

**THE AUTHORITY TO DETERMINE
ADMISSION POLICY BY A SCHOOL
GOVERNING BODY INCLUDES THE POWER
TO DETERMINE THE CAPACITY OF A
PUBLIC SCHOOL BUT DOES NOT
INFLEXIBLY LIMIT THE DISCRETION OF
THE HEAD OF DEPARTMENT TO ADMIT
A LEARNER**

***Member of the Executive Council for Education
in Gauteng Province v Governing Body of the
Rivonia Primary School***
Case CCT 135/12 [2013] ZACC 34

1 Introduction

During the latter part of the year 2012 and early 2013, various articles or commentaries dealing with the admission of learners to public schools appeared in daily and weekend newspapers. Some of them commented on the manner in which school governing bodies of public schools appeared to be discriminating in the admission of prospective learners, while others commended school governing bodies on performing their admission function in accordance with the powers granted to them by legislation (see, *inter alia*, Govender and Pillay “Schools Told to Stop ‘Apartheid’” 19 August 2012 *Sunday Times* 2; Child “Rivonia Principal ‘Forced’ into Guilty Plea” 13 September 2012 *The Times* 4; and Sigcau “Schools Should Open their Doors to All” 21 September 2012 *The Times* 16).

The articles that appeared during early 2013 mostly commented about the opening of public schools for the academic year 2013 in the five inland provinces (see, *inter alia*, Mashaba, Sibisi and Monama “Few Hiccups as Pupils go Back to School” 10 January 2013 *The Times* 5), while others berated the manner in which some prospective learners were refused admission by certain public schools (see, *inter alia*, Campbell “The ‘We Can’t Help You’ Slant Affects Life Choices” 14 January 2013 *Pretoria News* 9). Before then, on 10 January 2013, Mogomotsi Magome mentioned in the *Pretoria News* of the same date that the Minister of Basic Education had said that “she’ll fight tooth and nail to reverse the court ruling on school capacity” (10 January 2013 *Pretoria News* 1). The articles that appeared thereafter concentrated on whether school governing bodies of public schools in South Africa or the State, through the Department of Basic Education and its provincial education departments, has the power or

authority to determine the admission criteria or capacity of public schools for the purposes of the admission of learners (see, *inter alia*, du Plessis “Court Case puts Class Sizes in Spotlight” 13 January 2012 *City Press* 14; and Child “Do Parents have the Power, or the State” 6 March 2013 *The Times* 4). Further comments on this issue appeared during April 2013 (see Ajam “Gloves Off in Fight for Authority to Admit Pupils” 20 April 2013 *Pretoria News* 7).

During the rest of April 2013, most of the comments made in the newspapers dealt directly with the question that was raised in *Governing Body, Rivonia Primary School v MEC for Education, Gauteng Province* ([2012] 1 All SA 576 (GSJ), hereinafter “*Rivonia* [2012]”), which was by then taken on appeal to the Supreme Court of Appeal (*Governing Body, Rivonia Primary School v MEC for Education, Gauteng Province* 2013 (1) SA 632 (SCA), hereinafter “*Rivonia* (2013)”). The question for determination in this case was whether the capacity of a public school is determined by the school governing body or the provincial education department which is under a statutory duty to find sufficient capacity to provide schooling to all children of school-going age (see, *inter alia*, Child “Pray for Us, says Rivonia Primary” 8 May 2013 *The Times* 7; Seale “Ban Racist Admission Policies” 9 May 2013 *Pretoria News* 2; Child “Rivonia Trial puts Pupils in Crossfire” 10 May 2013 *The Times* 1; Opinion “Rivonia Primary’s Dilemma Needs the Wisdom of Solomon” 10 May 2013 *The Times* 12; and Mtsali “State Can Veto Admission Decisions” 10 May 2013 *Pretoria News* 4).

The above comments indicate the public interest that followed the decision in the Rivonia case (*Rivonia* [2012] and *Rivonia* (2013)). The reason for the interest shown is not difficult to find for the Constitution provides that everyone has the right to a basic education and as such the refusal to admit a learner by a public school may appear to be an infringement of this right (s 29(1)(a) of the Constitution of the Republic of South Africa of 1996). Furthermore the South African Schools Act of 1996 (84 of 1996) provides that a public school must admit learners and serve their educational needs without unfairly discriminating in any manner (s 5(1) of Act 84 of 1996). Some of the comments as shown above, regarded the refusal to admit the learner in this case as unfair discrimination.

The Constitutional Court also had the opportunity to determine the issues raised in this case in *Member of the Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School* (case CCT 135/12 [2013] ZACC 34). The judgment of the Constitutional Court was delivered on 3 October 2013. The following day, 4 October 2013, the public interest shown by the media resurfaced (see, *inter alia*, Child “State has the Final Say on School Admissions” 4 October 2013 *The Times* 4; and Mtsali “State Wins School Admission Battle” 4 October 2013 *Pretoria News* 3). The Constitutional Court judgment shall, for the purpose of this discussion, be referred to as *Rivonia* (CC).

In order to fully understand the legal issues involved in this case, it is necessary to have regard to the manner in which the South Gauteng High Court, the Supreme Court of Appeal and the Constitutional Court approached the determination of these issues. This is discussed in 4-6 below after setting out the dispute and the facts of this case in 2-3 below.

2 The dispute

In the Governing Body, Rivonia Primary School case, the applicant school governing body which was duly elected and constituted in terms of the South African Schools Act of 1996 (84 of 1996), sought an order to set aside the decision taken by the respondent (Head of Department of Education of the Gauteng Province, hereinafter “the HOD”) to instruct the principal of Rivonia Primary School to enrol a learner in Grade 1, or alternatively to set aside the enrolment of the learner by the HOD which was contrary to the admission policy of the said school (*Rivonia* [2012] 578 par 1.1).

The second order sought was to declare that the appeal by the learner’s parent and the decision of the HOD to enrol the learner were contrary to the admission policy of the school and that such decision be reviewed and set aside (*Rivonia* [2012] 578 par 1.2).

The last order sought was to set aside the decision of the HOD to withdraw the admission function which was delegated to the principal of Rivonia Primary School (*Rivonia* [2012] 578 par 1.3).

The applicant also sought interlocutory relief to the effect that:

- “2.1 the Member of the Executive Council for Education: Gauteng Province (‘the MEC’) and officials of the Gauteng Department of Education (‘the Department’) are interdicted from unlawfully interfering with the governance of the school;
- 2.2 the fifth to sixth respondents are interdicted from compelling the school or its Principal to admit learners other than in compliance with the school’s admission policy” (*Rivonia* [2012] 578 par 2).”

Equal Education and the Centre for Child Law, which intervened as *amicus curiae* raised certain constitutional issues based on the interpretation of sections 39(2), 9 and 29 of the Constitution (Constitution of the Republic of South Africa of 1996). The issues concerned the effect of these provisions in determining whether:

- the governing body of a public school was vested with the power to determine the enrolment capacity of a school as an incident of its power under the South African Schools Act of 1996 (s 5(5) of Act 84 of 1996); or
- the governing body’s power to determine admission policy extended to the power to determine the enrolment capacity of a school having regard to the duty of the Member of the Executive Council for Education under the South African Schools Act of 1996 (84 of 1996) to ensure that the public education system provided school places to all learners of compulsory school going age (s 3(3) of Act 84 of 1996 (*Rivonia* [2012] 578 par 3).

3 The facts

The school governing body of Rivonia Primary School had determined an admission policy to the effect that regard be had to the number of appropriately sized classrooms, the optimum desk working-space requirement for learners, the number of available teachers, *et cetera*, its

capacity was to accommodate 840 learners in all its seven grades, that is, 120 learners per grade. (*Rivonia* [2012] 579 par 6.1. See also *Rivonia* (2013) 634 par 5–7.)

The other provisions of the policy dealt with the time when applications for admission had to commence and close and the completion of applications by parents (*Rivonia* [2012] 579 par 6.2–6.4). The application process for the admission of learners to Grade 1 for the 2011 academic year was opened on 13 July 2010. On 15 July 2010, the mother of the learner of whom non-admission or refusal to admit formed the basis of this application, collected an application form which was returned on 21 July 2010. This learner was allocated number 140 as her application, which was returned on 21 July 2010, was the 140th. This learner was placed on the “A” waiting list as number 140 which was for parents who resided or were employed within the school’s catchment area. (*Rivonia* [2012] 579 par 7. See also *Rivonia* (2013) 634 par 8.) On 17 August 2010, letters were written by the school to all parents of prospective learners informing them that they would be notified as to whether their applications were successful by not later than 5 November 2010. On 26 November 2010, the parent of the prospective learner in this case was notified that her application was unsuccessful and that all the unsuccessful applicants’ details were forwarded to the district office which would communicate with them about the learners’ admission to a school closest to their residence or work area and which had space to accommodate them. (*Rivonia* [2012] 579–580 par 8. See also *Rivonia* (2013) 634 par 8–9.) The parent of the learner in this case was notified by the school on 5 November 2010 that the learner was placed on a waiting list “A” as the school had reached its capacity for Grade 1 for the 2011 academic year. An appeal was lodged by the said parent to the Member of the Executive Council of the Department of Education, Gauteng, hereinafter referred to as the MEC, against the refusal or non-admission by the school of the learner (*Rivonia* [2012] 580 par 9; and see also *Rivonia* (2013) 634 par 11).

A letter was telefaxed by the HOD to the principal of Rivonia Primary School on 2 February 2011, informing her that the parent of the learner whose admission was in issue had approached the HOD for assistance. The principal was also informed, in the same letter, that all submitted documents relating to the admission of the said learner have been perused, and further that according to the information relating to the number of learners in the school, the school had not reached its capacity. The principal was further instructed to admit the said learner without delay and informed that this was the outcome of an appeal from the HOD. (*Rivonia* [2012] 580 par 10. See also *Rivonia* (2013) 632 par 14.)

On 7 February 2011, the parent of the learner who was by then placed on the waiting list, accompanied by the learner, arrived at the school to have the learner admitted to Grade 1. The principal suggested that the learner be taken home pending the resolution of her admission (*Rivonia* [2012] 580 par 11 and *Rivonia* (2013) 635 par 16). The following day (8 February 2011), the parent and the learner, in the company of the official of the department, came to the school to have the learner admitted. The official had in his possession, a document from the HOD which instructed the principal to

admit the learner. They met the chairperson of the governing body who requested them to await the outcome of the attempt to resolve the dispute relating to her admission (*Rivonia* [2012] 580 par 12 and *Rivonia* (2013) 36 par 17). The principal was also given a letter from the HOD which withdrew her admission function immediately and delegated it to an official of the department (District Office Director) (*Rivonia* [2012] 580 par 12 and *Rivonia* (2013) 636 par 17–18). The learner was consequently placed in a Grade 1 classroom (*Rivonia* [2012] 580 par 18 and *Rivonia* (2013) 630 par 19–20).

4 Issues for determination, submissions and decision of the South Gauteng High Court

The main issue for determination by the South Gauteng High Court was whether the capacity of a public school is determined by the governing body by having regard to the sectional interests of the learners admitted in that school or by the provincial department of education which is under a stationary duty to provide public schooling to all school-going learners. (*Rivonia* [2012] 580 par 4. See also s 3(1), (3) and (4) of Act 84 of 1996.)

The school governing body's submissions were that:

- The South African Schools Act of 1996 (Act 84 of 1996) grants it the authority to determine the admission policy and it was the only body that could determine that policy subject to the Constitution, the Act (Act 84 of 1996) and any applicable provincial law.
- No statutory or other legal power is granted to the MEC or HOD to determine the capacity of a public school and such determination is an inherent and necessary incident of any admission policy.
- The officials of the Department of Education (provincial) are bound by the school's admission policy which they may not ignore or override contrary to the constitutional principle of legality.
- Where the Department does not agree with any aspect of the admission policy, it may not ignore it but has to use the remedies available to it to set these aspects aside.
- The HOD has no authority to determine a public school's capacity.
- Any appeal to the MEC must be fair, providing all parties had the opportunity to make representations (*Rivonia* [2012] 581 par 15).

The respondents' submissions, on the other hand, were that:

- The question of school capacity cannot be determined by the admission policy drawn up by the governing body but has to be determined at systemic level by the provincial education department taking into account the relevant statutory framework provided for in the South African Schools Act of 1996 (Act 84 of 1996), as interpreted in light of sections 39(2), 9 and 29 of the Constitution.
- Were each public school to determine the number of learners it could accommodate, this would prevent public educational resources from being utilized in an equitable and efficient manner having regard to the

needs of learners of the province which would create the risk of a class of school-going children being denied access to public education.

- The racially discriminatory system of education spending under the *apartheid* had bequeathed to the province a public-schooling system in which some schools were much better resourced than most other schools in the system and as such, if governing bodies of some of the formerly better-resourced schools were to be allowed to determine their capacities at levels lower than the others, the racially discriminatory privileges bequeathed by the *apartheid* system would be capable of entrenchments under the new democratic order (*Rivonia* [2012] 581 par 16).

It is evident from the submissions by the parties in this case that the South Gauteng High Court was requested to interpret the enactment that granted school governing bodies the power to determine admission policy which was closely linked to the capacity to accommodate a number of learners against the background of the constitutional provisions which guaranteed the right to a basic education and the right to equality. (S 29 and 39(2) of the Constitution of 1996. See also *Investigating Directorate: Serious and Economic Crimes v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC); and *Phumelela Gaming and Leisure Ltd v Gründling* 2007 (6) SA 350 (CC)).

The South Gauteng High Court emphasized the nature of the right to a basic education and pointed out that it was immediately realizable unlike other socio-economic rights which might be limited by “availability of resources” or subject to “reasonable legislative measures” (*Rivonia* [2012] 583 par 26). This right might only be limited by a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. (*Rivonia* [2012] 583 par 26. See also *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 8 BCLR 761 (CC) 774–776 par 37.) Seen in this light, “an unequal access to education entrenches historical inequality, since it perpetuates socio-economic disadvantages”. (*Rivonia* [2012] 584 par 26. See also *Head of Department: Mpumalanga Education Department v Hoërskool Ermelo* 2010 (2) SA 415 (CC).) The South Gauteng High Court therefore interpreted the provisions of the South African Schools Act of 1996 (84 of 1996) that authorize governing bodies to determine admission policy without regard to the Constitutional provision that guaranteed the right to a basic education as a method that might be used to perpetuate the inequality of the past in the provision of basic education (*Rivonia* [2012] 583–585 par 26–29).

The provision which grants school governing bodies the authority to determine the admission policy is contained in section 5(5) of the South African Schools Act of 1996 (84 of 1996). The Act also provides that a public school must admit learners and serve their educational needs without discriminating in any way (s 5(1) of Act 84 of 1996). Although the Act authorizes the school governing body to determine admission policy, it also places an obligation on the MEC to ensure that there are enough school places to accommodate every child of school-going age (*Rivonia* [2012] 591 par 56; and s 3(3) and 12(1) of Act 84 of 1984).

In determining the meaning to be ascribed to the provisions of section 5(5) of the South African Schools Act of 1996 (84 of 1996), the South Gauteng High Court indicated that these provisions had to be interpreted in

conjunction with the obligations imposed on the MEC in terms of section 3(3) and (4) of the Act (84 of 1996). These provisions oblige the MEC to ensure that there are enough school places to enable every child to attend a public school. According to this judgment, this is in line with the constitutional right of access to a basic education for all children (*Rivonia* [2012] 592 par 64).

The South Gauteng High Court held, against the background indicated in the immediately preceding paragraphs, that “section 5(5) does not and should not be interpreted to include the unqualified and exclusive power to any school governing body to determine a school’s maximum capacity” (*Rivonia* [2012] 595 par 78). The court, in effect held that a school governing body did not have an unqualified power to determine the maximum capacity of a public school (*Rivonia* [2012] 596 par 82 and 600 par 109). The South Gauteng High Court also held that the HOD acted lawfully in overturning the decision of the principal to refuse the learner’s application for admission (*Rivonia* [2012] 597 par 86–87 and 600 par 109). On the question whether the power or function to admit a learner by a principal might be withdrawn by the HOD, the court held that:

“As the Principal was never afforded an opportunity to state her case before the withdrawal of her delegated powers of admission, I find that the HOD’s conduct in this respect was arbitrary and unlawful and consequently falls to be reviewed and set aside ... She should have been afforded an opportunity to furnish reasons why her delegated powers of admission should not be withdrawn. This is in line with the old *audi alteram* principle” (*Rivonia* [2012] 598 par 94).

5 The determination by the Supreme Court of Appeal

An appeal against the decision of the South Gauteng High Court was lodged with the Supreme Court of Appeal (*Governing Body, Rivonia Primary School v MEC for Education Gauteng Province* 2013 (1) SA 632 (SCA)). The decision of the South Gauteng High Court (*Governing Body, Rivonia Primary School v MEC for Education, Gauteng Province* [2012] 1 All SA 576 (GSJ)) was reversed on appeal.

The question for determination by the Supreme Court of Appeal was “whether a governing body has the authority to determine school capacity as an incident of admission policy, and if so, whether a provincial authority may override this determination” (*Rivonia* (2013) 639–640 par 34 and 633 par 3). After the granting of leave to appeal to the Supreme Court of Appeal, the MEC for Education of the Gauteng Province amended the regulations dealing with the admission of learners to public schools to provide that the capacity of a public school, that was, the number of learners to be admitted, was to be determined by the HOD and not the school governing body (*Rivonia* (2013) 637 par 23).

In order to provide an answer to the question raised in this case, the court emphasized that the proper approach was to have regard to the structure of the South African Schools Act of 1996 (84 of 1996) to determine whether the school governing body or the HOD had the authority to determine the capacity of a public school (*Rivonia* (2013) 637–639 par 26–34). The Supreme Court of Appeal did not agree with the interpretation of the South Gauteng High Court that the effect of section 3(3) and (4) of the South

African Schools Act of 1996 (84 of 1996) implied that the determination of the capacity of a public school was the responsibility of the Department of Education and not the governing body as envisaged by section 5(5) of the Act (*Rivonia* (2013) 642–644 par 41–48).

In considering this question, the court relied on the provisions of the South African Schools Act of 1996 (84 of 1996) dealing with the governance of public schools and the oversight role of the provincial government in the governance of public schools (*Rivonia* (2013) 640 par 35). According to the South African Schools Act of 1996 (84 of 1996), the governance of a public school vests in its governing body (s 16 of Act 84 of 1996; *Rivonia* (2013) 638 par 28). The governing body of a public school stands in a position of trust towards the school (s 16(2) of Act 84 of 1996). It is further provided that the professional management of a public school must be undertaken by the principal under the authority of the HOD. (*Rivonia* (2013) 638–639 par 28 and 639 par 33. See also s 16(3) of Act 84 of 1996.)

Although the governance of public schools vests in their governing bodies, they may perform only such functions and exercise such rights as prescribed by the South African Schools Act of 1996 (84 of 1996). The HOD is authorized to withdraw, on reasonable grounds, any or more of the functions of a school governing body (s 22 of Act 84 of 1996; and *Rivonia* (2013) 640 par 36). The functions which school governing bodies may perform are contained throughout the Act (84 of 1996), *inter alia*, sections 5(1) (admission), 6(2) (determination of language policy) and 8 (adoption of a code of conduct for learners). Other functions are listed in section 20 of the South African Schools Act of 1996 (84 of 1996). These functions have been described as “core functions” in *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* (2009 (3) SA 422 (SCA) 428 par 16). Further functions may be allocated to school governing bodies in terms of section 21 of the Act (84 of 1996). These functions have been described as “either non-essential to the functioning of schools, or if not allocated, are performed by the department” (*Hoërskool Ermelo v Head of Department of Education, Mpumalanga* 2009 (3) SA 422 (SCA) 428 par 18).

The Supreme Court of Appeal highlighted the fact that the authority of a school governing body to govern a public school was not absolute as the HOD might, on reasonable grounds, withdraw any of the functions of a school governing body (*Rivonia* (2013) 640 par 36). This is in terms of section 22 of the South African Schools Act of 1996 (84 of 1996). In the case where a school governing body had ceased to perform any of the functions allocated to it or had failed to perform one or more of such functions, the HOD may appoint other persons to perform such functions (s 25(1) of Act 84 of 1996; and *Rivonia* (2013) 640 par 36).

After considering the provisions of the South African Schools Act of 1996 (84 of 1996) dealing with the authority of school governing bodies relating to admissions as well as the governance of public schools, the court proceeded to deal with provisions which placed a duty on the MEC for Education to ensure that there were enough school places to afford every child of school going age the opportunity or right to attend school (s 3(3) and (4) of Act 84 of 1996; and *Rivonia* (2013) 642 par 41). The respondent had relied on these provisions to indicate that the Department of Education was entitled to act as

it did, that is, overriding the capacity determined by the school governing body and admitting the learner. The respondent had also relied on the provisions of section 39(2) of the Constitution of the Republic of South Africa of 1996, which required the court to interpret legislation in a manner that promoted the spirit, purport and objects of the Bill of Rights so as to give effect to the rights of equality and basic education (s 9 and 29 of the Constitution of the Republic of South Africa of 1996). After considering the meaning to be accorded to these provisions, the court commented that:

“A plain reading of ss3(3) and (4) makes it clear that they are concerned with the MEC’s obligation to ensure that infrastructure is provided for compulsory attendance of all children in the province between the ages of 7 and 15 years of age, as envisaged by s3(1). To this end these provisions require the MEC to determine the infrastructural shortcomings that impede the fulfilment of this objective and to report annually to the Minister on any remedial steps being taken to solve these problems. They plainly have no relation to the governance of a school” (*Rivonia* (2013) 642 par 43).

It was therefore held that “as a governing body may determine the school’s policy, so too does it have the discretion to exceed that capacity if the circumstances require it, and that discretion must be exercised on rational and reasonable grounds. But it is not open to the HOD to summarily override that authority as occurred in this case” (*Rivonia* (2013) 645–646 par 54; see also *Rivonia* (2013) 646 par 56; and Visser “The Admission of Learners in Public Schools: Who Makes the Decisions?” 1998 *THRHR* 487).

6 The determination by the Constitutional Court

An appeal was lodged with the Constitutional Court which delivered its judgment on 3 October 2013 (*MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* Case CCT 135/12 [2013] ZACC 34, hereinafter “*Rivonia* (CC)”). The submission by the applicants was that the Supreme Court of Appeal had erred in its interpretation of the South African Schools Act of 1996 (84 of 1996) in that:

- It overstated the power vested in governing bodies by section 5(5) of the South African Schools Act of 1996 (84 of 1996) whereas provincial legislation makes it clear that a decision not to admit a learner taken at school level is not final as it has to be confirmed by the department; and
- it overlooked the fact that the Department of Basic Education was under a statutory obligation to ensure that the existing public school infrastructure was utilized as efficiently as possible (*Rivonia* (CC) 13–14 par 27–29).

The respondents, on the other hand, submitted that the interpretation of the South African Schools Act of 1996 (84 of 1996) by the court *a quo* was correct in that this Act vested the power to determine the capacity of a public school in its governing body. The respondents further submitted that the HOD did not have the right to ignore the school’s admission policy and to instruct the principal to admit a learner, but should rather have taken steps to set the said policy aside and withdraw the power from the governing body (*Rivonia* (CC) 14 par 30). They also submitted that the mechanism provided by the South African Schools Act of 1996 (84 of 1996) should have been

employed by the department in dealing with the problems of placing additional learners in public schools but it did not attempt to use these mechanisms (*Rivonia* (CC) 14–15 par 31).

The Court identified three questions for determination. They were phrased as follows:

“The first is whether the Gauteng HOD was vested with decision-making power in relation to the admission of learners to public schools. If so, the second question is whether the Gauteng HOD was empowered to depart from the admission policy of Rivonia Governing Body and admit the learner contrary to the capacity determination in that policy. And if so, the third question is whether the Gauteng HOD’s exercise of that power to admit the learner was reasonable and procedurally fair” (*Rivonia* (CC) 15 par 33).

In determining the first question, that is, whether the HOD was vested with the power to admit learners to public schools, the court indicated that the South African Schools Act of 1996 (84 of 1996) envisaged that public schools were to be run by a three-tier partnership at national and provincial levels as well as parents of learners and members of the community in which they were located at local level. Each and every sphere of this partnership has certain functions to perform (see s 5A(1)(b) and 5A(2)(b) of Act 84 of 1996 in respect of national government). The province also has a role to play, *inter alia*, in ensuring that enough school spaces exist so that every child may attend school (s 3(3) and (4) of Act 84 of 1996). The province also has to ensure that the admission policy determined by school governing bodies complies with the prescribed national norms and standards while an obligation is placed on the HOD to determine the minimum and maximum capacity of a public school in accordance with the prescribed norms and standards (s 58C of Act 84 of 1996; and *Rivonia* (CC) 16–18 par 35–39). The school governing body is responsible for the determination of, *inter alia*, the admission policy which includes deciding on the capacity of a public school (s 5(5)–(9) of Act 84 of 1996; and *Rivonia* (CC) 18–22 par 40–46).

Against this background, the Constitutional Court concluded that:

“the scheme of the Schools Act in relation to admissions indicates that the Department maintains ultimate control over the implementation of the admission decisions. And the Gauteng Regulations afforded the Gauteng HOD the specific power to overturn a principal’s rejection of a learner’s application for admission” (*Rivonia* (CC) 27 par 52).

With regard to the second question, that is, whether the Gauteng HOD was empowered to depart from the admission policy of the Rivonia school governing body and admit the learner contrary to the capacity determination in that policy, it was held that the “Gauteng HOD was ... entitled, when exercising his constitutional and statutory powers to depart from a capacity determination provided for in the admission policy” (*Rivonia* (CC) 26 par 50). This decision was reached after considering the effect of Regulation 13(1) (headed “Refusals and Admissions” of the Gauteng Department of Education Regulations Relating to the Admission of Learners to Public Schools, Provincial Gazette 439 General Notice 61 of 1998 and s 5(7) and (9) of the South African Schools Act of 1996. (*Rivonia* (CC) 22–27 par 46–53. See also *Head of Department, Mpumalanga Department of*

Education v Hoërskool Ermelo 2010 3 BCLR 177(CC); and *Head of Department, Free State Province v Welkom High School* Case CCT 103/12 [2012] ZACC 25.) The Constitutional Court therefore found that the court *a quo* had erred in concluding that the South African Schools Act of 1996 (84 of 1996) placed admission decisions squarely in the hands of the school governing body and that the HOD (Gauteng) could not override the admission policy of a public school (*Rivonia* (CC) 29 par 57).

As the school governing body and the principal were not afforded the opportunity by the HOD to make representations when the learner in this case was admitted, the HOD was found to have acted in a procedurally unfair manner (*Rivonia* (CC) 29–36 par 58–68). It was also emphasized that in disputes between governing bodies and national or provincial government, “cooperation is the required general norm. Such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised” (*Rivonia* (CC) 36 par 69).

The separate concurring judgment of Jafta J (Zondo J concurring) supported the main judgment in so far as it held that the HOD had the power to reverse the decision of the principal regarding the admission of a learner to a public school but did not support the conclusion that the HOD’s exercise of the power to admit the learner contrary to the admission policy of the school was exercised in an unprocedural manner (*Rivonia* (CC) par 91). According to this judgment, the main issue before the Court was whether the order issued by the court *a quo* was wrong and the claim for procedural fairness was not properly pleaded by the parties (*Rivonia* (CC) 46 par 92; 49–50 par 98; 54–57 par 102–110). It was therefore concluded that:

“I also support setting aside the order of the Supreme Court of Appeal and replacing it with an order declaring that the Head of Department was empowered to instruct the principal to admit the learner in excess of the limit in the school’s admission policy. In my respectful view the question of whether the Head of Department acted in a procedurally fair manner in issuing the instruction to the principal and in placing the learner in the school without giving the school the opportunity to make representations on the tenth-day statistics was not an issue raised in this court by any of the parties” (*Rivonia* (CC) 46 par 91).

Unlike the main judgment, this judgment found that there was meaningful engagement and cooperation by the HOD in attempting to resolve the dispute relating to the admission of the learner with both the principal and the school governing body and that “the assertion that the Head of Department adopted a heavy-handed approach to the issue loses sight of what really happened. Faced with a contemptuous governing body and an intransigent principal, it is difficult to imagine that the Head of Department could have acted differently”. (*Rivonia* (CC) 59 par 117. See also *Rivonia* (CC) 57–60 par 111–117.)

7 Conclusion

The issues which are discussed in this note have plagued the South African school system for a number of years since the enactment of the South African Schools Act of 1996 (84 of 1996). They revolve around the relationship between school governing bodies and school principals on the

one hand and the various provincial departments of education and in some instances the national department of basic education on the other hand. Most of these disputes involve the determination of either the admission policy or language policy by school governing bodies. Although school governing bodies have the authority or power to determine these policies, such determination or implementation has to comply with the provisions of the South African Schools Act of 1996 (84 of 1996) and the constitution (*Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T); *Head of Department: Mpumalanga Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC); and *Seoding Primary School v MEC of Education* 2006 4 BCLR 542 (NC)).

The function to determine these policies (admission and language policies) is the responsibility of school governing bodies (s 5(5) and 6(2) of Act 84 of 1996). Such determination is, however, not absolute or without limitation. It is subject to any provision dealing with admission or determination and implementation of language or admission policy as provided for by the South African Schools Act of 1996 (84 of 1996), any relevant provincial legislation and the Constitution (Constitution of the Republic of South Africa of 1996). Therefore, when determining the admission policy, the school governing body should be guided by the duty not to discriminate on any of the grounds provided for by the Constitution (see Chapter 2 of the Constitution of the Republic of South Africa of 1996). The South African Schools Act of 1996 (84 of 1996) also provides that a public school has to admit learners and serve their educational needs without unfairly discriminating in any manner (s 5(1) of Act 84 of 1986).

It is clear from the decision of all courts involved in this case that the determination of the admission policy is the preserve of a school governing body. This authority, that is, the determination of admission policy, also includes determining the capacity to accommodate a specific number of learners. The admission policy must, however, not be implemented in an inflexible manner by the school governing body or the principal as the department maintains ultimate control over admission decisions. This calls for cooperation between the school governing body and the principal on the one hand and the provincial or national department of education on the other hand. The effect of the Constitutional Court judgment in Rivonia has been described as “giving neither party complete victory, but also sent neither away empty-handed”. (Gordon “No Real Winners in Rivonia School Case” 8 October 2013 *Pretoria News* 9. See also Grootes “The Private/public Education Debate” 10 October 2013 *Pretoria News* 13).

IP Maithufi
University of Pretoria