SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

REF: NW/1819/0534

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Own Accord
And	
LAERSKOOL SCHWEIZER-RENEKE	First Respondent
SCHOOL GOVERNING BODY OF LAERSKOOL SCHWEIZER-RENEKE	Second Respondent
HEAD OF DEPARTMENT: NORTH WEST DEPARTMENT OF EDUCATION	Third Respondent
MEC FOR EDUCATION: NORTH WEST PROVINCE	Fourth Respondent

FINAL INVESTIGATIVE REPORT

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1. INTRODUCTION AND MANDATE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

1.1. This is an investigative report in respect of the South African Human Rights Commission's ("the Commission") investigation into the allegations of unfair discrimination based on race at Laerskool Schweizer-Reneke ("the School").

1.2. The Commission is an independent State institution established in terms of section 181 of the Constitution of the Republic of South Africa of 1996 ("the Constitution") to strengthen constitutional democracy. In terms of section 184(1) of the Constitution, the Commission is mandated to:

1.2.1. promote respect for human rights and a culture of human rights;

1.2.2. promote the protection, development and attainment of human rights; and

1.2.3. monitor and assess the observance of human rights in the Republic.

1.3. The Commission is empowered, in terms of section 184(2)(a) and (b) of the Constitution, to investigate and report on the observance of human rights in the country and to take steps to secure appropriate redress where human rights have been violated.

1.4. The Commission has additional powers in terms of legislation, including the South African Human Rights Commission Act 40 of 2013 ("SAHRC Act"). Further, the Commission follows the procedures set out in the South African Human Rights Commission Complaints Handling Procedures in the conduct of an investigation into human rights violations.

2. BACKGROUND TO THE INVESTIGATION

2.1. On 9 January 2019, a photograph depicting four black and eighteen white learners seated at separate tables in a classroom at the School ("the Photograph") was widely shared in the media as well as on social media platforms. The Photograph sparked public outrage, with many people labelling the incident as racist. Members of the public and other concerned groups

gathered within the vicinity of the School to protest against what they perceived to be racial segregation.

2.2. The incident prompted the Commission to initiate an own accord investigation into whether the human rights of the four black learners were violated.

3. **THE PARTIES**

3.1. The Commission initiated an own accord investigation in terms of section 13(3) of the SAHRC Act, which empowers the Commission to investigate any alleged violations of human rights on its own initiative or on receipt of a complaint (own emphasis).

3.2. The First Respondent is Laerskool Schweizer-Reneke ("the School"), a public school as defined in section 1 of the South African Schools Act, No. 84 of 1996, for learners from Grade R to Grade 7. The School is situated at No. 7 Olivier Street in Schweizer-Reneke, within the district of Dr Ruth Segomotsi Mompati District Municipality in the North West Province.

3.3. The Second Respondent is the School Governing Body ("the SGB") of the First Respondent. It was duly elected and constituted under sections 16 and 23 of the Schools Act. The SGB was represented by its chairpersons during the investigation. Mr Joseph Du Plessis represented the SGB between 2019 and 2021. Mr OJ Van Niekerk represented the SGB in 2021.

3.4. The Third Respondent is the Head of the Provincial Department of Education in the North West Province. The Head of the Department exercises executive control over public schools through principals.

3.5. The Fourth Respondent is the Member of the Executive Council for Education in the North West Province ("the MEC"). In terms of section 1 of the Schools Act, the MEC is responsible for education in the North West Province. At the time of the incident in January 2019, the MEC was Mr Sello Lehari.

4. SCOPE OF THE COMMISSION'S INVESTIGATION

4.1. The Commission's investigation initially sought to probe whether the conduct of the School or its educators towards the four learners amounted to a violation of the learners' rights to equality and dignity.

4.2. The Commission's investigation also sought to explore whether or not language had been used as a proxy for race at the School.

4.3. Whilst conducting its investigation, the Commission's attention was drawn to additional issues, namely:

4.3.1. the disruption of teaching and learning by the protestors who gathered at the School to protest against what they perceived to be racial discrimination against the black learners.

4.3.2. the allegations of procedural irregularities relating to the suspension of Ms Elana Barkhuizen.[1] It was alleged that Ms Barkhuizen was suspended without being furnished with a description of the allegations of misconduct against her and had not been afforded an opportunity to make representations in this regard. The alleged conduct raised issues relating to procedural fairness, rationality, legality and the right to fair labour practices.[2]

4.3.3. the impact, if any, that the wide dissemination of the Photograph showing the faces of the learners had on the human rights of the learners, including their right to privacy.

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[1] The Commission notes that Ms Barkhuizen's name and identity had already been made public by the MEC during his public briefing on 10 January 2019, and thereafter during the media conference she and her legal representatives subsequently held on 15 January 2019. Ms Barkhuizen is an educator at the School and it was established that she had shared the photographs on the parents' WhatsApp group.

[2] As shown below, this issue had become moot at the time of the finalisation of the Commission's investigations.

4.3.4. the public disclosure of Ms Barkhuizen's name during the MEC's briefing with the community members who had gathered at the School on 10 January 2019. It was alleged that the disclosure potentially prejudiced her right to privacy as well as her own safety and that of her family.

4.4. Issues relating to the right to basic education, the right to privacy, the right to freedom and security of the person, procedural fairness, legality, rationality and fair labour practice are foundational for the observance and realization of human rights and fall within the mandate of the Commission. In view thereof, the Commission determined that the scope of its investigation be expanded to include the issues mentioned in paragraph 4.3 above.

5. STEPS TAKEN BY THE COMMISSION IN CONDUCTING ITS INVESTIGATION

5.1. During its investigation, the Commission:

5.1.1. Conducted inspections in loco at the School on 10 January 2019 and 14 January 2019.

5.1.2. Engaged with officials of the Department of Education in North West Province ("the Department").

5.1.3. Interviewed the Principal of the School, Mr Alwyn Henning; the former and current Chairman of the SGB; and Ms Olivier (the teacher of the classroom from which the Photograph was taken). These interviews were conducted at the School on 10 January 2019, 14 January 2019, 4 October 2019 and 4 August 2021.

5.1.4. Interviewed the then-suspended teacher, Ms Barkhuizen, who had taken the photographs of Ms Olivier's classroom. That interview took place in the presence of Ms Barkhuizen's legal advisors.

5.1.5. Conducted telephonic interviews with the parents of various learners enrolled at the School, including the parents of the four black learners appearing in the Photograph. Further face-to-face interviews with the

parents of the four learners were conducted on October 2019 at the School premises.

5.1.6. Corresponded through written correspondence with the SGB, the MEC and the Department with regard to the School's admission and language policies, and the report of the consultants employed by the SGB to conduct an investigation into the events of 9 January 2019, with a specific focus on the conduct of Ms Barkhuizen.

6. SUMMARY OF OBSERVATIONS FROM THE INSPECTION IN LOCO OF 10 JANUARY 2019

6.1. The Commission noted during the inspection in loco at the School on 10 January 2019 that protest action had occurred at the School, led by a number of community members and members of political parties. The protestors sang and chanted liberation songs within the School premises. Learners were on the School premises at the time of the protest. Some of the parents of learners had removed their children from the School premises allegedly out of concern for their safety. The MEC was present at the School for a planned meeting with the School. This meeting could not take place due to the protest-related unrest at the School. The MEC, however, proceeded to address community members and, among others, stated as follows:

"Let me give you my decision on behalf of the Department, as the Department we highly condemn what happened yesterday…the name of the teacher is Ellen (sic) Barkhuizen… she is suspended with immediate effect."[3]

[3] A news video clip of the MEC's address to community members was made public and accessible at https://www.youtube.com/watch?v=SRmeRqLibv0

7. SUBMISSIONS MADE TO THE COMMISSION

Interview with the Principal, the Chairperson of the SGB and Ms Olivier

7.1. On 14 January 2019, the Commission conducted an interview with the Principal, the Chairman of the SGB, and Ms Olivier. The following was established or stated during the interview:

7.1.1. It was confirmed that Ms Barkhuizen took the photographs of Ms Olivier's classroom.

7.1.2. Ms Barkhuizen was not responsible for the seating arrangements in Ms Olivier's classroom. She was a class teacher for a different Grade R class.

7.1.3. Some protestors had allegedly threatened to burn down the School. This resulted in the hiring of private armed security personnel to guard the School's infrastructure.

7.1.4. The Principal advised that there were 327 learners at the School of which 290 were white, 33 were black African, 3 were coloured, and 1 was Indian. He further stated that there was confusion in respect of the teacher who was suspended. He stated that the teacher who was suspended (Ms Barkhuizen) was the teacher who took the Photographs of another teacher's classroom. The class teacher (Ms Olivier) assigned to the classroom depicted in the Photograph had not been suspended but was still reporting for duty at the School.

7.1.5. The Principal further stated that on 10 January 2019, the School and the SGB had issued a media statement stating that:

7.1.5.1. the Photograph was not a true reflection of the character of the School;

7.1.5.2. the School is proud of its integrated character;

7.1.5.3. the Photograph was a reflection of a single moment in a classroom and was taken and sent to parents on the first day of school;

7.1.5.4. the SGB does not condone any distinction based on race; and

7.1.5.5. the SGB would provide support to the School staff when it appears that integration is not taking place as it should.

7.1.6. The Principal advised that the School does not have an anti-racism policy due to the fact that it had until 2014 admitted only Afrikaans-speaking learners. He stated that from 2014, Setswana-speaking learners were admitted to the School.

7.1.7. The Principal also advised that the School had briefed advocate Jerry Merabe, who is an expert in policy making and implementation, to conduct an investigation into the events of 9 January 2019 and to assist the School with the drafting of policies dealing with racism, diversity and transformation at the School. The School, in addition, undertook to work with the Commission in the drafting and review of the policies.

7.1.8. Teaching and learning had been disrupted, as could be seen by low levels of attendance on 14 January 2019, when only 61 of the 327 learners had attended school.

Interview with Ms Barkhuizen

7.2. On 16 January 2019, the Commission conducted a face-to-face interview with Ms Barkhuizen. The Commission sought to obtain information about:

7.2.1. her account of what had transpired pertaining to the seating arrangements, the taking of the Photograph and its dissemination;

7.2.2. her response to being suspended without being furnished with a description of the allegations of misconduct against her and without being afforded an opportunity to make representations;

7.2.3. whether the public disclosure of her name had any negative impact on her right to privacy and both her own and her family's safety.

7.3. Ms Barkhuizen confirmed that she had created a group on a social media platform, WhatsApp, to communicate with parents of the Grade R pupils in her own and Ms Olivier's classes.

7.4. She also advised that the first day of school, being 9 January 2019, was a busy day. Some of the pupils, particularly those in Grade R, were at school for the first time and were unsettled. Some pupils had been crying. A number of parents contacted the teachers, including Ms Barkhuizen, to enquire about how their children were doing on the first day. Ms Barkhuizen took a number of photographs (two from her classroom and two from that of her Grade R colleague, Ms Olivier, whose class is situated adjacent to her classroom) as a means of communicating an assurance to all the Grade R parents that their children were settling in. This mode of communication with the parents was more efficient than engaging with each parent in the Grade. The Photograph that had sparked outrage was one of the photographs that Ms Barkhuizen sent to the Grade R learners' parents via the 'closed' WhatsApp group.

7.5. Ms Barkhuizen stated that the Photograph was not aimed at causing a racial stir but was only meant to show the Grade R learners' parents that their children were settling in well at the School.

7.6. After the public disclosure of her name, Ms Barkhuizen and her minor children moved out of their home, fearing for their safety. At the time of the interview with her, Ms Barkhuizen's children were not attending school as they had moved out of their home to a place of safety.

Interview with the parents of the learners

7.7. In January 2019, the Commission also conducted interviews with parents of the learners enrolled at the School, including the parents of the four black learners appearing in the Photograph.

7.8. The parents advised the Commission that the seating arrangements and the purpose thereof had been explained to them. The parents had been informed that the seating arrangements were temporary and aimed at assisting their children to settle in the classroom. The parents stated that they did not believe that the separation of the learners was racially motivated. One of the parents advised that he had more than one child enrolled at the School and that neither he nor his children had ever experienced racism at the School. Another parent stated that she was shocked when she received the Photograph on the WhatsApp group. Her husband contacted Ms Barkhuizen and the school principal to enquire about the seating arrangements and was advised that the separation was aimed at bridging the language barrier between the learners and that it was just a temporary arrangement until the children were settled and integrated.

7.9. The parents described Ms Barkhuizen and Ms Olivier as good educators and spoke well of them. They indicated further that they had not previously experienced any racist conduct by the two educators or the School.

Correspondence to the SGB and the MEC

7.10. On 17 January 2019, the Commission addressed letters to the MEC and the SGB in terms of which it:

7.10.1. pointed out the alleged irregularities in the manner in which Ms Barkhuizen was suspended. The Commission also stated that it was of the view that a *prima facie* violation of Ms Barkhuizen's right to fair labour practice had occurred on the basis that she had been suspended without being furnished with the allegations of misconduct attributed to her and without being afforded an opportunity to make a representation.

7.10.2. stated that the public disclosure of Ms Barkhuizen's name immediately following her suspension may have resulted in undue prejudice and a violation of her right to privacy.

7.10.3. urged the Department to take urgent steps to restore an environment conducive to learning and teaching at the School, pending the finalization of any investigation and other processes that would be initiated by the Department of Education and/or other Organs of State. In addition, the Department was advised to enlist the services of professional counsellors to provide psycho-social support to the learners who may have been traumatized by the developments at the School.

7.11. The Commission requested the MEC and the SGB to respond to the allegations by 21 January 2019.

Response of the SGB

7.12. On 21 January 2019, the SGB addressed its response to the Commission's letter of 17 January 2019 and stated that:

7.12.1. the incident at the School sparked protest action, and that tensions at the School escalated on the arrival of the MEC. Protestors entered the School premises, and the situation became volatile and threatening. The learners were traumatized by the noise, banging on class windows and threatening behaviour of the protestors.

7.12.2. the MEC held a meeting with the Principal and the Chairperson of the SGB on 10 January 2019. The MEC immediately expressed his shock and outrage at the incident and asked the SGB for its full cooperation in the investigation. The SGB agreed to cooperate.

7.12.3. the MEC sought the name of the person who had taken the Photograph, and the Principal responded that it was Ms Barkhuizen. The SGB Chairman had informed the MEC that Ms Barkhuizen is

appointed by the SGB and assured the MEC that the SGB would work with the Department to investigate the matter.

7.12.4. the MEC consulted with various people who were representing political parties and community organizations as well as Departmental officials. The consensus amongst them was that the teacher be suspended. Mr du Plessis, the SGB Chairperson, tried to further explain the situation but was silenced by the MEC and stopped from elaborating. The MEC announced that the teacher would be suspended and that an investigation would be started very soon.

7.12.5. the MEC then proceeded to the School hall where the protesters had begun gathering and announced to them and the media, amongst others, that the teacher named Ellen Barkhuizen (sic) would be suspended.

7.12.6. the SGB was informed during a meeting on 11 January 2019 that Ms Barkhuizen had left town and was not available to meet with the SGB.

7.12.7. the SGB was under severe pressure due to the protest action and threats of violence at the School.

Response from the MEC

7.13. On 22 January 2019, the then MEC Lehari, requested an extension to 25 January 2019 to furnish his response to the Commission. The Commission granted the extension until 23 January 2019. The MEC did not furnish his response by the extended deadline of 23 January 2019. The Commission addressed a further letter requesting the MEC to furnish his response. On 28 January 2019, the MEC furnished his response dated 25 January 2019 to the Commission's letter dated 17 January 2019. The MEC stated that:

7.13.1. He visited the School on 16 January 2019 and pleaded with the SGB and the parents to ensure that there is stability at the School and that the learners attend school so that teaching and learning could take place.

7.13.2. It was the decision of the SGB to suspend Ms Barkhuizen since she is an employee of the SGB. The MEC further stated that the suspension letter was issued by the SGB. The MEC supported the action taken by the SGB, noting the severity of the alleged conduct and in pursuit of the protection of constitutional values.

7.13.3. The Inclusive Education Unit of the District Department of Education had started providing counselling to learners and parents needing counselling.

7.13.4. The Department appreciated the Commission's efforts to ensure that children's rights are protected, defended and promoted in school.

7.14. The MEC did not respond to the allegations that the public disclosure of Ms Barkhuizen's name immediately following her suspension may have resulted in undue prejudice and a violation of her right to privacy.

7.15. On 9 September 2019, the Commission addressed a letter to the SGB and the Department in terms of which it requested the parties to make submissions regarding the conduct of the School and whether such conduct constituted unfair discrimination. The Commission pointed out that it had made a determination that the conduct of the School, through Ms Olivier, amounted to discrimination and that the School bore the onus to prove that there was no discrimination or that the discrimination was not unfair. The Commission also requested a number of documents, including the Admission Policy, Language Policy, Advocate Marabe's report[4] and the employment equity plans of the SGB and the Department.

[4] As stated in paragraph 7.1.7 above, the Principal advised that the School had briefed advocate Jerry Merabe, to conduct an investigation into the events of 9 January 2019 and to assist the School with the drafting of policies dealing with racism, diversity and transformation at the School.

Further interviews with the parents of the four black learners, the Chairman of the SGB, the officials of the Department and the Principal

7.16. On 4 October 2019, the Commission conducted interviews with the parents of the four black learners, Mr Joseph Du Plessis, then Chairman of the SGB, the officials of the Department and the Principal. The Principal and Ms Olivier were represented by a legal representative from the Suid-Afrikaanse Onderwysers Unie[5] in the interviews. The legal representatives made submissions and relied on the court papers in Ms Barkhuizen's application to the Labour Court. The then Chairman of the SGB made submissions on behalf of the SGB in person. The submissions were as follows:

7.16.1. The seating arrangements were not aimed at discriminating against the black learners but were based on the language needs of the learners and were aimed at assisting them to integrate.

7.16.2. The Chairman of the SGB admitted that objectively viewed out of context, the Photograph was shocking. He further stated that lessons were learnt from the events of 9 January 2019 and that steps were being taken, including the review of the School's policies, in order to prevent the incident from recurring.

7.16.3. The Chairman of the SGB informed the Commission that the School was taking measures to avoid a repeat of the incident of 9 January 2019. He further stated that the School worked with the Ahmed Kathrada Foundation and held a walk which brought different ethnic groups together to honour the late Ahmed Kathrada.

7.16.4. The legal representative from the Suid-Afrikaanse Onderwysers Unie provided the Commission with a copy of Ms Barkhuizen's application before the Labour Court. He stated that Ms Barkhuizen's founding affidavit correctly sets out the position of the School. Furthermore, the

[5] Suid-Afrikaanse Onderwysers Unie is a teachers union.

application had succeeded in the Labour Court. The affidavit contains the following material averments:

7.16.4.1. The Grade R class was divided into two classrooms.[6]

7.16.4.2. The School term commenced on 9 January 2019;

7.16.4.3. On 7 and 8 January 2019, Ms Barkhuizen and Ms Olivier invited parents of the Grade R learners to attend at their respective classrooms in order to meet teachers and to familiarise themselves with the classrooms;

7.16.4.4. On 7 and 8 January 2019, Ms Barkhuizen explained her approach to seating arrangements in her classroom, particularly with reference to individual learners' needs and requirements. For example, Ms Barkhuizen would seat girls and boys separately at the commencement of formal teaching to avoid bickering, disagreements and distractions.

7.16.4.5. The School makes use of interpreters to assist with translation and interpretation. The contract of the interpreter who usually assisted Ms Barkhuizen was terminated in December 2018. To address the challenge, Ms Barkhuizen brought her domestic worker to the School to facilitate interpretation and translation until permanent arrangements were made.

7.16.4.6. The seating arrangements are often changed depending on the relevant pupil's needs and requirements. The seating arrangements are decided solely on the basis of the interest of the learner.

[6] Founding Affidavit of Ms Elizabeth Barkhuizen in the Application before the Labour Court under case number J 44 / 2019 at para 23 ("Ms Barkhuizen's Founding Affidavit")

7.16.4.7. On 9 January 2019, Ms Barkhuizen used the WhatsApp group to communicate with the parents of the Grade R learners.

7.16.4.8. Parents were enquiring about the well-being of their children. In an effort to alleviate the parents' fears, Ms Barkhuizen decided to take photographs (on her cellphone) of the two classrooms. Her intention was to show the parents that the learners were peaceful and content.

7.16.4.9. Ms Barkhuizen detests racism. She received support from the parents of black learners.

7.16.4.10. She sent the pictures to the parents using the WhatsApp group.

7.16.4.11. Mr M, the father of one of the four learners in the Photograph, phoned Ms Barkhuizen, expressing clear irritation with what he referred to as a separation of his child and the other black learners from other white learners. Ms Barkhuizen explained to Mr M that no separation had been done according to race, and that the learners were often moved around during the course of the first day to accommodate each pupil's individual needs.

7.17. On 4 October 2019, the School provided the Commission with the investigative report compiled by Advocate MJ Marabe[7] and MH Mthombeni[8]. Advocate Marabe and Mr Mthombeni had been briefed to investigate the following:

7.17.1. The incident in the Grade R class on 9 January 2019, with specific reference to the conduct of Ms Barkhuizen;

[7] Advocate practicing in Bloemfontein.

[8] Retired Chief Director: School Governance and Management Consultant.

7.17.2. The governance of the School with specific reference to the following:

7.17.2.1. Ethos of the School;

7.17.2.2. Social Media Policy;

7.17.2.3. Admission and Language Policy; and

7.17.2.4. Management and Diversity

7.17.3. The investigative report made the following findings:

7.17.3.1. Ms Barkhuizen's version of events was not opposed in the Labour Court. The evidence was accepted. Accordingly, Ms Barkhuizen had not committed any misconduct.

7.17.3.2. The School gives expression to an ethos that promotes the best interest of the School and strives to ensure its development through the provision of quality education for all learners at the School. Accordingly, there were no justifiable reasons to recommend any amendments to the School's ethos.

7.17.3.3. The language and admission policies of the School are in line with the Constitution, the Schools Act, Norms and Standards for Language Policy in Public Schools and Admission Policy for Ordinary Public Schools published in terms of section 3(4)(i) and (m) of the National Education Policy Act. These policies are living documents and will be reviewed from time to time.

7.17.4. The investigative report made the following recommendations:

7.17.4.1. The SGB to determine a Communication Policy;

7.17.4.2. The SGB must review the School ethos from time to time;

7.17.4.3. The language and admission policies of the School must be reviewed from time to time; and

7.17.4.4. The SGB is urged to address the imbalances of the past in its recruitment process if reasonably practical and in the best interest of the learners.

7.18. On 4 October 2019, the parents of the four black learners maintained that whilst they were shocked when they first saw the Photograph depicting their children being separated from white learners, the School explained the purpose of the separation, and they were satisfied with same. The parents also advised the Commission that the incident did not in any way impair the dignity of the learners. They further advised that the learners had fully integrated into the School and were doing well academically and in different sports activities.

7.19. On 4 October 2019, the Chairperson of the SGB furnished the Commission with other photographs taken in Ms Olivier's classroom. The impugned Photograph was taken at 9:12:21 am. Another photograph was produced showing two black learners seated on a desk with white learners. This photograph of Ms Olivier's class was taken at 9:18:06 am.

7.20. These photographs were used to substantiate the argument of the School that seating arrangements were temporary. The School also used the photographs to provide further explanation of the context within which the photographs were taken and to show that there were more photographs depicting something different and that the photographs should be considered holistically.

Further interviews with the Principal and Mr OJ Van Niekerk

7.21. On 4 August 2021, the Commission conducted final interviews with the School and the SGB. They advised as follows:

7.21.1. Ms Olivier has retired from her post as an educator at the School.

7.21.2. To bridge language barriers, the SGB had previously hired an interpreter who assisted with interpretation for learners who did not understand Afrikaans. The contract with the interpreter was

terminated in December 2018. In January 2019, the School did not have an interpreter. Ms Barkhuizen brought her domestic worker to the School to assist with interpretation. The School and the SGB advised the Commission that they considered it adequate to rely on such private arrangements, such as the use of a domestic worker who may not be trained as an educator or interpreter, since their role was merely limited to interpreting.

7.21.3. The School has since appointed a General Assistant who also assists with interpretation in the classroom and thus negating the need for appointing an interpreter.

7.21.4. Three of the learners are still enrolled in the School. One of the learners left the School when the parents relocated in 2020.

7.21.5. There are thirteen (13) primary schools in Mamusa Local Municipality. The School is the only Afrikaans medium school.

7.21.6. The School has reviewed its language and admission policies. In 2019, there were 327 learners at the School of whom 290 were white, 33 were black African, 3 were coloured, and 1 was Indian. In 2021, there were 294 learners at the School of whom 247 were white, 37 were black African, 5 were coloured, 4 were Indian, and 1 was Asian.

7.21.7. The School adopted a Communication Policy to regulate the communication between the School and the media and to prevent teachers from sharing information with the media.

7.21.8. In 2014, the School started enrolling non-Afrikaans-speaking learners. No measures were taken to accommodate non-Afrikaans-speaking learners. Even after the 2019 incident, the School did not change its practices since it did not do anything wrong. What happened on 10 January 2019 was just a matter of bad media coverage.

Interview with Ms Olivier

7.22. After discovering that Ms Olivier had retired, the Commission requested an interview with her in person. She advised that she needed to first consult her husband who is a lawyer. She later agreed to a telephonic interview which ultimately took place on 11 August 2021. During the interview, Ms Olivier advised as follows:

7.22.1. She reiterated that on 10 January 2019, the learners were aged 5, and did not know anyone at the School. She separated the four learners in order to enable them to communicate in Setswana.

7.22.2. She requested the School's general assistant to assist with interpretation.

7.22.3. The seating arrangements were based on her consideration of the situation in the classroom. As an educator, she was required to assess the situation in the classroom and make consideration for the learners' language capabilities and their general conditions. At times, she could decide to separate boys from girls. She had to consider the needs of those who were crying. If there were learners who spoke Russian, she would have seated them together. It would not make sense to group Setswana-speaking learners with Afrikaans-speaking learners on the first day. The learners could not be separated for the entire year as they would have to learn Afrikaans.

7.22.4. She did not know that one of the four black learners did not speak Setswana and that another learner could speak Afrikaans.

7.22.5. She advised that children do not see colour. The black learners would play with the white learners and become friends. During lunchtime, the black learners would look for each other because they come from the same culture.

7.22.6. Her decision to separate the black learners on 10 January 2019 was correct.

8. **UNCONTESTED FACTS**

8.1. Having considered the submissions of the parents, the School, the SGB and the MEC, the Commission notes the following to be uncontested facts:[9]

8.1.1. As at 9 January 2019, both Ms Barkhuizen and Ms Olivier were employed as Grade R educators at the School;

8.1.2. The school term for 2019 officially commenced on Wednesday, 9 January 2019. There are two Grade R classrooms with approximately 22 pupils in each class. On 7 and 8 January 2019, the Grade R class educators invited the parents of the then-prospective learners to meet them as teachers and to familiarise themselves with the classrooms.[10]

8.1.3. The parents and the learners were granted an opportunity to acquaint themselves with the teachers and the classrooms prior to the formal commencement of the school activities on 9 January 2019. On the said dates, Ms Barkhuizen explained to the parents her approach to the seating arrangements in the classroom, particularly with reference to the individual learners' needs and requirements. She also explained seating arrangements and her approach in relation to communication difficulties arising from language barriers.[11]

8.1.4. The school is an Afrikaans medium school, and to assist learners who have difficulty communicating in Afrikaans or English, it makes use of interpreters to interpret and translate for the learners. The services of the interpreter who assisted in the Grade R classes were terminated in December 2018. There was no interpreter available at the commencement of the school term, and Ms Barkhuizen made her own

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[9] Some of these were accepted as uncontested fact in the *Solidarity obo Barkhuizen v Laerskool Schweizer-Reneke and Others* (J44/19) [2019] ZALCJHB 90; (2019) 40 ILJ 1320 (LC); [2019] 7 BLLR 725 (LC) (24 January 2019).

[10] See *Solidarity* (note 6 above) para 10.

[11] See Solidarity (note 6 above) para 10.

private arrangements to facilitate interpretation and translation in her classroom until permanent arrangements could be made.[12]

8.1.5. On the first day of school, Grade R learners were typically anxious, and it required special effort on the part of the teaching staff to ensure that learners and their parents were comforted. In keeping with the first school day, Ms Barkhuizen, through the course of the morning, received various enquiries from parents via her mobile phone about their children.[13]

8.1.6. In November 2018, Ms Barkhuizen created a WhatsApp group for all the then-prospective 2019 Grade R parents. She decided that it would be more practical to address the messages she received from the parents via the said WhatsApp group rather than to reply to each parent individually.[14]

8.1.7. Ms Barkhuizen had received a number of messages from parents enquiring about their children, and in an effort to alleviate the parents' anxiety, she decided to take photographs on her cellular phone of the two Grade R classes and distribute them via the WhatsApp group that she had created to communicate with the parents. Her intention was to show the parents that the learners were content. Ms Barkhuizen took four photographs in total, of which two depicted Ms Olivier's classroom and two depicted her own classroom.[15]

8.1.8. Shortly after Ms Barkhuizen sent the said photographs to the parents via the WhatsApp group, she received a phone call from a parent of one of the learners, Mr 'M', expressing his irritation with what he referred to as a separation of his child and other black learners from

[12] See Solidarity (note 6 above) para 12.

[13] See Solidarity (note 6 above) para 13.

[14] See Solidarity (note 6 above) para 14.

[15] See Solidarity (note 6 above) para 15.

the white learners. Mr ‘M’ was, in fact, referring to a picture taken of Ms Olivier’s classroom.[16]

8.1.9. Ms Barkhuizen explained to Mr ‘M’ that no separation is done according to race and that the learners are moved around often during the course of the first day to accommodate the learners’ individual needs and to accommodate the different daily activities. Ms Barkhuizen further explained to Mr ‘M’ that the Photograph was taken in the other Grade R classroom (Mrs Olivier’s classroom) and that she had no hand in the seating arrangements of that class. Her explanation to Mr ‘M’ came to nought, and she advised him to call the Principal, as she was busy with the orientation of the learners.[17]

8.1.10. The Photograph that sparked outrage was, in fact, of Ms Olivier’s classroom.[18]

8.1.11. On 10 January 2019, some political parties and their members gathered and protested at the School premises. The protest became so volatile that the learners and the educators were eventually evacuated.[19]

8.1.12. At around 10:56 on 10 January 2019, Ms Barkhuizen received a phone call from the School principal, informing her that after consultation with the MEC, they had decided to suspend her with immediate effect and with full benefits. At 11:01, the MEC publicly announced that he had decided she must be suspended.[20]

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[16] See Solidarity (note 6 above) para 16.

[17] See Solidarity (note 6 above) para 17.

[18] See Solidarity (note 6 above) para 18.

[19] See Solidarity (note 6 above) para 20.

[20] See Solidarity (note 6 above) para 21.

8.1.13. On 10 January 2019, Ms Barkhuizen received her suspension letter, informing her that she had been suspended pending an investigation.[21]

8.1.14. Approximately 90% of the learners at the School are white. The School's statistics demonstrate that the number of non-white learners has not significantly increased beyond the 10% mark in the last four years.

8.1.15. All educators at the School in 2019 were white. The SGB had already been advised, through its internal investigative report, that its future recruitment processes must, if reasonably practicable, address the imbalances of the past in order to achieve broad representation at the School.

9. ISSUES TO BE DETERMINED

9.1. As stated above, at the commencement of the investigation, a number of issues required determination. It is necessary to dispose of some matters that have since become moot and no longer require a determination by the Commission. With regard to mootness, in *National Coalition for Gay and Lesbian Equality and Others v Minister for Home Affairs and Others,* the Constitutional Court held that:

> *"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law*."[22]

9.2. The moot issues relate to the alleged irregularities in the suspension of Ms Barkhuizen. In its letter to the MEC and SGB dated 17 January 2019, the Commission expressed concerns about the alleged irregularities in the manner in which Ms Barkhuizen was suspended and indicated that the alleged

[21] See Solidarity (note 6 above) para 22.

[22] 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18

irregularities could constitute a violation of the right to fair labour practices. However, the Commission notes that Ms Barkhuizen initiated proceedings in the Labour Court to challenge her suspension from work. Furthermore, the Commission has noted that the MEC did not oppose the application by Ms Barkhuizen but instead filed a notice to abide by the decision of the Labour Court. On 24 January 2019, the Labour Court declared the suspension of Ms Barkhuizen to be unlawful and set it aside.[23] This issue has, therefore, been resolved by the judgment of the Labour Court and will not be taken any further by the Commission.

9.3. The remaining issues for determination are as follows:

9.3.1. Whether the separation of the four black learners, as depicted in the Photograph, amounted to a violation of their right to equality in terms of section 9 of the Constitution.

9.3.2. Whether the learners' right to privacy under section 14 of the Constitution was violated when the Photograph of them was taken and disseminated.

9.3.3. Whether the conduct of the protestors threatened or violated the rights of the learners to basic education in terms of section 29(1) of the Constitution.

9.3.4. Whether the public disclosure of Ms Barkhuizen's name amounted to a violation of the right to privacy and/or her right to freedom and security.

10.LEGAL FRAMEWORK

The Constitution

[23] See Solidarity (note 6 above)

10.1. The Constitution confers the rights enshrined in sections 9, 10, 12, 14, 28, and 29 to everyone.

10.2. Section 9 of the Constitution provides guarantees for the right to equality for everyone and prohibits unfair discrimination.[24]

10.2.1. The correct approach to a constitutional challenge based on the equality clause was summarised in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) ("*Harksen*") at para 53 as follows:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

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

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24 Section 9 of the Constitution provides as follows:

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

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

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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

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

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

(ii)If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

(iii) If, at the end of this stage of the inquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c)If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."

10.2.2. Although this test was formulated with reference to the interim Constitution, it has been applied to challenges based on section 9 of the Constitution.

10.2.3. In determining whether discrimination has an unfair impact, the Constitutional Court held that the following factors must be taken into account:[25]

"(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether

[25] Harksen, Paragraph 51

the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

10.3. Section 10 of the Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected.

10.4. Section 12(1)(c) of the Constitution states that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.

10.5. Section 14(d) of the Constitution states that everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed.

10.6. Section 28(2) of the Constitution states that a child's best interest is of paramount importance in every matter concerning the child.

10.7. Section 29(1) of the Constitution confers the right to basic education, including adult basic education, on everyone.

10.8. The rights recorded above attach to every person and are enjoyed everywhere in the country, except where they are limited in terms of section 36 of the Constitution.[26]

10.9. Notwithstanding the constitutional protection of the above rights, it is now trite that in terms of the principle of subsidiarity, where legislation has been enacted to give effect to constitutional rights, cases of infringement of a constitutional right must be primarily decided in terms of the provisions of the said legislation, in preference to the provisions of the Constitution.[27] The provisions of the Constitution, however, remain relevant in the interpretation of the provisions of the enabling legislation.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

10.10. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act') was enacted pursuant to the provisions of section 9 of the Constitution. Section 6 of the Equality Act states that *"[n]either the State nor any person may unfairly discriminate against any person*".

10.11. Section 7 of the Equality Act states that *"**subject** to section 6, no person may unfairly discriminate against any person on the ground of race, including—*

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26 Section 36(1) provides: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

27 See *Chirwa v Transnet Limited* (2007) ZACC 23 at 123

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

(b) the engagement in any activity which is intended to promote, or has the effect of promoting exclusivity, based on race;

(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group."

10.12. Section 6 of the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the state and non-state actors on the same grounds, including language, race, ethnicity and culture.

10.13. Section 7 of the Equality Act prohibits unfair discrimination on the basis of race. In particular, subsection 7(a) prohibits the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but is actually aimed at maintaining exclusive control by a particular race group. Section 7(b) of the Equality Act further prohibits the engagement in any activity which is intended to promote or has the effect of promoting exclusivity based on race.

10.14. Section 1 of the Equality Act defines "discrimination" as *"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly— (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds".*

10.15. Central to this prohibition is the definition of "prohibited grounds", which the Equality Act defines in section 1 as follows:

"(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."

10.16. Section 13 of the Equality Act regulates the burden of proof in equality matters. In this regard, section 13 of the Equality Act provides that:

"(1) If the complainant makes out a prima facie case of discrimination—

(a) the Respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) the Respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place—

(a) on a ground in paragraph (a) of the definition of "prohibited grounds", then it is unfair, unless the Respondent proves that the discrimination is fair;

(b) on a ground in paragraph (b) of the definition of "prohibited grounds", then it is unfair—

(i) if one or more of the conditions set out in paragraph (b) of the definition of "prohibited grounds" is established; and

(ii) unless the Respondent proves that the discrimination is fair."

10.17. The Court in *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) stated that:

10.17.1. The scheme of section 13(1) is used to determine whether the complainant has established, on a *prima facie* basis, the existence of discrimination. The initial onus is on the complainant. Once that is established, it then lies on the Respondent, who must show that there was no discrimination at all or that the discrimination complained of was fair.

10.17.2. The shifting of the onus to the Respondent occurs immediately when the complainant makes out a *prima facie* case of discrimination, and even before the kind of discrimination is established. Proof of discrimination at this stage does not require the complainant to prove that it was unfair. Final relief will only be granted if the Respondent fails to prove that no discrimination took place or, if it took place, that it was not unfair.

10.17.3. Section 13(1)(a) requires the complainant to merely make out a *prima facie* case, whereas the Respondent must prove, on the facts before the court, that discrimination did not take place as alleged, or if it did, was not unfair. The onus is, therefore, heavier on the Respondent i.e. they must prove either that no discrimination has taken place or, if it did, that it was not unfair. This being akin to civil proceedings, the onus may be discharged on a balance of probabilities.

10.18. Section 14 of the Equality Act identifies the test for the determination of unfairness. It states the following:

"*14 Determination of fairness or unfairness*

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the Respondent has proved that the discrimination is fair, the following must be taken into account:

(a) the context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2) (b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) the nature and extent of the discrimination;

(e) whether the discrimination is systemic in nature;

(f) whether the discrimination has a legitimate purpose;

(g) whether and to what extent the discrimination achieves its purpose;

(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) whether and to what extent the Respondent has taken such steps as being reasonable in the circumstances to-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

10.19. Notwithstanding the enactment of the Equality Act, the *Harksen* test remains instructive in equality matters. Recently, the full bench in *Gaum and Others v Van Rensburg NO and Others* endorsed the *Harksen* and *Prinsloo* test and stated as follows:

> *"In Prinsloo v van der Linde and Another 1997 (3) SA 1012 (CC) p554 and Harkson v Lane NO 1998 (1) SA 300 (CC) para 53, the Constitutional Court found the stages of an enquiry into the violation of the equality clause as starting with whether the conduct differentiates between people or classes of people. Even if the differentiation does bear a rational connection it might nevertheless amount to discrimination. The rational connection enquiry need not be done first because if a court finds that the discrimination is unfair and unjustifiable the rational connection inquiry would be unnecessary. The next question is whether the differentiation amounts to unfair discrimination. If the discrimination is on a specified ground in s9(3) then discrimination is established. If discrimination is established then the enquiry is whether the discrimination is unfair. If the discrimination is found on a specified ground then the unfairness is presumed. If the discrimination is found to be unfair a determination is necessary to find whether the conduct can be justified under the limitation clause.*[28]

10.20. Since the coming into operation of the Equality Act, our courts have dealt with several unfair discrimination claims and, in the process, provided guidance on the treatment of the factors listed in section 14 of the Equality Act in the determination of fairness or unfairness.

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[28] (40819/17) [2019] ZAGPPHC 52; [2019] 2 All SA 722 (GP) (8 March 2019)

10.21. In *Du Preez v Minister of Justice 2006 9 BCLR 1094 (SE) ("Du Preez"),* the issue before the Equality Court was whether the short-listing criteria for appointments utilized by the Respondent constituted unfair discrimination. The Applicant in the matter was a magistrate who alleged that the criteria utilized were irrational, discriminatory and inequitable and, in effect, constituted an absolute barrier to his appointment.

10.22. The Court remarked that the difference in wording between section 9(2) of the Constitution and section 14(1) of the Equality Act had to be reconciled, but held that the Equality Act and Employment Equity Act were *"sufficiently close for authority on the one to be of assistance in the interpretation and application of the other."*

10.23. Importantly, the Court referred to the considerations that must be taken into account as set out in sections 14(2) and (3) of the Equality Act and stated that although the list is wide and comprehensive, it is not necessarily exhaustive. The Court further highlighted that not all the criteria mentioned in section 14 are applicable in all cases, nor do those that are relevant necessarily bear the same weight in the enquiry. Each case is to be decided on its own particular facts and circumstances.

10.24. The Court further noted the need to interpret the Equality Act's section 14(1) with sensitivity to constitutional values and objectives. The Court found that although there was unarguably a need for transformation in the judiciary and, therefore, that the discrimination had a legitimate purpose, the Applicant had succeeded in making out a case of unfair discrimination because the short-listing procedure did not provide any substitute for his experience. There was no proportionality in a selection policy based on race and gender to the absolute exclusion of all the other qualities required for a position as responsible and important as that of a regional magistrate. Such a policy is irrational within its own terms and objectives. The short-listing formula raised an insurmountable obstacle for the complainant. The Court concluded that the Respondents failed to prove that the discrimination perpetrated against the complainant was fair.

10.25. In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park (26926/05) [2008] ZAGPHC 269; (2009) 30 ILJ 868 (EqC)* (27 August 2008), the claimant approached the Equality Court for compensation under the Equality Act for having been unfairly discriminated against by the Respondent (the church) on the ground of sexual orientation when it terminated his services as a contract music teacher because he was living in a homosexual relationship. The church admitted the discrimination but resisted the complaint on the basis that the discrimination was fair, for which contention it relied on the constitutional right to freedom of religion. The court had to determine whether the Respondent's right to religious freedom outweighed the complainant's right to equality and the right not to be discriminated against on the ground of sexual orientation.

10.26. The Court stated that the onus rested on the Respondent to prove that the unfair discrimination was fair and referred to section 14(2) of the Equality Act. It held that the Respondent had failed to show that the complainant was in a position of spiritual leadership as alleged, as his work involved no religious responsibilities at all. Importantly in that regard, the complainant was not even a member of the church, neither was he an employee of the church. He was, in a sense, removed or distanced from the church, and did not participate in its activities.

10.27. The Court stated that it would not be devastating to the church to keep the complainant on in his teaching position. In other words, the impact on religious freedom would be minimal. On the other hand, the termination of his contract on the ground of his homosexual orientation would have an enormous impact on the complainant's rights to equality and dignity. The Court concluded that the church had failed to discharge the onus of proving that the discrimination was fair and accordingly found that the Respondent had unfairly discriminated against the complainant on the ground of his sexual orientation.

10.28. In *September v Subramoney NO & Others [2019] 4 All SA 927 (WCC),* the Applicant was a transgender person incarcerated at a correctional centre and sought, in terms of the Equality Act, to be allowed to express her gender

identity while in prison. The Applicant contended that the Respondents' treatment constituted unfair discrimination and harassment under the Equality Act. In paragraph [85] of its judgment, the Court referred to the factors listed in section 14 of the Equality Act in order to determine the fairness or lack thereof.

10.29. The Applicant contended that the fourth Respondent did not justify his discrimination against her in any way and that the first Respondent did not address the issue of fairness under sections 14(2) and (3) of the Equality Act. In this regard, the Applicant contended that the first Respondent argued that to the extent that his refusal to allow the Applicant to express her gender identity constituted discrimination, it was reasonable and justifiable in the circumstances since the Applicant would have been at risk of being sexually assaulted.

10.30. The Court stated that the alleged security of the Applicant, if she were allowed to express her gender identity, brings the factors under section 14(3) of the Equality Act to the fore, namely section 14(3)(f) whether the discrimination has a legitimate purpose, section 14(3)(g) whether and to what extent the discrimination achieves its purpose and section 14(3)(h) whether there are less restrictive and less disadvantageous means to achieve the purpose.

10.31. The Court held that:

> *"...the first Respondent's neutral application of the rules applicable to all its inmates at Helderstroom, (and correctional services facilities generally), including the Applicant, is discriminatory as it does not make provision for transgender inmates. In the result, the neutral application of the rules to the Applicant causes discrimination against her on the basis of her gender identity.*"
>
> *Moreover, should there indeed be a threat, the respondents should have alternative less restrictive measures available to ensure her safety instead of refusing to allow her to express her gender identity. In line with its obligation, the first Respondent should ensure that she is not exposed*

to any known threat of violence while legitimately disciplining her for an infringement."

10.32. In respect of the finding of unfair discrimination, the Court found that the Respondents have not demonstrated any prejudice or hardship (to them or to her inmates) that would arise if they permitted the Applicant to express her gender identity. The Court concluded that "the respondents' failure to apply the principle of reasonable accommodation to the Applicant and to allow her to express her gender identity renders the discrimination in this regard against her manifestly unfair".

10.33. In *Gelyke Kanse and others v Chairman of the Senate of Stellenbosch University and others* [2018] 1 All SA 46 (WCC) the Applicants sought to review and set aside decisions of the Senate and Council of the Stellenbosch University ("the SU") to adopt a new language Policy ("the 2016 Policy") for the SU in terms of the Higher Education Act 101 of 1997. The application was made on constitutional as well as administrative law grounds, and sought essentially to secure the continuation of Afrikaans as a primary language of instruction at the SU. The Applicants argued that the 2016 Policy constitutes direct unfair discrimination against Afrikaans-speaking students; and indirect unfair discrimination against White and Coloured students. The Court stated that the Constitutional Court has made it clear that complaints that the policies or conduct of organs of State violate the right not to be unfairly discriminated against must be brought under the Equality Act, not under the Constitution. The Court found that absent an application in the Equality Court, a High Court judge has no power to hear complaints in terms of the Equality Act. That is why in De Lange, the Constitutional Court refused to hear an unfair discrimination claim that had been raised only in the High Court. The Applicants have launched this application exclusively in the High Court.

10.34. The Court nevertheless undertook the exercise to demonstrate that even if this Court had the necessary jurisdiction to entertain the complaint, the Applicants would still be faced with difficulties. The Court then referred to the test for fairness as set out in section 14(2) of the Equality Act, which requires

a Court to consider the context and the factors set out in section 14(3) of the Equality Act. The Court held that on a proper consideration of the factors, it was compelled to conclude that the 2016 Policy was fair because:

> *"(a) SU accepts that access to tuition in the language of one's choice has a connection to human dignity and that (assuming there is discrimination at all) it will have some negative impact on Afrikaans speakers. At the risk of being repetitive, SU still offers tuition in Afrikaans and accordingly any conceivable impairment of dignity is minimal. Importantly, the majority of Afrikaans speakers are able to learn in English, particularly with the additional assistance offered by SU in the first year of study; (b) Those who are disadvantaged are primarily White Afrikaans speakers. The truth is that they generally occupy a historic and current position of privilege in society. Certainly, that weighs in favour of fairness; (c) The discrimination is thus limited. It is systemic in the sense that it flows from a policy, but there is systematic discrimination against White Afrikaans people generally; (d) The 2016 Policy serves the legitimate purpose of ensuring equitable access to SU, and ensuring that Black (African) students are not prevented from learning. By ensuring that all information will be available in English, it achieves that purpose; (e) There (as explained earlier) are no less restrictive means to achieve that purpose within SU's available resources. The reason is because the Policy requires the maximum possible Afrikaans offering within SU's resources; (f) The Policy promotes (as it were) diversity in that it makes SU an attractive and accommodating space for all students, regardless of race." (own emphasis)*

10.35. The Court concluded that any conceivable discrimination in this regard was fair.

10.36. In *Lourens v Speaker of the National Assembly of Parliament of the Republic of South Africa and others [2016] 2 All SA 340 (SCA),* the Appellant was an Afrikaans-speaking person who believed that the current practice of Parliament in relation to the language used for legislation, and the rules of Parliament in that regard, amounted to unfair discrimination against him and

all non-English speaking people in the country in that Bills are introduced into Parliament invariably in English, are published in English, and that the official text that is sent to the President for signature is also, invariably, in English only. According to the Appellant, the failure to translate all Acts of Parliament into all eleven official languages amounted to unfair language discrimination in terms of the Equality Act. While not disputing that there was discrimination, the Respondents argued that the discrimination was not unfair.

10.37. In its judgment, the SCA stated that section 14 of the Equality Act sets out the test for fairness and set out its provisions. In concluding that Parliament and the National Government are not guilty of unfair discrimination insofar as they do not pass Bills and enact them in all official languages, the Court did not engage with each of the factors listed in section 14.

South African Schools Act 84 of 1996

10.38. The South African Schools Act 84 of 1996 ("the Schools Act") was enacted to give effect to the right to education. It introduces a new national system for schools to address past injustices in educational provision, provides for education of progressively high quality for all learners, and in so doing, lays a strong foundation to advance, develop and support the democratic transformation of society, as well as combat racism and sexism and all other forms of unfair discrimination and intolerance.

10.39. Section 5 of the Schools Act states that *a public school must admit learners and serve their educational requirements without unfairly discriminating in any way*.

Children's Act 38 of 2005

10.40. One of the declared objectives of the Children's Act 38 of 2005 (Children's Act) is to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards. Section 8(2) of the Children's Act states that all organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.

Protection of Personal Information Act, No. 4 of 2013

10.41. The Protection of Personal Information Act 4 of 2013 ("POPI Act") was enacted to give effect to the constitutional right to privacy. Although some portions of the POPI Act came into effect on 11 April 2014, the operative provisions of the POPI Act, which give content and meaning to the right to privacy, only came into effect on 1 July 2020, over a year after the cause of action in this matter arose.

10.42. In view of the established legal principle against the retrospective application of a new enactment,[29] the POPI Act will not be relied upon in this report in determining whether the public dissemination of the Photograph and the public disclosure of Ms Barkhuizen's name violated the right to privacy.

11. ANALYSIS

11.1. Against the above legal backdrop, we now determine whether the rights referred to above were violated.

(a) Whether the learners' right to equality was violated

11.2. The Commission considered this matter through the prisms of the Constitution, legislation and the jurisprudence of the courts. Section 9 of the Constitution, as well as *Harksen* are an instructive point of commencement for the consideration of the impugned conduct.

11.3. As indicated above, unfair discrimination by both the State and private parties, including on the grounds of language, race, ethnicity and culture, is specifically prohibited by sections 9(3) and (4) of the Constitution. *Harksen*, on the other hand, outlines the constitutional test for distinguishing between fair and unfair discrimination.

11.4. The Equality Act expounds on the content of the right to equality, as well as the test to be applied in distinguishing between fair and unfair discrimination.

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[29] *S v Mhlungu and Others* 1995 (7) BCLR 793 (CC)

11.5. The distinction between fair and unfair discrimination is important as the equality clause, and the Equality Act do not prevent the government from treating people differently from others, and the principle of equality does not require everyone to be treated the same.[30] Accordingly, people may be treated differently for a variety of legitimate reasons, including affirmative action. Differentiation is permissible if it does not amount to unfair discrimination.[31]

11.6. On the facts of the case, the School admitted that it sought to use the language differences as the basis for the temporary seating arrangements in Ms Olivier's Grade R class on 9 January 2019. The resultant effect of this decision was that the learners in the class were also seated along racial lines.

11.7. A determination must be made into whether such seating arrangements amounted to discrimination and, if so, whether such discrimination was unfair.

Whether the seating arrangements in the class amounted to discrimination

11.8. When applying the discrimination test provided for in section 1 of the Equality Act, it is arguable that the seating arrangements in Ms Olivier's Grade R class on 9 January 2019 constituted discrimination in that (for the period the arrangements were in place), they created an environment in which the black and white learners in the class were denied the benefit and opportunity of closely engaging and interacting with each other. The withholding of such opportunity or benefit was expressly done on the basis of language, which in turn, had the consequence of separating the learners in the class along the lines of race.

[30] Currie and de Waal *The Bill of Rights Handbook* 5th Edition p239.

[31] Currie and de Waal (note 27 above) p239

11.9. The above conclusion is bolstered by the application of the first leg of the *Harksen* unfair discrimination test. On the application of the *Harksen* test, it cannot be gainsaid that the School discriminated against the black learners in that the School differentiated between the learners on the ground of language and race. Language and race are listed grounds. Accordingly, the differentiation of the learners cannot be classified as mere differentiation as it is based on prohibited grounds under section 9(3) of the Constitution. Accordingly, discrimination has been established.

Whether the discrimination amounted to unfair discrimination

11.10. As indicated above, the Constitution and the Equality Act do not prohibit discrimination. They prohibit unfair discrimination. Fairness is the moral concept that distinguishes legitimate from illegitimate discrimination.[32] The test of unfairness focuses primarily on the impact of the discrimination on the victim and their human dignity. Unfair discrimination principally means treating people differently in a way that impairs their human dignity.[33]Currie and De Waal classify unfair discrimination as treatment that is hurtful or demeaning; conduct that occurs for no good reason; and treatment of some people as inferior or incapable or less deserving of respect than others.[34]

11.11. In terms of section 13(1)(2) of the Equality Act, if discrimination is found to have taken place on a listed ground, the discrimination is unfair, unless proven otherwise by the Respondent. This test is similar to the second leg of the *Harksen* unfair discrimination test. The Respondent must prove the fairness of the discrimination on a balance of probabilities.

11.12. As indicated above, the seating arrangements in Ms Olivier's class on 9 January 2019 amounted to discrimination on the grounds of language and race, which are listed grounds in the definition of prohibited grounds in

[32] Currie and de Waal (note 27 above) p244.

[33] Currie and de Waal (note 27 above) p244.

[34] Currie and de Waal (note 27 above) p244.

section 1 of the Equality Act. In terms of section 13(1)(2) of the Equality Act, therefore, such discrimination is unfair, unless proven otherwise by the School.

11.13. Noting that the seating in Ms Olivier's class on 9 January 2019 also resulted in the separation of learners in the class along the lines of race, it is arguable that the seating arrangements amounted to unfair discrimination within the ambit of section 7(b) of the Equality Act, in that they had the effect of promoting exclusivity based on race.

11.14. The question to be determined next is whether the School has done enough to rebut the presumption of the unfairness of its conduct on 9 January 2019.

11.15. Section 14(2) and (3) of the Equality Act outlines some of the factors to be considered in a determination of unfairness. These factors include the (a) context; (b)whether the discrimination is based on objectively determinable criteria intrinsic to the activity concerned; (c) whether the discrimination is likely to impair human dignity; (d) the impact of the discrimination on the complainant; (e) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; (f) the nature and extent of the discrimination; (g) whether the discrimination is systemic in nature; (h) whether the discrimination has a legitimate purpose; (i) whether there are less restrictive means to achieve the purpose; and (j) whether the Respondent has taken steps to accommodate diversity or address a disadvantage arising from any of the prohibited grounds. These factors are commensurate to those listed by the court in *Harksen.*[35]

[35] In that case, the Constitutional Court listed some of the factors which have to be considered in order to determine whether the discriminatory provisions have impacted unfairly on the complainant as follows:

11.16. The relevant factors, as applied to the context of this case, are, in turn, discussed below. As indicated in *Du Preez*, it is not necessary to consider all the factors in arriving at a determination on the fairness or otherwise of the discrimination complained of.

Context and purpose of the discrimination as well as the criterion used for the discrimination

11.17. With regards to the context and purpose of the discrimination, the School advised that the differentiation in the seating arrangements was reasonable and justifiable given the context of what was happening at the School on 9 January 2019, which was the first day of school for the learners who are central to this inquiry. The School further stated that the seating arrangements were temporary and were aimed at helping the new learners settle in by seating them close to learners who speak the same language as them. They were also aimed at addressing language barriers and integrating the learners. The school further stated that the differentiation was not aimed at impairing the dignity of the learners or at discriminating against them. The School also advised the Commission that, at times, boys are separated from girls in order to enable learners to settle in and that this cannot be construed

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(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

(c)with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature. *See* Harksen, Para 51.

to be discriminatory. Therefore, according to the School, the discrimination served a legitimate purpose.

11.18. Whilst the Commission must give due weight to the opinions of the School and Ms Olivier, who are particularly knowledgeable in providing education to Grade R learners, their views cannot be accepted without question.

11.19. For example, although the School cited language as the primary consideration for the seating arrangements, the Commission noted through its investigation that one of the learners, Learner S, did not speak Setswana and that one other learner from the group of four learners, Learner M, had attended a mixed-race pre-school and understood Afrikaans. During the meeting of 4 October 2019, Learner S' mother informed the Commission that her son did not speak Setswana but spoke English. Learner S' mother also does not speak Setswana. Learner M's mother informed the Commission that her son attended a mix raced pre-school, which was also attended by some of the white learners in Ms Olivier's class. When probed about this, Ms Olivier stated that she did not know that Learner S did not speak Setswana. This, therefore, undermines the argument of the School that language was the primary criterion in the seating arrangements. Effective communication is intrinsic to the activity of teaching. However, the fact that the four black learners had different language skills and needs demonstrates weaknesses in the argument that the four black learners had been separated from the white learners on the basis of their language abilities.

11.20. At this juncture, it must also be noted that intention is not an essential element of unfair discrimination.[36] Accordingly, the School's intentions are not determinative in this matter. This does not mean, however, that the absence of an intention to discriminate is irrelevant to the enquiry.

Whether the discrimination is likely to impair human dignity

[36] *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998) para 43. *(Walker).*

11.21. Currie and De Waal correctly argue that the word discrimination carries a pejorative association.[37]Therefore, the enquiry into whether the presumption of unfair discrimination has been rebutted involves an examination of the impact of the discrimination on the victim and their dignity.

11.22. On the face of it, discrimination that separates learners on the basis of race – even if well-intentioned and purportedly on the basis of language – is likely to impair human dignity.

11.23. In this case, however, although the effect of the seating arrangements on the day in question resulted in the separation of the learners along the lines of race, the parents of the affected learners advised the Commission that the incident did not in any way impair the dignity of their children. They further advised that the learners had fully integrated into the School and were doing well academically and in different sports.

The position of the learners in society; the impact of the discrimination; the nature and extent of the discrimination; and whether the discrimination was systemic

11.24. The interplay between the discriminatory measure and the person or group affected by it is important at this stage of the enquiry. In *Hugo*, O'Regan J stated that:

> *The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair*.[38]

11.25. The four learners are black and belong to a race group that has historically been deeply affected by patterns of disadvantage and continues to be so affected. This notwithstanding, the parents of the affected learners insisted

[37] Currie and de Waal (note 27 above) p245.

[38] *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 112 *(Hugo)*

that their children were not adversely impacted by the seating arrangements of 9 January 2019.

11.26. In any event, even if the learners were adversely impacted, the nature and extent of the discrimination was limited to a portion of the first day of school, and does not appear to be systemic in nature. Indeed, the Commission also observed that by 4 October 2019, the desks at which the four black learners were seated on 9 January 2019 were still situated in the same spot but were occupied by learners of different races. Accordingly, any impact the discrimination would have had would have been minimal.

Less restrictive means

11.27. Despite the legitimate purpose the discrimination may have served, the Commission is of the view that less restrictive and disadvantageous means ought to have been used to achieve the purpose of integrating the learners.

11.28. The SGB conceded that the Photograph considered in isolation was 'not nice' and that lessons were learnt from the incident. The School also confirmed that efforts to support the integration of learners would no longer be based on language as it had done in January 2019. This concession confirms the view of the Commission that less restrictive and less disadvantageous means were open to the School to facilitate integration. The separation of the learners by Ms Olivier however well-intentioned and purportedly on the basis of language was misguided, particularly in the context of a South African society which remains deeply segregated along the racial lines observed during its apartheid past. She ought to have used other means to achieve the purpose of integrating the learners without separating them on the basis she had separated them. This duty is particularly pronounced for educators, School Management Teams and other decision-makers in the school environment, who are enjoined to protect the best interests of children in accordance with all the rights in the bill of rights.

Final Analysis

11.29. In *Solidarity obo Barkhuizen v Laerskool Schweizer-Reneke and Others*[39], Prinsloo J held that *"[r]acism cannot and should not be tolerated, and it has to be attacked and destroyed wherever it is found. In the same breath, however, racism should not be found and named where it does not exist."*

11.30. The facts on record show that the four black learners were treated differently purportedly on the basis of language and indirectly on the basis of their race, which are both listed prohibited grounds. The Commission accordingly established that the learners were discriminated against. Because the differentiation was based on grounds listed in section 1 of the Equality Act and section 9(3) of the Constitution, the discrimination is presumed to be unfair, unless the School shows that it was fair. Whilst there are some factors which militate against a finding of fairness, as more fully discussed above, the Commission is of the view that, on the whole, the School discharged the onus of proving that the discrimination was fair on a balance of probabilities.

11.31. At the risk of repeating what has been stated elsewhere in this report, we summarise the School's submissions. First, the School showed that the seating arrangements were not aimed at discriminating but at assisting the learners to settle in on the first day of school. The seating arrangements were changed during the day in question. Accordingly, the nature and extent of the discrimination were, therefore, limited to a portion of the first day of school. Secondly, the incident did not impair the dignity of the learners or adversely impact them in any other way. The learners had since fully integrated. This was confirmed by the parents of the learners, who advised that the learners had fully integrated into the School and were doing well academically and in different sports. Thirdly, it was not uncommon for seating arrangements to be based on differentiation on listed grounds on the first day of school. These are determined based on context and the needs of learners. For example, Ms Barkhuizen would seat girls and boys separately at the commencement of formal teaching to avoid distractions.

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[39] See *Solidarity* (note 6 above) para 41.

11.32. In light of the above, and having considered the facts in this matter and the legal framework within which rights must be protected, the Commission finds that separating the four black learners from the white learners did amount to discrimination.

11.33. The Commission is of the view that the discrimination in question was likely the result of unconscious racial profiling and an absence of clear policy supporting integration, which, in turn, were likely the result of the slow progress in the transformation of the demographics of the School. Although the unconscious racial profiling of learners is regrettable, it does not rise to the level of unfair discrimination in the context of this case.

(b) Whether the learners' right to privacy under section 14 of the Constitution was violated

11.34. In our law, the right to privacy is entrenched in section 14 of the Constitution, which states that everyone has the right to privacy. The POPI Act is not applicable to this case as the alleged violation occurred before the operative provisions of the POPI Act came into effect.

11.35. In *Bernstein v Bester*[40] (Bernstein), Ackermann J said:

> *"Use of this term [namely, the right to privacy] has not been unproblematic, since in terms of a resolution of the Consultative Assembly of the Council of Europe this right has been defined as follows:*
>
> > *'The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially."*

[40] [1996] ZACC 2, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) para 73. *(Bernstein)*

11.36. Section 28 of the Constitution states that a child's best interest is of paramount importance in every matter concerning the child. The Children's Act was enacted, inter alia, to give effect to certain rights of children as contained in the Constitution. Sections 10, 14 and 15 of the Children's Act are a cluster of provisions designed to ensure that children's rights are protected, and their dignity is upheld in any proceedings affecting them.

11.37. There exists, in this case, reasonable privacy interests of the children who are depicted in the images. The Photograph clearly depicting the children, although intended for circulation in a closed WhatsApp group which included their parents and or caregivers, ultimately came to be circulated in the media and social media platforms. The faces of the children were, in the main, not blurred or concealed in the media and social media communications. Whilst the outrage that the Photograph evoked may be justifiable, no interest of justice was served by the circulation of the Photograph (beyond the confines of the WhatsApp group of parents created by Ms Barkhuizen) in a manner that prejudiced the privacy rights of the children. The Commission's investigation did not extend to establishing the identity or details of the person who distributed the Photograph beyond the closed group of parents.

11.38. As stated above, the Constitutional Court in Bernstein stated that the unauthorized publication of private photographs constitutes a threat to the right to privacy. This pronouncement has added gravitas in respect of the publication of photographs of children without the consent of their parents/caregivers.

11.39. Accordingly, the unauthorized publication of the Photograph, in a manner that revealed the identity of the learners, in the media and social media platforms prejudiced the learners' rights to privacy.

11.40. The unauthorized publication of the Photograph, which turned the School into a spectacle, further violated the learners' section 28 rights in that it placed the learners' well-being at risk and compromised their best interest.

(c) Whether the public disclosure of Ms Barkhuizen's name amounts to a violation of the right to privacy and/or her right to freedom and security of the person

11.41. Following the investigation of the allegations against Ms Barkhuizen, the Commission could not find any evidence that Ms Barkhuizen violated the learner's human rights as contained in the Bill of Rights. Furthermore, the Commission could not find any evidence to support the allegations that Ms Barkhuizen unfairly discriminated against the four black learners on any of the prohibited grounds. Ms Barkhuizen merely took the Photograph in another teacher's class and shared it on the parents' WhatsApp group. She did not circulate it to the media.

11.42. The public disclosure has had serious deleterious effects on the privacy and safety of Ms Barkhuizen and her family. They left their home, fearing for their safety. Ms Barkhuizen's children could not attend school as they had moved out of their home to a place of safety.

11.43. In *Solidarity obo Barkhuizen v Laerskool Schweizer-Reneke and Others* the Labour Court described the harm suffered by Ms Barkhuizen as follows:

> *"The actions of the respondents and the hasty manner in which they suspended the applicant, caused the applicant trauma, public humiliation and being branded as a 'racist'. In fact, on the Applicant's version, she was branded as a racist that required immediate suspension without due process in full view of the public. This had caused indeterminable damage to her professional integrity and her personal life."*

11.44. The public disclosure of Ms Barkhuizen's name amounted to a violation of the right to privacy and prejudiced her other human rights, including the right to freedom and security of the person, freedom of movement and human dignity.

(d) Whether the conduct of the protestors threatened or violated the rights of the learners to a basic education

11.45. The disruptions to teaching and learning and the subsequent removal of the learners from the School constituted a serious threat to the learners' right to basic education.

11.46. In *Governing Body of the Juma Musjid Primary School & others v Essay NO & others (Centre for Child Law & another as Amici Curiae),* the Constitutional Court stated emphatically that the right to a basic education entrenched in section 29(1)(a) is 'immediately realizable' and may only, in terms of section 36(1) of the Constitution, be limited in terms of a law of general application that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[41]

11.47. In *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & Another*,[42] the Constitutional Court recognized the importance of education in redressing the entrenched inequalities caused by apartheid and its significance in transforming our society.

11.48. The right to protest is enshrined in section 17 of the Constitution. It reads as follows:

> *"everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions*".

11.49. The Commission has previously commented that the right to demonstrate must be exercised in accordance with the law and, as such, should not be exercised in a manner that results in the destruction of public or private property and infringes on the rights of others. While protestors are free to

[41] 2011 (8) BCLR 761 (CC) para 37.

[42] 2010 (2) SA 415 (CC).

advance their interests through protest action, preventing access to schools undermines the right to education.[43]

11.50. As stated above, on 10 January 2019, community members protested outside and within the School premises. The manner of the protest action resulted in the disruption of teaching and learning, as well as trauma to the minor learners. Some parents removed their children from the School premises allegedly out of concern for their safety. This prejudiced the learners' right to basic education as enshrined in section 29(1) of the Constitution. Additionally, the protest action, which resulted in the disruption of schooling, violated the learners' right not to have their well-being, education and development placed at risk.[44]

11.51. On 15 September 2016, the Commission issued a report pursuant to the National Investigative Hearing on the Impact of Protest-related Action on the Right to a Basic Education in South Africa.[45] In the report, the Commission found that:

11.51.1. the right to basic education is affected by protest-related action arising from causes that, in most cases, may be unrelated to the provision of basic education. Protest action, which results in a denial of access to schools by learners, violates the learners' right to basic education.

11.51.2. learners are disadvantaged by certain protest-related actions in that they are consequentially (a) physically barred or intimidated from

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[43] SAHRC Media Statement *Vuwani Protests: Not in the best interests of children* 6 September 2017 accessible at https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/853-media-statement-sahrc-vuwani-protests-not-in-the-best-interests-of-children

[44] Section 28(1)(f)(ii) of the Constitution.

[45]Report into **National Investigative Hearing** into the Impact of Protest-related Action on the Right to a Basic Education accessible at https://www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf

attending school; and (b) infrastructure on which learners rely to access education is damaged or destroyed.

11.51.3. the manner in which the right to protest is exercised needs to take into consideration other rights, such as the right to basic education and the principle of 'the best interests of the child'. Ensuring that children do attend school should be a priority for communities, public officials and society, acting in concert, in the interests of the children's right to education.

11.51.4. the National Department of Basic Education and the South African Police Service (SAPS) appear to have no uniform policy or approach in dealing with protest-related action.

11.52. The Commission made a number of recommendations, including that:

11.52.1. The DBE should constitute an interdepartmental National Public Protest Response Team (National Response Team). This national body should include relevant government departments, particularly SAPS and the Department of Cooperative Governance and Traditional Affairs (CoGTA) and other relevant stakeholders.

11.52.2. The National Response Team should develop Guidelines that: (a) set out clearly the roles and responsibilities of the various government departments within the context of school disruptions; (b) establish early warning systems and responses to be taken in the event of school disruptions due to protest action.

11.53. The allegation that some protestors threatened to burn down the School prompted the School to hire private armed security personnel to guard the School infrastructure. The SAPS, in particular the Public Order Policing Unit ("POP"), ought to have intervened to prevent harm to the School infrastructure and to protect teachers and learners. In its report on the National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education, the Commission further noted that there is an urgent need to encourage the development of new forms of citizenship

expression that are less aggressive and in which people's frustrations are not expressed through actions that further exacerbate their dire conditions.

11.54. Accordingly, the protest action at the School disrupted teaching and learning and, therefore, the protestors prejudiced the learners' right to basic education.

11.55. The Commission also notes that some parents removed their children from the School during the protest action, fearing for their safety. In its report on the National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education, the Commission found that there are genuine reasons why caregivers may hinder a child's attendance at school, for example, due to lack of water or proper sanitation facilities at the school or for reasons of insecurity. Accordingly, the removal of the children by their parents served a legitimate purpose of protecting them from potential harm.

12. **FINDINGS**

12.1. In light of the above, the Commission makes the following findings:

12.1.1. The allegation that the School unfairly discriminated against the four learners is not substantiated.

12.1.2. The unauthorized publication or circulation of the Photograph in a manner that revealed the identity of the learners in the media and social media platforms, by persons in the closed parents' WhatsApp group, and by members of the media and the public, violated the learners' right to privacy, as well as their right not to have their well-being, education and development placed at risk.

12.1.3. The public disclosure of Ms Barkhuizen's name by the MEC constituted a violation of her right to privacy and prejudiced her human rights, including her rights to due process, security, freedom of movement, association and human dignity.

12.1.4. The violent protest action at the School disrupted teaching and learning, and therefore the protestors prejudiced the learners' right

to basic education, and placed the learners at risk in violation of their right not to have their well-being, education, and development placed at risk.

13. DIRECTIVES

13.1. In view of the findings in paragraph 12 above, the Commission makes the following directives:

13.1.1. Within 90 days of this report, the SGB of the School is directed to adopt a clear policy regarding the publication of messages or images of learners to third parties in order to ensure that the identity and personal information of learners are protected in accordance with the law.

13.1.2. Within 90 days of this report, the Principal of the School is directed to provide an update to the Commission on the process of drafting policies dealing with racism, diversity and transformation at the School in line with the undertaking made by the Principal reflected in paragraph 7.1.7 of this report.

13.1.3. Within 90 days of this report, the Department is directed to implement the recommendations recorded in the Commission's Report on the National Investigative Hearing on the Impact of Protest-related Action on the Right to Basic Education in South Africa applicable to Provincial Departments of Education, in order that appropriate protection of the right to basic education is urgently implemented. A copy of the National Investigative Hearing report is attached hereto for ease of reference.

13.1.4. Within 14 days of this report, the current MEC for Education of the North West Province must issue a public written apology to Ms Barkhuisen for the manner in which she was treated by the Department and the former MEC for Education in the North West Province. The written apology should, *inter alia*, state that the MEC is apologizing for the violation of Ms Barkhuisen's rights to due

process and privacy. Moreover, the MEC should apologize for the former MEC's conduct of falsely accusing Ms Barkhuisen of racism and for placing her life and the life of her family at risk through the public disclosure of her identity. The written apology should be printed in at least one national newspaper and posted on the website of the Department for at least one month.

14. OPPORTUNITY TO COMMENT ON THE PROVISIONAL INVESTIGATIVE REPORT

14.1. On 07 October 2022, a copy of the provisional investigative report was shared with the parties for their review and comment. In this regard, the parties were invited to submit their comments to the provisional investigative report in writing within fourteen (14) days of the report, being on or before 27 October 2022.

14.2. No comments were received from the parties.

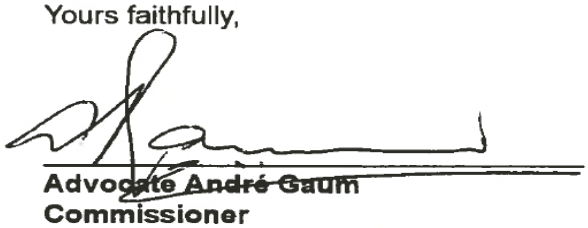
14.3. In view of the above, the Commission's analysis, findings and directives in the provisional investigative report have been confirmed in this report unaltered.

15. JUDICIAL REVIEW

15.1. The Commission's directives herein are binding on the Respondent. Should any of the parties be aggrieved by the findings and directives of the Commission as contained herein, such a party is entitled to challenge same in court through the process of judicial review. An application for judicial review must be made within 180 days of the date on which all internal remedies were exhausted. Where there are no internal remedies available, the application must be made within 180 days of the date on which the Applicant became aware of the decision (or could reasonably be expected to have become aware of the decision).

SIGNED AT JOHANNESBURG ON THE 18TH DAY OF JANUARY 2023.

Yours faithfully,



Advocate André Gaum
Commissioner
South African Human Rights Commission