Matukane and others v Laerskool Potgietersrus
[1997] JOL 102 (T)

Reported in (Butterworths)	[1996] 1 All SA 468 (T)
Case No:	2436 / 96
Judgment Date(s):	16 / 02 / 95
Hearing Date(s):	05 / 02 / 96
Marked as:	Reportable
Jurisdiction:	Supreme Court
Division:	Transvaal Provincial Division
Judge:	Spoelstra J
Bench:	TT Spoelstra J
Parties:	Magiliweni Alson Matukane, Leslie Seromo Phatudi, The Member of the Executive Council for the Northern Province:Education Arts Culture and Sports (A); Laerskool Potgietersrus (R)
Appearance:	Adv WH Trengove SC, Adv M Chaskalson, Cheadle Thompson & Haysom, MacRobert De Villiers Lunnon & Tindall Inc (A); Adv N Coetzee SC, Adv D Bisschoff, MS Van Niekerk (R)
Categories:	Application – Civil – Public
Function:	Sets new precedent

Key Words

Constitutional Law – Right to equality – Refusal to admit pupils – Prima facie proof of discrimination – Act 200 of 1993 – Act 200 of 1993, s8 – Act 200 of 1993, s8(2) – Act 200 of 1993, s8(4) – Onus on school

Mini Summary

The respondents refused to admit the applicants in their school. The issue before the Court was whether the refusal to admit black pupils to this primary school constitutes unfair discrimination in terms of the right to equality clause. The court held that such refusal of admittance was prima facie proof of discrimination as set out in subsection 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993. Further that the onus rested on the school to prove any absence of unfair discrimination.

• Editor's Summary • Cases Referred to • Judgment •

Constitutional law – Right to equality – Refusal to admit black pupils to primary school – Prima facie proof of discrimination as set out in subsections 8(2) and 8(4) of the Constitution shown – Onus on school to prove absence of unfair discrimination.

Editor's Summary

The Applicants contended that the Respondent's refusal to admit the children of the First, Second and Third Applicant to the Respondent School was unfair discrimination as envisaged by sections 8(2), 8(4), 24, 31, 32 and 247 of the Constitution of the Republic of South Africa Act 200 of 1993 read with sections 8(1), 8(2), 24, 46, 91(1), 91(2), 91(3), 91(4), 91(5) and 99(1) of the Northern Province School Education Act 9 of 1995.

The Respondent contended that discrimination on the grounds of ethnic or social origin, culture or language was not *per se* unfair having regard to, *inter alia*, sections 17, 31 and 32(*c*) of the Constitution as well as the United Nations' Charter on Human and People's Rights (articles 20 and 22) and international law. The Respondent also averred that it was entitled to protect and maintain the school's character and ethos. According to the argument these principles of international law justified the conduct of the Respondent's governing body. The Respondent also averred that the school was full and that the names of the First, Second and Third Applicants' children would be placed on a waiting list.

Held – The Court found that the facts stated proved *prima facie* discrimination by the Respondent in refusing the said children admission to the school. The Court held that the Respondent could only escape the consequences of the finding if it established that

discrimination did not exist or that such discrimination was not unfair. It did not matter which of the forms of discrimination mentioned in section 8(2) of the Constitution was proven.

On the facts before the Court, it could not be proven by the Respondent that it did not unfairly discriminate against the black children. The waiting list produced by the Respondent did not contain the names of any black children. Furthermore, it could not be said that the school was full because there were 28 Afrikaans-speaking pupils per classroom and only 22 English speaking pupils per classroom.

Notwithstanding the unproved powers, to which the Respondent's governing body had laid claim in terms of Act 70 of 1988, and which allowed for a change in the admission criteria of the school only after consultation with the school's parent community, the Court held that such powers could never be exercised in conflict with the Constitution.

The Court found it to be common cause that a requirement in the Respondent's "Requirements for Admission" that a proposed pupil should be white, had no cause and effect. There was no other requirement absolutely disqualifying black children from admission. The child and its parents were required to, *inter alia*, agree with the objective and mission of the school and honour the English culture and traditions, allowing such children to participate therein. There was no reason why non-whites could not subscribe to those requirements.

The Court accordingly granted the application with costs including the costs of two counsel.

Notes

For the Constitution of the Republic of South Africa Act 200 of 1993, see *Butterworths Statutes of South Africa* 1995 (Vol 1)

Cases referred to in judgment

No cases were referred to in this judgment.

Judgment

SPOELSTRA J

The Respondent is a model C primary school in Potgietersrus. It is a state-aided public school as defined in section 1 read with section 95 of The Northern Province School Education Act 9 of 1995 ("the Act"). It is an Afrikaans/English parallel-medium school presently providing tuition for 646 Afrikaans-speaking, 64 English-speaking and 54 pre-primary or grade 0 pupils. The respondent is a juristic person controlled by a governing body as envisaged by sections 24 and 91 of the Act.

The first three applicants are parents who have unsuccessfully applied to have their children admitted as pupils in the English-medium stream of Laerskool Potgietersrus, the respondent. The fourth applicant is an executive council member of the Northern Province and is responsible for Education, Arts, Culture and Sport. He has joined the other applicants in his official capacity to represent the interests of parents who would like to send their children to the school and also in the public interest.

The applicants contend that black children, and particularly those of the parents listed in Annexure "A" to the notice of motion, have been refused admission to the school because of the respondent's policy to refuse black children admission to the school. It is contended that the children were refused admission on racial grounds. This policy violates section 8(2) of the Act and also sections 8(2), 10, 24(*a*) and 32(*a*) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Constitution"). The relief claimed is briefly, first, for an order declaring that the respondent may not, on grounds related to race, ethnic or social origin, culture, colour or language, refuse to admit any child; secondly, for an interdict restraining the respondent from refusing to admit any child on such grounds; thirdly, for an order directing the respondent to admit the children of the parents listed in Annexure "A"; and finally for an order for costs.

The first applicant is a director in the Northern Province Department of Water Affairs and Forestry. Although this was questioned by the respondent, the first applicant alleges that he moved from Giyani to Potgietersrus and has now acquired a residence in the town. He has three children. The two eldest are thirteen and are in standard 5 while the youngest is 8 years old and is in standard 1. He wished to enrol them with the respondent. It is common cause that on 11 January 1996 he and his wife visited the respondent's principal, Mr Rossouw, to do this. The application forms annexed to the answering affidavit were filled in. The principal informed them that the children could not simply be enrolled. They were told that they would have to wait until 25 January, at which stage he would have been able to ascertain how many children would be returning to the school for the 1996 academic year. He would then be in a position to assess the available accommodation and determine whether additional children could be enrolled. It is also common cause that, during this visit, the first applicant could not provide his residential address in Potgietersrus. He undertook to supply it the following day. There is a serious dispute of fact on what occurred the following day. The principal was otherwise occupied and was not available to speak to them. They were received by the school secretary. The first applicant's wife and the secretary accuse each other of discourteous and ill-mannered conduct. I find it unnecessary to discuss and decide this dispute. A decision thereon seems unnecessary for determination of the issues involved. After this episode the first appellant raised the matter with the department. On 19 January 1996 the regional director for the Western Zone of the Department of Education informed him that his children could be registered with the respondent. He then arranged that, on 22 January, he would meet Mr Mohapi, a circuit school inspector, who would accompany him and his children to the school. On 22 January, after a discussion with the principal, application forms were completed and he was told by an individual whom he believed to be a teacher, that he was to buy school uniforms for the children. He did so at considerable expense. On 23 January 1996 he took his children to school. However, they were scared off by the intimidating and threatening conduct of whites blocking the school entrance. On the following day two opposing groups, one white and the other black, were present outside the school premises. They were again prevented from gaining access to the school premises. Eventually first applicant managed to have his children temporarily admitted to the already overcrowded Akasia Primary School in Potgietersrus. The first applicant states that he believes that his children were refused entry to the school premises on racial grounds.

The respondent denies that it was responsible for or had control over or anything to do with the conduct of the group of individuals outside the school premises on 23 and 24 January. The children's registration on 22 January was accepted despite the protest of the governing body of the school. The validity of the registration of the children is denied. The view of the respondent's governing body is reflected in the following passage from the answering affidavit:

> "Die bestuursliggaam het geoordeel, en dit is pertinent so aan Mnr Rossouw oorgedra, dat die moontlikheid bestaan dat daar soveel aansoeke van leerlinge mag wees wat in die Engelse taal onderrig ontvang, dat toelating van sodanige leerlinge aanleiding kon gee dat die dominante karakter en etos van die skool daardeur verander sou word. Dit was daarom ook aan Mnr Rossouw oorgedra dat die bestuursliggaam nie alleen geregtig was nie, maar ook verplig was om die ouers van die skool te raadpleeg alvorens daar 'n beginselbesluit geneem kon word."

The respondent alleges that the present application was brought before the school's parent community could meet to discuss and decide on the matter of admission of the applicants' children.

The second applicant is a teacher at a technical high school. He is resident in Potgietersrus, and applied to have his eleven-year-old daughter admitted to the English-medium stream of the school for the 1995 school year. He again applied for her enrolment for the current school year. On both occasions he was informed that she could not be accommodated as the school was full. On each occasion he was informed that his child's name would be placed on a waiting list. At present she is attending the Pietersburg Primary School as a boarder in the school's hostel.

The second applicant states that, during late 1994, a group of concerned black parents formed an *ad hoc* committee because they believed that schools in Potgietersrus, which had historically been reserved for whites, were refusing to admit black children. The list, Annexure "A" to the notice of motion, is a list of black parents who have unsuccessfully applied for admission of their children to the Laerskool Potgietersrus. The second applicant

testifies that the respondent busses children from Zebediela to the respondent's school on a daily basis. The primary school at Zebediela which, prior to the Constitution, catered for only white children, now has only black children.

The respondent denies that it refuses to admit children because they are black. It also denies the accuracy of Annexure "A". Respondent annexes a list containing 55 names of black children in respect of whom applications were received for admission to the school. The respondent points out that these are not the only children who were refused admittance to the school. The respondent annexes a further list containing the names of 57 white children whose names are on a waiting list and who were also refused admittance because they could not be accommodated. The respondent accuses the applicants of having made the matter a racial issue. According to the respondent all the new applications received for admittance during 1996 have been refused. The respondent admits that a number of children from Zebediela are presently enrolled at the Laerskool Potgietersrus and contends that the obvious reason for this is that the primary school at Zebediela is now swamped by English-speaking pupils to the extent that the school has lost its erstwhile character. The children now attend the respondent school because the character and ethos of this school still corresponds with that of the Zebediela school in earlier times.

In January 1995 the third applicant also applied for his daughter to be admitted to the respondent school. He was informed that the school was full, but that his child's name would be placed on a waiting list. He nevertheless filled in the application forms and submitted them to the school. At the beginning of 1996 he again applied to have her registered. Once again the principal informed him that the school was full. He contends that the refusal is a refusal to admit black pupils and that this is a racist policy. He rejects the explanation that the school is full and alleges that children of whites who submitted applications for admission of their children subsequent to his, were accepted by the respondent. No example of a specific instance is provided. The third applicant also fails to stipulate whether these children attend the Afrikaans- or the English-medium classes. This statement hence bears limited weight. The only relevant part of this applicant's statement is the part that relates to his own child.

In answer to these allegations the respondent contends that the school is predominantly Afrikaans. Since 1955 English pupils have been accommodated because their numbers did not justify a separate English-medium school. The school has only three classes where tuition is offered in English. These classes cater for pupils from grade 1 to standard 5 and for pupils who need specialised education. The respondent avers that the school is overcrowded to the extent that the pre-primary classes are housed in the school's hostel. The respondent denies that the explanation that the school was full was a lie. In this regard reference is made to a letter written to Dr Motsoaledi on 24 February 1995 by an official of the department, Mr Harris. The letter stated that the school's statistics showed that, at that stage, the school had 669 children (580 Afrikaans and 89 English) and that, according to a formula at the department's regional office, the school was full. The letter suggests that further admissions should be negotiated with the governing body. From these facts and the fact that the school now has 710 pupils I am asked to draw the conclusion that the school is in fact overcrowded.

The dispute between the fourth applicant and the respondent is based largely on legal and educational differences rather than factual considerations. Their dispute revolves, *inter alia*, on the authority and powers of the respondent's governing body versus those of the Northern Province's Department of Education and Culture and the advisable ratio of children per class. As will appear later on, I do not consider these differences material to the decision of the matter.

As I understand the respondent's contention, it is twofold. One of the submissions is that the school is full and that the children could hence not be accommodated. The other is that the school has an exclusively Christian Afrikaans culture and ethos, which would be detrimentally affected or destroyed by admitting pupils from a different cultural background. The respondent contends that the latter consideration is protected by international law that is embodied in the South African law. The local or municipal law should be interpreted in accordance with the principles of international law and certain treaties to which the government has become a party and which contain provisions designed to protect the right of a minority group in a country to preserve its cultural

heritage. The submission is that, provided there is no discrimination on racial grounds, a cultural group is entitled to protect its culture by excluding persons from alien cultural groups from participation in its cultural activities, including education.

On my understanding of the submission, it is not argued that the Act or some of its provisions are invalid and unenforceable. As stated above, the contention is that, by virtue of section 35(1) of the Constitution, the relevant provisions of the Act and the Constitution should be construed with reference to the principles stated in international law. Section 35(1) of the Constitution provides:

> "35(1) In interpreting the provisions of this Chapter [Chapter 3] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, *where applicable*, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law." (My emphasis.)

In terms of section 7 of the Constitution the provisions in Chapter 3 bind all legislative and executive organs of the State at all levels of government and they apply to all law in force and all administrative decisions taken and acts performed (section 7(1) and (2)). According to section 7(3) juristic persons shall be entitled to the rights contained in the Chapter where, and to the extent that, the nature of the rights permits.

The rights in Chapter 3 referred to in argument are:

"8.

(2)

No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(4)

Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

10.

Every person shall have the right to respect for and protection of his or her dignity.

17.

Every person shall have the right to freedom of association.

24.

Every person shall have the right to–

(*a*)

lawful administrative action where any of his or her rights or interests is affected or threatened;

(*b*)

procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

31.

Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

32.

Every person shall have the right–

(*a*)

to basic education and to equal access to educational institutions;

(*b*)

to instruction in the language of his or her choice where this is reasonably practicable; and

(*c*)

to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."

Apart from the above sections, I was also referred to the following section of the Constitution:

"247

(1)

The national government and the provincial governments as provided for in this Constitution shall not alter the rights, powers and functions of the governing bodies, management councils or similar authorities of departmental, community-managed or state-aided primary or secondary schools under laws existing immediately before the commencement of this Constitution unless an agreement resulting from bona fide negotiation has been reached with such bodies and reasonable notice of any proposed alteration has been given."

At this stage it is perhaps convenient to refer also to the sections of the Act that are relevant:

"8.

(1)

Subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools.

(2)

Admission requirements for public schools shall not unfairly discriminate on grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, culture or language.

24.

(1)

For the purpose of promoting the participation of the people of the Province in the governance of public schools, the Member of the Executive Council shall establish a governing body for every such school.

46.

Subject to the provisions of this Act, the control and executive authority of a state-aided school shall vest in its governing body.

91.

(1)

Any management council, board or local management or domestic council, committee, board or other body for the control or management of a public school or hostel, established or deemed to have been established under the provisions of an Act repealed by this Act, and which existed immediately prior to the commencement date, shall be deemed to be a governing body established in terms of section 24.

(2)

At the end of the term of office of a body referred to in subsection (1) it shall be replaced with a governing body constituted in terms of sections 24 and 25.

(3)

Notwithstanding any other provision of the Act, but subject to subsections (4) and (5), a body referred to in subsection (1) or a governing body which succeeds it in terms of subsection (2), shall continue to exercise whatever rights, powers and functions the body referred to in subsection (1) exercised on 27 April 1994.

(4)

No right, power or function contemplated in subsection (3) may be exercised in a manner which conflicts with any provision of Chapter 3 of the Constitution.

(5)

The rights, powers and functions contemplated in subsection (3) may be altered by law after negotiations contemplated in section 99 over such alterations having taken place.

46.

Subject to the provisions of this Act, the control and executive authority of a state-aided school shall vest in its governing body.

99.

(1)

For the purposes of facilitating negotiations between the department and governing bodies as contemplated in section 247(1) of the Constitution, the Member of the Executive Council may by notice in the *Provincial Gazette* establish a centralised negotiating forum at which negotiations over the alteration of the rights, powers and functions of such bodies shall take place."

It is common cause that, in terms of these provisions, a school is prohibited from turning children away on racial grounds. Perhaps it is more correct to say that a decision *unfairly* denying a child admission to a school on the ground of race is impermissible and unconstitutional. The Constitution does not outlaw discrimination as such. It prohibits *unfair* discrimination (section 8(2)). This is echoed in section 8(2) of the Act and also

recognised in section 62 (discrimination at private schools) of the Act. However, section 32(*c*) of the Constitution is couched in more absolute terms. The word "unfair" should probably be read into section 32(*c*). In view of the concession on behalf of the respondent that a refusal to admit a child to the school on the ground of its race is unlawful, it is unnecessary to consider this any further.

Mr *Bisschoff*, on behalf of the respondent, argued that the respondent is entitled to refuse admission of pupils on grounds of culture. He contends that this is not contrary to the Constitution and that the respondent's governing body is entitled to protect the cultural character and ethos of the school by refusing to admit pupils from a different or foreign culture. Mr *Trengove*, on the other hand, submits that the purported refusal on cultural grounds is a poor disguise for a policy that is patently racist.

It is common cause that only two public schools in Potgietersrus offer English-medium education. One is the respondent and the other is the Akasia school. It is not disputed that the latter is overcrowded. Apart from private schools there is no alternative for English-speaking pupils or other children who elect to receive tuition through medium English.

It is also common cause that the clause in the respondent school's constitution to the effect that it serves the white community and that a proposed pupil must be white, is contrary to sections 8 and 32 of the Constitution and hence invalid. The respondent does not rely on this provision in its constitution and concedes that it must be regarded *pro non scripto*.

The first question to be considered is whether the stated facts *prima facie* prove discrimination and, if so, whether the respondent has established the contrary. On this question I am satisfied that discrimination has been *prima facie* proved. I say this for the following reasons:

1. The fact that no pupils of colour have been admitted to the school notwithstanding the number of applications received by the respondent, not only for this year but also for the previous year, is a strong indication in this direction.

2. When, in its answering affidavit, the respondent refers to three English "classes" ("klasse") I assume that what is intended is that three classrooms are occupied by English-medium stream pupils. This means that each such classroom houses about 22 pupils. Each of the Afrikaans classrooms houses about 28 pupils. It follows that there must be room in each of the English classrooms to accommodate more pupils. The allegation that the English-medium classrooms are full, cannot be accepted. There seem to be no English-speaking children on the respondent's waiting list. From this, one must necessarily infer that the respondent does not want to enrol black pupils or pupils who want to be educated through medium English. This inference is corroborated by the respondent's statement as quoted above. Moreover, during 1995 the school was able to accommodate 89 children in the English-medium classes. There seems to be no reason why at least the same number could not be accommodated this year. The respondent fails to give any explanation for this obvious anomaly.

3. The respondent's statement that it would be swamped by English-speaking pupils, whereby the Afrikaans character and ethos would be destroyed, is so far-fetched as to border on the ridiculous. Were all black children on the respondent's list to be admitted, the ratio between Afrikaans-speaking and English-speaking children would, at worst for the respondent, be in the order of 6:1. Furthermore one must bear in mind that the English-speaking children will represent a number of different cultures such as Tsonga, Pedi, Sotho and probably more. It is inconceivable that they could change the school's present character and ethos. Were the numbers in the English classes to escalate dramatically, a case may be made out for separate English and Afrikaans schools.

4. The school's waiting list contains only names of what appear to be white Afrikaans-speaking children. The respondent does not state that any of these children is either of colour or English-speaking. It is significant that none of the names of any of the black children who have applied for enrolment are on the waiting list. One can only infer that their names were intentionally omitted because they had not been seriously considered for acceptance into the bosom of the school.

The respondent can only escape the consequences of the above finding if it establishes that discrimination does not exist or, as I have indicated earlier on, that such

discrimination as does exist is not *unfair* (section 8(4) of the Constitution). It does not matter which of the forms of discrimination mentioned in section 8(2) of the Constitution is proved. Should it be found that the applicants have failed to prove discrimination on purely racial grounds, the established facts undoubtedly prove discrimination on the grounds of ethnic or social origin, culture and language.

Mr *Bisschoff*, on behalf of the respondent, contends that discrimination on the grounds of ethnic or social origin, culture or language is not *per se* unfair. In this regard he relies *inter alia* on sections 17, 31 and 32(*c*) of the Constitution. According to Mr *Bisschoff*, these provisions must be read in the light of what the international law provides in regard to minority groups in a country. The Afrikaner people constitute a minority. By virtue, for instance, in the United Nations' Charter on Human and Peoples' Rights (articles 20 and 22) the Afrikaner people, as a minority, have an unquestionable and inalienable right to self-determination. This includes the right to freely determine their political status and to pursue their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind. The state has a duty to ensure the exercise of their right to development. According to article 4(4) of the Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious or Linguistic Minorities, states should, where appropriate, take measures in the field of education in order to encourage knowledge of the history, traditions, language and culture of minorities existing within their territory. National policies and programmes should be implemented with due regard for the legitimate interests of persons belonging to minorities. A Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Francesco Capotorti, a special rapporteur for the United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities, was also placed before me amongst the literature on which the respondent relies for a conclusion that the respondent is entitled to protect and maintain the school's character and ethos. According to the argument these principles of international law justify the conduct of respondent's governing body.

Perhaps I have oversimplified the argument or perhaps I do not understand it at all. To the extent that I do understand the argument, I believe that, in the present context it is wrong. Assuming that in terms of international law, our government has a duty to protect these rights of a minority people and that these rights include the right to a national school for such a minority as the respondent seems to think it is, the argument overlooks the unambiguous provisions of section 32(*c*) of the Constitution. That section accords with what I was able to glean from the Capotorti study, namely that such a minority should be allowed to have its own schools where children can be educated in the mother-tongue according to their own religion and culture. In the literature to which I was referred by Mr *Bisschoff* I found nothing in support of his contention. Section 32(*c*) of the Constitution confers on such a minority people a right to establish their own educational institution based on the values the respondent wishes to preserve. Moreover, the respondent seems to ignore the fact that it is not an exclusive Afrikaans school but a parallel-medium school that already accommodates two different cultures and languages. No answer is offered as to why the Afrikaans section should have stronger or better rights than the English section. If it is based solely on numbers, I consider the argument illogical and unacceptable.

Mr *Bisschoff* also argued that the respondent's governing body derives its powers from section 31(1) of the Educational Affairs Act (House of Assembly) 70 of 1988. These powers include the power to prescribe, after consultation and with the approval of the parent community, criteria for the admission of a pupil to the school (regulation 6(5) GN R2932 of 6 December 1991 as amended). Admission of children to the school is hence a matter that is controlled by the governing body. According to a directive of the department contained in what seems to be a circular to schools, the principal is delegated the power to give effect to the criteria. According to the directive, any amendment to the criteria for admission should be implemented after discussion with the parents at a properly constituted parents' meeting. Criteria for admittance shall only be amended in consultation with the school's parent community. The directive can only have binding force to the extent it conforms with Act 70 of 1988 and the regulations published thereunder, and also with the provisions of the Constitution. I do not find the kind of power to which the respondent's governing body lays claim in any of these statutory provisions. It can never exercise powers in conflict with the Constitution.

The respondent annexed to its papers its Requirements for Admission (Toelatingsvereistes). Clause 5 contains a requirement that a proposed pupil should be white. As mentioned before, it is common cause that this provision has no force or effect. Apart from this provision, I cannot find anything in the other requirements which absolutely disqualify black children from being admitted. The child and its parents are required to agree with the objective and mission of the school, namely provision of excellent and relevant education with a Christian national character in mother-tongue medium Afrikaans or English. Since they require their tuition in the English language, the child and its parents must declare that they honour and respect the English culture and traditions and that they will allow the children to participate therein. They must undertake to abide by the school's code of conduct and accept the principle of differential education. There is no reason why non-whites cannot subscribe to these requirements. Were the respondent's case that the children or their parents refused to agree to these requirements, the respondents might have had a reasonable reason to refuse to admit such children. I do not express any firm view thereon.

Mr *Bisschoff* argued that the application forms annexed to the respondent's papers show that they have not been signed by the parents of the children concerned. According to Mr *Bisschoff*, this indicates a clear refusal to agree to the requirements for admission. This is a spurious argument. Nowhere in the respondent's papers is it alleged that the parents, and in particular the first applicant, was required to sign the forms but refused to do so. The forms completed on 2 January were not annexed to the papers. There is no evidence that they were not properly signed. Mr *Bisschoff* is clutching at a straw with this argument.

I do not propose to consider the argument between the fourth applicant and the respondent on the number of children that must or can or should be accommodated in a classroom. In view of my findings this is irrelevant. The negotiations between the representatives of the department and the governing body also seem to be inconsequential to a decision in this matter. Least of all need I involve myself in their respective claims of authority and power in regard to the admission of pupils to the school. No relief is claimed on that score. Their negotiations to settle the matter are also immaterial to my decision.

The respondent failed to establish that there was no unfair discrimination against the black children. Even if their applications had been rejected because they had elected to receive their schooling through medium English, it would still constitute unfair discrimination.

In the light of the above findings, I need not consider Mr *Trengove's* other submissions.

The applicants' application must therefore succeed. The relief claimed is couched in somewhat wider terms than the statutory provisions allow. During argument, I have indicated to counsel that I intend to suitably amend the prayers.

Regarding costs, the applicants are entitled to a cost order. Mr *Trengove* asked for costs that would include the costs of two counsel. Mr *Bisschoff* did not submit that such an order is not justified. This is obviously a case where such an order is appropriate. Accordingly I make an order in terms of prayers 2, 3, 4 and 6 of the Notice of Motion as amended by me. Costs shall include the costs of two counsel.

For the applicants:

WH Trengove SC and *M Chaskalson* instructed by *Cheadle Thompson and Haysom*, Johannesburg c/o *MacRobert, De Villiers, Lunnon and Tindall Inc*, Pretoria

For the respondent:

NJ Coetzee SC and *D Bisschoff* instructed by *MS van Niekerk*, Pretoria