroom capacity of existing schools. In the Western Cape, for instance, the WCED has since 2009 created school places for no fewer than 33 000 additional learners. Shifting demographics, as well as numerous other factors, necessitate the making of decisions both to open schools and to close schools.'*

Further he stated that his decision in each case:

> '…w*as motivated by the objective of improving the educational opportunities of all children in the province, and that the decisions are part of a process in improving the lives of over 4000 learners in the province. This includes measures to enhance the quality of education at some schools and to have learners attend schools that are better equipped to provide a quality education.*'

and that:

> '(a) *sensible balance must be struck. Even if it were demonstrably in the interests of 7 learners (for one of the applicant schools has only 7 learners) to have a school of their own, it would not be in the interest of learners in the province generally for the WCED to expend its financial resources disproportionately on those 7 learners.'*

[62] After referring to the guidelines he stated:

> *'the possible reasons for closing a school include low levels of learner enrolment, inadequate curriculum provisioning, limited school access, unsuitable schooling infrastructure, poor retention of learners, an inability to attract and retain educators, and difficulties related to the location of schools on private property.'*

[63] In his supplementary affidavit the Minister gave further insight into the background against which he was required to make school closure decisions, namely, a significant over-supply of primary schools and an under-supply of high schools (as a legacy of apartheid); many more schools than may be properly resourced and run in light of budgetary constraints; a reliance on multi-grade teaching in many schools; and many schools that are too small to provide an optimal education, according to international and local research and expert opinion.

[64] The Minister stated that one of the ways in which resources can be found for new high schools was to close small rural schools thereby freeing up valuable resources that can be better used elsewhere. His department maintained 1450 schools, of which 159 schools have up to 100 learners each. The department is of the view that its resources enable it to maintain approximately 1000 well-functioning and well-resourced schools and that schools should ideally have more than 100 learners in order to provide optimal educational, extra-curricular and social opportunities to all learners. The Minister mentioned further that over the past decade nearly 3000 schools have been closed in only five of the other provinces.

[65] Finally in this regard, the Minister stated that neither he nor his department had preconceived standards or tests against which they measured any performance of any particular school. The decision as to which

schools should be closed *'was one which involved a balancing of many factors'* and therefore no point was served by the applicants in comparing one or two aspects of an applicant school with one or two aspects of a school which was not closed.

[66] In *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) it was held that (at para [28]):

> *'Rationality, as a necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given; and to ensure that the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such action.'*

[67] In *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (at para [45] the Court dismissed an argument based on the fact that another provincial education department had dealt differently with the subject matter of the decision sought to be reviewed. In doing so the Court stated:

> *'That is irrelevant to the rationality enquiry. The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.'*

[68] There can be no doubt that the *'problem'* which faced the Minister as described above in his own words was complex and that his decision to close a number of schools in response thereto was a rational decision in relation to the purpose for which the power to close schools was given by s33.

[69] Ultimately, furthermore, the decisions to close schools are concerned with the allocation of public resources. As was recently noted by the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance*[5], albeit in the context of an interim interdict, *'... the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not always well suited to make decisions of that order.'*

[70] It is also appropriate in this context to be mindful of the boundaries of judicial power which follow from the doctrine of the separation of powers. The following was stated by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd:*

> *'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*[6]

[71] In my view the same can be said of the decision as to which schools should be closed and which kept open. The Minister's closure decisions had to balance a range of competing interests. The closure decisions are thus classically polycentric. They were taken after a lengthy and thorough process of investigation and evaluation in which the representations of the affected

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[5] 2012 (6) SA (CC) 223 at para 68
[6] 2012 SA 618 (CC) at para 95

SGB's and school communities played a critical role. Each of the schools initially identified was unique in relation to its geographical setting, learner numbers, facilities, feeder communities, history and particular problems.

[72] Finally, it is worth observing that school closure decisions are in their very nature contentious. In each case there will, very often and understandably so, be a large degree of community involvement and investment in the existing school. Whilst the range and depth of emotion may vary, the decision to close any school will generally be unpopular and unwelcome within the community in which the school is situated and which it serves and particularly with those who have long or historic associations with the school. Given the emotionally laden and contentious nature of a decision to close a school it is most unlikely that the ultimate decision will please all parties and interests concerned.

[73] In my view the applicants' attempts to ascribe arbitrariness or capriciousness to the closure decisions on the basis of certain similarities between some schools, is misplaced. No equation exists which can measure why, in a certain case, the Minister might or should have given greater weight to issues of road safety than in other cases. It is a case of comparing like with unlike and to ascribe arbitrariness or capriciousness on the basis of limited superficial similarities between schools or factors cited for or against their closure is a futile exercise. For these reasons I consider that the generic ground of review that the closure decisions were taken arbitrarily and capriciously is unfounded and falls to be rejected.

SCHOOL SPECIFIC GROUNDS OF REVIEW

[74] The applicants advanced a range of specific reasons and considerations in respect of each school as a basis for the argument that the Minister's decision to close the schools fell to be set aside. The underlying basis for this contention was that in taking the closure decisions the Minister had made material errors of fact in his reasoning process or by placing weight on irrelevant considerations or failing to give sufficient weight to relevant considerations, either in isolation or in comparison to other schools which were said to have found themselves in similar circumstances. In other cases, again often based on or in conjunction with errors of fact, it was submitted that closure decisions were not rationally connected to the information placed before the Minister or the reasons given for the school's closure.

[75] These grounds are, however, problematic in fundamental respects. The first is that on the applicants' approach this Court, in many instances, is required in effect to act as a court of appeal, making findings of fact relating to issues which are either raised at a late stage by the applicants or, in other instances, are credibly disputed by the respondents. Not only does this create irresolvable differences of fact on the papers but in requiring this Court to act as a court of appeal, blurs the distinction between appeal and review.

[76] In *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 SCA the Court recognised that in principle material mistakes of fact can constitute a ground of review. It cautioned, however, that such a basis for review (at para [48]):

> *'should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review'*

and added:

> *'for example where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'*

[77] In *Government Employees Pension Fund and Another v Buitendag and Others* 2007 (4) SA 2 (SCA), the Court confirmed that a material mistake of fact was a ground for the review of an administrative decision. Whether or not the decision would be reviewed and set aside depended on a consideration of the public interest in having the decision corrected, as well as other factors, particularly the interest of the person in whose favour the decision had been made. Ultimately the Court was required to make a value judgment, balancing all the relevant factors. Speaking of the materiality of the mistake the court stated as follows (at para [12]):

> *'The limits of the principle set out in* Pepcor*, particularly in view of the warning contained in that decision, have yet to be defined by the Courts; but it is instructive to have regard to the decisions of this Court where the principle has been applied. In* Pepcor *the decision maker would not have made the decision had he known the true facts; in* Bullock *the whole foundation of the decision was the incorrect advice given to the decision maker and in* Oudekraal *the fact not known to the decision-maker (or not taken into account by him) was obviously of cardinal importance in the decision he was called upon to make.'*

[78] It is clear therefore that *'mere'* errors of fact which are not material or fundamental to the decision cannot be used a basis for setting aside

administrative decisions, particularly those which are informed by a wide range of considerations i.e. polycentric and policy-laden decisions.

[79] Most recently in *Dumani v Nair* 2013 (2) SA 274 SCA the Court warned again against the review ground of material error of fact being misused so as to blur the distinction between appeal and review and held that where the power to make findings of fact was conferred on a particularly functionary the review ground would be confined to the situation where the functionary had made an error in respect of a fact that was established in the sense that it was non-contentious and objectively verifiable.

[80] The applicants relied on a range of alleged *'material errors of fact'* in relation to each school earmarked for closure. These included the number of learners said to be at the school as opposed to the numbers relied upon by the Minister, whether the learner numbers were *'continuing to climb'* or *'dwindling'*, various misdirections by the Minister concerning traffic safety concerns, whether multi-grade teaching was being successfully carried out at one or more schools which were subject to closure, the fact that in some instances the receiving schools were also carrying out multi-grade teaching and the standard or availability of certain facilities at some receiving schools.

[81] In my view there is little to be gained from a minute examination of these grounds of review since they are essentially appeals against the Minister's decisions based on errors of fact which are not material. There is in addition the legitimate concern that should the applicants be allowed to present at the stage of litigation a range of *'facts'* which they contend the Minister had not been informed of and which should have been taken into

account, the s33(2) process will be undermined and raises the real possibility of a cycle of representations and reviews. As counsel for the respondents argued in relation to a particular school, permitting challenges to the Minister's decision on the basis of information raised subsequently (some of it even changing in the course of litigation), would make it difficult if not impossible for the Minister to ever close a school. The Minister would never be able to determine whether he or she had been informed of all possible facts potentially relevant to the decision since a review would always be possible where an applicant could point to a further possibly relevant factor which happened not to have been placed before the Minister.

[82] Other pitfalls lie in the areas of debate about policy aspects which often underlie the reasons given to justify school closures. A prime example is that of multi-grade teaching. This Court is in no position to second-guess the respondents' policy regarding the elimination, where possible, of multi-grade teaching in small schools. Our courts have repeatedly held that it is not open to them to interfere with rational decisions of the executive lawfully made on the basis that the courts might consider that a different decision would have been preferable. Particularly where such decisions are complex, involve the balancing of competing interests and are taken by persons with special expertise and experience.

[83] Against this background I propose to deal thematically with the major areas of complaint which were specified, in one form or another, as grounds of review.

ADVANTAGES OF SMALL SCHOOLS

[84] The first is the polemic about the benefits of small schools, a viewpoint that arises in many of the supporting affidavits on behalf of the rural schools. Again this is not a consideration which the Court can second guess given that the Minister and the department have arrived at the view, supported by expert opinion and research and in line with national education policy, that learners derive significant benefits from attending large, better resourced schools. Furthermore, the department, under the political direction of the Minister, is best placed to determine the fairest and most equal manner in which to deploy its limited resources across the province. It need hardly be pointed out that where smaller schools are closed educators at those schools become available to teach at larger schools, often at the identified receiving schools with the result that the learner educator ratio at the receiving school is improved.

BUS TRANSPORT

[85] Many concerns were raised about the potential dangers of bus transport where rural schools are closed and the learners must now use such transport to reach more distant receiving schools. There is little reason to doubt the Minister's statement that the safety of learners is of great concern to him and the department and the Rule 53 record reveals that the question of transportation is a primary concern from the earliest stage of the investigation until the Minister's decision to close a school is finally taken. In all appropriate cases the decision to close a school was informed by whether or not there was an existing learner transport route or whether a new route had to be established if necessary. We were referred to no instances where learners faced with the difficulty of travelling greater distances to a receiving school had their interests ignored. Inasmuch as many representations raised

concerns about school learner safety and the Rheenendal bus tragedy in which 14 learners were killed, the respondents point out that some 50 000 learners in the Western Cape use the learner transport service daily and accidents are rare.

MULTI-GRADE TEACHING

[86] This is perhaps the prime example of a debate about policy in which the Court should not embroil itself in the review process. As the respondents point out, the elimination, where feasible, of multi-grade teaching in the best interest of learners is national and provincial policy, developed in accordance with national legislation and based on research and the views of experts in the field. It matters not that, as the applicants emphasized, certain of the receiving schools also practice multi-grade teaching. The Minister observed that it would be impossible to eradicate multi-grade teaching across the board in the Western Cape; this could only be done on a progressive basis and one such measure is through the closure of small schools and the moving of learners to larger schools where multi-grade teaching is likely to be eradicated sooner, particularly through the addition of those teachers who become available through the closing of smaller schools.

LEARNER NUMBERS

[87] Nor is there much to be gained through quibbles over the exact level of learners at a given school and whether numbers are declining *'drastically'* or only dwindling. As counsel for the respondents pointed out, this was often

only one factor taken into account by the Minister in his decision to close a particular school and the question of low numbers often merges into the question of dwindling numbers.

GANGS

[88] In many supporting affidavits reference is made to gang activities and turf wars and it is contended that children from one school cannot safely attend a school further down the road. It was common cause that the department runs a Safe Schools Programme to support schools in an endeavour to improve safety and security in learning environments. There is obviously a limit to what it can do to address fundamental socio-economic problems in communities, including gangsterism, and there is nothing to gainsay the Minister's statement that he took the safety of learners into account when he made the closure decisions.

[89] Although it is evident from the papers and the review record, it is worth recording that there is no instance, or at least none which has been drawn to my attention, of any proposed school closure which would leave any learner without an alternative school which he or she can feasibly and practically attend, thereby giving content to the right to basic education.

[90] In the result, subject to what follows, I consider that the school specific grounds of review are without merit.

DISCREPANCIES BETWEEN REASONS INITIALLY GIVEN FOR PROPOSED SCHOOL CLOSURES AND THE FINAL REASONS

[91] A further review ground advanced in respect of several schools was the discrepancy between the reasons initially given by the Minister for the proposed closure of schools and the reasons finally given. As has been pointed out this ground of review was relied upon specifically in the founding and supplementary affidavits in relation to Beauvallon and Lavisrylaan schools.

[92] The reasons given initially given by the Minister are found in the initial letters written to the SGB which were repeated in the notice calling a public meeting. After taking the closure decisions the Minister gave his reasons in his statement dated 16 October 2012. In that statement the format he used was to set out the primary reasons for the closure of the schools, describing these as being *'amongst the relevant considerations'* which had emerged. After announcing his decision to close he then cited further considerations which, for the most part, dealt with the advantages of a particular receiving school identified for those learners affected by a school closure.

[93] When the primary reasons for closure in the 16 October statement are read against the reasons initially furnished by the Minister for the proposed closure it will be seen that for the most part that they are substantially the same. There are, however, four instances where this is not the case and where, on 16 October, considerations are given as reasons for closure, which were not mentioned in the Minister's initial reasons. These four instances are Beauvallon Secondary School, Klipheuwel Primary School, Urionskraal SGK Primary School and Wansbek Primary School.

[94] In the case of Beauvallon the initial reasons given to the SGB were:

- *'consistent underperformance in the NSC examinations as well as Grades 8 – 11'; and*
- *'high dropout rate'*

[95] By 16 October both of these factors appeared to no longer have played a significant role in the Minister's decision to close the school since the reasons he cited for closure were:

- *'the infrastructure at the school is becoming increasingly unsuitable;*
- *the unsuitable infrastructure impacts on the safety of learners and teachers, the security of the school and the ability of the school to retain learners;*
- *the 461 learners can be accommodated at John Ramsay High School.'*

[96] After announcing his closure decision the Minister went on to state that John Ramsay High School had achieved better academic results and had a better retention rate than Beauvallon which can legitimately be seen as an indirect reference to *'underperformance'* and a *'high dropout rate'*, the initial reasons the Minister cited. Be that as it may, it is clear that what the Minister regarded as Beauvallon's unsuitable school infrastructure and its consequences for the school and its learners was a significant, if not the primary, reason for its closure. However, as Beauvallon's headmaster pointed out in the founding affidavit, this factor was never raised either with the SGB or with the school community by way of the Minister's initial letter or the public notice. Accordingly, neither the SGB nor the school was given an opportunity to engage with this factor as a potential reason for the closure of the school.

[97] Where the Minister relies to a significant degree on a reason for closure which has not been raised in the s33(2) process and which should have been cited initially, that process is undermined, if not rendered a futile exercise. In my view in the present circumstances this defect amounts to

significant procedural unfairness. It can be accommodated under a number of PAJA grounds including non-compliance with a mandatory procedure or condition prescribed by an empowering provision or even the taking of irrelevant considerations into account.

[98] This particular challenge to the procedural farness of the Minister's exercise of his powers was squarely raised by Beauvallon in the founding affidavit but was not answered. In the circumstances I consider that the Minister's decision falls to be reviewed on this basis.

[99] The same ground of review was specifically raised in respect of Lavisrylaan Primary School. In its case the initial reasons given for the proposed closure were that:

- *'the learner numbers have been dwindling';*
- *'there is also a preparatory school within 500m offering the same curriculum';*
- *'enough provisioning at neighbouring schools' and*
- *'there is no principal at present and the post has been vacant for three years'.*

[100] In the Minister's statement of 16 October 2012, save for the last-mentioned consideration relating to the principal's post, he relied upon substantially the same reasons for the school closure decision plus certain further considerations which had arisen during the course of the s33(2) process. The Minister relied upon no additional reasons adverse to the school itself for his closure decision. In the circumstances I consider the challenge to the decision to close Lavisrylaan School based on the above-mentioned ground of the review is without merit.

[101] In regard to Klipheuwel School the initial reasons given were that there was no feeder community and *'dwindling learner numbers'*. In giving his final reasons for the closure of the school the Minister cited various factors which arose from or related to the reasons initially given. However, he added the following:

> *'Klipheuwel Primary school relies upon multi-grade teaching. Based on learner enrolment figures at the school, the staff establishment provided by the WCED consists of 2 educators. These educators are required to teach 41 learners across grades 1 – 6.'*

[102] In relation to Urionskraal School the Minister cited as his initial reasons for closure that learner numbers have been dwindling and there was no feeder community. In announcing his decision he cited a number of reasons, which either arose during the s33(2) process or from the reasons originally given. Again, however, he cited a new reason in the following terms:

> *'Urionskraal NGK Primary school relies upon multi-grade teaching. Based on learner enrolment figures at the school, the staff establishment provided by the WCED consists of 2 educators. These educators are required to teach 34 learners across grades 1 – 6.'*

[103] Finally, in relation to Wansbek School the Minister gave as his initial reasons that learner enrolment was lower than 25. In announcing the school's closure the Minister cited as his primary reasons that school numbers were low and had decreased from 17 in 2009 to 7 in 2012 as well as other considerations which arose from the reasons initially given or which legitimately arose during the course of the s33(2) process. He added, however, the following primary reason:

'Wansbek VGK Primary school relies upon multi-grade teaching. Based on learner enrolment figures at the school, the staff establishment provided by the WCED consists of 1 educator. This educator is required to teach 7 learners across grade 4 - 6'

[104] The complaint can thus be made in relation to these three rural schools that the fact of their use of multi-grade teaching was not put to them at the beginning of the s33(2) process so that the SGB and the parent community could make representations in that regard. Mr Fagan conceded that the process was flawed to this extent but argued that the defect was not material inasmuch as it was common cause that the schools did carry on multi-grade teaching and, had this been raised in the initial reasons, it would have made no difference to the Minister's ultimate decision. There is weight to this submission inasmuch as a ground of review should not comprise a formalistic exercise of identifying discrepancies between initial and ultimate reasons and setting aside the decision irrespective of the materiality of such discrepancies. Furthermore, a decisive consideration is that none of the three schools involved relied upon the discrepancy in the reasons as a ground of review or to suggest that the s33(2) process was procedurally unfair. They did not suggest that had they known of the department's policy regarding the elimination of multi-grade teaching they would have seized the opportunity to make representations on that issue. In the result I am persuaded that inasmuch as it was not relied upon by the applicants and on the basis of its lack of materiality, this discrepancy cannot be relied upon as a basis to review these three closure decisions.

CONCLUSION

[105] For these reasons I consider the only school closure decision in respect of which grounds of review have been established is that pertaining to Beauvallon Secondary School. In this regard I have considered the judgment of Le Grange J but I find myself unable to agree that the applicants make out a case for the setting aside of any other school closure decisions. It follows that, in my view, apart from the relief sought by the first and second applicants, the remaining relief sought by the applicants should be dismissed.

COSTS

[106] The national Minister sought no costs order against any of the applicants. For their part the provincial Minister and the department sought no costs order against any applicant save for the South African Democratic Teachers Union, their rationale being that any costs orders against the SGB's or schools would be pointless since they would come out of the public purse. Costs were sought against SADTU principally because the Minister questioned its participation in the application, considering its involvement as *'purely political'*. However, should a costs order be granted against SADTU alone the effect would be that it has to carry the financial burden of unsuccessful litigation in which there were some thirty-two other unsuccessful applicants. SADTU's involvement in the application appears moreover to have derived in no small part from its stance that the Minister was under an obligation to consult with it before making any school closure decisions. Although I have found that argument to have no merit I consider that the public interest is served in having this question determined by a court as also the question of the parameters of a s33(2) exercise. Taking all these factors

into account I consider that it would be inappropriate to burden SADTU with a costs order.

[107] In the result I would have made the following order:

1. *The first respondent's decision, made on or about 16 October 2012, to close Beauvallon Senior Secondary School with effect from 31 December 2012, is reviewed and set aside;*
2. *The review applications by the third to 35th applicants in respect of the first respondent's decision to close another 16 schools with effect from 31 December 2012 is dismissed;*
3. *The application for declaratory for relief in relation to s33(2) the South African Schools Act, 81 of 1996, is dismissed;*
4. *The first and second respondents are ordered to pay the first and second applicant's costs.*

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B O Z A L E K , J