Constitutional contestations: Solving governance disputes in South African schools

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1. Introduction: The history of education in South Africa

The themes of domination and resistance loom large in the history of South Africa's education system, and this is important in shaping our understanding of South Africa's current education system and governance of schools.[1] Since the arrival of colonisers and the introduction of formal schooling, the provision of education has always been unequal. While the children of the colonisers were generally provided with adequate or even excellent education, the same was not true for the children of the colonised. The children of slaves were introduced to the first formal school in 1658, which unsurprising, was highly oppressive.[2] Mission schools were introduced in the 1730's and expanded towards the end of the 18th century[3] and they contributed enormously to the education of black South Africans for about one hundred and fifty years.[4] Nevertheless, the majority of black children were unable to access any education at all. In 1953, when the Apartheid government introduced the Bantu Education Act,[5] it placed financial as well as political constraints on mission schools, which made mission schools impossible to operate.[6]

[1] DDT Jabavu 'The Segregation Fallacy and other Papers' available at https://www.sahistory.org.za/topic/amersfoort-legacy-history-education-south-africa (accessed 22 August 2018). See also J Jansen 'Curriculum as a Political Phenomenon: Historical Reflections on Black South African Education' 1990 59(2) *The Journal of Negro Education* 195-206.

[2] V Msila 'From Apartheid Education to the Revised National Curriculumn Statement: Pedagogy for Identity Formation and Nation Building in South Africa' 2007 16(2) *Nordic Journal of African Studies* 146-160. See also https://www.sahistory.org.za/topic/amersfoort-legacy-history-education-south-africa

[3] J Du Plessis *A History of Christian missions in South Africa* (1911) 99-102.

[4] J L Van der Walt 'Hermeneutics for a Balanced Assessment of Mission Education in South Africa until 1953' 1922 12(2) *South African Journal of Education* 220-225.

[5] Act 47 of 1953.

[6] A Lewis 'Perceptions of Mission Education in South Africa from a Historical-Educational Perspective' 2007 *Tydskrif vir Christelike Wetenskap* 182.

The Apartheid laws had a particular focus on ensuring an education of poorer quality for black South Africans.[7] This was not a by-product but a conscious aim of the Apartheid era Education Department, articulated clearly by Hendrik Verwoerd, the then Minister of Native Affairs and architect of Apartheid that Bantu Education was designed to teach black learners to be 'hewers of wood and drawers of water'.[8] One of the chief aims of apartheid was that all races in South Africa developed separately and this was achieved through deliberate and systematic segregation in all spheres of life.

Through the Bantu Education Act, education of black children was taken out of the hands of mission schools and the apartheid government insisted that the Black South African should be limited in such a way that '…he is taught enough English and Afrikaans to enable him to carry out orders'.[9] The amount of money allocated to Bantu education was limited during the 1970s, per pupil spending for white learners was ten times that for black learners.[10] Education for black children was underfunded and the classrooms were overcrowded. Bantu education was simply inadequate.[11] This legacy continues to affect learners in South Africa today. Spaull has described the state in South Africa's public education system as being bifurcated into two systems.[12]

Before the implementation of the new Constitution, parliament was sovereign.[13] The legislature and the judiciary were seen as a single entity and this centralised power in the hands of

[7] S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 35.
[8] http://overcomingapartheid.msu.edu/sidebar.php?id=65-258-2 (accessed 22 August 2018).
[9] J Barkon 'Apartheid in South Africa' 1961 *Current History* 106. 'He' in this case is the black South African.
[10] C Simbo 'The Right to Basic Education, the South African Constitution and the *Juma Musjid* case: An Unqualified Human Right and a Minimum Core Standard' 2013 17 *Law, Democracy and Development* 168.
[11] M Mncwabe *Post-Apartheid Education: Towards Non-Racial, Unitary and Democratic Socialization in the New South Africa* (1993) 27.
[12] N Spaull 'Education in South Africa: A Tale of Two Systems' http://www.politicsweb.co.za/opinion/education-in-sa-a-tale-of-two-systems (accessed 9 January 2018).
[13] M Van Heerden 'The 1996 Constitution of the Republic of South Africa: Ultimately Supreme without a Number'2007 26 *Politeia* 33.

parliament. The effect of that was that the judiciary had limited capacity to review executive power.[14]

2. The establishment of the current governance system

Shortly before the new government came to power (1991), the National Party government under President de Klerk started the process of decentralising and deracialising education.[15] Post 1994, a new legal framework for schooling was introduced through the South African Schools Act,[16] the National Education Policy,[17] as well as various policies of norms and standards. The new system introduced desegregated schools, nine years of compulsory education and most importantly for the focus of this chapter, it established a new school governance system. The democratic government aimed to decentralise control of public school education and this resulted in the current system where significant power is ceded to multiple role players in education, notably provincial governments, unions, parents, principals, learners, and school governing bodies.[18] According to Woolman and Fleisch, this was done deliberately to ensure that no one interest group is left to use the law as a means of promoting its own agenda as the previous government had done.[19]

Oldfield notes that the reconstruction of the South African society as a whole required a re-rewriting of both legal and social contracts that govern the relationship between the state and its citizens in the post-apartheid era.[20] In the area of education, this required that the state introduce new policies that rebuild educational structures from school level, the district level, the provincial level and the national level. Put simply, Oldfield envisions a structural

[14] P Labuschagne 'The Doctrine of Separation of Powers and its application in South Africa' 2004 23 *Politeia* 86-87.
[15] S Woolman& B Fleisch *Constitution in the Classroom* (2009)5.
[16] Act 84 of 1996.
[17] Act 27 of 1996.
[18] Woolman & Fleisch *Constitution in the Classroom* (2009)3.
[19] Woolman & Fleisch *Constitution in the Classroom* (2009) 6.
[20] S Oldfield 'The South African state: a question of form, function and fragmentation' in Motala & Pampallis (eds) *Education and Equity: The Impact of State Policies on South African Education* (2001) 32-33.

redistribution of power in to the different tiers of government in post-apartheid South Africa,[21] which has largely been achieved. Woolman and Fleisch observe that '[t]he South African system of public education is no longer the product of a parlous, fragile state: it is the product of a government with a much firmer grip on the levers of power'.[22]

3. A description of the current governance arrangements in South African schools

In post-apartheid South Africa, the democratic government sought to embed new values in our education system. One such value was democracy in the governance of public schools so that parents, learners, educators and the community would participate and work in co-operation with each other.[23] Another important value that was established by the newly elected government was constitutionalism - that policies and rules that govern public schools were to be infused with the principles enshrined in the Constitution.[24] The same constitutional principles were intended to guide the basic minimum standards as provided for by national laws, provincial laws and policies. What follows is a description of governance arrangements, with a focus on the powers and duties of school governing bodies (SGBs) compared with the powers and duties of heads of departments (HODs).

4. The various role players in school governance

Various levels of governance coexist within government at the national, provincial, district and circuit levels and SGBs govern at school level. The minister for basic education represents the department of education and has the responsibility of governing schools at the national level. In each province, there is a head of the provincial department of basic education (provincial DBE) who is responsible for school governance at the provincial level. Furthermore, each province is divided into various education districts, which are headed by directors at the district office.

[21] *Ibid.*
[22] Woolman & Fleisch *Constitution in the Classroom* (2009)7.
[23] L Stwayi & B Mansfield-Barry 'School Governance' in F Veriava, A Thom & TM Hodgson *Basic Education Rights Handbook* (2017) 75.
[24] F Veriava 'The Contribution of the Courts and of Civil Society to the Development of a Transformative Constitutionalist Narrative for the Right to Basic Education'. Unpublished PhD thesis, University of Pretoria, 2017.

These districts are further divided into education circuits, which are headed by circuit managers whose functions are delegated by each district office.

The minister for basic education has the role of creating basic standards that all schools should meet in the provision of education.[25] The Minimum Uniform Norms and Standards for Public School Infrastructure which all provincial governments should adhere to is one such an instance. The Provincial Department of Basic Education(DBE) must ensure that there are enough schools for all learners, which must be in line with the standards set by the minister.[26] District officers play a supportive role by carrying out delegated functions from the DBE. District officers can dissolve SGBs that are no longer effective and can also withdraw certain functions of the SGB on reasonable grounds.[27]

4.1 The School Governing Bodies

The SGB is made up of school principals, educators and non-educator staff, parents of learners of the school, learners (the representative council of leaners) and co-opted members of the community in which the school is situated. The SGB plays a supporting role, including acting in the school's interest,[28] supporting school staff, appointing SGB staff, encouraging partnerships and augmenting the finances of the school.[29] SGBs also have administrative functions such as the adoption of a code of conduct[30] and a constitution for the SGB. The administration of property, asset management and the purchasing of goods and services also fall within the domain of the SGB. The SGB sets school policies on issues such as language,[31] religion in schools, admissions[32] and policies relating to specific issues such as learner pregnancy and school safety. These policies must be in line with the provisions of the Constitution and the South African Schools Act.

[25] SASA 5(A).
[26] Stwayi & Mansfield Barry 'School Governance' 77.
[27] *Ibid.*
[28] T Bisschoff 'Functions of School Governing Bodies in South Africa- First Steps Towards School Based Management' 2000 *Management in Education 14* 12.
[29] *Ibid.*
[30] SASA 8.
[31] SASA 6(2).
[32] SASA 5(5).

The school's code of conduct is developed by the SGB through a consultative process involving the learners.[33] SGBs conduct disciplinary hearings for breaches of the code of conduct and may take measures, including temporary suspension of a learner in certain circumstances, and may recommend expulsion, which must be ratified by the HOD.[34]

4.2 The Head of Department

The head of department (HOD) is the most senior official in the department of the provincial department of education.[35] The HOD reports to the Member of Executive Council (MEC), who is the elected political head of the provincial department. The HOD has a wide range of responsibilities, key aspects of which will be highlighted in the case law discussed below. Firstly, the HOD is responsible for education must ensure that each SGB's admissions policy complies with national norms and standards.[36] The HOD can also intervene in the language policy of a school. The HOD must also ensure that a learner who is subject to compulsory attendance of school,[37] is provided with a place in a school.[38] If an application for admission is refused, the HOD must in writing, inform the parents or guardians of such a learner of the refusal as well as the reasons thereof. [39] Furthermore, if a learner who is subject to compulsory attendance is expelled from school, the HOD must ensure that such a learner is placed in an alternative school.[40]

The HOD may also exempt leaners from compulsory school attendance, entirely, partially or conditionally if such exemption would be in the best interest of the learner.[41] The HOD must keep a record of learners who are exempted from attending school.[42] Perhaps most

[33] Bisschoff 'Functions of School Governing Bodies in South Africa' 12.
[34] SASA 9.
[35] Stwayi & Mansfield-Barry 'School Governance' 83.
[36] *Ibid.*
[37] It must be noted that the South African Schools Act provides for the compulsory attendance of school for learners from the first grade to the ninth grade or from ages 7 to 15. See chapter 2 of the Act.
[38] SASA 2.
[39] SASA 2 (8).
[40] SASA 2 (5).
[41] SASA 2 4(1).
[42] SASA 2 4(2).

importantly, is the fact that the HOD also has the responsibility of enhancing the capacity of school governing bodies through the establishment of a program to train newly elected governing bodies, to enable them perform their functions, and to provide continuance training to enable them assume additional functions and to promote effective performance of their functions.[43] HODs must further ensure that principals assist SGBs in the performance of their functions. HODs must also determine the manner in which an application to a public school must be made.[44] HODs may expel a learner if found guilty of a serious misconduct.[45] An HOD may on reasonable grounds withdraw the function of the SGB.

The different role players in the realisation of the right to a basic education provides confirmation that the drafters of the South African Schools Act viewed school governance as a democratic process.[46] The democratisation of education means that the government embraces principles such as participatory democracy in the area of education.[47]Participatory democracy means that all stakeholders in the area of education can be involved in decisions concerning education.[48] A key feature of participatory democracy is co-operative governance, which refers to role players working together in harmony and in good faith with one another to ensure the realisation of the right to a basic education.[49] The Constitutional Court has introduced a public participatory remedy called meaningful engagement.[50] This process is part of co-operative governance and requires that parties talk to one another in a constructive manner and in good faith in order to resolve disputes, particularly, disputes concerning the realisation of socio-economic rights. Meaningful engagement as a participatory remedy in cases of disputes is discussed in detail below.

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[43] SASA 3.
[44] SASA 2 5(7).
[45] SASA 2 9(2) a.
[46] R Kruger & C McConnachie 'The Impact of the Constitution on Learners Rights' in T Boezaart (ed) *Child Law in South Africa 2ed* (2017) 536.
[47] Stwayi & Mansfield-Barry 'School Governance' 80.
[48] R Kruger & C McConnachie 'The Impact of the Constitution on Learners Rights' 536.
[49] *Ibid.*
[50] See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC), *Port Elizabeth v Various Occupiers* 2004 (12) BCLR 1268 (CC), *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC), *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC).

5. Co-operative governance in four selected court cases

Section 40 of the Constitution provides for the principles of co-operative governance and inter-governmental relations amongst all spheres of government and all organs of state. Co-operative governance is a key principle in school governance and requires parties to resolve matters in good faith and to engage with each other meaningfully. The idea is that parties must go through all the internal processes provided for resolving disputes before turning to the court: the court must be a last resort. This is in line with the principles of participatory democracy since it ensures that all parties are involved in achieving the right to education.[51] Moreover, the Schools Act sets out how the different role players in education must work together to ensure the realisation of the right to basic education.

However, this is easier to state in theory than it is to achieve in practice. Several disputes between SGBs and HODs have reached the courts. This chapter describes four cases which were involved disputes so intractable that they were fought all the way through three tiers of courts, to the Constitutional Court. The cases will be described and analysed, with a focus on the governance issues that were in dispute, and on the remedial approach of the Constitutional Court in respect of each.

5.1 The Hoërskool Ermelo case on language policy

The first case deals with access to education, relating to the right to be educated in a language of one's choice. The South African Constitution guarantees a right to be educated in a language of one's choice but this is subject to a number of qualifiers: it must be reasonable, practical, just and such right must be exercised in a manner that does not infringe on the equal right of access to education of others.[52] This formulation in the Bill of Rights was a compromise driven

[51] Stwayi & Mansfield-Barry 'School Governance' 80.
[52] H Choma 'Head of Department et al and Ermelo et al Judgment: A Critique' 2011 8:477 *US-China Law Review* 481.

by the former government's negotiators, as they were determined to protect the Afrikaans language as a language of instruction. The African National Congress could accept that but wanted to ensure that language was not used to exclude children on the basis of race. There were some early cases on this issue,[53] but the first case which went all the way to the Constitutional Court began in Ermelo, where the English medium schools could no longer accommodate grade 8 learners due to the fact that the classrooms had reached their maximum capacity.[54] Consequently, approximately 113 grades 8 learners were note admitted into any school. Hoërskool Ermelo was an Afrikaans medium school and was only prepared to take the learners if they were willing to be taught in Afrikaans. It must be noted that the school could accommodate 2000 learners but only 587 learners were in the school at the time (2007). For this reason, the department of education reasoned that the number of children in Hoërskool Ermelo was below the norm and hence the school should accommodate the grade 8 learners who not in school.[55]

Hoërskool Ermelo refused to admit the English medium grade 8 learners.[56] The HOD withdrew the power of the SGB to determine language policy and also to appoint an interim SGB to decide on language policies. It was the interim governing body's decision to make the school a parallel medium school (English and Afrikaans) that brought the issue to the High Court. The High Court upheld the decision of the HOD, reasoning that in terms of the Schools Act, the HOD had the power to withdraw the authority of the SGB to pronounce on language policies.[57]

The High Court took the approach that in terms of section 22(1) of the Schools Act, the HOD is entitled to revoke any function of an SGB and this includes the function to determine a school's language policy.[58] It was held further that once the any function of the SGB is revoked, the

[53] For example, *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2005] 3 All SA 436 (SCA).

[54] *High School Ermelo and Another v Head of Department Mpumalanga Department of Education and Others* (3062/2007) [2007] ZAGPHC 232 Par 29. *(*Hereafter *Ermelo HC*).
[55] *Ermelo HC* Par 49.
[56] *Ermelo HC Par* 28.
[57] *Ermelo HC Par* 28.
[58] *Ermelo HC* Par 13.

provisions of section 25 of the Schools Act applies. The implication is that the SGB ceases to perform its function in terms of section 25 and the HOD may appoint people to perform the function. Considering this reasoning, the High Court held that the HOD had acted reasonably.[59]

The case was then taken on appeal to the Supreme Court of Appeal (SCA). The SCA shifted the focus away from language policy and focused instead the principle of legality and the exercise of administrative power.[60] The court looked at key provisions of the Schools Act such as the power given to the governing body to govern the school.[61] According to the Schools Act, the governing body may perform only the functions and responsibilities prescribed to it by the Act. The court focused on section 6 of the Act which grants authority to the SGB of a public school to determine the language policy of the school.[62]The Court held that the HOD had no power to revoke the power of the SGB to determine language policy since this power is exclusively given to the SGB by withdrawing the powers of the SGB, and the court held that the HOD had acted unlawfully.[63]

The Constitutional Court's approach to the case differed from that of the appeal court. Although it continued to focus on governance, this judgment is clearly located within a deep understanding of the historical context and the need for redress. Justice Dikgang Moseneke's words set the scene:

> 'The case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners per class ratios in Ermelo reveal startling disparities which point to a vast difference of resources and of the quality of education. It is trite that education is the engine of society. And therefore, an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage.'[64]

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[59] *Ibid.*
[60] *Hoërskool Ermelo and another v the Head of Department of Education, Mpumalanga and Others [2009] 3 All SA 386 SCA* Par 3. (Hereafter *Ermelo SCA*).
[61] *Ermelo SCA* Par 14.
[62] SASA 6.
[63] *Ermelo SCA* Par 30.
[64] *Head of Department Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* [2009] ZACC 32(Hereafter Ermelo CC) Par 2.

The Court reminded the parties that a public school is a public resource and has to be managed in the interests of the learners, parents and the broader interests of the members of the community in which the school is situated, in light of the values enshrined in the South African Constitution.[65] The court held that the determination of language policy in public schools must be exercised by the SGB but emphasised that the power to determine language policies in a public school must be 'understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress.'[66]

As to the appointment of the interim committee, the court held that it was unlawful and that even if it was lawful, the way the HOD appointed the interim committee and the way it proceeded to determine a new language policy was against the requirements of procedural fairness.[67] The court found it just and equitable to direct the SGB to reconsider and determine the school's language policy in light of the judgment. The court directed the SGB to consider adapting its language policy since its enrolment numbers were dropping. Moreover, there was a need to address the unequal access to education, which the language policy was perpetuating.[68]

The Court held that the approach of the SGB in which only the needs of learners in Hoërskool Ermelo were considered in the determination of their language policy had to be re-assessed and that it was the needs of learners in the broader community – beyond the school - that had to be taken into consideration.[69] The Court added that the approach of the school was inconsistent with the provisions of our new Constitution, especially section 29(2), as well as with section 6(2) of the Schools Act.[70]

[65] *Ermelo CC* Par 80.
[66] *Ermelo CC* Par 61.
[67] *Ermelo CC* Par 92.
[68] *Ermelo CC* Par 100.
[69] *Ermelo* CC Par 17-18.
[70] *Ermelo* CC Par 21-23.

In the end, the Court ordered that the SGB and the department to report to the Court within a specified period on the steps they had taken to review the language policy and the outcome of such meeting.[71] The Court added that:

> 'An overarching design of the [Schools] Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education, whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education, who bears the obligation to establish and provide public schools, and together with the Head of the Provincial Department of Education exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body, which exercises defined autonomy over some of the domestic affairs of the school.'[72]

The school carried out the directions of the court, this resulted in them adjusting their language policy to permit the inclusion of the learners who were taught in English, and the SGB even committed funds for the appointment of extra teachers to do so.[73]

Van Leeve submits that this case provided content on the right to education and the obligation of SGBs in respect of the right to education: the court listed factors which needs to be considered when determining what is reasonably practical to learn in a language of one's choice. [74] These factors included the availability of and accessibility of public schools, enrolment levels, the medium of instruction, the language choices that both parents and learners have made and the curriculum options.

5.2 The Rivonia Primary case on admissions policy.

The second case deals with the refusal of admission to a school on the basis that the school is full. In the *Rivonia* case, the first applicant (the SGB) had determined a policy that governs the admission of learners to the second applicant (a public primary school, hereafter referred to as

[71] *Ermelo* CC Par 75.
[72] *Ermelo* CC Par 56.
[73] E Serfontein and E de Waal 'The Effectiveness of Legal Remedies in Education: A School Governing Body Perspective' 2013 1 *De Jure* 45-62.
[74] Y Van Leeve 'Executive Heavy Handedness and the Right to Basic: A Reply to Sandra Fredman' 2016 *Constitutional Court Review* 199-215 208.

the school).[75] The school had the capacity to admit a maximum of 840 learners, which amounts to a total of 120 learners per grade.[76] The fourth applicant (the mother of the child who was refused admission) was the 140th applicant and was allocated number 140 on the 'A' waiting list[77]. It was communicated to the child's mother that the school had reached it maximum capacity and could not admit her daughter to grade 1.[78]

The child's mother appealed the matter to the MEC for education. The MEC received statistics that in 2011 the school admitted 124 learners into grade 1 and hence the school had not reached the maximum capacity and instructed that the learner be admitted to grade 1.[79] The School still refused to admit the learner insisting that the school had reached its maximum capacity. The district office director arrived at the school and gave a notice to the principal to the effect that the HOD had delegated the admission function to him in his capacity as district director. He then physically marched the learner to the nearest grade 1 class and put her at an empty desk.[80] The issue before the court was whether the capacity of a public school is determined by the SGB (taking into regard the interests of the learners in that school) or by the HOD who is under a statutory duty to ensure the provision of public schooling to all the school age learners in the province. [81]

In the High Court, the central argument of the applicant was that section 5(5) of the Schools Act provides that the admission policy of a public school is determined by the SGB of such school.[82] The court reasoned that providing basic education across race and class (looking at the demographics of the nation) requires the government's intervention in the preliminary power given to the SGBs to determine admissions policies.[83] The court added that if the government

[75] *Governing Body Rivonia Primary School and another v MEC for Education: Gauteng Province and Others (GSJ case No 11/08348;7)* December 2011(Hereafter Rivonia HC) Par 6.
[76] *Rivonia HC* Par 6.1.
[77] *Rivonia HC* Par 8.
[78] *Ibid.*
[79] *Rivonia HC* Par 12.
[80] *Rivonia HC* Par 13.
[81] *Rivonia HC* Par 14.
[82] *Rivonia HC* Par 15.
[83] *Rivonia HC* Par 73.

does not intervene in the power given to schools to determine admission policies (and the necessary and implied duties included in the determination of policies) then we allow for a situation where power can be used to perpetuate existing inequalities.[84] The power given to SGBs to determine admissions policies cannot be interpreted in such a way as to prevent the hand of the government from completely interfering.

The court concluded that section 5(5) of the South African Schools Act 'should not be interpreted to include the unqualified and exclusive power to any SGB to determine a school's maximum capacity.'[85] The SGB and the department should have a common vision of providing basic education for children. [86] The court then held in favour of the MEC for education and the SGB, unhappy with this decision, appealed the matter at the SCA.

The Supreme Court looked at the preamble of the South African Schools Act which provides that schools would be governed democratically with learners, teachers and parents in partnership with the state.[87] According to the education White Paper,[88] public school governance was to become part of the country's new structure of democratic governance. The idea was that public-school governance would depart from the model of authoritarian control of education of the pre-constitutional era.[89]

The court reasoned that the governance of public schools was now vested in schools and their school governing bodies and the principal of the school serves ex officio on the governing body as a representative of the HOD.[90] The governing body must promote the best interests of the school which includes the making and implementation of policies, admission policies being an incidence of such policies.[91] The implication is that the HOD acts through the principal, who is

[84] *Ibid*.
[85] *Rivonia HC* Par 79.
[86] *Idem*.
[87] *Rivonia SCA* Par 27.
[88] The Organisation, Governance and Funding of Schools (Education White Paper 2), GN 130, February 1996(Organisation, Governance and Funding White Paper) para 3.17)
[89] *Ibid.*
[90] *Rivonia SCA* Par 28.
[91] *Rivonia SCA* Par 33.

responsible for the management and the administration of the admission of the school (the admission is done through the school governing body's admission policy).[92]

The question then arises whether the authority of a governing body to govern a school is absolute? The Supreme Court answered in the negative and referred to a White Paper[93] which spelt out the oversight role of the department of education and section 22(1) of the South African Schools Act which gives the HOD the authority to withdraw certain responsibilities from the SGB but only after informing the SGB of the intention to do so.[94] The Court held that the lawmaker purposely gave the power over admission policies to the school governing bodies with the intention of promoting democratic school governance.[95] The HOD then appealed to the Constitutional Court.

The Constitutional Court held that compulsory communication and co-operation needed to be ensued between the SGB and the department of education.[96] The aim of this was to instil the notion of co-operative governance between the SGB and the department of education in order to bridge the gap that was created by the previous regime and wherein the power to make decisions regarding admission was left in the hands of the SGB and the consequence of which we are trying to correct today.[97] The Constitutional Court created space to allow for deliberative democracy and meaningful engagement, some of the things that were lacking in the previous regime.[98]

The Constitutional Court held that the HOD had the power to admit the learner. SGB may determine capacity as part of its admission policy, but that this does not vest complete power

[92] *Ibid.*
[93] The Organisation, Governance and Funding of Schools (Education White Paper 2), GN 130, February 1996 (Organisation, Governance and Funding White Paper) Par 3.17.
[94] *Rivonia SCA* Par 36.
[95] *Rivonia SCA* Par 45.
[96] *Ibid*.
[97] *Rivonia CC* Par 54-74.
[98] See further S Liebenberg 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' 2016 19 *PELJ* and G Muller 'Conceptualizing 'Meaningful Engagement' As a Deliberative Democracy Partnership' 2011 3 *STELL LR.*

in the SGB. However, this power had to be exercised within the parameters of the Schools Act, which provides that it is the department of education that has ultimate power to determine the implementation of admission decisions.[99] Considering this, it was held by the Constitutional Court that the HOD was empowered to issue an instruction to the principal of a public school to admit a learner even though such admission will be in excess of the capacity limit set in the admission policy.[100]

The Court highlighted the provincial regulations which gave the HOD the authority to overturn a principal's decision whether to accept or reject a learner's application.[101] A prominent theme in the Court's judgment was the need for co-operation between the SGB and the HOD. The Court stressed that compulsory co-operation was needed in disputes of this nature.[102] The Court emphasized that such co-operation was rooted in the shared constitutional goal of ensuring that the best interests of the learners are furthered and that the right to basic education is realised.[103] The Court reiterated its findings in the Welkom and Ermelo cases and highlighted its prior calls for cooperation amongst role players in education.[104] Again, the Court called for engagement between the SGB and the HOD:

> 'Where a provincial department requires a school to admit learners in excess of the limits stated in the school's admission policy, there must be proper engagement between all parties affected. This principle of cooperation permeated this Court's approach in Ermelo and was reaffirmed recently by the majority of this Court in Welkom.'[105]

An important point which was raised by the case was that if the Department of Education is not involved in the determination of capacity and admissions there will be a continuation of the patterns of privilege and poverty which transformation seeks to address.[106] The Court had clarified who had the final say in admission disputes but that this does not imply that the SGBs

[99] *Rivonia CC Par 80*.
[100] *Rivonia CC* Par 81.
[101] *Rivonia CC* Par 54.
[102] *Ibid*.
[103] *Ibid.*
[104] *Rivonia* CC Par 74.
[105] *Rivonia* CC Par 72.
[106] Skelton A 'The Role of the Courts in Ensuring the Right to a Basis Education in a Democratic South Africa: A Critical Evaluation of Recent Education' 2013 1 *De Jure* (46) 17.

have no power. The SGBs can still decide on their admission policies but the Court's point was that those policies are not inflexible.[107] The decision of the Court means that realistically, public schools are to be ran as a matter of partnership between the SGBs and the HODs. This echoes the Court's call for co-operation between the SGBs and the HODs.

Fredman observes that the court focused on the procedural issues in the case and neglected to deal with the substantive issues which in her view were complex and needed the attention of the court.[108] She added that the case concerned a socio-economic right (the right to education) which gives rise to a positive duty on the state to promote, protect and fulfill but the court focused on its traditional function which is restraining excess of power.[109]

Van Leeve disagrees with Fredman to some extent, pointing out that in comparison to SCA, the Constitutional Court approached this case differently to the way it dealt with *Welkom*. The court characterised Rivonia as an example of a 'radically unequal distribution of resources and an ongoing disparity in accessing and quality education resources'. [110] This approach according to Van Leeve is a turn-around as compared to the approach of the SCA.

Skelton submits that adequacy or quality was a major theme in this case since the Court engaged with issues such as capacity and class sizes.[111] She adds further that the case was also about availability since it raises the question of whether the Department of Basic Education in the province had provided sufficient schools for learners in that area. Skelton also submits that an important point which was raised by the case was that if the Department of Education is not involved in the determination of capacity and admissions there will be a continuation of the patterns of privilege and poverty which transformation seeks to address.[112]

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[107] https://mg.co.za/article/2013-10-03-concourt-rules-in-favour-of-department-in-rivonia-primary-admissions-case (accessed 15 November 2017).
[108] S Fredman 'Procedure or Principle The Role of Adjudication in Achieving the Right to Education' 2016 *Constitutional Court Review* 165 182.
[109] Fredman (2016) *Constitutional Court Review* 165 197.
[110] Van Leeve (2016) *Constitutional Court Review* 199 208.
[111] Skelton (2013) *De Jure* 17.
[112] *Ibid*.

5.3 Welkom High School case on pregnancy policies

This case involves two separate set of facts from two different cases, amalgamated to be heard together, that differ slightly but with the same issues arising from the facts. The SGB's of Welkom High and Harmony High introduced policies which sought to exclude pregnant learners from their respective schools.[113] Both schools had introduced pregnancy policies that sought to exclude pregnant learners for certain time periods.[114] Two girls were excluded from the two schools based on the pregnancy policies. It was the HOD's instructions to the principals of both schools to re-admit the two learners that brought the matter to court.[115]

The two matters were consolidated, and the Free State High Court held that the HOD does not have the authority to compel the school principals to act contrary to their school policies and that the decision to exclude the learners for the specified time periods were valid. Furthermore, the Court interdicted the HOD from actions that would undermine the decisions taken by the schools in the future. [116] The Court was of the view that a SGB exercises a functional autonomy over a school and that such a role requires it to draw up a code of conduct for the school in the form of a school policy.[117] A pregnancy policy forms part of the code of conduct and the school principal needs to implement the pregnancy policy with sensitivity, flexibility and discretion.

The Supreme Court of Appeal mostly agreed with the High Court. It was held that the Schools Act made it clear that it was the SGB that had the authority to pronounce on issues of governance of public schools.[118] The SCA held further that the decision to adopt the pregnancy policy was an administrative decision and that even if such decision was unlawful; the HOD did

[113] *Welkom High School and Another v Head of Department of Education, Free State Province, and Another* 2011(4) SA 531(FB) (Hereafter Welkom *HC*).
[114] *Welkom HC* Par 2-24.
[115] *Ibid.*
[116] *Welkom HC* Par *12*.
[117] *Welkom HC* Par *27*.
[118] *The Head of Department: Department of Education, Free State Province v Welkom High School & Harmony High School Others* [2012] ZASCA 150(Hereafter *Welkom SCA*) Par 28-29.

not have the power to direct the schools to discard the policy. The court made a distinction between 'professional management' of a public school and 'governance'. The court was of the view that the professional management of a school is undertaken by the principal under the authority of the HOD, but the governance of a school is vested in the school governing body.[119] The Court held further that it was the HOD that held executive power over public schools and that it exercises its power through principals of public schools.[120] The SGB appealed the judgment.

In the Constitutional Court, it was held that the South African Schools Act envisages a partnership between the state, parents, learners and the members of the community and further regulates the relationship between the partners in terms of their roles and contributions in the realisation of the right to education.[121] The Court held that the SGB had the power to implement policies including pregnancy policies but that the SGB was not allowed to make policies that is contrary to the rights of pregnant learners in the Constitution.[122]

On the other hand, the court was of the view that the Schools Act did not give the HOD the power to over-ride the decisions of the SGB by instructing the principal directly by asking him or her to act contrary to their policies.[123] The HOD could have consulted with the SGB or approached a court to have the policies set aside according to section 22 of the Schools Act. Even though the HOD intended to protect the constitutional rights of the pregnant learners, the way he approached the issue was contrary to the principle of legality and in this light the Constitutional Court affirmed the interdict which was granted against the HOD in the High Court and the Supreme Court respectively.[124]

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[119] *Welkom SCA* Par 11.
[120] *Welkom SCA* Par 30-32.
[121] *Welkom CC* Par 49.
[122] *Welkom CC* Par 71.
[123] G Nicolson 'ConCourt orders Free State Schools to Review Pregnancy Policies' Daily Maverick (2013) available at https://www.dailymaverick.co.za/article/2013-07-11-concourt-orders-free-state-schools-to-review-pregnancy-policies/ (accessed 29 August 2018).
[124] *Welkom CC* Par 95.

The Court also considered the effect that the pregnancy policies could have on other learners who were not part of the proceedings, and with this in mind the court ordered that the HOD of Free State and the school governing bodies engage meaningfully to provide clarity on the constitutionality of the pregnancy policies.[125] The Court dismissed the appeal and ordered the school governing bodies to review their pregnancy policies considering the judgment and to report back to the court on the means and steps taken in the reviewing of the policies. In the reviewing process, it was required of the SGBs and the HOD to engage meaningfully, thus giving effect to the requirements of the Constitution and the Schools Act.[126] The Court also highlighted that the nature of partnership which the Schools Act and the Constitution envisages requires cooperation:

> 'Given the nature of the partnership that the Schools Act has created, the relationship between public school governing bodies and the state should be informed by close cooperation, a cooperation which recognises the partners' distinct but inter-related functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith. The goals of providing high-quality education to all learners and developing their talents and capabilities are connected to the organisation and governance of education. It is therefore essential for the effective functioning of a public school that the stakeholders respect the separation between governance and professional management, as enshrined in the Schools Act.'[66]

Fredman submits that the pregnancy policies are extremely invasive in that pregnant learners were expected to report to their teachers that they were pregnant and learners who discovered that their classmates were pregnant were obliged to report them to the school authorities. She submits further that the said policies were biased in that the pregnant girl is the only one who seems to face the 'punishment' for being pregnant.[127] She adds further that the issue of expulsion of pregnant learners has been a concern of the human rights community since the practice is discriminatory and infringes on the right to education. For this reason, she submits that it is disturbing that such policies persist in a democratic South Africa.[128] She submits further that the Court was primarily occupied by the formal legal processes that the department ought to have followed and hence neglected to deal with substantive issues arising

[125] *Welkom CC* Para 119.
[126] *Welkom CC* Par 128.
[127] Fredman (2016) *Constitutional Court Review* 165 167.
[128] Fredman (2016) *Constitutional Court Review* 165 168.

from the case such as pronouncing on the unconstitutionality of the pregnancy policies adopted by the schools.[129]

In a reply to Fredman, Van Leeve submits that the Court's finding that the pregnancy policies could be constitutionally impugned was proof that the Court was concerned with the substantive issues in the matter.[130] Van Leeve added further that the Court found that *prima facie* the policies were unconstitutional and ordered that the SGBs review the policies. Considering this Van Leeve concluded that this was sufficient proof that the Court dealt with the substantive issues.[131]

5.4 Admissions policies in FEDSAS

In this case,[132] the Member of Executive Council (MEC) under the authority of section 11(1) of the Gauteng School Education Act,[133] published draft amendments to regulations for admission of learners to public schools in Gauteng. The MEC then invited comments from interested parties on the draft amendments and FEDSAS submitted its comments.[134] In the comments FEDSAS asserted its dissatisfaction with a significant part of the draft regulations. FEDSAS was dissatisfied with 29 of the proposed regulations. Underlying FEDSAS's discontentment was that the amendments were invalid since they contradicted national legislation.

According to FEDSAS the draft amendment encroached on the powers of the SGB and it seemed the MEC had acted ultra vires.[135] Section 5 of the Schools Act empowers only the SGB to admit learners and the draft regulations proposed empowering officials to enforce admission

[129] Fredman (2016) *Constitutional Law Review* 165 176.
[130] Van Leeve (2016) *Constitutional Law Review* 199 205.
[131] Van Leeve (2016) *Constitutional Law Review* 199 205.
[132] *Federation of Governing Bodies for South African Schools v Member of the Executive Council Department of Basic Education Gauteng Province and Head of Department, Department of Basic Education Gauteng Province* [2013] ZAGPJHC 406(Hereafter *FEDSAS HC*).
[133] Act 6 of 1995.
[134] *FEDSAS HC* Par 1-6.
[135] Equal Education welcomes Constitutional Court Judgment on FEDSAS Case- Feeder Zones based solely on Geography Have Limited Lifespan' 2016 available at https://equaleducation.org.za/2016/05/20/equal-education-welcomes-constitutional-court-judgement-on-fedsas-case-feeder-zones-based-solely-on- geography-have-limited-lifespan/ (accessed 29 August 2018).

policies on schools.[136] It was argued by FEDSAS that the amended regulations violated the principle of legality and were passed in a procedurally unfair manner.[137]

According to the Respondents (the MEC) consideration was given to the interests of other parties and some of the draft regulations were amended to correct the concerns of FEDSAS and other parties who raised concerns. The draft regulations came into force albeit FEDSAS's dissatisfaction. FEDSAS challenged its dissatisfaction at the South Gauteng High Court on three grounds. The first was that they conflicted with the Schools Act; secondly, that the powers conferred on the MEC by section 11(1) were ultra vires and the third and final ground was that they were not reasonable and justifiable in terms of section 4 of the Gauteng School Education Act.[138]

The High Court upheld the application and struck out many of the regulations[139] which FEDSAS contested because they were invalid. The High Court found that certain provisions in the regulations were beyond the scope of the MEC's authority. The High Court then modified some of the provisions in order to avoid having to strike them out. The MEC together with the HOD, Gauteng, took the matter to the Supreme Court and there the court was asked to decide whether the provisions were invalid as FEDSAS contended and further if the regulations conflicted with the Schools Act or the applicable provincial law.

In a unanimous judgment, the Supreme Court upheld the appeal and reversed the decision of the High Court. The Court held that the regulations were not unfair either procedurally or substantively.[140] The SCA considered the need to reform the public education system looking at the history of Apartheid and its impacts on the education of the nation:

[136] *FEDSAS HC Par 39*
[137] *FEDASA HC Par 27*.
[138] Act 6 of 1995.
[139] *FEDSAS* HC Par 57.
[140] *Member of the Executive Council for Education, Gauteng and Another v Federation of Governing Bodies for South African Schools* [2015] ZASCA (Hereafter 'FEDSAS SCA') 149 Par 17.

One of the fundamental changes effected by the democratic government in reforming the country's education system, was the implementation of a participative and co-operative school governance system involving government, education authorities and local school communities represented by school governing bodies. The Schools Act was enacted in the spirit of transformation of the public school education system. It provides, inter alia, for a power sharing arrangement between the State, parents and educators. This collaborative administration system was intended to enhance access to decent basic education for all learners irrespective of race, talent, intellectual and behavioural dispositions, and to lay a solid foundation for the development of the country.[141]

The Court considered Schedule 4 of the Constitution which provides for education is a concurrent function between the national and provincial legislatures and hence the possibility of overlap and conflict between the national and provincial legislatures should be anticipated.[142]The Court held that the regulations were aimed at achieving even distribution of learners of different intellectual abilities in public schools. The SCA also mentioned that FEDSAS had not considered the disparities in the education system due to apartheid.

The Court highlighted that even though certain powers have been given to the SGB that power does not exist in a vacuum and should be exercised in accordance with applicable provincial law.[143] The Court referred to the Rivonia Primary School case and held that the Gauteng Department of Education also had the authority to exercise reasonable control over admissions and capacity in public schools. The Court upheld the appeal in so far as the provisions ensured the right to education and protects the learners from unfair discrimination.

The Constitutional Court began by highlighting the importance of the right to education to show that at the core of the case is the right to education which the Court must not lose sight

[141] *FEDSAS SCA* Par 11.
[142] *FEDSAS SCA* Par 15.
[143] *FEDSAS SCA* Par 16.

of amidst other issues. The Court added that even though the Constitution guarantees that right to a basic education and to adult basic education there are still disputes on access to basic education. The Court emphasised the fact that preceding cases such as Ermelo, Rivonia and Welkom had dealt with these issues and, yet such issues are still in dispute:

> 'Even so, disputes on access to basic education in our society are not scarce. There are continuing contests on the governance of public schools and policies on admission of learners. This despite a number of precedents of our courts that were meant to clear the murky waters of the shared space between school governing bodies and provincial executives charged with the regulation of public schools.'[144]

As mentioned above, FEDSAS argued that some of the provisions were unreasonable and unjustifiable in light of the Gauteng Education Act. FEDSAS submitted further that some of the regulations were in conflict with the Schools Act and by virtue of section 149 of the Constitution; these regulations should be struck out.[145] The Court held that education is a functional area of concurrent national and provincial legislative competence, both parliament and the provincial legislature may legislate on education.[146] The Court highlighted the need for cooperation among the various stake holders in education:

Parents must be meaningfully engaged in the teaching and learning of their children. The Schools Act carves out an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up in a democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school. The Constitution and the Schools Act also entrust vital tasks related to the education of our children to the MEC and HOD. In the past, this Court has correctly cautioned against undue dominance of school governing bodies by the provincial executive. We have called for cooperative governance between statutory creatures – school governing bodies and the MEC and HOD – entrusted with effective and universal access to basic education.[147]

[144] *FEDSAS* CC Par 4.
[145] *FEDSAS CC* Par 25.
[146] *FEDSAS CC* Par 26.
[147] *FEDSAS CC* Par 47.

The Court found the regulations to be in harmony with national legislation and further that none of the regulations were unreasonable or unjustifiable as FEDSAS contended. The Court paid attention to regulation 3(7) which prohibited a learner's prospective school from obtaining confidential information about a learner from his or her previous school. The Court found that this provision protected a learner from being unfairly discriminated against at the admission stage.[148]

The MEC argued that the decision to alter the feeder zone was since public schools cannot be governed in such a way that only the needs of learners and parents in the area are catered for. The feeder zone regulation was provided for by Regulations 4(1) and 4(2) and the aim was to remedy the geographical separation perpetuated by apartheid.[149] The purpose of the regulation was to allow for equal access to education according to the MEC.

At the Constitutional Court, it was held that there was no conflict between national and provincial legislation since education is both the function of the regional and provincial government.[150] The Court found that the regulations were in harmony with national legislation. The Court found further that none of the regulations were unreasonable, unjustifiable or irrational.

6. An analysis of the court's approach to governance with a focus on 'engagement'

A re-occurring pattern in the Constitutional Court judgments in all four cases is the emphasis on engagement and co-operation between the School Governing Bodies and the Heads of Department. The Constitutional Court highlighted co-operation and engagement as necessary

[148] *FEDSAS CC* Par 30-33.
[149] *FEDSAS CC* Par 34.
[150] *FEDSAS CC* Par 26.

approaches to resolving disputes between school governing bodies and the heads of departments.[151]

Section 38 of the Constitution provides that anyone whose right has been infringed or threatened may approach the court for relief.[152] Section 172 provides for the powers of the constitutional court in granting reliefs. The cumulative effect of sections 38 and 172 of the constitution is that the courts have the power to grant a litigant the appropriate relief. The Constitution further guides the courts to the kind of order they should make but does not strictly compel them in ways in which remedies should be crafted and this allows for creativity and innovation.[153]

In her 'Normative Theory of Public Law Remedies'[154] Susan Sturm argues that traditional adjudication has proven inadequate in remedying constitutional rights violations which have their roots in structural discrimination and this has called for creative and innovative means of remedying constitutional rights violations. In public law litigation, it appears that informal dialogue and negotiation as well as participation by actors achieves better outcomes as opposed to the traditional adversarial idea that relief ought to be sought strictly in a formal court of law.

Although not explicitly provided for in the Constitution, meaningful engagement was implied in various sections of the Constitution.[155] The preamble of the Constitution places a duty on the government to improve the quality of life of all citizens and free the potential of each person.[156] The Constitution further states that the state should respect, protect, promote and fulfil the rights in the Bill of Rights.[157] In Olivia Road, it was held that the most important of these rights are the rights to dignity and life which are protected through the meaningful engagement

[151] Liebenberg (2016) *PELJ* 31.
[152] The Constitution, section 38.
[153] The Constitution, section 172.
[154] S Sturm 'A Normative Theory of Public Law Remedies' 1991 *Geo.L.J* 1357 79.
[155] L Chenwi and K Tissignton 'Engaging Meaningfully with Government on Socio-Economic Rights- A Focus on the Right to Housing' 2010 *Community Law Centre (CLC*) *University of Western Cape SERI* 11.
[156] *Olivia Road* para 16 .
[157] The Constitution, section 7(2).

process. [158] Moreover, according to section 152 of the Constitution, local government should '…encourage the involvement of communities and community organizations in matters of local government.'[159] In Olivia Road, the court held that a municipality which evicts people without engaging meaningfully with them does not act in the spirit and purpose of the Constitution.[160] The court made it clear in the Olivia Road case that no one may be evicted without due regard to all relevant considerations.[161]

Meaningful engagement as a participatory public law remedy in the area of education was introduced in *Juma Musjid*.[162] This case is particularly important because it deals with the eviction of a public school on private property and hence deals with meaningful engagement both in the housing and education dispute. The parties in this case were ordered to engage meaningfully in order to resolve the dispute. Although meaningful engagement was not successful in this case, the court wanted the parties to find a solution to the problem.[163] Like in *Juma Musjid*, meaningful engagement has subsequently been used in education rights disputes in cases such as *Hoërskool Ermelo*, *Welkom High*, *Rivonia Primary* and the *FEDSAS* cases. Meaningful engagement means deliberative democracy, involvement, and participatory democracy, a platform for discussion, fostering a culture of cooperation, respect for all parties involved in the dispute, fairness and informal dialogue and these advantages of engaging meaningfully cannot always be found in traditional litigation. [164]

One of the advantages of meaningful engagement is that 'the courts can be part of the solution, but will draw on the parties and even civil society role players to find solutions and to monitor the outcomes of court decisions'.[165] Meaningful engagement as a remedy is still at its infancy

[158] *Olivia Road* para 16.
[159] *Olivia Road* para 16 and The Constitution section 152.
[160] *Olivia Road* para 16.
[161] *Olivia Road* para 16 and 17.
[162] *Juma Musjid* para 84.
[163] Skelton (2013) *De Jure* 7.
[164] Liebenberg (2016) *PELJ* 31.
[165] Skelton (2013) *De Jure* 37.

and underdeveloped,[166] this was evidenced in the *Juma Musjid* case where the remedy was first introduced to the shores of educational cases and the parties failed to reach an agreement albeit being ordered to engage with each other meaningfully.[167] Some of the ways of ensuring that meaningful engagement is effective is to ensure that all stakeholders are incorporated in the engagement process, the court must exercise proper supervision in the engagement process and pronounce on the outcome of the engagement.[168]

Liebenberg submits that meaningful engagement in the area of education needs to be applied consistently and developed more but that engagement remedies 'have significant potential to promote the adoption of constitutionally compliant education policies through requiring sustained collaboration amongst a broad array of stake-holders in the sector'.[169]

[167] *Juma Musjid* para 75.
[168] Liebenberg (2016) *PELJ* 37.
[169] Liebenberg (2016) *PELJ* 36 and 37.

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