CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 58/00

BEL PORTO SCHOOL GOVERNING BODY	First Appellant
VERA SCHOOL GOVERNING BODY	Second Appellant
DOMINICAN-GRIMLEY SCHOOL GOVERNING BODY	Third Appellant
JAN KRIEL SCHOOL GOVERNING BODY	Fourth Appellant
ALTA DU TOIT SCHOOL GOVERNING BODY	Fifth Appellant
PIONEER SCHOOL GOVERNING BODY	Sixth Appellant
ELJADA SCHOOL GOVERNING BODY	Seventh Appellant
PAARL SCHOOL GOVERNING BODY	Eighth Appellant

versus

THE PREMIER OF THE PROVINCE, WESTERN CAPE	First Respondent
THE MINISTER OF EDUCATION OF THE PROVINCE OF THE WESTERN CAPE	Second Respondent

Heard on : 8 May 2001

Decided on : 21 February 2002

JUDGMENT

CHASKALSON CJ:

[1] This appeal concerns the validity of the policy pursued by the government of the Western Cape in attempting to give effect to the constitutional imperative to introduce equity into its educational system. The appellant schools do not dispute the validity of the goal to which the policy is directed, nor do they dispute the core aspects of that policy which make provision for a programme of rationalisation within the education system in order to ensure that education in the province is conducted on a fair and proper basis. Their complaint is that the manner in which the rationalisation programme is to be implemented imposes an unfair burden on them. They have a further complaint, and that is that they were neither informed adequately of the details of the rationalisation programme and the impact that it would have on them, nor were they consulted in regard to such matters.

[2] When litigation commenced in the Cape High Court the applicants were eleven schools under the auspices of the Western Cape Education Department (the WCED). The relief claimed focussed on the need for information. The applicants sought an order directing the provincial government to provide them with information which they said they required for the exercise or protection of their constitutional rights. They also sought leave to approach the Court on the same papers, supplemented if necessary after receipt of the relevant information, for an order directing the WCED to employ general assistants working at the applicant schools and interdicting the WCED from retrenching any of the teachers at their schools without giving them at least three months notice of

its intention to do so.

[3] After the WCED had lodged answering affidavits in response to the claims of the applicant schools the focus of the relief sought by the schools changed. They no longer demanded information, saying that there was sufficient information in the answering affidavits to enable them to formulate the claims that they wished to make. Those claims are reflected in an amended notice of motion in which the schools claim an order:

> "1. Declaring the respondents' failure to employ the general assistants presently employed by the applicants, to be in conflict with the fundamental rights entrenched in chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996, and therefore unlawful.
>
> 2. Directing the respondents to employ the general assistants presently employed by the applicants."

[4] The claims made by the applicants were dismissed by Brand J in the Cape High Court.[1] The applicants then applied for a certificate in terms of Constitutional Court rule 18(2) to enable them to apply to this Court for leave to appeal directly to it against the decision of Brand J, and in the alternative, for leave to appeal to the full bench of the Cape High Court or the Supreme Court of Appeal. In the absence of Brand J, the application was dealt with by Davis J who, in a considered judgment, refused leave to appeal to the full bench or the Supreme Court of Appeal, holding that there was not a

[1] *Bel Porto School Governing Body and Others v the Premier of the Province, Western Cape, and Another* case No 12126/99 (C), unreported judgment of Brand J dated 21 September 2000.

reasonable prospect that another court would alter the order granted by Brand J, and consistently with that finding, provided a negative certificate in terms of rule 18 of the rules of this Court.

[5] The applicants then applied to this Court for leave to appeal directly to it and leave was granted. Subsequently three of the original applicants withdrew, leaving eight applicants who persisted with the appeal.

The background to the dispute

[6] In 1994 when the interim Constitution came into force ours was a grossly unequal society. The interim Constitution was designed to create a new order "in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".[2] This commitment to the transformation of our society was affirmed and reinforced when the Constitution adopted by the elected Constitutional Assembly in 1996 came into force. The preamble to the Constitution "recognises the injustices of our past" and makes a commitment to establishing a society "based on democratic values, social justice and fundamental human rights". The society is to be built on the foundation of the values entrenched in the first section of the Constitution. These values include "human dignity, the achievement of

[2] See the preamble to the interim Constitution.

equality and the advancement of human rights and freedoms"[3] and a "multi-party system of democratic government, to ensure accountability, responsiveness and openness".[4]

[7] The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others.

The history

[8] Before the interim Constitution came into force education in South Africa was conducted at racially segregated schools managed by different departments of education. In the Western Cape there were four education departments reflecting these divisions. They were the departments of the House of Assembly (HOA), the House of Delegates (HD), the House of Representatives (HR) and the Department of Education and Training (DET). There were great disparities in the system. The HOA schools had better buildings, better grounds, better equipment, and better pupil teacher ratios than schools in the other departments had. There were also disparities between the other departments

3 Section 1(a).

4 See section 1(d).

and conditions in the DET schools were the worst of all.

[9] After the interim Constitution came into force the WCED was established to take over responsibility for all schools in the province. This was in about September 1995. At that time there were teaching and non-teaching staff at the various schools in the province. Most were employees of the former departments but some were employees of the schools. The South African Schools Act[5] (the Schools Act) continues to sanction this distinction and permits schools to supplement their teaching and non-teaching staff by employing additional teachers and assistants out of their own funds.[6]

[10] There are special schools that provide education for disabled pupils. They are referred to in the evidence as Elsen schools and I will refer to them as such in this judgment. The appellants are Elsen schools that were formerly HOA schools established to meet the educational needs of white disabled children. They were administered by the HOA education department.

[11] Elsen schools need teachers with special skills. They also need general assistants for various purposes, including class assistants to help the teachers attend to the children during classes and drivers to transport the children to and from schools. In those schools

5 Act 84 of 1996.

6 Section 36 of the Schools Act.

where there are hostels, general assistants have to perform duties normally performed by hostel workers and where that is necessary they also have to help the children with dressing, bathing, feeding and other personal needs. The general assistants must also be sensitive to the special needs of disabled children which might differ from school to school depending on the nature of the handicap from which the children suffer. There are also general assistants who perform other work, for instance, as clerks, foremen and labourers.

[12] When the appellant schools were administered by the HOA education department, the policy of that department was that the general assistants would be employed by the schools themselves. They received a special subsidy from the department to assist them to meet the costs of employing such assistants. It was up to the schools to decide how to use that subsidy. The first appellant attached to its founding affidavit a document that reflects the arrangements between the Elsen schools and the HOA education department at that time. Each of the schools was entitled to decide how many general assistants it would employ and what their salaries and terms and conditions of employment would be. The department recommended to the schools that the general assistants should be employed on contracts that would be subject to termination on 24 hours notice. The schools were, however, free to decide on all such matters themselves without reference to the department, and were not obliged to inform the department of appointments that were made or the salaries that were paid.

[13] The WCED says that this arrangement was the result of choices made by these schools. This is not admitted by the schools. In the view that I take of the matter nothing turns on this dispute. What is clear is that this policy had been followed for several years before the interim Constitution came into force. As a result, when the WCED was established and took over responsibility for the administration of the schools in the province, the general assistants at the appellant schools were all employees of the schools themselves.

[14] The other departments of education had different policies. They employed the general assistants at the Elsen schools in their departments, though there were apparently fewer assistants per pupil than was the case in the HOA schools. Schools in the other departments were also disadvantaged in other respects as compared with HOA schools.

Requests to change the policy

[15] Within approximately a year of the WCED having been established the appellants began to request that the policy concerning the employment of the general assistants at their schools be reviewed. Because of the differences that exist between the members of this Court concerning the relationship between the teachers at the appellant schools and the WCED, and the adequacy of the opportunities given to those schools to make representations to the WCED concerning the proposed policy changes, it is necessary to

refer in some detail to the evidence dealing with such matters.

[16] A request for the HOA policy to be changed seems to have been raised initially by the first appellant in May 1995. It submitted a memorandum to the executive director of education in the Western Cape dealing with its non-teaching staff and asking a number of questions concerning the policy relating to such staff. After setting out the functions performed by the non-teaching staff and the important part they play in the functioning of the school, five specific questions were asked.

[17] They were:

> "1. On whose pay-roll should they be according to legislation?
>
> 2. Is there a laid down norm for determining the total number of staff on the school's establishment? We believe that the 34 additional staff as utilised by us are of the utmost importance to our children's education, therapy and caring.
>
> 3. Are there service contracts and conditions for these workers available from the Department or should our school draw up its own?
>
> 4. Does the Department have any policy on resolving disputes, misconduct etc. or should we draw up our own?
>
> 5. Is the disparity between workers from other education departments and workers at our school paid out of our subsidy fair? If not, how can this be rectified?"

[18] The enquiry was responded to by the WCED in a letter that bears no date but

which was apparently received by the first appellant early in September 1995. After explaining that the WCED had only recently completed the task of taking over the Elsen schools, answers were given to the five questions that had been asked. They were:

> "1. The governing body of the school receives a subsidy for the running of the school, and the people concerned are appointed by the governing body. They are in the employment of the school and therefore on its payroll.
>
> 2. There are staffing norms for educators as well as non-educators. You should, however, bear in mind that your school is classified as a school for specialised education. On account of the extraordinary circumstances which exist at your school, it is very difficult to lay down hard and fast rules pertaining to staffing.
>
> 3. A model service contract for General Assistants has been drawn up, and a copy is enclosed for your perusal. Some of the items covered in the contract, may, however, need to be adapted to suit your specific needs, as long as the adaptations are legally justifiable.
>
> 4. The Department has a set policy regarding disputes and misconduct. In addition to the Departmental policy, these issues are covered in depth by the Public Service Labour Relations Act 1994. I attach a copy of Circular 26/1994 in which some of the basic issues regarding misconduct are dealt with.
>
> 5. It is not clear what form of disparity you are referring to. If you have housing subsidies and medical benefits for General Assistants in mind, I can assure you that the Department shares your concern that the current system is not fair. The Sub-directorate: Work-Study of this Department is already busy with an investigation in this regard at a Worcester school for specialised education. If funds can be found, the Department will consider the translation of a realistic number of posts of General Assistants to subsidised posts on your establishment."

[19] In October 1996 the first appellant began to press for a change in policy which it said could be traced back to 1976. A detailed memorandum was submitted to the WCED motivating a request for its non-teaching staff to be placed on the official WCED establishment. The memorandum concluded with the statement that, "as the financial implications have reached critical proportions, and the school is technically bankrupt, a prompt resolution is vital".

[20] There is nothing on the papers to show what the response to this request was. The next event mentioned in the correspondence is a meeting some nine months later in July 1997 between Dr Theron of the WCED and the school. The question whether the non-teaching staff would be taken over by the WCED was apparently the subject to be discussed at this meeting. There is, however, once again nothing on the papers to say whether the meeting took place, and if it did, what was said.

[21] Requests for the policy to be changed were also made by the second and third appellants. In October 1996 the second appellant was told by the head of education at the WCED that "most" of the non-teaching personnel at the school would be placed on the staff establishment of the WCED once the new staffing scales had been approved. In September 1997 the third appellant was told by the Director of Special Education Needs that it was legally possible for the general assistants "to become civil servants" and the WCED would try to accommodate as many of their general assistants as possible "but

no guarantee of the number can be given". No firm commitment was, however, made to either of these appellants, and it was never part of their case that an agreement had been reached between them and the WCED for their general assistants to be taken onto the WCED's establishment. None of the other appellants suggest that any representations or undertakings were made to them that their general assistants would be employed by the WCED.

[22] The matter came to a head towards the end of 1997. On 27 October 1997 attorneys for the first and second appellants wrote to the WCED saying that they had been consulted and were in the process of obtaining instructions from the management committees of ten other Elsen schools who were also affected by the WCED's policy to the former HOA schools. The letter complains that the Department has refused to place the general assistants at these schools on the staff of the WCED and that as a result the schools had been obliged to use their subsidies and the proceeds of their fundraising to pay the salaries of such assistants, whilst other schools did not have this obligation. The letter refers to attempts since 1995 to resolve this problem saying that although there had been an acknowledgment that the problem needed to be solved, there had been continual postponements and nothing had been done. The letter concludes with a demand that unless the "discrimination" is removed within seven days, legal action would be taken. The letter of 27 October was followed by a letter dated 9 December 1997. The attorneys now had instructions from 12 schools including the 11 applicant schools, and say that

action is to be taken in connection with the breach of fundamental rights of the schools arising out of the WCED's failure to pay for the general workers at the schools. After setting out the details of the complaint, the letter contains a demand for information in terms of section 32 of the Constitution relating to all investigations, reports etc. pertaining to the complaints of the schools. It also alleges that this failure constituted a breach of the schools' right to just administrative action because the complaints had not been properly investigated and there was no justification for the WCED's conduct. A formal request was made for reasons for the WCED's conduct. There was a further demand. It concerned the possible rationalisation and re-deployment of teachers at various schools. The letter referred to reports in the press that this was about to happen and complained that the schools did not know whether any of their teachers were likely to be affected. It said that there had not been an adequate investigation into the conditions at the schools and that the schools had not been consulted about these plans. It was contended that this infringed various substantive constitutional rights of the schools.

[23] The letter raises a number of issues. It asks for information as to what the WCED intends to do about rationalisation and re-deployment, and calls on the WCED to consult with the appellant schools and to investigate the conditions at the schools. It demands an undertaking that at least three months written notice will be given to the schools concerned if the WCED intends to reduce staff at the schools. It alleges that the conduct

of the WCED infringed the schools' rights to fair administrative action. The grounds relied on for this contention are that the conduct was not justifiable and that it was also procedurally unfair, since there had been no investigation into the needs of the schools concerned. A formal request was made for reasons for the conduct of the WCED in relation to these matters. Finally, it was said that if the WCED did not intend to comply with the requests made in the letter legal proceedings would be taken. A copy of the letter had accordingly been sent to the state attorney and the WCED was requested to consent to any application that might be brought and served on the state attorney.

[24] The demand from the applicants' attorneys was responded to by the state attorney on 12 December 1997. Attached to that letter was a formal response from Dr Theron on behalf of the WCED. This response, which is of importance to the issues in this case, records the attitude of the Department as follows:

> "1. The general assistants at the applicant schools were employees of the schools and not the department.
>
> 2. Because of financial problems which the schools were experiencing they had made demands for the general assistants to be placed in the employment of the WCED. The WCED could not do this. It had first to make provision for its own staff who might become redundant before taking on staff employed by the schools.
>
> 3. The process of determining staffing norms was presently under discussion with the relevant unions. In the meantime, ad hoc subsidies were being given to these schools concerned to assist them.

4. The final decision as to posts at the various schools would be made consistently with the financial resources available to the WCED according to the same norms as would be applied to all schools.

5. If as a result of the rationalisation scheme there should be posts vacant after the rationalisation and re-deployment, the general assistants at the schools could apply for positions, but no assurance could be given that they would be appointed."

[25] There was a long silence from the schools after that. On 10 November 1999 the proceedings in the present matter were commenced in the Cape High Court. This was approximately 23 months after Dr Theron's response to the requests made in the attorney's letter for information concerning the attitude of the WCED. There is no explanation in the application for the delay. There is nothing in the affidavits to show what, if any, response was made to the state attorney's letter, nor is there any reference in the founding affidavits to further correspondence between the schools and the WCED or their attorneys after that. All that is said is that "in the past year, negotiations to end the deadlock have not resolved the dispute".

[26] It appears from the answering affidavits lodged on behalf of the WCED that there was in fact contact between the first appellant and the WCED during 1998 including a meeting between its representatives and the Minister of Education in the provincial government at which the first appellant stated its case to the Minister. It also appears from the answering affidavits that meetings between the WCED and school principals

are held on a quarterly basis each year and that the question of staffing was raised at these meetings. In a letter from the third appellant to the WCED on 16 May 1997 there is a reference to one of these meetings. The letter said:

> "From information given at the Elsen Principal's Meeting held at the Eros School on 5 May, it seems that there is a strong possibility that the services of General Assistants paid by the Board might have to be terminated in order to create vacancies for employees of the Department who, for whatever reason, have been declared redeployable. In ordinary terms such treatment of loyal and, in many cases long-standing, employees would amount to rank injustice to an already disadvantaged category. In terms of the Constitution of South Africa we are advised that 'unfair discrimination' and 'unjust administrative procedures' could be cited."

The reference in that letter to "general assistants paid by the board", is a reference to the board of management which controls the school.

[27] A new provisioning policy received provisional approval from the provincial cabinet on 29 October 1999. This was communicated to the acting head of the WCED on 2 November 1999, but had apparently not yet been made public when the proceedings were commenced.

The relief claimed in the proceedings initiated in November 1999

[28] The relief claimed in the proceedings is also of importance, and I deal with that now. Although the notice of motion is dated 10 November 1999, the founding affidavit of the first appellant was signed in April 1999. The founding affidavits of most of the

other appellants were signed in April or May 1999. The application and the relief claimed was therefore directed to the then existing policy of the WCED and not to the policy that was provisionally approved by the provincial cabinet on 29 October.

[29] The claims in the notice of motion were for an order directing the WCED to furnish the Applicant's attorneys of record with the following written information and documentation within fifteen days after the granting of the order:

> "1.1 Full particulars of investigations, if any, that have been conducted by the Respondents regarding the position of general assistants at the applicant schools;
>
> 1.2 Copies of any reports containing the findings of such investigations;
>
> 1.3 Full particulars of actions, if any, that the Respondents are planning to take regarding the appointment and payment of the said general assistants and the time frame within which such action will be taken;
>
> 1.4 Reasons for the Respondents failure to employ and pay the said general assistants;
>
> 1.5 The number of teaching posts that the Respondents intend to allocate to each of the Applicants;
>
> 1.6 The manner in which this allocation of teaching posts will be phased in;
>
> 1.7 Full particulars on investigations, if any, that have been conducted by the Respondents in this regard;

1.8 Full particulars of investigations, if any, that have been conducted by the respondents about the cumulative effect of:

1.8.1 their failure to appoint and remunerate general assistants at the Applicant schools;

1.8.2 any plans that the Respondents may have to rationalise teaching posts at the Applicant schools;

1.9 Copies of the reports, if any, of the investigations mentioned in paragraphs 1.7 and 1.8 above;

1.10 Allowing the Applicants to approach this Honourable Court, if necessary, on these papers, supplemented if necessary, after compliance by the Respondents with the order in paragraph 1 above, for an order:

2.1 Directing the Respondents to employ the general assistants presently employed by the Applicants;

2.2 interdicting the Respondents from retrenching any of the applicants' teachers without giving the Applicants three months notice of the intention to do so;

2.3 granting further and/or alternative relief;

2.4 directing the Respondents to pay the costs of such further applications;

3. Directing the Respondents to pay the costs of this application;

4. Granting further and/or alternative relief."

[30] On 15 December 1999, and prior to the preparation of its answering affidavits, the WCED wrote to the applicant's attorneys informing them that a scheme had been

prepared for the provisioning of posts at all schools in the province in accordance with equitable principles. The scheme had been approved in principle by the MEC for Education and the provincial cabinet and would be implemented pursuant to a plan to be determined after negotiations with the unions recognised by the WCED.

[31] The WCED lodged its opposing affidavits in February 2000. The personnel provisioning scheme approved by the provincial cabinet was attached to the opposing affidavit. The thrust of the WCED's opposition was that the delays in the formulation of the new policy were due to the complexities of the matter which were compounded by a substantial reduction of its budget in the middle of the process. The affidavit denies that the schools were not kept informed of developments. It refers to the explanation given by Dr Theron in response to the letter from the applicant's attorneys in December 1997 (which had not been referred to in the founding affidavit) and states that there were regular meetings with principals of all schools, including Elsen schools, during which problems relating to staffing and the provisioning of schools were raised. The allegations of unfair treatment and discrimination are also denied. Attention is drawn to the fact that there are significant disparities between various schools within the Department and that the redressing of these disparities is a matter of great sensitivity and urgency. As a result the rationalisation process was complex and involved a careful balancing of the needs of the various schools and the availability of funds.

[32] The applicants lodged their replying affidavit on 17 April 2000. On 30 June 2000 they gave notice of their intention to amend the notice of motion to delete the claim for information and to claim an order:

> "1. Declaring the Respondents' failure to employ the general assistants presently employed by the Applicants, to be in conflict with the fundamental rights entrenched in chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996, and therefore unlawful;
>
> 2. Directing the Respondents to employ the general assistants presently employed by the Applicants;"

A claim was also made for costs including the costs sought in prayer 1 of the notice of motion prior to its amendment. As a result the validity of the claim for information remained an issue in the High Court.

[33] The claim is a substantive claim for positive relief in respect of the alleged infringement of constitutional rights. In the founding affidavits lodged on behalf of the appellant schools it is alleged that their rights and rights of the children attending their schools had been infringed by the conduct of the WCED. The rights said to have been infringed are rights under sections 9 (equality), 10 (dignity), 11 (life), 12 (freedom and security of the person), 26 (access to housing), 27 (access to health care) and 28 (children's rights). In correspondence attached to the founding affidavit, the allegation is made that the appellants' rights to just administrative action under section 33 of the

Constitution had also been infringed.

[34] In the application for leave to appeal and in argument before this Court on the appeal, only three issues were raised by the appellants. First, that the WCED's failure to employ the general assistants at the appellant schools infringed the equality rights of the schools under section 9 of the Constitution. Secondly, that the new policy adopted by the WCED infringed the rights of the children at the appellant schools under section 28 of the Constitution. Thirdly, that in its dealings with the appellants the WCED had infringed the appellant schools' rights under section 33 of the Constitution to just administrative action. The allegations concerning the alleged breaches of sections 10, 11, 12, 26 and 27 were correctly not pursued by counsel for the appellants. I will deal in turn with each of the three contentions that were relied upon.

The equality argument

[35] The judgment of Brand J does not deal with the issue of equality directly, though it is referred to indirectly in the context of the alleged infringement of the right to just administrative action. In this Court, counsel for the appellants raised two arguments in support of the equality claim. First, that the WCED policy concerning the employment of general assistants differentiated between the appellants and other Elsen schools and that there was no rational basis for such differentiation. Secondly, that the differentiation constituted unfair discrimination against the appellant schools on the grounds of race.

[36] This difference between the appellants and the other Elsen schools existed before the WCED was established. It was one of many differences between schools which the WCED found when it took over the administration of the schools that had previously been administered by the different departments of education. It was one of the differences that had to be taken into account in the process of rationalisation and reconstruction that was required in bringing the four departments together as one department. What has to be decided on this aspect of the case is whether the way in which the WCED dealt with this difference infringed the constitutional rights of the appellants under section 9 of the Constitution.[7]

[37] The WCED inherited an education system that was grossly unequal. Some schools had superior equipment, better teachers, a better teacher pupil ratio and better grounds and infrastructure than other schools. In the main, the disparities reflected the racial discrimination which existed under apartheid though there were no doubt also disparities within racial groups. The WCED had the daunting task of converting this

[7] Section 9 provides:

> "(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 anyone 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."

system to an equitable system.

[38] This task was made more difficult because of the budgetary constraints within which the WCED had, and still has, to function. This is not peculiar to the WCED. It affects all government departments which are grappling with the history of racial disparities and unequal distribution of goods and services.

[39] Because of the budgetary constraints the WCED had to reduce the number of teachers and general assistants and other staff employed by it at schools. Because of the inequitable allocation of resources to different schools in the past, it had to address the inequity in the posts established at the various schools, and introduce an equitable staffing basis so that the teacher pupil ratio at certain schools would not be materially disproportionate to the teacher pupil ratio at other schools. This meant that it would have to redeploy teachers and personnel from some schools to other schools, and dismiss teachers and other personnel whose services would no longer be required. The teachers were unionised and in terms of the Labour Relations Act[8] there would have to be negotiations with the unions concerning the retrenchment and redeployment of the staff.

[40] In order to deal with these matters the WCED took advice from experts and engaged in negotiations with the unions representing its employees. The appellants do

[8] Act 66 of 1995.

not suggest that the scheme for the allocation of posts to the various schools in the WCED, and the arrangements made concerning the number of general assistants to be employed at each of the various Elsen schools is irrational or that it infringes the equality provisions of the Constitution. Their complaint is that the scheme makes provision for the new posts created at the appellant schools to be filled by general assistants employed by the WCED, rather than the general assistants employed by the appellants. They say that this will impose a financial burden on them because they will have to retrench their employees and carry the cost of the retrenchment, and that the scheme is also prejudicial to the learners at their schools who will have to adjust to new and possibly inferior assistants.

Rationality

[41] The first enquiry in terms of the section 9 analysis that has to be undertaken is whether the scheme is rational. In my view it clearly is. In *Prinsloo v Van der Linde*[9] it was said:

> "...a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."

[42] The WCED decided not to deal with staffing and other "equality" issues at the

[9] 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 36.

various schools within the province on a piecemeal basis. Instead it sought to develop a coherent and comprehensive plan for addressing these problems in order to meet two requirements that it set for itself - equity and compliance with budget. It consulted experts and spent considerable time endeavouring to find a satisfactory solution to the complex problems it faced.

[43] In the end, its solution as far as staffing was concerned was to set criteria for staff posts on a basis that would produce an equitable result. The scheme had to accommodate a provincial cabinet decision that there be a reduction of approximately 12% in the personnel budget. It made provision for the reduction of posts at schools that were overstaffed and the creation of new posts at schools that were understaffed. Knowing at all times that there would have to be a reduction in staff numbers, it declined to create new posts at schools until the scheme had been finalised. It thus did not accede to requests from the appellant schools to employ the general assistants who were then employed by the schools themselves. It did, however, increase the special subsidy paid to the appellant schools in the year 2000.

[44] The scheme as finalised gives preference to existing employees of the WCED. Where new posts are created, existing WCED employees who will be redeployed in terms of the plan will be appointed to the posts, in preference to persons who are not employees of the WCED. This is a perfectly rational scheme. It is not arbitrary to refuse

to take on new employees where existing employees have to be retrenched. Nor is it arbitrary to give preference to your own employees over others.

[45] In support of their argument counsel for the appellants relied on the fact that the Eastern Cape Education Department, which had been faced with a similar problem, had treated the employees of the schools on the same basis as it had treated its own employees. That is irrelevant to the rationality enquiry. The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.

[46] Counsel for the appellants also relied on the decision of this Court in the *Grootboom* case[10] contending that the WCED had to act reasonably in dealing with education and other matters affecting children. That case was concerned with section 26 of the Constitution and not with section 9. In terms of section 26, the state is obliged to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the right of "access to adequate housing". The Constitution specifically sets "reasonableness" as a standard for access to housing. That

[10] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

is a higher standard than that called for in a rationality review under section 9(1). If we were to apply a "reasonableness" review at the stage of the section 9(1) enquiry, we could be called upon to review all laws for reasonableness, which is not the function of a court.

Racial discrimination

[47] It was contended that the differentiation between the appellants (which were formerly schools for white pupils) and the other Elsen schools (which were formerly for coloured, Asian, and black children) amounted to unfair discrimination on the grounds of race.

[48] It is common cause that the appellant schools are now all non-racial schools. There is nothing to suggest that the purpose of the WCED's policy was to favour one racial group over another, nor is there any evidence to suggest that this has been the impact of its policy on any of the persons affected by it. In the absence of any such evidence it cannot be said that the policy constitutes direct or indirect discrimination on the grounds of race. The reason why the WCED will not take the general assistants at the appellant schools onto its staff is not that the schools were formerly "white schools". It is that it has a surplus and not a shortage of personnel. It is unwilling to employ the appellants' workers in jobs for which its own employees are available. This was stated clearly in Dr Theron's letter of 12 December 1997 where he said: "The WCED . . . had first to make provision for its own staff who might become redundant before taking on

staff employed by the schools." This has nothing to do with the race of the pupils or parents at the schools, or with the race of the general assistants.

[49] There is no evidence to support the claim based on racial discrimination and that claim must accordingly be rejected.

The financial burden on the appellants

[50] The appellants complain that because of the policy that has been adopted by the WCED they have been prejudiced in two respects. They have had to carry the cost of paying their own general assistants, whilst at other schools such assistants are on the WCED staff and are paid for by the WCED. In addition when the WCED creates posts for general assistants at their schools, and assigns re-deployed WCED employees to such posts, the schools will be compelled for financial reasons to discharge the general assistants employed by them and accept redeployed general assistants in their place. As a result they will not only lose the benefit of the services of assistants, some of whom have worked for them for several years, but they will also have to pay the retrenchment costs of discharging these employees. The relief claimed is tailored to shifting this financial obligation to the WCED.

[51] The Schools Act[11] requires funding for schools to be provided by both the state

[11] Above n 5.

and the schools themselves. The state's obligation is dealt with in section 34 (1) of the Schools Act which provides:

> "The State must fund *public schools* from public revenue on an equitable basis in order to ensure the proper exercise of the rights of *learners* to education and the redress of past inequalities in education provision."

The schools' obligations are dealt with in section 36 of the Schools Act which provides that the governing bodies must take all reasonable measures within their means to supplement the resources supplied by the state in order to improve the quality of education provided by the school to all learners at the school. According to Mr O'Connell, the Superintendent General of the WCED, there is not a single school in the province that does not have to raise funds itself to meet its obligations.

[52] The WCED has a finite budget. Mr O'Connell sums up the dilemma confronting the WCED as follows:

> "It is simply not possible to isolate a limited number of schools within the Western Cape and to afford them some special dispensation, as regards the appointment of general workers . . . This would be unfair to other schools . . . Such action would also ignore the reality that the WCED is compelled to operate within the budget allocated to it and is continually faced with the dilemma of allocating resources in accordance with sound education policy, but at the same time making sure that such allocation of resources is affordable. If the WCED were possessed of unlimited financial and other resources, it would be able to comply with all the needs and requests raised by educational institutions and other interested parties . . . This, however, is simply not the reality of the

matter."

[53] It is a policy decision as to how the finite budget should be applied. If the appellants had received additional subsidies sufficient to cover the full cost of employing all the general assistants on their staff less money would have been available to the WCED for other purposes. These purposes include the upgrading of schools whose needs were neglected in the past. Such schools might have been entitled to claim that their need for subsidies to assist them to procure equipment which they lack and to meet their running expenses is greater than the need of the appellant schools.

[54] The financial information placed before the Court by the appellants deals only with the subsidies that they receive and the cost to them of employing the general assistants. It does not deal with other income or expenditure. There are two subsidies, a general subsidy and a special additional subsidy paid to the appellant schools to allow for the fact that they employ their own general assistants. It appears that the total subsidies paid to the schools (i.e. the basic subsidy plus the special subsidy) in almost every instance is in excess of the total costs incurred by the schools in employing general assistants.

[55] The evidence concerning expenditure by the appellant schools is directed to the costs incurred by them in employing the general assistants on their staff. Those costs depend on the number of employees at each school. No comparison is made between

those numbers and the numbers of general assistants employed at other Elsen schools. There is no information as to how the surplus of the total subsidies they receive, after paying the general assistants, is applied or what needs are unmet as a result of the schools having to use part of their total subsidies to pay the general assistants. There is also no information to show the numbers of general assistants employed at other Elsen schools, whether those schools that were understaffed had to use funds to employ additional assistants, or whether because of a lack of funds they had to do without them. Nor is there any information as to the needs of the other schools in comparison with the appellant schools and whether the subsidies they received were adequate to meet those needs.

[56] There is evidence that some schools were "oversupplied" with teachers and general assistants, and others were "under supplied". There is also evidence that there are substantial disparities between the infrastructure, provisioning etc. at the former HOA schools and the former DET schools. Mr O'Connell refers to the wide ranging disparities that exist, and to the "increasingly urgent demand for more classrooms, more textbooks and more educational resources". He also refers to the need to give effect to "the constitutional imperative of promoting equity within the context of previously disadvantaged communities". This, he says, makes the rationalisation program complicated and difficult and there is accordingly a need to pool resources, staff and financing.

[57] The obligation to give effect to constitutional imperatives is stressed by the WCED in its motivation to the provincial cabinet seeking approval for the rationalisation and redeployment scheme. It said:

> "The SICA project team investigated the allocation of cleaning and administrative staff at educational institutions of the WCED with, inter alia, the aim to effect equity in this regard. The findings of the project team indicate that the post provisioning, ranges from no posts at most institutions that were attached to the ex-DET to an undersupply or oversupply at schools that were attached to the ex-House of Representatives and to an oversupply at many schools that were attached to the ex-CED. The WCED is committed to equity and must therefore rectify these disparities . . . . The WCED needs to deal with this matter urgently as the maintenance of the status quo is untenable. Although the recommended PPS will not fully address the needs of all schools because of financial constraints, it will definitely put in place an equitable basis from which to commence redressing the imbalances of the past."

[58] A policy dealing with rationalisation and the redeployment of teachers and other employees had to be formulated by the WCED before a decision could be taken concerning the number of general assistants to be employed at the various schools. As Brand J points out in his judgment, if the WCED had acceded to the demands of the appellants and had employed all the general assistants on their staff before the scheme had been finalised, it would have advantaged those schools over others that were under-resourced.

[59] There is also evidence that at least some of the appellant schools are better

equipped than most of the other Elsen schools in the WCED. Due to the privileged position they previously had in the education system, the HOA schools would not only have had better grounds, better equipment and possibly better reserves and better teachers than the other schools, but also more general assistants than many of them. If the matter is addressed in the context of "equality" it might well be said that these other schools were entitled to receive a larger share of the subsidy budget than the appellants to enable them to address the deficit from which they suffer.

[60] The appellants might possibly have had a case for the special subsidies to be increased, but that is not the relief that they have claimed, and there is insufficient information in the record before us to hold that if regard is had to the needs of all the schools in the system, the appellant schools were treated unfairly as far as the payment of subsidies is concerned.

The costs of retrenchment

[61] It is not yet known how many of the general assistants are likely to be retrenched at each of the appellant schools, or what the cost of retrenchment is likely to be. The schools make the bald allegation that there will be retrenchment costs which they will have to pay themselves. But that is as far as they go, and it is not possible on the basis of that bald allegation to know what the financial "burden" of the retrenchment costs will be.

[62] Moreover, the policy that has now been adopted by the WCED is to require all Elsen schools, and not only the appellant schools, to employ class assistants and drivers themselves for which they will receive a subsidy calculated on a per capita basis. Although this policy will have to be phased in at the other WCED schools, it involves no change at the appellant schools, save possibly for the amount of the subsidy to be paid.

[63] I am prepared to assume for the purposes of this judgment that the imposition of an unfair financial burden on the appellant schools would constitute unfair discrimination for the purposes of section 9(3) of the Constitution.[12] However, since this is not a case in which there has been differentiation on a ground referred to in section 9(3) the onus of proving that there has been discrimination that is unfair is on the appellants.

[64] In *Walker's* case[13] it was said that section 9(3):

> "prohibits 'unfair' discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness."

[65] The purpose of the scheme in the present case is to promote equality, which is relevant to the enquiry into unfairness that has to be made. One cannot make such an

---

12 Cf: *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

13 Id at para 44.

enquiry on the basis of only one strand of policy. Seen in its entirety, the purpose of the policy is to "equalise" the education system and to put all schools on a basis consistent with that requirement. This includes the "equalisation" of teachers, equipment, grounds and general infrastructure. Although exact "equality" may never be possible, an equitable system can be put in place. But there is a finite budget. If money is made available to the appellant schools for the costs of retrenchment, it will not be available to other schools for purposes which may be equally pressing, for example, the upgrading of under-resourced schools. This is a relevant consideration. The question that has to be decided is whether it is unfair to require that money to be used for other purposes, including the needs of schools in dire distress, rather than for the needs of the appellant schools.

[66] In a process as complex as the one of which the present scheme is a part, some schools are inevitably going to be affected more adversely than other schools at different stages of the process. That does not mean that the scheme as such is unfair. If a comparison is made between the appellant schools and the other schools there is nothing to suggest that, if the appellant schools have to meet the retrenchment costs out of their own funds, they will be materially worse off than most schools, as far as personnel, equipment, infrastructure, etc. are concerned. They will no doubt have less to spend on equipment and infrastructure, but it is likely that they already have better facilities than most schools.

[67] The only school that suggests that it may not be able to meet the costs of retrenchment is the first appellant which describes itself as being "technically bankrupt". It is not clear what this means. Even if it means that it is not in a position to pay retrenchment costs, the same contention is not made by the other schools.

[68] The cause of this "technical bankruptcy" is attributed to the first appellant having had to pay the salaries of its general assistants. The general and special subsidies that it receives are, however, sufficient to cover such costs. It may be that the first appellant has employed more general assistants over the years than the other schools have done, and has also spent money on equipment and resources that other schools do not have. There may be other causes for its "technical bankruptcy". If the first appellant is in crisis, it may have to make special representations to the WCED to assist it to overcome the crisis, and if it does, the WCED would have to deal with the request on its merits. The fact that the first appellant is "technically bankrupt", however, does not mean that the entire scheme for the rationalisation and re-deployment of personnel must either be set aside, or adapted to meet its needs.

[69] The same applies to the costs of retrenchments at the other schools. If retrenchments take place and the costs are ascertained, the schools can apply for a special subsidy to assist them in that regard, and the WCED will have to consider such a request on its merits. It could possibly come to their assistance as was done in the year 2000

when the special additional subsidy was increased in response to representations from the schools. But even if the WCED refuses to subsidise all or part of such costs, and it is assumed that this is what will happen, there is insufficient information in the record before us to justify a conclusion that this would be unfair.

[70] As long as the WCED complies with the requirements of the Constitution and any relevant law, the manner in which it allocates its budget is a matter for it and not the courts to decide. According to Mr O'Connell, the implementation of the new personnel and provisioning scheme is but one aspect relating to the delivery of educational services. It is tied in with and closely related to a host of other aspects and problems. It is this complexity, and in particular the difficulty of how to prioritise the use of a limited budget in the context of an inherently unequal system, that makes it impossible on the information that has been placed before us to hold that the appellant schools were or will be the victims of unfair discrimination.

Discrimination against the pupils

[71] It is contended that the pupils at the schools will be prejudiced because they will lose contact with general assistants known to them and will have to adjust to others who may be less competent. Because of the policy concerning class assistants and drivers it seems likely that the general assistants having the closest contact with the pupils at day schools may well be retained. There will, however, probably be changes at those schools

with hostels.

[72] There can be no doubt that the disabled children require assistants who are sensitive to their needs. According to the WCED, general assistants will only be redeployed to Elsen schools if they are competent to perform the duties that have to be performed. If they are not, the schools are entitled to object to the redeployment. It is not possible to say in the abstract that the particular employees who will be re-deployed at the appellant schools (if that happens) will not be competent to do the jobs, or that the children will suffer as a result of having to relate to the new employees in place of the old. The children will no doubt have to adapt to the new assistants, but that is always the case when teachers change, as regularly happens when pupils advance to the next grade, and there is no reason to believe that if the redeployed general assistants are competent, the children will not adjust to them. The evidence is insufficient on this score to justify a claim of discrimination, still less, a claim of unfair discrimination.

Just administrative action

[73] There is no specific reference in the founding affidavits to an alleged infringement of the rights of the appellant schools to just administrative action. However, the attorneys' letter of December 1997 contained an allegation that the conduct of the WCED, in failing to employ the general assistants at the appellant schools, was procedurally unfair in that there had not been a proper investigation into the needs of the

schools and proper attention had not been given to the problems that existed. It was said that this conduct was not justifiable and that reasons had never been given for it. A demand was made for written reasons to be provided. There was another reference in the letter to administrative law, directed to the policy pertaining to teachers at the schools. It was alleged that there were rumours that there were to be retrenchments and a reduction of teaching posts, but there had not been consultation with the appellant schools over that issue, and proper investigations had not been made into the needs of the schools. This was said to be procedurally unfair, unjustifiable, and the reasons for that conduct were demanded. This letter is referred to in the founding affidavit in support of the prayer for information and reasons for the WCED's conduct. Although that claim was subsequently withdrawn, the appellants contended in argument before the High Court that procedural fairness had not been observed by the WCED in its dealings with them. That issue is dealt with by Brand J in his judgment and was also raised in argument before this Court. It is necessary to address that argument in this judgment.

[74] Not surprisingly, however, in view of the allegations made in the founding affidavit and the basis of the claim advanced there, little if any attention is given in the affidavits to the administrative law claim.

[75] In the joint judgment of Mokgoro J and Sachs J it is said that "although formally employed by the appellants' schools and not by the Department," the general assistants

employed by the appellants "were in effect public servants working in government schools" and as such, administrative justice "required that they be given a right to participate in negotiations as to retrenchments similar to that afforded to their counterparts in other ELSEN schools".[14] Similar comments are made by Madala J in his judgment.[15]

Whose rights are in issue?

[76] I am unable to agree with this approach. The general assistants at the appellant schools are not parties to this litigation. Although reference is made to the fact that the scheme is likely to lead to their retrenchment, no claim was made by the appellants on behalf of the employees. The appellants' claim is based on alleged infringement of their own constitutional rights, and the rights of the children of their schools, not their employees' rights. The relief the appellants seek is relief designed to relieve them of the burden of continuing to employ the general assistants, and of having to pay the costs of retrenchments that might take place.

[77] There is no evidence on record as to the terms and conditions of service of the general assistants of the appellant schools, other than that they are different to those of the general assistants employed by the WCED. Nowhere is it alleged in the affidavits made on behalf of the appellants that the general assistants were only "technically"

[14] At para 135.

[15] At para 197.

employees of the schools, or that they were in substance "public servants". No averment is made anywhere in the affidavits lodged on behalf of the appellants that the general assistants at their schools have any rights against the WCED, or that they believe that they had such rights.

[78] It is common cause on the evidence that the general assistants at the appellant schools are not and never have been employees of the WCED. They were and always have been employees of the schools that appointed them. Their salaries, benefits and other conditions of employment are and always have been different to those of the general assistants employed by the apartheid departments and the WCED. In this regard their status is no different to that of other assistants or teachers at schools throughout the WCED who were employed by the schools themselves and not by the WCED.

[79] The order sought by the appellants will not benefit the general assistants at their school. There is no challenge to the validity of the rationalisation or re-deployment scheme and at the hearing before the High Court it was made clear that the appellants do not want the scheme to be altered. The case advanced by them in their affidavits was that "the fair and proper course of action is first to bring the appellant schools in line with all other schools", and then to implement the rationalisation and re-deployment scheme. Consistent with this the relief claimed is an order directing the WCED "to employ the general assistants presently employed by the applicants." An order in such terms will

relieve the appellants of an obligation of continuing to employ and pay the salaries of the general assistants, and possibly of any obligation to meet the costs of retrenchment, but will be of little value to the workers. The rationalisation and re-deployment scheme makes provision for retrenchments to be carried out on the LIFO system - last in, first out. If the general assistants at the appellant schools are employed by the WCED now, they will be the last in and thus the first to be retrenched. The order will thus not be of benefit to them. Indeed it may be to their prejudice, for it will possibly leave them with no rights against the appellants and with little or no rights against the WCED, for the period of service according to which the retrenchment allowance will be calculated will be far less than would be the case if they were to be retrenched as employees of the appellants.

[80] It is presumably for this reason that Mokgoro J, Sachs J and Madala J propose that an order be made different to that claimed by the appellants. The effect of the order proposed by them is that the WCED must take account of the length of service of the general assistants at the appellant schools in the implementation of the rationalisation and re-deployment scheme. An order in these terms was not claimed by the appellants. It involves an amendment of the scheme that would have an adverse effect on those WCED employees who will lose their jobs if the schools' employees are given preference over them. It may also have a bearing on competition for jobs between WCED employees and teaching and non-teaching staff at other schools who are employees of the schools

themselves and not the WCED. For if the WCED has to treat the general assistants at the appellant schools in this way, why will it not have to treat other teachers and general assistants employed by schools themselves throughout the WCED in the same way?

[81] An order directing the WCED to employ the general assistants working for the appellants, or to amend the rationalisation and re-deployment scheme so as to take into account the length of service of the general assistants employed by the appellants when the scheme is implemented, is likely to have an adverse effect upon the general assistants employed by the appellants, or the general assistants employed by the WCED, depending on the terms of the order. Yet none of the workers are before the Court.

[82] The claim brought in the High Court was not a claim under the Labour Relations Act on behalf of their employees. The only claim that is before us on this aspect of the case, and the only claim we are called upon to consider, is the appellants' claim that their constitutional rights to just administrative action has been infringed. It is that claim that I now address.

Just administrative action

[83] At the time of the relevant events the right to just administrative action was regulated by item 23(2)(b) of schedule 6 to the Constitution, which provides:

"Every person has the right to -

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action had been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

[84] I am unable to agree with Mokgoro J and Sachs J that the words in item 23(2)(b) of schedule 6 to the Constitution have no evident meaning, and that unless "animated by a broad concept of fairness their interpretation can result in a reversion to what has been criticised as the sterile, symptomatic and artificial classifications which bedevilled much of administrative law until recently".[16] Item 23(2)(b) seems to me to encapsulate and in some respects extend the well-known common law grounds of judicial review as they have developed over the years in England and South Africa - legality, procedural fairness and rationality. These provisions can be interpreted and applied without "sterile, symptomatic and artificial classifications", and without importing into the Constitution a requirement that decisions must not only be procedurally fair, but also substantially fair. If that had been the purpose of item 23(2)(b), sub-paragraph (b) would not have confined itself to procedurally fair administrative action, but would have referred generally "to fair administrative action".

[16] At para 152.

[85] For good reasons, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. Whilst procedural fairness and the *audi* principle is strictly upheld, substantive fairness is treated differently. As Corbett CJ said in *Du Preez & Another v Truth & Reconciliation Commission*[17]

> "The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly . . . The duty to act fairly, however, is concerned only with the manner in which the decisions are taken: it does not relate to whether the decision itself is fair or not."

[86] The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn.

[87] The role of the courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, courts would not interfere with the decision.

[88] I do not consider that item 23(2)(b) of schedule 6 has changed this and introduced

---

[17] 1997 (3) SA 204 (A) at 231G.

substantive fairness into our law as a criterion for judging whether administrative action is valid or not. The setting of such a standard would drag courts into matters which according to the separation of powers should be dealt with at a political or administrative level and not at a judicial level. This is of particular importance in cases such as the present, in which the issue relates to difficult and complex policies adopted in order to promote an equitable transformation of apartheid structures and a reversal of policies that were grossly unequal.

[89] I do not understand the *Carephone*[18] case, or any of the cases that have followed it,[19] to hold otherwise. What they require for a decision to be justifiable, is that it should be a rational decision taken lawfully and directed to a proper purpose.

[90] If that is the case, and if the decision is one which a reasonable authority could reach[20] it would in my view meet the requirements of item 23(2)(b). It follows that I am unable to agree with the views expressed by Mokgoro J and Sachs J concerning the interpretation and application of item 23(2)(b).

---

18 *Carephone (Pty) Ltd v Marcus NO* 1998 (10) BCLR 1326 (LAC).

19 See for instance *Deacon v Controller of Customs and Excise* [1999] 2 All SA 405 (SE) at 418g-j; *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* 2000 (4) SA 621 (C) at 640G-641A; *Derby-Lewis and Another v Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission and Others* 2001 (3) BCLR 215 (C) at 243D-I.

20 See the comments of Lord Cooke in *Regina v Chief Constable of Sussex* 1999 (1) All ER 129 (HL) at 157d-e.

Procedural fairness

[91] In this Court and in the High Court, the appellants' principal attack upon the validity of the rationalisation and redeployment scheme was based on an allegation that their right to procedural fairness was infringed. They contend that the decision was taken by the WCED unilaterally and without consultation with them.

[92] The appellants' case was advanced on the basis that the WCED's policy concerning the employment of general assistants at the appellant schools, discriminated against the appellants unfairly. They contended that they had a right to require the WCED to assume responsibility for the employment of the general assistants that were in their employ, and to do so before implementing the rationalisation and redeployment scheme. Otherwise, the discrimination would be perpetuated.

[93] Subparagraph (b) of item 23(2)(b) creates a right to procedural fairness in respect of administrative action in favour of persons whose rights or legitimate expectations are affected or threatened by such action. The appellants have failed to show that the rationalisation and redeployment scheme infringes any of their rights. In their written argument in this Court the appellants contended, however, that even if it is found that they have no rights that are affected or threatened, they at least had a legitimate expectation to be heard in relation to their grievances.

[94] Legitimate expectation is not raised as an issue in the founding affidavits, and is not dealt with in the judgments of the High Court or in the application for leave to appeal. It seems to have been raised for the first time in the written argument where it is dealt with in passing in one paragraph of an argument that extends over 71 paragraphs. It received scant if any attention during the oral argument.

[95] Although representations were made to the second and the third appellants that some of their non-teaching staff would be placed on the establishment of the WCED, no unqualified undertaking was given in that regard. It was later made clear by Dr Theron in December 1997 that this was not going to happen, and that no assurance could be given to the appellants that any of the general assistants employed by them would be appointed to the WCED establishment. There is no suggestion on the papers that any representations or undertakings to employ their staff were ever given to the general assistants themselves. In any event the general assistants were not involved in the negotiations with the schools, and were not party to the litigation.

[96] It was not contended in written or oral argument that any of the appellants had a substantive legitimate expectation that the WCED's policy would be changed to comply with their requests. The argument went no further than asserting that there was a legitimate expectation to a hearing, and that there was thus a basis for the enforcement of the *audi* principle, even if the appellants rights were not infringed. Substantive

legitimate expectation is a contentious issue on which there is no clear authority in our law.[21] As the foundation for such a claim has not been laid, I do not consider it appropriate to consider that issue in the present case. My failure to deal specifically with that issue should not be understood as an acceptance of the proposition apparently accepted by Madala J that substantive legitimate expectation is part of our law. I leave that question open for decision in a case when the issue is properly raised and the factual foundation for such a contention is established.

[97] In the absence of full argument on this issue I am prepared to assume in favour of the appellants, as was done in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*,[22] that procedural fairness may be required for administrative action affecting material interests, such as the appellants' have in the present case, that fall short of enforceable or prospective rights. That makes it unnecessary to decide whether a sufficient foundation was laid in the present case for an argument based on legitimate expectation.

[98] It is not disputed by the schools that they knew that policy changes were under consideration and that they would involve schemes for rationalisation. Nor is it disputed

---

[21] This issue was left open in *Premier, Mpumulanga and Another v Executive Committee, Association of State-Aided Schools Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 32.

[22] 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 101. The issue is one that calls for full and detailed argument and the assumptions made by this Court in this and other cases should not be understood as expressing a view favourable to or against the assumption made.

that they made representations to the Department to take over the employment of the general assistants employed by them at their schools. The Department's response was that a decision could not be taken until a new policy had been determined. The schools knew this, and knew that there was no assurance that the new policy would make provision for the general assistants to be employed by the WCED.

[99] Approximately two years before the application was launched the WCED stated clearly in its response to the demand from the appellants attorneys that it would have to make provision for its own staff before taking on staff employed by the schools. It also said that if as a result of the rationalisation scheme there should be posts vacant after rationalisation and redeployment had taken place the general assistants at the appellant schools could apply for posts, but no assurance could be given that they would be appointed.

[100] Apart from the representations made directly to the Department, representatives of the appellant schools also attended meetings between the WCED and school principals that were held every quarter. According to Dr Theron, principals at all schools are required to attend these meetings. He confirms that they were kept fully informed at the meetings of developments affecting them and says that the principals had the opportunity at these meetings of raising matters of concern to them. He says also that the question of personnel provisioning measures was raised at most if not all these meetings. The

appellants do not dispute this. They say, however, that they were unable to get clear answers at these meetings as to what the policy would be. This is not surprising since the policy was only finalised shortly before the proceedings were commenced.

[101] The first appellant also brought the complaints concerning general assistants to the attention of the Minister for Education in the Provincial government during 1998. The Minister arranged for representatives of the first appellant to meet the Director of Special Education in the WCED to discuss the problems with him. The Director then briefed the Minister on these discussions. The Minister subsequently wrote to the first appellant saying that all correspondence received from the school has either been attended to by the directorate or has been channeled to the sections responsible for these matters.

[102] The first appellant has therefore had the opportunity of having had its case considered at the highest level. It has made representations to the Department concerning its financial position, and the alleged discrimination against it and the other appellant schools. At least some of the other appellants have done the same. None of the schools suggest that they were not given the opportunity of making representations to the HOA to change its policy to the schools. There is nothing on the papers to suggest that anything can be added to the representations that have already been made.

[103] The substance of the appellants' complaint is not that they have not had the opportunity of making representations to the WCED concerning the employment of the general assistants at their schools. The substance of their complaint is that their representations have not been answered to their satisfaction, that the WCED did not involve them in negotiations with the Unions representing the WCED employees, and that policy as formulated has not paid sufficient regard to the representations made by them.

[104] What procedural fairness requires depends on the particular circumstances of each case.[23] It does not, however, require the government to agree to requests put to it by persons seeking policy changes. In the present case the WCED could not reasonably be expected to have entered into negotiations with each of the 1750 educational institutions in the Department concerning its needs in relation to the rationalisation and re-deployment scheme. The needs would have differed from school to school, each no doubt with a particular concern that could be traced to the education policy of the past. The HOA Elsen schools had specific concerns. But so too would other HOA schools, and also the HR, HD and DET schools.

[105] The schools were informed of the need for rationalisation and re-deployment and

---

[23] See *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 39, *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 24, *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 101.

were given the opportunity of airing their views. The appellants requested that changes be made to the policy concerning the employment of general assistants at their schools. Representations were made to the WCED in support of the claim that the general assistants at the HOA Elsen schools be employed by the WCED. All the schools had the opportunity of raising the issue and stating their concerns at the quarterly meetings. By the end of 1997 they had taken legal advice and they knew then that in the process of rationalisation and redeployment that was to take place, the WCED contemplated giving preference to its employees over those of the schools. They were told this approximately two years before the policy was finally adopted. If they wished to add to the representations previously made, they had ample opportunity of doing so before the policy was finalised. In fact, it was during this period that the first applicant pursued the matter and sought and secured an interview with the provincial premier to put its case to him. In my view it cannot be said that in these circumstances the requirement of procedural fairness was not complied with.

[106] In his judgment Ngcobo J holds that the WCED infringed the rights of the appellants by failing to consult with them concerning the implementation of the scheme.[24] Although he concludes that the appellants are not entitled to the relief claimed by them, he would have made a declaration that the rights of the appellants to just administrative action have been infringed and would have directed the parties to submit further

[24] At para 246.

affidavits and argument dealing with the appropriate relief in the light of the finding made by him.

[107] Due to the course that the litigation took, the implementation of the scheme was not raised in the founding affidavits and no relief was sought in that regard in the Notice of Motion. The details of the scheme were placed on record by the WCED in their answering affidavits lodged on 14 February 2000. The appellants, in replying affidavits lodged some two months later on 17 April 2000, complained that they had not been included in the negotiations that had taken place between the WCED and the trade unions. The relief they sought, however, as expressed in the affidavit of Mr van der Merwe, the Chairman of the first appellant, was that

> "The fair and proper course of action is to first bring the applicant schools in line with all other schools. At that point negotiations between respondents and the trade unions, if necessary, will be meaningful."

[108] This was not the relief claimed in the notice of motion. But subsequently, on 30 June 2000, the appellants amended their Notice of Motion to withdraw the claims previously made by them. Instead the appellants sought a declaration of rights that the failure by the WCED to employ the general assistants in their employ was in conflict with their rights under Chapter 2 of the Constitution[25] and an order directing the WCED to employ them. This, in effect, brought the Notice of Motion in line with the averment

[25] The terms of the order are set out in paragraph 3 of this judgment.

made by Mr van der Merwe in his affidavit.

[109] Some two months later on 31 August 2000 - and only thirteen days before the date on which the application was to be heard - the appellants lodged supplementary affidavits covering 92 pages, in which they complained about the impact that the scheme would have on them. The WCED then lodged affidavits dealing briefly with these matters. The issues thus raised concerned the impact that the scheme would have on the schools, the general assistants employed by them, and the children at their schools. These matters have been dealt with fully in this judgment.

[110] In his supplementary affidavit Mr van der Merwe again mentioned that the appellant schools had not been consulted on the details of the scheme or its implementation, but the appellants did not seek any relief in that regard other than the relief claimed in the amended notice of motion. Under the heading "relief sought", Mr van der Merwe said:

> "It seems clear that the most equitable and logical way forward is for the WCED to first appoint all general assistants at the applicant schools, and thereafter to negotiate the implementation of its new policy with representatives of all workers at ELSEN schools.
>
> In the premises I humbly request the honourable Court to grant the relief as prayed for in the amended Notice of Motion."

[111] The further affidavits lodged by the WCED in response to the supplementary affidavits of the appellants included an affidavit by Mr Elliott, the director of its personnel management, in which he said:

> "The approach of the applicants has, throughout, been that the general workers presently employed by the governing bodies should be henceforth employed by the WCED. That in essence is the relief sought in terms of the amended Notice of Motion recently delivered by the applicants."

[112] The appellants did not dispute this averment. Nor did they raise any objection to the details of the way the scheme was to be implemented that were set out in a circular attached to Mr Elliott's affidavit. On the contrary, at the hearing before the High Court the appellants tied themselves to the relief that they had claimed in the amended notice of motion. This is emphasised by Brand J in his judgment where he says:

> "[A]pplicants specifically want BC 22 [the provisioning scheme] to be implemented with the exception that they want all the general assistants currently employed by them to be employed by the WCED."

If the appellants had sought other relief, the WCED may have had an answer and the whole course of the litigation may have been different.

[113] In its opposition to the application for leave to appeal the WCED said:

> "The relief which the Applicants sought was an order directing that the Respondents appoint all the general workers currently employed at the eleven schools represented by

> the Applicant governing bodies . . . The Applicant schools did not ask for an order setting aside the Personnel Provisioning Measures issued by the Western Cape Education Department, nor did they ask for any order directing that such measures be set aside pending the holding of consultations with the Applicant schools in relation to the Personnel Provisioning Measures."

The appellants did not dispute this contention or suggest that they might on appeal wish to change the position taken by them in the High Court. The WCED directed their opposition in this Court to the only issue raised by the appellants, and that was whether the general assistants employed by them should have been taken onto the establishment of the WCED. For their part, the appellants persisted in this Court in their claims as formulated and at no stage did they seek to amend or amplify the relief claimed.

[114] There are 1750 educational institutions in the Western Cape, each of which will be affected in different ways by the implementation of the scheme. The WCED was obliged in terms of the Labour Relations Act [26] and the collective agreements between itself and the public service unions representing its employees, to negotiate with the unions on the question of retrenchments. The general assistants were not, however, employees of the WCED and there was no statutory or contractual obligation to negotiate with them. Nor was there any statutory obligation to negotiate with the schools concerning changes of policy or levels of staffing. The schools were kept informed of developments at quarterly meetings and had the opportunity to raise their concerns there. Even if the WCED was obliged to do more than this and to consult with the schools on

[26] Section 189 of Act 66 of 1995.

the manner in which the new provisioning scheme was to be implemented (and I express no opinion on that issue), the appellants have not objected to the details of the plan for the implementation of the scheme and have sought no relief in that regard. The only relief they sought was the substantive relief concerning the employment of their general assistants. That claim was correctly dismissed by the High Court.

[115] I am therefore unable to agree with Ngcobo J that the appellants are entitled to relief in the form proposed by him. This was not the relief sought by the appellants in the High Court or in this Court, and it is inconsistent with the attitude adopted by the appellants throughout the litigation.

[116] The appellants did not seek a postponement of the hearing of the appeal to enable them to amend the relief claimed and to place additional evidence before the Court. If they had, the WCED would have been able to deal with such averments and, if it considered it necessary to do so, would have been able to place evidence before this Court on that issue.

[117] *Prince v President, Cape Law Society and Others*[27] was an exceptional case in which this Court decided to hear additional evidence on appeal. The factors taken into account in doing so were

[27] 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

> "the validity of Acts of Parliament that serve an important public interest is in issue; the constitutional right asserted is of fundamental importance and it goes beyond the narrow interest of the appellant; the validity of the impugned provisions has been fully canvassed by a Full Bench of the High Court and that of five Judges of the SCA; the course which the litigation took in the High Court and the SCA; and the appellant is a person of limited resources."[28]

It was also stressed that there could be no prejudice to the parties if they were granted leave to adduce further evidence necessary in order for the Court properly to decide the issues presented to it in the appeal.[29]

[118] The present case is quite different. The relief claimed does not concern an Act of Parliament which affects the general public, but the particular interests of the appellants, and no doubt of their employees who might be affected by the implementation of the scheme. The issue of implementation has not been canvassed in any other court. The course the litigation took was not the result of any uncertainty as to the correct procedure to be followed in constitutional litigation. It was the result of a decision deliberately taken by the appellants. They tied themselves to a particular form of relief and as a result the High Court was not asked to consider, and did not consider, whether the implementation of the scheme should be deferred pending further consultation with the appellants. I am also not satisfied that the re-opening of the case at this late stage would not cause prejudice to the respondent and possibly other parties affected by the scheme.

---

[28] Id at para 23.

[29] Id at para 29.

[119] In *Prince's* case it was made clear the parties must make out their case in their founding papers and will not ordinarily be allowed to supplement and make their case on appeal.[30] In my view, although this Court may have greater flexibility than the Supreme Court of Appeal in allowing additional evidence on appeal, it is a power which should not be exercised unless the circumstances are such that compelling reasons exist to do so. Those circumstances existed in *Prince*. They do not in my view exist in the present case.

Rationality

[120] The appellants contended that the decision taken concerning the general assistants at their schools is irrational and thus unlawful. This is the same argument as that raised in relation to the claim based on section 9(1). It must be rejected for the same reasons.

Did the WCED apply its mind to the appellants' representations?

[121] Counsel for the appellants submitted that the WCED did not apply its mind to the effect that the implementation of the rationalisation and re-deployment scheme would have on the appellants and the children at their schools. If it had, so it was contended, it would have realised that the implementation of the rationalisation scheme, without first appointing the general assistants at the schools to its staff, would cause hardship to the appellants and the children.

---

30 Id at para 22.

[122] No averment is made in the founding or replying affidavits that the WCED failed to apply its mind to the impact its policy would have on the appellants or the children at their schools. It is, however, clear that the WCED did consider the representations and that it rejected them. Its reasons for doing so are known. The real question is thus whether in the light of the reasons given the WCED's policy can be said to infringe the appellants' rights to just administrative action.

Justifiability

[123] Sub-item (iii) of item 23(2)(b) of schedule 6 to the Constitution makes provision for every person to be given reasons for administrative action which affects their rights or interests, and sub-item (iv) vests a right in every person to administrative action "which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

[124] Counsel for the appellants did not contend in their argument that the requirements of sub-item (iv) had not been complied with. However, their argument on equality and also on rationality and the submissions they made concerning the unfairness of the policy covers ground that might well be relevant to justifiability.

[125] The only right of the appellants alleged to have been infringed by the policy was their right to equality. I have dealt with that, and in view of the conclusion that I reached

in that regard, the claim under item 23(2)(b) must be dealt with on the basis that the policy does not infringe any "rights" of the appellants.

[126] We have heard no argument as to the meaning of sub-item (iv) and in particular no argument as to what is meant in the context of the sub-item by "rights" and "justifiable". In the absence of such argument it is not desirable to say more about such matters than is absolutely necessary for the purposes of this judgment.

[127] The approach now adopted by the courts of England to judicial review in public law cases, is that "the intensity of review . . . will depend upon the subject matter in hand".[31] Thus, action affecting rights protected under the Human Rights Act usually calls for heightened scrutiny and more intensive review than action affecting other rights or interests. As we have heard no argument on whether under our law the intensity of review in cases involving the infringement of particular rights may require a stricter standard than rationality, I prefer to express no opinion on that issue. The present case is concerned with policy matters relating to attempts to introduce equity into an inherently unequal education system, with all the difficulties attaching to that. The changed policy does not infringe any constitutional or other rights of the appellants. It is a case in which courts should tread warily.

---

31 *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at para 28.

[128] Largely for the reasons given by me in dealing with the claim based on equality, I am satisfied that even if sub-item (iv) is applicable to the appellants' claim, and even if justifiability may in certain cases permit a standard of review more intensive than review for rationality, this is not a case in which it would be appropriate to set a higher standard, or for this Court to interfere with the decision of the WCED.

[129] I would add only this. Policy is not written in stone. It can be adapted from time to time to meet the exigencies of particular cases. If the appellants consider that their special needs call for some special consideration in relation to the re-deployment process, or the cost of retrenchment, it remains open to them to continue to press their case for such relief. But it is the Department and not this Court that must decide this question.

Costs

[130] The appellants contend that they were entitled to bring the application for information and that an order for costs ought not to have been made against them in the High Court. The application was launched before the appellants had been advised of the decision concerning the rationalisation and redeployment of staff. That decision was in fact taken only a few days before proceedings were commenced in the High Court. After they became aware of the decision the appellants did not persist in their claim for information; instead they sought substantive relief on the same papers on the grounds that the implementation of the decision would infringe their constitutional rights. That was

the real dispute between them and the WCED, and little if any costs would have been saved if they had received that information before they launched the application, instead of immediately after it had been launched. They lost the real dispute in the High Court and on that ground alone Brand J would have been entitled to order them to pay the costs of the application, other than the costs of preparing the application for information.

[131] This court should not be required to determine questions of law that have no relevance other than the responsibility for costs of aborted litigation, particularly where those costs are but a small fraction of the costs that have been incurred.

[132] The appellants have failed. However, their appeal, which raised important issues of constitutional law, was not without substance. The appellants instituted proceedings in the interests of their schools and the children they serve. There is, as Brand J said, every reason to have sympathy for them and their cause. Justice will be done if the appeal is dismissed and no order is made as to the costs of the appeal.

[133] I accordingly make the following order. The appeal is dismissed. No order is made as to costs.

Goldstone J, Kriegler J, Yacoob J, Madlanga AJ, Somyalo AJ concur in the judgment of

Chaskalson CJ.

MOKGORO AND SACHS JJ:

Introduction

[134] This case raises important questions about when it is appropriate for a court to intervene in matters of public administration. Section 33 of the Constitution gives everyone the right to administrative action that is procedurally fair and that is justifiable in relation to the reasons given for it. The majority judgment prepared by Chaskalson CJ comes to the conclusion that the educational authorities in the present matter behaved in a manner that was procedurally fair, and that, insofar as the papers can be said to have made out a challenge based on justifiability, acted in a justifiable way.

[135] In our view, the majority judgment places undue emphasis on the circumstance that the general assistants at the appellants' schools did not have a contract of employment with the Western Cape Education Department (WCED) and that the WCED therefore had no obligation to give them the consideration they claimed. We are of the view that although formally employed by the appellants' schools and not by the Department, such assistants were in effect public servants working in government

schools in exactly the same way as the general assistants at other ELSEN schools. As such, administrative justice required that they be given a right to participate in negotiations as to retrenchment similar to that afforded to their counterparts in other ELSEN schools. Furthermore, when it came to the implementation of the redeployment scheme, it was unjustifiable to operate the Last-In-First-Out (LIFO) principle in a manner which categorically disregarded the dedicated years which many had spent in government schools looking after children who were autistic, without sight or hearing, affected by cerebral palsy or other disabilities.

[136] We do not suggest that this case presents an example of egregious targeting or intentional neglect based on unacceptable considerations. On the contrary, the papers indicate conscientious attempts to reconcile a vast range of competing considerations with as much overall fairness as could be achieved. We accept that in the present matter the WCED inherited not only a fragmented education system, but a grossly inequitable one. Redistribution of resources was necessary. One cannot deny that for a young democracy facing immense challenges of transformation, the need to ensure the ability of the executive to act efficiently and promptly is important.[1] The overall scheme the WCED produced was negotiated over many years and has a number of interrelated dimensions, making it necessary to have regard for the package as a whole. It is not

---

[1] *Premier, Province of Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 41; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151; 2001 (7) BCLR 652 (CC) at para 102.

always easy or appropriate to disentangle one particular aspect from the rest. Decisions of an economic nature involving policy considerations as to allocation of resources were, in the absence of more, a province of the Province.

[137] Nevertheless, in the hurly-burly of the process, the appellants' schools were knowingly, even if not maliciously, left by the wayside. We believe that the administration has to be disciplined by the principles of fundamental fairness as set out in section 33 of the Constitution, and that the categorical exclusion of the general assistants at the appellants' schools both from the processes concerned with re-deployment, and from the right to have their length of service taken into account, manifested unfair treatment, and entitled them to judicial relief.

The Factual Background

[138] Since 1976, and particularly during the 1990s, the appellants' schools frequently raised their concerns about the unfair consequences of their general assistants not being on the "Official Establishment" of the schools with the relevant education department. As soon as the WCED was created, it acknowledged that there were disparities which had to be addressed. The issues had, however, never been resolved.

[139] The attitude of the WCED to the appellants, not always consistent, can be gleaned from the papers. Mrs. W.T. Wilkinson, Acting Head of Education, in a letter to Mr. Van

der Merwe, chairman of the Bel Porto Governing Body (the First Appellant), noted in 1995 that there was a need to provide uniform establishments for the general assistant posts for schools, and that negotiations should take place between experts of the former departments, and the educational guidance service, and school principals. The Sub-Directorate: Work Study should be utilized to determine the envisaged staff provisioning scales as soon as possible.

[140] The Head of Education, responding in 1996 to a letter of Dr. Patrick Normand, chairman of the Vera School Governing Body (the Second Appellant), stated that:

> "[m]ost of the non-teaching personnel to which you refer in your letter will be placed on the staff establishment of the Western Cape Education Department once these new staffing scales have been approved and made official."

[141] In 1997, the appellants, through rumour we are told, had heard that retrenchments were looming in the WCED, as a consequence of the staff rationalisation which they had heard formed part of the education transformation process[2] and was to be embarked upon by the WCED. The appellants became concerned about the possibility of retrenchments at their schools, and the implications for staff and learners that would ensue. That their

---

[2] These ELSEN schools were formerly administered by four separate departments based on the policy of apartheid, which were part of the Tricameral system of education, i.e. the Department of Education and Training and the three departments of education of the House of Assembly, the House of Delegates and the House of Representatives respectively. Each of the four separate education departments had a sub-department dealing with ELSEN Schools. The appellants' schools were attached to the Department of Education of the House of Assembly. This rationalisation process, which is a major effort to equalise education by, among others, integrating the four previous education departments and significantly reducing the staffing levels of both teaching and non-teaching positions had commenced in 1995.

already unbearable financial situation would be compounded, intensified their concern. They themselves, as opposed to the WCED, would have to bear the cost of retrenchments when they could least afford it. They began to press the WCED vigorously for details about its plans, particularly after some initial very general information about the WCED's plans was disclosed.

[142] On 16 May 1997, the Chairman, Board of Management of Dominican-Grimley School (the Third Appellant), wrote to the head of the WCED, as follows:

> "The future status of Board employees vis-a-vis Department employees
> From information given at the ELSEN Principals' Meeting held at the Eros School on 5 May, it seems that there is a strong possibility that the services of General Assistants paid by the Board might have to be terminated in order to create vacancies for employees of the Department who, for whatever reason, have been declared redeployable. In ordinary terms such treatment of loyal and, in many cases long-standing, employees would amount to rank injustice to an already disadvantaged category. In terms of the Constitution of South Africa we are advised that "unfair discrimination" and "unjust administrative procedures" could be cited.
>
> The Department is earnestly requested, firstly, to expedite the distribution of the official Establishment for Non C-S Educators. Secondly, the Department is requested to devise a just and equitable policy specifically applicable on a once-off basis to accommodate the needs and rights of General Assistants presently employed by Boards of Management at ex House of Assembly Schools for Specialized Education."

On 2 June, 1997, Dr Theron of the Department responded:

> "The rectification of disparities in the working conditions and benefits of workers in the former Departments of Education has been delayed by the process of establishing the new Western Cape Education Department (WCED), with a new Act, supported by the appropriate Regulations, having to be drafted and promulgated, but I am pleased to inform you that the WCED is at last in a position to resolve this issue.
>
> The new South African Schools Act stipulates that all schools will soon become either public or private institutions. This means that workers at public schools, of which Dominican Grimley will be one, will become civil servants, irrespective of their former Departmental affiliations, and will enjoy equally the benefits applicable to their ranks and vocational categories.
>
> Regarding the position of General Assistants paid by the Board when schools become public institutions, I want to assure you that the WCED will strive to avoid any unfairness or injustice in the handling of this matter."

On 8 August 1997, the school wrote to the Department, imploring the WCED to indicate when the matter would be finalised. On September 30, the Department responded as follows:

> "As stated in our letter of 30 May 1997 the South African Schools Act, 1996 (Act 84 of 1996) made it possible for all general assistants to become civil servants irrespective of their former status as employees of governing bodies of state subsidized schools. This ruling will also be applicable to the general assistants at the Dominican Grimley School.
>
> However, due to a number of factors this issue could not be finalised yet. The various trade unions and other stake holders must still be consulted, a cut back of 12% of all non-educator posts must be implemented and the financial implications must be taken into consideration before a final decision could be taken on this complicated issue. The Western Cape Education Department (WCED) will however try to accommodate as many general assistants as possible but no guarantee of the number can be given."

The appellants sought information about the WCED's rationalisation plans in letters dated 27 October and 9 December 1997. They sought the information in order to determine the extent to which these plans would affect their schools. The response which was received from Dr. Theron of the Department on 12 December in essence stated:

> 1. The great majority of the general assistants at the former Department of Education and Culture, Administration: House of Assembly's state-sponsored schools for Special Education (Elsen Schools) were not public servants of the Department or another government department, but were employed through the governing bodies of these schools and their salaries were paid by the schools out of their own funds and/or through subsidies received from the government. For this purpose, all of these schools must register as employers. These schools, like the former Model C schools, handled the personnel in question. The general assistants in question were therefore under the management of the schools concerned, and not therefore of the government. It should be mentioned that the schools decided themselves about the number of personnel they would appoint.

2. The abovementioned personnel at equivalent schools of the Department of Education and Culture; Administration: House of Representatives were, however, in the employ of the government.

3. After the former Department of Education and Culture, Administration: House of Assembly was established, the schools concerned began suffering financial hardships, and rationalisation of posts was beginning, so the abovementioned 12 schools thereafter made demands for the general assistants to be placed on the establishment of the WCED.

4. The WCED, however could not do this, considering that a new establishment for non-CS educators had to be created and negotiated, the Department's budget had been drastically reduced, and in the first place the WCED had to make provision for its own staff who might become redundant. The process of determining staffing norms is presently under discussion in the bargaining chamber with the relevant unions. In the meantime, ad hoc subsidies were being given to these schools concerned to specifically subsidies their personnel expenses.

5. It should be pointed out that the WCED cannot construct these new conditions of service necessarily in terms the personnel needs of the schools, but in terms of what the WCED is able to finance.

6. Furthermore, it should be pointed out that the new concept for schedules of service makes provision for equal conditions of service in respect of the relevant former schools. The same norms would be applied to all schools.

7. If in terms of the abovementioned rationalisation scheme there should be posts vacant after the rationalisation and re-deployment of departmental personnel, the general assistants at the schools could apply for positions. However, no assurance could be given that they would be appointed.

The letter did not provide sufficient information to enable the appellants to determine the extent of the impact upon their schools, their general assistants and learners, of the WCED's plans. They could not therefore respond to the WCED and present proposals to mitigate the effects of the Personnel Provisioning Measures (PPM).

[143] This letter made it clear that staffing levels had not yet been finalised, and that

further negotiations were continuing. Although we were not told in the papers or in Court why an application was not launched until November 1999, it is possible that the appellants hoped that they would receive information, and perhaps even be included in discussions regarding the WCED's plans and their implementation. The appellants stated that when further information was not forthcoming, they resorted to an application in the High Court to compel the respondents to provide them with the necessary information. They further sought an order permitting them to approach the High Court once the respondents had provided the information if it proved necessary. The appellants stated that they felt left in the dark, as there was no consultation, and averred that the Department did not properly investigate the situation at their schools. Chaskalson CJ in his judgment for the majority notes that it is not surprising that the appellants were unable to get clear answers at the meetings between the WCED and the principals as to what the policy would be, since the policy was only finalised shortly before the proceedings were commenced.[3]

[144] Only some of the information was provided in the answering affidavits of the respondents, including, most notably, the envisaged rationalisation blueprint of the WCED: the PPM. After reading the PPM, it was clear to the appellants that the WCED had no intention of appointing the general assistants at the appellants' schools to the posts to be established. The appellants amended their notice of motion, applying for an

---

[3] At para 100.

order:

> "1. Declaring the Respondents' failure to employ the general assistants presently employed by the Applicants, to be in conflict with the fundamental rights entrenched in chapter 2 of the Constitution of the Republic of South Africa and therefore unlawful.
>
> 2. Directing the Respondents to employ the general assistants presently employed by the Applicants.
>
> 3. Granting further and/or alternative relief.
>
> 4. Directing the respondents to pay the costs of the application relating to:
>
> 4.1 the aforesaid relief.
>
> 4.2 the relief sought in prayer 1 of the notice of motion prior to the amendment thereof."

[145] The Cape High Court rejected their application with costs, Brand J declaring that the WCED could not be compelled to renege on its agreements with trade unions and their individual employees.

[146] In the papers, and at the hearing of this case, the WCED clearly expressed the view that it was not necessary in connection with provisioning, to consult with the appellants' schools or to make any efforts to consult with their general assistants, although they well knew that the general assistants would be affected by the implementation of their policy. The evolution and communication of this policy of

categorical exclusion is fully dealt with in the majority judgment. Mr. O'Connell for the WCED, in his affidavit sums up the position with the blunt statement that "[t]he provisioning of posts is not a matter to be negotiated between the governing bodies of schools and the WCED."

[147] Having eliminated the appellant schools from negotiations over implementation, the WCED in fact held consultations with six unions representing employees within the WCED.[4] From the papers, and oral argument presented by counsel for the respondents, it is apparent that the WCED was negotiating only with representatives of current employees of the Department. There were no representatives bargaining on behalf of the general assistants at the appellants' schools.

The issues before the Court

[148] The appellants raised several issues before this Court. They argued that the failure of the WCED to appoint their general assistants and pay their salaries, as is the case with other ELSEN schools in the Western Cape, creates inequality between the former and the latter. Unless this inequality is corrected before the implementation of the PPM, they averred, such implementation will result in the appellants being unfairly discriminated against in violation of their constitutional right to equality in terms of section 9 of the

[4] The Public and Allied Workers Union of South Africa, the Democratic Nursing Organisation of South Africa, the Public Servants Association of South Africa, the National Education, Health, and Allied Workers Union, the Hospital Personnel Trade Union of South Africa, and the National Union of Public Servants and Allied Workers.

Constitution. They also argued that there was a violation of their right to just administrative action in terms of section 33.[5] Their basic argument on this score was that the failure of the WCED to give them a proper hearing prior to the implementation of the PPM violated their right to procedurally fair administrative action. In the letter of demand which preceded their institution of proceedings in the High Court however, they stated that the actions of the administration were in fact unjustifiable. In the flurry of amendments intended to respond to the information provided in the respondents' affidavit, they did not expressly go on to pursue an argument based on absence of justifiability. Nor in argument before this Court did they in terms raise the question of whether or not the refusal of the WCED to employ the general assistants resulted in administrative action that was not justifiable in relation to the reasons given. They did nevertheless consistently maintain that the process had led to results that were unfair, unreasonable and unjustifiable. This in fact was the basis for the contention that they were being denied their right to equality.

[149] It is unfortunate that the issue of the justifiability of the administrative action was not argued as such before us. We do believe, however, that it was implicit in the claim being made, particularly in respect of the disproportionately harsh impact that the measures would allegedly have on the appellants' schools. This is an area of considerable novelty and controversy. The common law in our country and abroad has

---

[5] Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 read with item 23(2)(b) of Schedule 6 to the Constitution.

been undergoing notable evolution. The impact of the Constitution has been touched upon but not fully explored in our jurisprudence. We accordingly believe that in the present matter, which is concerned with questions of basic fairness rather than matters of form, it would be inappropriate to exclude from consideration constitutional claims which were vigorously advanced with strong factual foundations, because the format used turned out not to present the appellants' claims at their strongest. The central focus of the case has always been the basic fairness or unfairness of the procedure followed and the outcome arrived at.[6] In our view, the same factual considerations which were fully canvassed in respect of the argument relating to irrationality, are foundational to the question of justifiability, which we believe lies at the heart of the matter.

[150] It should be stressed that in this Court the appellants made no challenge to the PPM themselves, but merely sought to rectify what they considered to be an injustice in the way the measures were to be implemented. Similarly, with respect to their argument on the right to just administrative action, what was under attack before the High Court was the unfairness of the procedure adopted and the disparate impact of the PPM on the appellant schools. In this Court, the appellants' challenge went to the unfairness of the effect of implementing the PPM without due consideration of their interests. It is clear

---

[6] A further averment that they did not pursue with particular vigour was that the process followed and the scheme as developed and to be implemented by the WCED, breached their rights to dignity, life, freedom and security, access to housing, access to health care, and the fundamental rights of children at their schools. We were not pressed to consider each one of these alleged breaches individually, and will not refer to them further, save to say that they would appear to have possible relevance to questions of proportionality that might arise rather than to constitute independent and sustainable bases for challenging the actions of the respondents.

that the remedy they seek is to correct the unfairness which they consider the implementation will give rise to, rather than to try to turn the clock back and have the whole scheme revisited. For reasons which follow, we have come to the conclusion that their right to just administrative action has been infringed and that appropriate relief of a feasible and practical kind can be granted. As a result, we do not find it necessary to deal with the arguments raised on the question of their right to equality.

[151] There was clearly a dispute between the parties on the papers and in argument regarding the duty of the WCED to consult with the appellants or with representatives of the general assistants at the appellant schools, and whether or not such a duty to consult as existed was carried out. In light of our findings on the issue of whether the WCED's decision was justifiable in relation to the reasons given, we do not feel it necessary to deal with the issue of procedural fairness.

The right to just administrative action in terms of section 33

[152] Section 33 enumerates four aspects of just administrative action. Prior to the enactment of the Promotion of Administrative Justice Act[7] item 23(2)(b) of schedule 6 to the Constitution provided that section 33 is deemed to read as follows:

> "Every person has the right to—

[7] Act 3 of 2000.

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

The theme of fairness must be seen as governing the manner in which the four enumerated sections must be interpreted.[8] The words themselves have no fixed and self-evident meaning. Unless animated by a broad concept of fairness, their interpretation can result in a reversion to what has been criticised as the sterile, symptomatic and artificial classifications which bedevilled much of administrative law until recently.[9] Undue technicality and artificiality should be kept out of interpretation as far as possible; the

---

8 See *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231F/G-H; 1997 (4) BCLR 531 (A) at 542C/D-E regarding: general fairness. As Wade and Forsyth state in the Preface to the latest edition of their book on administrative law in England, at the heart of all new developments in administrative law is the need to bring more fairness, along with justice, into the law. All the particular rules must be related to that primary purpose, directly or indirectly, and "amid much discussion of proportionality and legitimate expectation, it is the ordinary person's sense of fairness which is the touchstone." See Wade and Forsyth *Administrative Law* 8 ed (Oxford University Press, Oxford 2000) at viii.

9 For criticism of adopting an unduly technical approach and the trend to move towards a more flexible approach, see: Klaaren "Administrative Justice" in Chaskalson et al (eds) *Constitutional Law of South Africa* (Juta, Cape Town, Revision Service 5, 1999) at ch 25.8; Burns *Administrative Law Under the 1996 Constitution* (Butterworths, Durban 1998) at 186-7; Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SA Law Journal* 484 at 503; and Pretorious "*Ten Years after Traub: The doctrine of legitimate expectation in South African Administrative Law*" (2000) 117 *SA Law Journal* 520 at 539-542, 546-7.

quality of fairness, like the quality of justice, should not be strained. There are at least three respects in which the concept of fairness should be seen as animating section 33. The first is to provide the link between the four enumerated aspects so that they are not viewed as separate elements to be dealt with mechanically and sequentially, but, rather, as part of a coherent, principled and interconnected scheme of administrative justice. Secondly, the interpretation of each of the individual subsections within the framework of the composite whole must be informed by the need to ensure basic fairness in dealings between the administration and members of the public. Thirdly, the appropriate remedy for infringement of the rights must itself be based on notions of fairness.

[153] The jurisprudence of transition is not unproblematic. This Court has emphasised the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society.[10] This relates to substantive fairness, which focuses on the effect or impact of government action on people. This Court has also emphasised the obligation upon the government to exhibit procedural fairness in decision-making. A characteristic of our transition has been the common understanding that both need to be honoured. The present case highlights a particular aspect of that complex process, in which a court may be called upon to examine both the procedural fairness of the decision and substantive fairness, or fairness of the effect or impact, and in that examination these two aspects may to some extent become intertwined. It is

---

[10] See *Premier, Province of Mpumalanga*, above n 1 at para 1.

necessary to determine the circumstances in which a court, looking at a scheme that as a whole passes the test of constitutional fairness, can and should detach a detail which, viewed on its own would be constitutionally unfair. Although there is disagreement between us and the majority on procedural fairness, we do not find it necessary to decide the procedural question. In our view the impact on the appellants of the manner in which the scheme was to be implemented is disproportionately deleterious and unjustifiable. We proceed to give our reasons.

[154] Before applying this section to the present case, we make two general observations. First it is necessary to underline the importance of acknowledging that courts will be reluctant to intervene in policy questions and anxious to avoid unduly clogging the functioning of government.[11] As was emphasised in *Premier, Province of Mpumalanga*[12] a court should be slow to impose obligations upon government which will inhibit the government's ability to make and implement policy effectively. This principle is well recognised both in our common law and in the jurisprudence of other countries; in the celebrated words of Holmes J, "[t]he machinery of government would not work

---

[11] Corder in this regard states that:

> "[c]ourts and practising lawyers are only now beginning to grapple with redefining the role of the law in regulating the tension which must exist between the procedural fairness and rationality of the administrative process on the one level, and the need for efficient, effective and expeditious public administration on the other."

Corder, "From Administrative Law to Administrative Justice," Chapter in Cheadle, Davis and Haysom (eds) *Fundamental Rights Under the New Constitution* (Butterworths, Durban, forthcoming book) at 30 (of the chapter) (footnotes omitted).

[12] Above n 1 at para 41.

if it were not allowed a little play in its joints."[13] No challenge was made to the scheme as a whole and there is nothing on the papers to suggest that it was not compatible with constitutional principles. The process of change inevitably has uneven consequences. The fact that a measure is harsher for some than for others does not make it constitutionally unfair. In general then, the development of schemes to overcome disadvantage and achieve equality must be regarded as central to, rather than inconsistent with, constitutional endeavour. This judgment should not be understood in any way as suggesting that sacrifice and burden-sharing in the interests of the greater good by themselves indicate administrative impropriety. Similarly, it would be manifestly inappropriate for courts to remain oblivious to the need for fiscal discipline, which by its very nature necessitates hard choices.[14]

[155] At the same time, the importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated.[15]

---

13 *Bain Peanut Co. of Texas et al. v Pinson et al.* 282 US 499, 501 (1931).

14 Wade and Forsyth, above n 7 at 383 conclude a discussion on the relevance of resources by stating that in discretionary situations involving how limited budget is best allocated to maximum advantage, it is more likely to be unlawful to disregard financial considerations than to take account of them.

15 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 133. Some selections from the 'Second Breakwater Declaration' are apposite in this regard:

> "Administrative law and judicial review should not unreasonably interfere with policy-making and the allocation of resources by government in pursuing its electoral mandate.
>
> . . . .
>
> Government needs to have power. The exercise of power can be abused substantively and procedurally, however, and in many places within the Southern African region it is regularly abused to the detriment of the public interest. In a democracy, the controlling- that is to say the tempering, constraining, regulating- of public power is concerned with controlling the *exercise* of that power in order that it conform to the fundamental

Furthermore, in our view, the Constitution prohibits administrative action which, however meritorious in its general thrust, is based on exclusionary processes, applies unacceptable criteria and results in sacrifice being borne in a disproportionate and unjustifiable manner, the more so if those who are most adversely affected are themselves from a disadvantaged sector of the community.

[156] A second preliminary observation flows from the first. It relates to the broad circumstances in which a court will either more readily defer to the discretion of the authorities or more easily consider intervening. The wider the ambit of the decision, and the more it relates to general policy, the more will it fall within the discretion of the authorities and the less appropriate will it be for the court to intervene.[16] On the other hand, the more limited, discrete and particular the number of persons involved, and the more serious the impact on their lives, the more readily will the court infer a possible need to intervene. This is not to suggest that there is a clear cutting-off point between

---

> principles of fairness, equality and public responsiveness.
>
> . . . .
>
> Public power . . . includes not only the power exercised by governmental institutions at all levels and of different kinds, but also the exercise of power by nominally private bodies."

Corder and Maluwa (eds) *Administrative Justice in Southern Africa* (University of Cape Town, Cape Town 1997) at 13-4.

16 Thus, when dealing with balancing the protection of the general public interests against the individual's legitimate expectation, Wade and Forsyth state that expectations may be more readily protected substantively when the expectation is given individually to a small group (such as the residents of a carehome) than where a general announcement of policy is made to a large group (such as prisoners). In the first class of case the decision-maker's freedom of action is being restricted only in exceptional cases, while in the second a general restriction applicable in all cases is required. In this way, the authors suggest, the concept of fairness and reasonableness are linked in a fruitful way. Wade and Forsyth, above n 8 at 499-500.

policy on the one hand and implementation on the other. Implementation can involve considerations of policy, but such implementation should follow principles that do not discriminate in an unfair way, are within the powers of the authority concerned, are accomplished in a procedurally fair manner and are not disproportionate or unjustifiable in their impact. There are circumstances where fairness in implementation must outtop policy.[17]

The right to administrative action that is justifiable in relation to the reasons given

[157] The issue of administrative justice that arises in the present matter and is the focus of this decision is whether or not there was an infringement of the right of the appellant schools to be furnished with reasons and to have administrative action that is justifiable in relation to those reasons. As we have stated, this issue was not raised in these terms on the papers or in argument. The letter which preceded the institution of proceedings, however, expressly alleged that the way in which the general assistants at the appellant schools were being treated was unjustifiable. It was stated in the papers and reaffirmed

---

[17] Dealing with the question of discretion in relation to legitimate expectation as it has developed in English law, Sedley J provides a useful if controversial formulation for determining the court's duty in balancing the freedom of the administration as against the rights of individuals affected:

> "While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy). To postulate this is not to place the judge in the seat of the minister. . . . it is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it."

R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 (QB) at 731c-e.

in oral argument that when redeployment took place, the length of service of general assistants at the appellant schools would not be considered at all. It is this stance by the respondents that calls upon us to examine the justifiability of the decision in question.

[158] One of the strongest complaints of the appellants was that at no stage before the proceedings were instituted were they given information as to how the WCED intended to deal with the status of their general assistants, let alone offered reasons for the decision not to treat their general assistants as members of the staff complement in the same way as general assistants at other ELSEN schools. Moreover, not only were reasons not given, but the decision itself was not communicated until after the appellants had instituted their action for information.

[159] The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review.[18] Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus

[18] Wade and Forsyth, above n 8 at 516.

be forced to evaluate all the relevant considerations correctly and carefully.[19] Moreover, as in the present case, the reasons given can help to crystallise the issues should litigation arise.[20]

[160] The failure to give reasons timeously, or at all in the present matter, prejudiced all these objectives and precipitated the litigation in this matter. The reasons provided by the respondents during the course of this application will be dealt with more fully later but they may be summarised as follows:

(a) The fact that the general assistants were not employees of the state was the result not of a state initiative but of a decision made under the old regime by the governing boards of the appellant schools themselves. Also, the appellant schools were not singled out for disadvantageous treatment, but rather, subjected to the same principles as applied to all schools. This will be referred to as the *'own fault' rationale.*

(b) The general assistants were not specialists and the appellant schools would not

---

19 Burns, above n 9 at 188.

20 Corder notes the context of the right to reasons in relation to other Constitutional rights as follows:

> "The right also had to be seen in terms of those rights to which it was juxtaposed: the rights of access to information and of access to court. This suite of 'process' rights represented a reaction to the evils of apartheid perpetrated through bureaucratic discretion under a cloak of official secrecy and rendered immune from challenge in law by the use of ouster (or privative) clauses."

Corder, above n 11 at 7 (of the chapter).

suffer if they were replaced by similar functionaries drawn from other schools. This will be referred to as the *transferability rationale*.

(c) The implementation of the scheme in the manner proposed would save costs, and formed an integral part of a polycentric scheme from which it was not possible to detach an ingredient. In any event, it was necessary to comply with an agreement collectively bargained between the WCED and six unions representing employees at the other schools. This agreement did not allow for any exceptions in terms of the implementation of the LIFO principle. This will be referred to as the *comprehensive scheme rationale.*

[161] Two different types of justifiability attacks may be launched upon administrative action.[21] First, the action may be unjustifiable on its face. This is the case where any implementation of the act would be unjustifiable. Secondly, the action may be valid on its face, but nonetheless unjustifiable as applied in certain circumstances, as is alleged in the present matter.

[162] The right to administrative action that is justifiable in relation to the reasons given

---

[21] Klaaren, above n 9 at ch 25.8.

incorporates the principle of proportionality, fundamental to a constitutional regime.[22] This would ordinarily require that the effects of the action be proportionate to the objective sought to be achieved.[23] In this respect it involves an element of substantive review - it relates not simply to procedure but to substance.[24] Yet, while obliging a court to enter into the merits, it does not require the court to substitute its own decision for that of the administration.

[163] In *Carephone (Pty) Ltd v Marcus NO and Others*[25] Froneman DJP helpfully stated that the particular conception of the state and the democratic system of government as expressed in the Constitution should determine the power to review administrative action

---

22 That proportionality is inherent in the Bill of Rights was recently noted in the decision of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukwevho Intervening)*, above n 1 at para 101.

23 De Ville "Proportionality as a Requirement for Legality in Administrative Law in Terms of the New Constitution" (1994) 9 *SA Public Law* 360 at 367; *Roman v Williams NO* 1998 (1) SA 270 (C) at 281E; 1997 (9) BCLR 1267 (C) at 1275E/F.

24 Corder discusses substantive review as follows:

> "South African administrative law has always held firm, at least by judicial protestation, to the view that the function of the judge is to review administrative action for want of procedural propriety, rather than indulge in an appeal on the merits of the matter. There are sensible reasons for this approach: It facilitates finality of administrative decision-making and the exercise of discretion; it allows the expertise of the administrator on site to be expressed flexibly; it will usually promote efficiency; and it respects the constitutional doctrine of separation of powers. Regrettably, this approach also allows corrupt and despotic officials a degree of latitude to wreak injustice. And it has too often, in the case of South Africa at least, allowed the judiciary to shirk its responsibility of performing a 'watchdog' function in this sphere, by appealing to the formal limits of its review powers. This latter danger is all too real, despite the widely acknowledged inability to draw a clear line between review and appeal. While there are obvious instances that fit the description at either end of the spectrum, there is a large 'grey' area in between, and judges are clearly often influenced by the merits of a matter when pushing the limits of their power to review."

Corder, above n 11 at 25 (of the chapter).

25 1999 (3) SA 304 (LAC); 1998 (10) BCLR 1326 (LAC) at para 34.

and the extent thereof; the concept of separation of powers grants the courts the authority to examine the functioning of the state administration, while the foundational values of accountability, responsiveness and openness, provide the broad conceptual framework within the public administration must function and be assessed on review.[26] He continued:

> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinions on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."[27]

[164] In our view, the concept of justifiability requires more than a mere rational connection between the reasons and the decision, such as that the general assistants in question were technically not in the employ of the WCED. Although a rational connection would certainly be necessary, it would not on its own be sufficient. All exercises of public power have to have a rational basis,[28] this is one of the foundations of legality, or lawfulness as required by section 33(a). Justifiability as required by section 33(d) on the other hand, must demand something more substantial and persuasive than mere rational connection. At the same time justifiability presupposes what could be

---

26 Id at para 35.

27 Id at para 36.

28 *Pharmaceutical Manufacturers Association of SA and Others; In Re Ex Parte Application of President of the RSA and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 85, 90.

considerably less than what the court itself might have considered the best possible outcome if it had had to make the decision. The test in each case for appropriately locating the action between these two extremes has to be a flexible one, bearing in mind the problems of the country, the complexities of government and the need for officials to exercise a genuine discretion in the fulfilment of their functions.

[165] Both courts and academic commentators have suggested that when examining whether or not a decision is justifiable, the decision-making process must be sound, and the decision must be capable of objective substantiation by examination of the facts and the reasons for the decision.[29] Put another way, there must be a rational and coherent process that would tend to produce a reasonable outcome.[30] The suitability and necessity of the decision are to be examined, and in this regard, a number of factors might have to be considered: the nature of the right or interest involved; the importance of the purpose sought to be achieved by the decision; the nature of the power being exercised; the circumstances of its use; the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; the broad public interest involved. It might be relevant to consider whether or not there are manifestly less restrictive means to achieve

---

29 *Carephone*, above n 25 at 1336D-1337G. See also *Kotze v Minister of Health* 1996 (3) BCLR 417 (T) at 425E-G/H.

30 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (Juta & Co; Cape Town 1994) at 169.

the purpose.[31]

[166] In our view, the question to be asked is whether, bearing in mind such factors described above, the decision can be defended as falling within a wide permissible range of discretionary options. In this respect the principle of proportionality is particularly relevant.[32] Ultimately, the issue is a robust one of basic fairness and proportionality, necessitating a contextualised judicial determination of whether the decision is a defensible one on the basis of the reasons given, or whether it is so out of line and tainted with unfairness as to demand judicial intervention. Each of the reasons advanced by the respondents for the decision will now be considered.

Own fault rationale

[167] The historical basis for maintaining the distinct and disadvantageous situation is that the general assistants concerned happened to be employees at what were formerly whites-only schools. Yet such general assistants were not themselves the beneficiaries of sustained privilege. Their low salaries and their names indicate that they come from

---

31 Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SA Journal of Human Rights* 31 at 41.

32 Corder notes the importance of proportionality within the South African Constitutional regime as follows:

> "It seems that the imperative to embrace proportionality is irresistible in the medium term, especially in the light of its growing dominance generally in our constitutional jurisprudence. One thing is certain: There can be no return to the artificiality of the 'symptomatic unreasonableness' test that characterised South African administrative law in the twentieth century."

Corder, above n 11 at 29 (of the chapter).

a section of the community that has been both racially and economically disadvantaged. The children for whom they cared originally were all white, but today are predominantly black. Yet the albatross of working in schools which once were reserved for whites only is placed around their necks. The fact that these schools were once privileged and ended up with greater accumulated resources than other ELSEN schools is a good reason for opening them up to all, not for bringing about the dismissal of their long-service employees who themselves come from disadvantaged backgrounds.

Transferability rationale

[168] The potential impact of the transfer of general assistants from other ELSEN schools to the appellant schools was one of the matters hotly contested on the papers. It is not possible to resolve the dispute simply on the contradictory contentions in the affidavits. It is significant, however, that the assertions on behalf of the respondents were made by educational administrators who did not claim to have any expertise on the specific problems faced by ELSEN schools. We believe it would be wrong to assess the justifiability of the scheme insofar as it had an impact on the appellant schools purely in quantitative terms, or by assumptions about the non-specialist nature of the work of general assistants. These are special schools dealing with children with special needs. However important generic and transferable elements such as training and organisation might be for them, as they are for other schools, the ELSEN schools by their nature are particularly dependent on teamwork and the experience of dedicated employees. A

worker used to cleaning and feeding autistic children, or helping them onto a bus or giving them food, might not have the skills necessary to tend to children without sight or hearing, or those living with cerebral palsy. If all schools need good management and well qualified people, collegial integration and institutional ethos are also of the greatest importance to each individual institution. In the appellant schools they are doubly, trebly so.

[169] Furthermore, the interests of the children are also relevant. It is to be expected that children develop special relationships with individual care-givers who become familiar to them. A disruption of such bonds would be particularly poignant for those children who would have been disadvantaged before by being excluded from schools because they were not white, to be disadvantaged again because the schools they attend happened once to have been for whites only. In a sensitive environment involving children who are particularly vulnerable, any substantial threat to disturb the equilibrium that was not necessitated by the circumstances would require well-supported justification.

Comprehensive scheme rationale

[170] There can be no objection to rigorous bookkeeping to ensure that state monies are effectively used. Yet the bottom line of the constitutional enterprise is not to be found at the foot of a balance-sheet, but rather in respect for human dignity. Fairness in dealings by the government with ordinary citizens is part and parcel of human dignity.

As Wilson J said in *Singh et al. v Minister of Employment and Immigration et al.*:[33]

> ". . . the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles."[34]

In the present matter a relatively small number of employees was involved, namely those at eleven out of seventy-eight ELSEN schools and less than one percent of the 1750 schools falling under the WCED. By not counting the length of service of general assistants at the appellant schools, the WCED would undoubtedly benefit to some small extent in two ways: more posts would be available for general assistants retrenched from other ELSEN schools, and the WCED would not be liable for the costs of retrenchment of the long-serving employees at the appellant schools. We do not have clear information as to precisely what the extra costs for the WCED would have been if the

---

[33] [1985] 14 CRR 13 at 57.

[34] Hogg comments that:

> "Professor Weinrib must be correct when she says that: 'It is inherent in the nature of constitutional rights that they must receive a higher priority in the distribution of available government funds than policies or programmes that do not enjoy that status'. She concludes that: 'A different preference for allocation of resources cannot justify encroachment on a right'. . . . Nevertheless, there is a point at which the cost of rectification is so high that it would justify the limiting of a Charter right. Even Wilson J. seems to accept that 'prohibitive' cost could have this effect."

Hogg *Constitutional Law of Canada* Loose-leaf ed, vol 2 (Carswell Toronto, 1997) at ch 35.9(f) (footnotes omitted).

period of service of the employees at the appellant schools for purposes of LIFO were taken account of rather than disregarded, but it would at most represent an infinitesimal part of the total budget.

[171] The respondents contend that they were obliged to honour the terms of an agreement produced by collective bargaining with a number of trade unions. It is understandable that the unions involved worked assiduously to defend the interests of their members and to protect the PAWC Personnel Plan as elaborated by means of the collective bargaining process. Yet as this Court held in *Larbi-Odam and Others v MEC for Education (North-West Province) and Another*:[35]

> "Although it may be that in certain circumstances the fact that a provision is the product of collective bargaining will be of significance for s 33(1), I cannot accept that it is relevant in this case. Where the purpose and effect of an agreed provision is to discriminate unfairly against a minority, its origin in negotiated agreement will not in itself provide grounds for justification. Resolution by majority is the basis of all legislation in a democracy, yet it too is subject to constitutional challenge where it discriminates unfairly against vulnerable groups."[36]

We accept that the concept of justifiability for the purposes of limitation analysis as in *Larbi-Odam* will normally require considerably more persuasive evidence from the State than in the case of justifiability of reasons given for administrative action. Nevertheless,

---

35 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

36 Id at para 28.

the broad principle must be that the mere fact that a measure has its origin in a negotiated agreement will not in itself serve conclusively as justification. Equally, one can uphold the collective bargaining rights of organized workers - bravely fought for over generations - without accepting the effective exclusion from an agreement of workers who sought to be included but were kept out on an arbitrary basis, namely, that although employees of a state institution fulfilling public functions, they were for reasons of historical accident and despite protest to the contrary technically not state employees.

[172] Although the general assistants at the appellant schools were technically employees of the appellants, the appellants were not governing bodies of private and/or independent schools. They were governing bodies of WCED schools who were under the authority of the WCED. The WCED provided subsidies towards the payment of salaries of the general assistants. These general assistants were public servants and in our view deserved the same opportunity to make representations as was in fact given to their counterparts in other ELSEN schools. It is clear from the papers that the general assistants at the appellant schools were being regarded as "outsiders," to whom the WCED owed no obligation. Their fate was viewed as being entirely in the hands of the appellants. The situation in reality was far more complex than that. Government is responsible to all citizens, and must have a concern for the welfare of all citizens, not the least for those working on its behalf in the public sector. The appellants were in a different situation from many other employers.

[173] Whereas employers generally have the freedom to determine their employment policies in accordance with economic realities and relevant labour legislation, the latitude of the appellants in the area of employment, in contrast, is limited. The PPM and the Provincial Administration Western Cape (PAWC) Personnel Plan which governs the redeployment and retrenchment of WCED employees dictated that in the appellant schools many of the general assistants would have to be retrenched. The WCED is thus in effect dictating who should be employed at these schools. Unlike all the other employees directly on the payroll of the WCED, the affected general assistants were not in any way involved in the formulation of this policy or in the labour relations processes which came into operation under the PPM. An examination of the history of legislation relating to the provision of special education indicates that what are presently called governing bodies of such schools were statutory bodies and were delegated authorities of the government.[37]

---

[37] Several pieces of legislation have dealt with special education, many of which contain similar provisions providing substantial ministerial control over school governance. The relevant statutes are the Special Schools Act 9 of 1948, the Educational Services Act 41 of 1967, the Education Affairs Act (House of Assembly) (Act 70 of 1988), and the present South African Schools Act 84 of 1996.

Under all of the above legislation, the Minister is granted the power to establish schools for special education, or private schools could register with the government to provide special education (see, for example, s 2 of Act 9 of 1948, s 12 of Act 70 of 1988). The legislation prior to Act 84 of 1996 generally distinguished between schools that received state subsidies, and those which were fully under departmental control (see, for example, s 1 of Act 70 of 1988). Schools could be declared or deemed by the government to be subsidised schools, or subsidised schools could be declared to be public schools (see, for example, ss 29 and 38 of Act 70 of 1988). While it is not completely clear from the papers, it seems that the appellant schools were considered to be aided or subsidised schools under the pre-1996 legislation. Grants could be provided by the government to schools with conditions as prescribed by regulation (see, for example, s 3 of Act 9 of 1948, s 32 of Act 70 of 1988). The Minister could set conditions for qualification of teachers, conditions of service, and methods and medium of instruction (s 3 of Act 9 for 1948). A subsidised school could be declared to be a fully state-controlled or public school, and in such cases,

[174] We accept that, technically speaking, a rational basis derived from formal employment history, might exist for not treating the general assistants at the appellant schools as government employees. Yet in our understanding of what the Constitution as opposed to the law of contract requires in the circumstances of this case, such technical

---

employees at those schools would become employees of the Department of Education, provided they consented, and the benefits that they had accrued would be retained (see, for example, ss 4 and 13 of Act 9 of 1948, s 99 of Act 70 of 1988).

Under all of the legislation, the Minister has been granted significant powers relating to governance in schools providing special education, particularly in schools classified as state or public schools. In such schools, the Minister could appoint an advisory committee, and by regulation determine the composition of that committee, their terms of office, and the qualifications required for appointment. Many committee members were government appointees (see s 17 of Act 9 of 1948, ss 15 and 19 of Act 70 of 1988). The Minister has been granted powers generally to make regulations relating to special education at all schools providing special education (see for example ss 17 and 28 of Act 9 of 1948, ss 15 and 19 of Act 70 of 1988). While the pre-1996 legislation often gave greater autonomy to subsidised or aided schools, who were governed by governing bodies, than to public schools, the Minister had significant control over these bodies, and essentially delegated powers to them. For example, under s 31 of Act 70 of 1988, state-aided schools were managed by governing bodies, and the governing bodies could be regulated by the Minister in a manner similar to the regulation of the councils established at the public schools under ss 16 and 19 of that Act. Under s 97 of Act 70 of 1988, the power to appoint, promote or discharge any person vested in the governing body, subject to the prior approval of the Minister. Subject to the National Policy for General Education Affairs Act 76 of 1984, the salaries, salary scales and allowances for subsidised posts was determined by the Minister, and the Minister would prescribe the leave privileges, and other conditions of service. If a governing body did not fill a vacancy in a subsidised post within a reasonable period, the Minister could appoint someone to the post, if the school would be disadvantaged if someone was not appointed. In Act 84 of 1996, s 24 sets out the composition of governing bodies of schools for learners with special education needs. The Minister fixes the numbers of each type of representative to be elected to the governing bodies, and how they are to be elected or appointed (see also s 28). Under s 25, the Minister may step in for up to three months if the governing body is not performing its functions.

There were provisions in the various pieces of legislation whereby employees at subsidised schools were treated essentially as being government employees for various purposes. For example, in s 21 of Act 2 of 1948, any person employed at a Union special school or home, or an approved Union special school (if his/her salary was paid in full by the Union Department of Education and his appointment and discharge were subject to the control of the Minister) was considered for all purposes in respect of pension and retirement benefits, as if he/she was employed in a post classified in the public service. Under s 98 of Act 70 of 1988, persons appointed to a subsidised posts at state-aided schools were treated the same way as employees at public schools with regard to discipline for inefficiency and misconduct. The school was responsible for carrying out the discipline. A state-aided school could not dismiss someone without prior permission of the Minister. Under s 97 of Act 70 of 1988, a person employed in a subsidised post at a state-aided school was deemed to be a workman in the employ of the State for the purposes of the Workmen's Compensation Act 30 of 1941.

rationality does not in itself satisfy the test of fundamental fairness required by administrative justice. The test in our opinion is not what the erudite lawyer would say is technically legal, or the experienced accountant would declare to be the most cost effective, but what the ordinary person, steeped in our social reality and imbued with the general values of the Constitution would regard as fundamentally fair in all the circumstances, bearing in mind the urgent need for transformation in our country and the real difficulties faced by government. In our view, for reasons which follow, such an ordinary person would definitely regard the treatment to be meted out to the appellants and their general assistants as fundamentally unfair.

[175] Before doing so, however, we will deal with the respondents' assertion that there was a need to view the situation of the appellant schools in the context of a polycentric scheme, in respect of which any special consideration given to a particular school or group of schools could have unpredictable and unacceptable knock-on effects on the others and on the balance of the scheme as a whole. In this respect it is instructive to refer to the article by Fuller which introduced the concept of polycentricism into legal discourse.[38] After arguing that polycentric problems do not readily lend themselves to adjudication because of the multiplicity of affected persons, Fuller goes on to point out that:

---

[38] Fuller "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353.

> ". . . if it is important to see clearly what a polycentric problem is, it is equally important to realize that the distinction involved is often a matter of degree. There are polycentric elements in almost all problems submitted for adjudication."[39]

He further emphasised that:

> "[i]t is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication had been reached."[40]

In the matter before us, we believe that aspects of the implementation of the scheme which impinge negatively on the appellant schools are readily identifiable and detachable. A relatively small number of general assistants at the appellant schools seek to be treated in the same way as general assistants at other schools for purposes of LIFO. This will not challenge the principles of LIFO but, rather, ensure that they are implemented in a manner that is substantively equal for all. The collective bargaining agreement with the unions would accordingly not have to be altered, but at a relatively small cost to the WCED, would have to be applied in an across-the-board manner to all workers affected by the scheme.

[176] This Court has on more than one occasion isolated and dealt with a particular

---

[39] Id at 397.

[40] Id at 398.

aspect of a broad educational budget. In *Premier, Province of Mpumalanga*[41] it dealt with a decision by the Provincial Minister of Education to stop payments for the bussing of white children which had been taken without the affected schools having been given an appropriate hearing. The effect of the order of the Court was not to require the Provincial Education Department to revisit the whole budget for the year, but to insist that the subsidies continue until the end of the year as the period regarded by the Court as reasonable in all the circumstances[42]. It is clear that despite the polycentric nature of the issues involved and the budgetary implications of the court order, this Court felt it appropriate and necessary to intervene, and did so not simply by setting aside as unlawful a decision relating to a detail of the overall financial administration, but also by finalising the matter in accordance with principles of fundamental fairness.

[177] In *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc*[43] the Court was able to separate out from an overall educational scheme and budget certain elements in respect of which procedural fairness might have required a hearing for particular groups. Again, there was no suggestion that the particular aspect complained of was so interwoven with the general scheme that it could not be detached and dealt with separately, nor that potential

---

41 Above n 1 at para 2.

42 Id at para 52.

43 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at paras 12-25.

budgetary implications ruled out a re-consideration.

Conclusion

[178] The LIFO principle is a widely acknowledged principle of labour law, and uses objective criteria to introduce fairness into the practice of retrenchment and redeployment. Yet the LIFO principle, fair as it is, is set to be implemented in a manner that operates perversely against the general assistants at the appellant schools. They are categorically, and, in our view, unjustifiably excluded from its operation. The only justification offered for facing them with the inevitable prospect of being dismissed from their jobs and replaced with strangers, is that this will save the Department money and facilitate the redeployment of supernumeraries from other schools. The result would be to apply the LIFO principle in a manner that requires that the last-in from the other ELSEN schools will replace the longest- in from the appellant schools. This inversion of the effect the principle is intended to have, is not an unavoidable consequence of the need to rectify inherited injustices or maintain the integrity of the scheme as a whole. On the contrary, it is defended as a device to save the Department some money and to facilitate redeployment of more favoured workers who, unlike the workers at the appellant schools, were represented through their unions at the bargaining table when implementation was being determined.

[179] Our assessment of the facts drives us to the conclusion that decisions taken on

implementation threaten in practice to: disregard the length of service of existing staff at the appellant schools only, and hence unfairly make such assistants candidates for unemployment; disrupt the delicate equilibrium at the special education schools; impact negatively on the welfare of the school children; and require the appellant schools to find their own resources for payment of retrenchment costs in respect of employees who, in fairness, should be kept on rather than fired. In effect, workers at the appellant schools, themselves from a disadvantaged section of the community, were bureaucratically, *en bloc*, without having had a meaningful say and without being given a satisfactory explanation, unjustifiably converted from being workers in the school system, doing the same work as those in other schools, into supernumeraries to be retrenched and replaced.

Remedy

[180] There are several provisions in the Constitution which are important to bear in mind when considering constitutional remedies, in particular sections 38, 172(1), 8(3), and 39(2).[44] Section 172 provides that if a court finds law or conduct inconsistent with

---

[44] Section 38 of the Constitution provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

In addition, section 172(1) reads:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and

the Constitution, it must declare that law or conduct to be invalid to the extent of its inconsistency. In addition to the declaration, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own. The constitutional defect might lie in the incapacity of the common law or legislation to respond to the demands of the Bill of Rights. Section 8(3) then requires that the court should develop a suitable remedy. No particular remedy, apart from the declaration of invalidity, is dictated for any particular violation of a fundamental right. Because the provision of remedies is open-ended and therefore inherently flexible, Courts may come up with a variety of remedies in addition to a declaration of constitutional invalidity. An "all-or-nothing" decision is therefore not the only option. In *Fose v Minister of Safety and Security*[45] this Court stated that:

> "[i]t is left to the courts to decide what would be appropriate relief in any particular

---

> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Section 8(3) further provides:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

And finally, section 39(2) states that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[45] 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at paras 18-9 (footnotes omitted).

case.

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."

Kriegler J in *Sanderson v Attorney-General, Eastern Cape* underlined the fact that "[o]ur flexibility in providing remedies may affect our understanding of the right."[46]

[181] The flexibility in the provision of constitutional remedies means that there is no constitutional straightjacket such as suggested in the High Court or in argument in this Court. The appropriateness of the remedy would be determined by the facts of the particular case. In a constitutional state with a comprehensive Bill of Rights protected by a judiciary with the power and duty to do what is just, equitable and appropriate to enforce its provisions, it is not hard cases that make bad law, but bad cases that make hard law.

[182] Even before the English Human Rights Act[47] began to have its effect, English law recognised the need for flexibility in the granting of remedies to allow the provision of

---

46 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 27 (footnote omitted).

47 Human Rights Act 1998 (1998 c 42).

relief appropriate to the particular circumstances. The authors of one of the leading textbooks on administrative law ask:

> "What remedies should be at the disposal of a court supervising the public law functions of the modern state? First, the court should be able to set aside (quash) an unlawful decision. Secondly, it should be able to refer the matter back to the decision maker for further consideration in the light of the court's judgment. In some circumstances it might be desirable to permit the court, even though it is exercising review rather than appeal powers, to substitute its own decision for that of the impugned one. Thirdly, the court should be able to declare the rights of the parties, perhaps also on an interim basis until it is able to consider the matter fully. Fourthly, the court needs power to direct that any of the parties do, or refrain from doing, any action in relation to the particular matter. In addition, compensation or restitution may be needed where a citizen has suffered loss as the result of the unlawful administrative action. Finally, effective interim remedies- to "hold the ring" until full determination of the matter- are essential."[48]

[183] The contention by the respondents in our view exemplifies an inappropriate all-or-nothing approach that could be damaging for the development of administrative justice. Such a totalist perspective risks either forcing government to grind to a halt, or else completely subsuming legitimate claims by individuals or groups into the greater good. The particularised fairness in the context of balancing public and private interests that section 33 contemplates, would be lost.

[184] The objective of judicial intervention under that section is to secure compatibility

---

[48] De Smith et al *Principles of Judicial Review* (Sweet & Maxwell, London 1999) at 524.

with fundamental notions of fairness in relation to the exercise of administrative power. Once it has been established that conduct is inconsistent with the Constitution the court, in addition to declaring such conduct to be invalid to the extent of its inconsistency, may make any order that is just and equitable.[49] Thus, it would not be just and equitable to remedy unfairness to some by imposing unfairness on others.[50] On the other hand, the constitutional rights of some cannot be withheld simply because of some potential knock-on effect on others. The test is one of fairness, not legality. In some circumstances fairness may require a setting aside of a whole scheme so as to enable a significant part to be revisited, in others the scheme can go ahead in general with a part being re-examined and necessary adaptations made. If this were not so the interest of minority groups could always be overridden by invoking the principle that what matters is the greatest good for the greatest number. Alternatively and conversely, it could mean that the majority could be made to suffer unfairly in order to accommodate the interest of the minority. It is particularly important when a proposed measure is likely to have a disproportionate impact on a certain group that such group be given a meaningful opportunity to intervene and have its interests considered in a balanced way. This becomes even more significant when the group is vulnerable and disempowered. To say that it matters little because only a relative handful of persons were treated harshly, is to

---

49 Section 172(1) of the Constitution, above n 44.

50 In the present matter we do not believe it could be regarded as unfair to general assistants at other ELSEN schools to bring general assistants at the appellant schools within the very LIFO principles being applied to themselves.

suggest that fairness can be equated with or subordinated to utility. The concept of the greatest good for the greatest number can in appropriate circumstances be an important element in determining what is fair or justifiable, but it cannot serve as its sole measure otherwise there would be little scope left for administrative justice.

[185] We cannot, therefore, accept the gist of the respondents' arguments regarding remedies, namely, that it is impossible to do virtually anything at this stage to meet the appellants' claims; that requiring the government to consult at this stage with the appellants and their general assistants, or to employ the general assistants, would cause effects which would require essentially a reconsideration of the entire policy; that the collective labour agreements which form the backdrop of the PPM would necessarily be breached, and the PPM would have to be redesigned.

[186] It would indeed be most unsatisfactory and have negative consequences for constitutionality to fail to provide a remedy where there has been an infringement of a constitutional right. While courts should exhibit significant deference towards the administration and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account. It is the remedy that must adapt itself to the right, not the right to the remedy.

[187] Section 33 does not require a court to say that because a scheme is defective in part, the scheme as a whole has to be invalidated and revisited. Just as severance is a permitted method of detaching a defective part of the statute from the body of the legislation as a whole, and as reading-in is an appropriate method of filling an easily definable gap in a measure that constitutionally-speaking is under-inclusive, so should appropriate techniques be developed to fashion remedies for administrative injustice. Thus, establishing unfairness of process or unjustifiability of result should not inevitably vitiate the scheme as a whole, particularly if further unfairness would result. Unlike questions of legality, where the exercise of a power either is lawful or it is not, fairness can be a matter of degree. In this respect we can do no better than repeat what Steyn J recently said in *Regina v Secretary of State for the Home Department, Ex parte Pierson*:

> "It was suggested that severance would involve 'a rewriting' of the policy statement. This is a familiar argument in cases where the circumstances arguably justify a court in saying that the unlawfulness of part of a statement does not infect the whole. The principles of severability in public law are well settled. . . . Sometimes severance is not possible, e.g. a licence granted subject to an important but unlawful condition. Sometimes severance is possible, e.g. where a byelaw contains several distinct and independent powers one of which is unlawful. Always the context will be determinative. In the present case the power to increase the tariff is notionally severable and distinct from the power to fix a tariff. . . . It is an obvious case for severance of the good from the bad. To describe this result as a rewriting of the policy statement is to raise an objection to the concept of severance. That is an argument for the blunt remedy of total unlawfulness or total lawfulness. The domain of public law is practical affairs.

Sometimes severance is the only sensible course."[51]

[188] In *Premier, Province of Mpumalanga*[52] just such a practical approach was adopted, and we believe such a practical approach should be followed here. To insist on a hearing now on the limited aspect touching on the rights of the workers, the children and the schools as a whole, would serve little practical purpose. The issues have been canvassed on the papers and in court. The basic scheme of re-deployment as negotiated with the unions would remain intact, save for the excision of a manifestly indefensible and relatively tangential aspect of unfairness in its implementation. Endless hearings involving all the workers at all ELSEN schools at this stage would not be in anyone's interest. The workers at the other ELSEN schools have already taken part in negotiations, and their interests have been resolutely defended by respondents in these proceedings. We may assume that they will continue to press for their particular interests to be protected. Yet it is not for them, but for the Court to determine what is constitutionally fair. If the respondents remain fixed in their reasons for leaving the appellant schools on the margins as far as employment of general assistants is concerned, the unjustifiable impact of the scheme would continue.

[189] In the circumstances of the present case we feel that it is clear what justice and equity require: in order to cure the infringement of rights to just administrative action

---

51 [1998] AC 539 (HL) at 592a-d (footnotes omitted).

52 Above n 1 at para 52.

under section 33, the period of service of the general assistants at the appellant schools must be considered in the same way as that of their counterparts in other schools. What is important to note is that the proposed remedy leaves the general policy undisturbed. The rationalisation process and the allocation of posts to the different schools will also not be affected. The only difference will be that when decisions are made as to who are to occupy the posts, the LIFO principle will be applied in a manner which takes account of the long service of the existing general assistants. Its only effect is to ensure that the policy is applied in a fair and uniform manner to all who are affected by it.

[190] In our view, this Court should uphold the appeal, issue a declaration to the effect that the rights of the general assistants, the children and the appellant schools as a whole have been infringed in terms of section 33(d), to the extent of depriving their general assistants of the right to have their length of service taken into account when the PPM is implemented, and order the WCED to take account of the length of service of the general assistants at the appellant schools when implementing the PPM.

MADALA J:

[191] I have had the benefit of reading the several judgments prepared by my colleagues in this matter – that of Chaskalson CJ, the one by Ngcobo J and the joint judgment of Mokgoro and Sachs JJ. I reach the same conclusion as Mokgoro and Sachs JJ, albeit by a different route, that the WCED has violated the principles of administrative justice and fundamental fairness which are ordered in the Constitution.[1]

[192] The question is whether in taking its decision the WCED had sufficient regard to the requirements of fairness. Here we clearly have conflicting interests - those of the WCED and those of the appellants and their general assistants.

[193] In my view the appellants were given a raw deal by the WCED, which seems to have overlooked the true state of affairs – that we are dealing here not just with the governing bodies of the appellant schools but also and more importantly, with human beings – the general assistants – whose very livelihood and indeed dignity are in jeopardy in consequence of the attitude of the WCED which seeks, as it were, to prejudice such general assistants for no other reason but that they had taken up employment at the

---

[1] **Just administrative action**

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must -
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

previously advantaged HOA schools. The court a *quo* has not ameliorated the rawness of that deal.

[194] These schools, it is common cause, had enjoyed a certain degree of exclusivity and some preference from the authorities in that they had better working conditions, offered better facilities, better grounds, better equipment and better pupil-teacher ratios than other schools which also catered for children with special needs. The differences between the appellant schools and the other ELSEN schools were a legacy which the government had inherited from the apartheid dispensation. The WCED faced the daunting task of restructuring the education system and attempting to eliminate the disparities. The WCED did not initiate the differentiation. It was the result of the choice offered to and accepted by the former white ELSEN schools in approximately 1987, in terms of which the schools themselves employed their general assistants for whom they received an additional subsidy.

[195] It was submitted by the respondents that one of the very first objectives of the WCED after the merger of the schools previously under the different departments of education was to create a system of parity between all schools. Indeed it was both necessary and desirable that the WCED embark on an extended rationalisation programme if education in the Western Cape was to be conducted on a fair and proper basis and to reduce or eliminate the disparities.

[196] But even after the merger in 1994/5, the previous inequality in respect of the general assistants persisted at the twelve former HOA schools where such general assistants were still employed and paid by the governing bodies, while at the other 66 ELSEN schools the general assistants were employed and paid by the WCED and enjoyed pension, medical and housing benefits provided by the state. The appellants, in my view, have correctly not contended that the staff provisioning scales are themselves unfair. The adverse effect on the appellants of the implementation of the provisioning scales will, primarily and in the main, consist of the retrenchment packages of the general assistants or the payment of their salaries if they are retained or redeployed.

[197] The appellants had repeatedly brought this inequality to the attention of the WCED. The WCED acknowledged that the system was unfair[2] and undertook but failed to rectify it. Although the general assistants at the appellant schools were technically employees of the appellants, these were not governing bodies of private and/or independent schools. They were governing bodies of WCED schools which were under the authority of the WCED. The WCED provided subsidies towards the payment of salaries of the general assistants. These general assistants were public servants and deserved an equal opportunity to make representations.

---

[2] On 6 September 1995 Mr W.T. Wilkinson, acting head of education, in a letter to Mr S. van der Merwe stated that: "[I]t is not clear what form of disparity you are referring to. If you have housing subsidies and medical benefits for General Assistants in mind, I can assure you that the Department shares your concern that the current system is not fair."

[198] The approach of the respondents was that the WCED had no responsibility towards these employees and they were entirely the responsibility of the appellants. The situation is more complex than that. The appellants are placed in a very different situation from that of many other employers. Generally employers have the freedom to determine their employment policies in accordance with economic realities and the relevant labour legislation. The latitude of the appellants in the area of employment, in contrast, is limited, as the PPM and the PAWC agreement which governs the redeployment and retrenchment of Department employees dictates that in the appellant schools many of the general assistants must be retrenched. Effectively the Department dictates who should be employed at these schools. The affected general assistants were not in any way involved in the formulation of this policy or the labour relations framework which comes into operation under the PPM, unlike the other employees who are departmental employees. Should the department bear no responsibility whatsoever towards these employees?

[199] In labour law, it has been recognised that labour relations are sometimes much more complex than the traditional master-servant or employer-employee relationship. In some circumstances, a party who would not traditionally be considered to be an "employer" has been found to owe certain obligations towards a person who would not

traditionally be considered an "employee."[3] The fact that there is not a classical contractual relationship may not mean that there are absolutely no obligations present. The Labour Courts have adopted an approach of examining the entire employment circumstances to determine which parties should bear obligations to a particular individual, and the nature of such obligations.[4]

[200] The attitude of the WCED to the appellants gave rise to a legitimate expectation as to the future of their workers. This appears from the various communications of the WCED to some of the appellants. One W T Wilkinson, acting head of education, in a letter to Mr Van de Merwe, chairman of Bel Porto, noted in 1995 that there was a need to provide:

> "uniform establishments for the general assistants, and that negotiations should take place between the experts of the former departments, the education guidance service and the school principals." (My underlining)

---

3 For example, it has become increasingly common for people to be placed in temporary work by a placement agency. Traditionally, and under the Labour Relations Act 66 of 1995, the individual or company who hires out labour is deemed to be an employer of the person whose services are hired to the clients (Section 198(2)). However, both the temporary employment agency and its client are rendered jointly and severally liable if the former contravenes a binding collective agreement, wage determination or arbitration award, or the provisions of the Basic Conditions of Employment Act 75 of 1997 (Section 82). See Grogan, *Workplace Law* 6th ed (Juta, Lansdowne 2001) at 24.

4 See Grogan id at 22-4; *Buffalo Signs Co Ltd v De Castro & Another* (1999) 20 ILJ 1501 (LAC); *Board of Executors Ltd v McCafferty* (1997) 7 BLLR 835 (LAC), where the power to dismiss was seen as determinative of a contract of service. Here, the WCED's policy is ultimately requiring the dismissal; *Gaymans v Ben Ngomeni T/A Working World, Pretoria* (2000) 9 BLLR 1042 (LC). The Labour Relations Act 66 of 1995 and the Labour Courts have recognised the enormous implications that dismissals have on affected individuals, and have emphasised repeatedly the requirements for consultation in this area.

[201] In 1996 the head of education wrote to the second appellant and stated that:

> "most of the non-teaching personnel to which you refer in your letter will be placed on the staff establishment of the Western Cape Education Department once these new staffing scales have been approved and made official." (My underlining)

[202] On 02 June 1997 Dr Theron of the Education Department responded to the third appellant:

> "...that workers at public schools of which Dominican Grimley will be one, will become civil servants, irrespective of their former Departmental Affiliations and will enjoy equally the benefits applicable to their ranks and vocational categories. (My underlining)
>
> Regarding the position of the general assistants paid by the Board when schools become public institutions, I want to assure you that the WCED will strive to avoid any unfairness or in justice in the handling of this matter."

[203] On the 30 September 1997 in answer to further inquiries by the third appellant,Dr M J Theron responded that:

> "As stated in our letter of 30 May 1997 the South African Schools Act, 1996 (Act 84 of 1996) made it possible for all general assistants to become civil servants irrespective of their former status as employees of governing bodies of state subsidised schools. This ruling will also be applicable to the general assistants at the Dominican Grimley School. (My underlining)
>
> However, due to a number of factors this issue could not be finalised yet."

[204] In the aforegoing paragraphs I have cited the letters emanating from the WCED with a promise or undertaking that the general assistants at the appellants' schools would become civil servants, with the express rider that this would be so:

> "irrespective of their former status as employees of governing bodies of state subsidised schools."

Granted, there was also correspondence from the WCED trying to renege on those promises and undertakings. But should highly placed and supposedly responsible government officials be allowed to backtrack on their promises and undertakings?

[205] We were told in argument that the situation of the Western Cape ELSEN schools was similar to what occurred in the Eastern Cape. The Eastern Cape Education Department decided to appoint the general assistants at former white schools as employees of the Eastern Cape Education Department. In the Western Cape this was not done. Are there cogent reasons why the few general assistants at the Western Cape ELSEN schools could not be taken over by the WCED? If it was not possible to take them into the WCED was it not possible for the WCED to divert some of its resources to make a once-off retrenchment package to those general assistants who had to be retrenched? In my view such an alternative would have accorded with the principles of fairness.

[206] Although legitimate expectation was not raised as an issue in the papers and although it is not dealt with in the judgments of the High Court or in the application for leave to appeal and appears for the first time only in the written submissions we should not ignore it.

[207] When, if not in a case such as the present, does legitimate expectation arise? The very livelihood of the general assistants in this case is at stake: they face retrenchment at worst or redeployment at best. Was it not incumbent upon the WCED at least to have consultations with the members of the affected class? In my view the importance of the duty of fairness where livelihood is at stake cannot be overstressed. In the present case the WCED failed in that duty.

[208] In brief, the concept or the doctrine of legitimate expectation was first introduced into English common law by Lord Denning in *Schmidt and Another v Secretary of State for Home Affairs*,[5] and was wholly endorsed by House of Lords in *O'Reilly v Mackman and Other Cases.*[6] Its original ambit went not very far beyond the natural justice principles of *audi alteram partem* and were considered to be relevant only in procedural matters and in matters of administrative law, to the extent that procedures were

---

5 [1969] 1 All ER 904 (CA) at 909.

6 [1982] 3 All ER 1124 (HL) at 1126 - 7.

applicable.

[209] Since the 1970s, however, this concept has gained strength and been relied upon with judicial approval to give substantive benefits to persons who would otherwise have been left high and dry.[7] The concept as it stands now is aptly explained by Lord Fraser who, in the case of *Council of Civil Service Unions and Others v Minister for the Civil Service,*[8] in the House of Lords held that[9]:

> ". . . even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. . . . Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

[210] This line of judicial reasoning has not been confined to England. It has gained currency also in South Africa. In *Administrator, Transvaal and Others v Traub and Others,*[10] the English case law referred to above received extensive discussion and endorsement from Corbett CJ.[11] This Court has also had occasion to apply this doctrine

---

7 Riggs 'Legitimate Expectation and Procedural Fairness in English Law' (1988) 36 *American Journal of Comparative Law* 395. He contends relying upon considerable authority at 404 that "The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations."

8 [1984] 3 All ER 935 (HL).

9 Id at 943 - 4.

10 1989 (4) SA 731.

11 Id at 754G - 762.

in *Premier of Mpumalanga v Executive Committee of State-Aided Schools: Eastern Transvaal.*[12] I wish particularly to make reference to O'Regan J's approval of the dictum in the *Civil Service* case that:

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. . ."

[211] After citing a number of cases in which the concept of legitimate expectation was discussed Corbett CJ said:

> "It is clear from these cases that in this context 'legitimate expectations' are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis *(Attorney - General of Hong Kong* case *supra* at 350c*).* The nature of such a legitimate expectation and the circumstances under which it may arise were discussed at length in the *Council of Civil Service Unions case supra*. The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance:
> 'But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law. . . . Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from *the existence of a regular practice which the claimant can reasonably expect to continue . . . .*'"[13]

---

12 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

13 Above n 10 at 756 G-I

[212] As I see it, the doctrine of legitimate expectation is construed broadly and encompasses both substantive and procedural expectations.

> "As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken. As Prof Riggs puts it in the article to which I have referred (at 404): 'The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations.'"[14]

[213] An expectation which arises in the manner described above can only be prevented from being given substance to and validation by the courts if, and only if, the promise was made in violation of a statute or if a pressing public interest clearly indicates otherwise.[15]

[214] Prior to the finalisation of its present policy in respect of the appointment and redeployment of general assistants, the WCED failed to give the appellants and, I may mention, the general assistants themselves, a proper, if any, opportunity to make representations in this regard. Despite the numerous attempts by the appellants to ascertain what the WCED's plans were regarding general assistants at the appellant

---

14 Id at 758 D-E.

15 Riggs, above n 7.

schools, the WCED failed to consult the appellants and/or indeed the general assistants. Apparently, the WCED only consulted with trade unions representing those on the existing WCED staff establishment and the appellants were only informed about the new policy once it had been formulated and virtually finalised.

[215] I am of the view that even if it is found that the appellants did not have any rights that were affected or threatened, they at least had a legitimate expectation with regard to being heard and with regard to the promise made by high level officers of the Department of Education. The appellants and the general assistants were informed on occasion that their grievances were to be attended to. Only subsequently, on 6 September 1997, were they told that those grievances were not attended to. Then they were again told that their grievances were being attended to and that the respondents would report to them about the matter. However, it is now clear that their grievances were not to be attended to and that the appellants and the general assistants were not to be consulted on the matter.

[216] As far as procedural fairness is concerned I am of the view that the WCED created a semblance of an opportunity for the affected persons – the appellants but not the general assistants – to make representations about the future of the general assistants after the decision-making process had been taken or when it had reached such an advanced stage that persuasion had become impossible at worst, or improbable, at best. Meetings that were held regarding the rationalisation programme, it appears from the papers,

involved the WCED representatives and the trade unions only but excluded the appellants and their general assistants.

[217] This case demonstrates the problems of transition and transformation when the government is in the process of dismantling the old and appropriately restructuring the myriad legislative, executive and administrative structures of our country to put in place the new. That process must be characterised by the values and precepts enshrined in the Constitution and, in my view, must further embrace flexibility and sensitivity – particularly so in respect of the previously disadvantaged. In arriving at such a decision the WCED has completely overlooked these imperative constitutional values.

[218] Accordingly I agree with the dissenting judgment of Mokgoro and Sachs JJ that this Court should uphold the appeal, issue a declarator to the effect that the rights of the general assistants and the appellant schools as a whole have been infringed in terms of sections 33(1)(b) and (d), to the extent of depriving their general assistants of the right to have their length of service taken into account when the PPM is implemented, and order the WCED to take account of the length of service of the general assistants at appellant schools when implementing the PPM. This, in my view, is what amounts to appropriate relief which may encompass wider relief than that sought.

NGCOBO J:

[219] I am satisfied that there is merit in the appellants' contention that their constitutional rights to administrative justice have been infringed. For this reason I do not share the view expressed in the majority judgment in this regard. Yet while I agree with the conclusion reached by Madala, Mokgoro and Sachs JJ that the appellants' constitutional rights to administrative justice have been infringed, my reasons for that conclusion differ from those expressed in their respective judgments. In addition, as will appear from this judgment, we differ on the appropriate relief. Here are my reasons for the conclusion I reach and the relief I would have proposed.

[220] Prior to the demise of apartheid, public education in the Western Cape was provided on the basis of race. There were schools for Africans, Coloureds, Indians and Whites. These schools were administered by racially segregated education departments, namely: the Department of Education and Training for Africans (DET); the House of Delegates for Coloureds (HOD); the House of Representatives for Indians (HOR); and the House of Assembly for Whites (HOA). Racial classification was essential to this system of education. Race determined : which school a child will attend[1], the department

1 *Moller v Keimoes School Committee and Another* 1911 AD 635.

that administered that particular school, the resources the school shall receive and what education a child shall receive. Schools that provided education to learners with special needs (ELSEN schools) were divided along racial lines too. The appellants are governing bodies of such schools and their schools served the white community.

[221] The administration of schools by different racially segregated education departments coupled with the government policy of racial discrimination resulted in gross inequity in education. This manifested itself in gross disparity in the allocation of resources, in particular, financial and human resources. The African schools were allocated the least resources. The disparity in human resources ranged from an oversupply of personnel in white ELSEN schools to an undersupply in African schools. In addition, there was disparity in the conditions of employment that governed personnel in the two categories of schools. The governing bodies of white schools employed their own general assistants who provided assistance to learners with special needs. They determined the number of general assistants they required, how much they were to be paid, and the conditions of employment that governed them. They received a special subsidy from the HOA to pay their salaries. This privilege was not extended to other races. Their general assistants were employed and paid directly by the relevant education department.

[222] When the Interim Constitution came into effect, the racially segregated education

departments were replaced by a single education department, namely, the Western Cape Education Department (WCED).[2] The WCED took over the functions of the racially divided departments, including the employment of personnel previously employed by these departments. The governing bodies continued to exist and to perform the functions that they previously performed, including the employment of general assistants at the formerly white ELSEN schools. These schools continued to receive a special subsidy to pay salaries of the general assistants in their employ but this subsidy now came from the WCED.

[223] Thus when the WCED took over the responsibility for the administration of education in the Western Cape, it was faced with tremendous challenges, including bringing about equity in education, the amalgamation of the four racially segregated departments and the extensive rationalisation process. In order to address some of these challenges, a task team was appointed "to investigate personnel provisioning measures and a whole range of other issues and problems confronting the WCED and other provincial governing departments." The task team was to make recommendations, amongst other things, as to the standard norms that should govern the allocation of personnel to different schools. The investigations by the task team led to the development of the personnel provisioning measure (PPM). The PPM was only finalised and approved by the provincial cabinet in October 1999 and after the present litigation

---

[2] Section 2 of the Western Cape Provincial School Education Act 12 of 1997.

had commenced.

[224] The findings of the project team confirmed the existence of gross disparity in the allocation of personnel. According to the task team, this disparity ranged from no posts at most institutions that were formerly African schools to an oversupply or undersupply at schools formerly reserved for the coloured communities and an oversupply at schools formerly reserved for white communities. The PPM was intended to address these disparities. The PPM is not in issue in this litigation.

[225] While the PPM was still under consideration, it was clear to all that the rationalisation process would result in retrenchments. Indeed there were strong rumours to that effect. The appellants knew that should retrenchments occur, they would have to bear the costs of such retrenchments. Apart from this, keeping their general assistants on their payroll had proved costly and they were experiencing financial difficulties in this regard. Given these factors, the appellants began to urge the WCED to take into its employ their general assistants. The WCED declined this request maintaining that the general assistants are the responsibility of the appellants. In addition, the WCED stated that it could not take these employees as "[i]t had first to make provision for its own staff who might become redundant before taking on staff employed by [the appellants' schools]." However, it continued to provide subsidies to these schools "to assist them."

[226] It is this refusal to employ the general assistants presently employed at the appellants' schools that resulted in the present litigation which commenced in November 1999. Initially, the appellants sought an order for the supply of information pertaining to the refusal to employ their general assistants. In addition, they sought leave to seek a further order for the employment of their general assistants once the required information had been obtained.

[227] During December 1999 and prior to filing opposing affidavits, the WCED wrote a letter to the appellants' attorneys informing them that the PPM had been finalised and approved in principle by the MEC for education and the provincial cabinet. The letter further pointed out that the PPM would be implemented pursuant to a plan to be developed after consultation with the union representing employees employed by the WCED. There was no offer to consult with the appellants. Nor were the appellants invited to make representations on the implementation of the plan.

[228] The contents of this letter were subsequently confirmed in the opposing papers filed by the WCED during February 2000. In its papers the WCED provided the details of the PPM and pointed out that it had already initiated consultations with the relevant unions to determine the plan to implement the PPM. In addition, it indicated that the implementation was due to take place in April 2000. However, it appears that this date was subsequently changed to June and later September 2000. In its opposing papers the

WCED substantially provided the information sought by the appellants.

[229] In their reply filed in April 2000, the appellants specifically dealt with the proposed negotiations between the WCED and the unions. It was pointed out that such negotiations are "ill-conceived" because the appellants' schools and their employees who are to be affected by the implementation of the PPM were excluded from those negotiations. In particular, they were concerned whether their needs would be taken into consideration in that process. They submitted that "no meaningful negotiations can be conducted in the absence of some crucial interested and affected parties." It was further submitted that the proper course is first to bring the appellants' schools in line with the other schools and thereafter to hold negotiations.

[230] In the light of the information that was available to the appellants then, they amended their notice of motion in order to seek an order declaring that the refusal to employ their general assistants violated their constitutional rights and directing the WCED to appoint their general assistants. In addition, they claimed alternative remedy.

[231] In the meantime the WCED proceeded to consult with the unions to determine the plan to implement the PPM. It did this over the objections of the appellants which were conveyed to the WCED in the appellants' replying papers. The appellants were therefore deliberately excluded from this process. Although the WCED had indicated in February

2000 that it was initiating such consultations, such consultations did not commence until 9 June 2000. Further consultations were held on 22 and 26 June and 19 July 2000. The appellants were only informed of this fact on 28 July 2000. This was after the appellants had amended their notice of motion.

[232] At a quarterly meeting of principals held on 22 and 23 August 2000, long after the litigation had commenced, the principals, including those of the schools governed by the appellants, were informed that the plan to implement the PPM had been finalised and would be circulated to them shortly. At this meeting, the principals were merely advised of the salient features of the plan by Mr Mohamed Enver Hassen, the Deputy Chief Education Specialist. Those present sought clarification on those salient features and this was provided by Mr Hassen. Significantly, the purpose of informing the principals of the plan was not to invite them to make representations on the implementation of the PPM. It was merely to inform them of the existence of the implementation plan and that it was on its way.

[233] Having regard to events that had transpired by then, in particular, the finalisation of the plan to implement the PPM without consultation and the adverse effect it was to have upon the appellants and their employees, on 31 August 2000, the appellants filed supplementary affidavits. In these affidavits the appellants did not just mention consultation and implementation, they specifically dealt with the implementation of the

PPM and the failure to consult them on implementation of the PPM. They pointed out that the implementation of the PPM would adversely affect them. In addition, they complained that they had not been consulted on the determination of the plan to implement the PPM. In this regard Mr Stefanus Isak Minnaar, the principal of Vera School, had this to say:

> "26. As appears from the letter annexed hereto as "SIM 1", there have been four meetings between the WCED and Labour in the last few weeks about implementation of the new system, none of which the Applicant Schools or their workers were invited to attend.
>
> 27. The WCED is well aware of the present application but continues to act [unilaterally], without consulting the Applicants or their general assistants.
>
> 28. Redeployment is apparently set to take place on the "last in first out principle", which means that the WCED intends to employ the least experienced workers in their workforce at the Applicant schools, who will then be further discriminated against by the acquisition of a workforce inferior to those at other ELSEN schools.
>
> 29. The effect of such redeployment will be that the WCED is absolved from the duty to pay a certain amount of severance packages, while an equal number of people at the Applicant schools will have to be retrenched. In this way the duty of the WCED is transferred to the Applicant schools, without the latter having any say in the matter.
>
> 30. Any retrenchment of category "A3" workers is likely to have a devastating effect on the morale of category "A4" (hostel) workers, which will have a serious ripple effect on the handicapped learners,

who have personal relationships with the hostel workers."

[234] Having regard to the events that had unfolded then, the appellants, under the heading "RELIEF SOUGHT", submitted that "the most equitable and logical way forward is for the WCED to first appoint all general assistants at [their schools] and thereafter to negotiate the implementation of its new policy with representatives of all workers at ELSEN schools." Viewed in this context, what the appellants are in effect saying is this: they should have been consulted on the determination of the plan to implement the PPM. Since this was not done, "the logical way forward" is for the WCED to hold such consultation. If the WCED agrees to appoint all their general assistants, it should consult with the representatives of all the workers. Otherwise if it does not appoint the appellants' general assistants, it should consult with the appellants as representatives of their workers. The logic in the appellants' reasoning is understandable: they were concerned with the fate of their general assistants after the rationalisation process, in particular, the payment of retrenchment costs.

[235] In its response, the WCED did not dispute the fact that it had not consulted with the appellants. However, it disputed the submission that "the most logical way forward was for the WCED to appoint their general assistants" and that a case for the appointment of their general assistants had been made out. It said nothing, however, about the appellants' submission that the implementation policy should be renegotiated.

[236] This was the factual picture that eventually emerged when this matter came before the High Court.

[237] The appellants contended that the decision of the WCED to implement the scheme without first employing their general assistants infringed their right under section 33 of the Constitution to procedurally fair administrative action. Section 24(b) of the Constitution, as it was deemed to be at the time of the decision, entitled everyone to:

> "procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened."

This contention must be viewed against the specific complaint by the appellants that the WCED acted unilaterally without consulting with them on the determination of the plan to implement the PPM and the submission that the implementation of the PPM should be negotiated with all representatives of the workers. The appellants are not contending that they should have been consulted on the development of the PPM. They do not contend that the PPM should not be implemented. Their complaint is that they should have been consulted on the determination of the plan to implement the PPM.

[238] It is by now axiomatic that fair administrative action entails, among other things, a fair opportunity to make representations where the action contemplated will adversely affect the rights of others. To be effective, the opportunity to make representations must

be fair. As a general matter, the opportunity will be fair where the affected person is given full information on the action contemplated and the opportunity is given prior to the action contemplated. The purpose is not to go through motions. But it is to allow the person to be affected the opportunity to offer alternatives to the proposed action with a view to persuading the decision maker either to abandon the decision or to modify it. However, a fair opportunity does not necessarily require the decision maker to agree to the proposal made by the person affected. What section 24(b) requires is that administrative action which affects or threatens rights or interests be procedurally fair.[3]

[239] There can be no question that the WCED was constitutionally obliged to consult with the appellants prior to the determination of the plan to implement the PPM. The implementation of the scheme was to involve the abolition and creation of posts at appellants' schools. The general assistants employed by the appellants would only be considered for the new posts after the general assistants employed by the WCED at former African schools had been considered. The retrenchment of appellants' employees was therefore inevitable and the appellants would have to bear the retrenchment costs. While the appellants received a special subsidy to pay salaries of its employees, there was no indication that they would be assisted with the payment of retrenchment packages. All this is common cause. This clearly attracted a duty to give a hearing. That the number of retrenchments as well as the costs thereof are unknown, matters not. The fact

---

3 *Premier, Mpumalanga v Association of State-Aided Schools* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 39.

of the matter is that they were going to retrench their employees and bear the costs of such retrenchment.

[240] It is not in dispute that the appellants were not consulted on the determination of the plan to implement the PPM. Their objections to their exclusion from the consultation process were simply ignored by the WCED. The WCED did not suggest that the appellants were consulted at quarterly meetings. These quarterly meetings appear to have been no more than information sessions where school principals were informed of the events that are taking place within the WCED. They cannot therefore be said to amount to consultations. More importantly, on the record the only quarterly meeting that dealt with implementation was that of the 22 and 23 August where the schools were told that the plan to implement the PPM had been finalised and would be circulated to them shortly. The last that they had heard from the WCED on consultation and implementation was in a circular of 28 July when they were told that four consultation sessions had been held with the unions and that the process was in its final stages.

[241] That the WCED was obliged under the labour laws to consult with the unions does not justify its failure to consult the appellants. Nor does the absence of a statutory provision requiring such consultation justify failure to consult. The obligation to consult with the appellants arises from the constitutional right to fair administrative action which is triggered by administrative action that affects or threatens rights or interests.

Procedural fairness is an important principle in our constitutional democracy.[4] What will constitute fairness in a particular case will depend on the facts of the case.

[242] It must be emphasized that just like the WCED, the appellants were obliged under the labour laws to consult with the employees, in particular, on the retrenchment that was imminent. To be able to conduct meaningful consultation, they not only required information relating to the plan that would implement the PPM, but they also required sufficient time to consult. Yet it is clear that before the meeting of 22 and 23 August 2000, the appellants had no idea what that plan would entail. On 22 and 23 August only the salient features of the plan were conveyed to them, the plan itself was conveyed to them when the WCED filed its response to the supplementary affidavits. In addition, it is apparent from the proposed implementation dates that the appellants would not have sufficient time to consult with their employees on the plan. The latest proposed implementation date was September 2000 and the plan and its details were only made available to the appellants during September 2000. Yet the WCED had from February to the end of July 2000 to consult with the unions.

[243] Finally, it is important to emphasize the distinction between the PPM and the plan

---

[4] Id. It is not without significance that during the transition the rights, powers and functions of the appellant governing bodies were specially protected in section 247(1) of the Interim Constitution. Under that provision their rights, powers and functions could only be altered by "an agreement resulting from bona fide negotiation [that] has been reached with such bodies and [after] reasonable notice of any proposed alteration has been given."

to implement the PPM. The PPM provided the standard norm or the policy that would govern the allocation of personnel to posts. What had to be determined was how to implement this policy. The negotiations between the WCED and the unions were intended to determine the plan to be followed in implementing the PPM. The plan was therefore not concerned with the formulation of a policy but with how the policy would be implemented. Thus the PPM did not indicate how to fill the rationalized posts. Nor did it provide for the application of the LIFO principle in the filling of rationalized posts or the redeployment of personnel. These are matters that were negotiated and agreed upon by the WCED and the unions. They are manifestly not policy matters on which consultation is undesirable. In my view the WCED was therefore obliged to consult and negotiate with the appellants on the plan to implement the PPM.

[244] It is true, in determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively. It is also true, in a country like ours that faces immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly. On the other hand, to permit the implementation of a scheme that would have an adverse financial effect on the appellants without affording them a fair opportunity to make representations would flout the important principle of procedural fairness.[5]

---

[5] Id.

[245] Having regard to the history of institutionalised racial discrimination in this country, there can be no question that the need to undo the legacy of our history will remain with us for some time. It is a complex and difficult task. In the course of bringing about equity, others will feel that the measures taken are unfair. Such complaints are more likely to arise where those to be affected by measures aimed at bringing about equity are not properly consulted in the process. The process of consultation satisfies the need for information and provides the opportunity to express views on the matter. In the end it leaves all concerned with the feeling that their views were taken into consideration in the process.

[246] I conclude that in the circumstances of this case the decision by the WCED to consider and determine the plan to implement the PPM without affording the appellants the opportunity to be heard was a breach of their constitutional right to procedurally fair administrative action.

[247] What remains to be considered is the relief to which the appellants are entitled. Where a right contained in the Bill of Rights has been infringed, section 38 of the Constitution provides that "the court may grant appropriate relief". The "appropriate relief" must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make "any order that is just and

equitable."[6]

[248] This Court has previously considered the principles that govern the determination of an appropriate relief. The most recent occasion was in *Hoffmann v South African Airways*, where we said the following of and concerning the appropriate relief:

> "The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'.[7] (Footnotes omitted)

[249] What has to be considered in this case is what is the court to do where it has found that constitutional rights have been violated but there is either insufficient information for it to determine the appropriate relief or the parties have not had the opportunity to address it on that particular relief? Should the court adopt a passive role and refuse to intervene because the relevant information or argument has not been presented? A passive approach may well defeat the constitutional rights of the litigant and render them

---

6 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211(CC) at para 42*; National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 65.

7 Id at para 45.

meaningless and futile. In my view, the proper approach in such a case is to intervene. The determination of the appropriate relief is a judicial function. It should not be governed by notions akin to onus of proof. In constitutional adjudication, a court must play an active role in determining the appropriate relief. The court has a duty to ensure that all the facts and circumstances necessary for the determination of the appropriate relief have been placed before it.

[250] A person who suffers the infringement of a right entrenched in the Bill of Rights is entitled to an appropriate relief under section 38 of our Constitution.[8] Therefore the duty of the court where an infringement of a constitutional right has been found is to give the successful party an appropriate relief. This duty derives from the obligation of the court to protect and enforce constitutional rights and the need to redress the wrong occasioned by the violation of the constitutional rights. The granting of the appropriate relief is the gist of a civil trial - it is an important component of constitutional litigation. It redresses the wrong done and thus gives meaning and substance to constitutional rights. A concomitant of this duty is the duty to inform itself as to what the appropriate relief is having regard to the nature of the violation. This duty may, depending upon the circumstances of the particular case, require the court to direct that it be provided with information that is necessary to enable it to determine the appropriate relief. Thus the fact that the successful litigant has not claimed a particular relief or that the parties did

---

8 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 95 (a case dealing with a comparable provision in the Interim constitution).

not address argument on a particular relief, should be no bar to the determination of the appropriate relief. Similarly lack of information on the record should be no bar either. Courts, including this court, have available to them procedures to ensure that such information or argument is placed before them.

[251] Rule 29 of this Court read with section 22 of the Supreme Court Act, 1959 confers a wide discretion on this court to receive further evidence.[9] In *Prince v Law Society of the Cape of Good Hope and Others (Prince I)*[10], we had occasion to consider this rule albeit in the context of insufficiency of information relative to a constitutional challenge. There we observed that: section 22 confers wide discretion on the appeal court to receive further evidence on appeal; courts do not readily receive such evidence; as a general matter they will receive such evidence where special grounds exist and, in particular, where there will be no prejudice to the parties and the evidence is necessary in order to

---

9 Rule 29 of the Constitutional Court Rules makes certain sections of the Supreme Court Act, 1959 applicable to the proceedings of this Court. These sections include section 22, which deals with powers of courts on hearing of appeals and provides:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

10 *Prince v President, Cape Law Society and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

do justice to the parties.[11] In the context of constitutional litigation, we said:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.(Footnotes omitted)
>
> That said, the considerations applicable to allowing further evidence on appeal in constitutional matters are not necessarily the same as the considerations applicable in other matters. It is undesirable to attempt to lay down precise rules when leave to adduce further evidence on appeal will be granted by this Court."[12]

[252] There is no reason in principle why this rule should not be invoked in relation to the relief. Of course different considerations apply when such evidence is sought in order to determine the appropriate relief. The important considerations in determining the relief include the fact that there has been a finding of an infringement of a constitutional right; there is a need to redress the wrong occasioned by such violation;

---

11 Id at para 21.

12 Id at paras 22-3.

and there is a duty to give appropriate relief where a violation has occurred. It is undesirable to attempt to lay down precise rules. It is true, a litigant should not be allowed to litigate in piecemeal fashion. But this ought not to be allowed to obstruct the course of justice. In my view the court should only decline to receive further evidence where it would not be in the interests of justice to do so. The ultimate determinant therefore are the interests of justice.

[253] With those principles in mind I now consider the appropriate relief.

[254] Having regard to the nature of the constitutional infringement I have found in this case, the appropriate relief would be an order setting aside the implementation plan and directing that the WCED consult with appellants on the determination of the plan to implement the PPM. However, information necessary to determine the appropriateness of this relief is lacking. In addition, no argument was addressed on this relief. Apart from this there is no information as to whether the scheme has been implemented, and if so, how far the process has gone. In short, the papers have not laid down a sufficient foundation for such relief. But this does not mean that the appellants should be left without relief.

[255] The question which arises is whether it is in the interests of justice for this court to intervene and receive further evidence on the issue of appropriate relief.

Considerations that are relevant in this regard include: the appellants' constitutional rights to administrative justice have been violated; the violation occurred during the course of litigation and was referred to in the papers; the evidence is required on a narrow issue, namely, appropriate relief; refusal to receive further evidence may well compel the appellants to relitigate the issues already litigated and this may cause further delay in the implementation of the PPM. These factors must be viewed against the duty of this court to grant appropriate relief where it has found a violation of constitutional rights and the need to redress the wrong occasioned by the infringement of the appellants' constitutional rights.

[256] The present litigation has had an unfortunate history. It commenced as litigation seeking information with a view to determining the reason for the refusal to employ the general assistants employed by the appellants. The ultimate goal was to challenge such refusal. When the information emerged from the opposing papers, the appellants only sought an order for the employment of their general assistants. However, the litigation did not prevent the WCED from proceeding to develop a plan to implement the PPM. This it did without consulting with the appellants over their objection. The record amply demonstrates that the issue of implementation and failure to consult was raised later in the course of litigation because of the conduct of the WCED, which being aware of the litigation proceeded to determine the plan to implement the PPM over the objection of the appellants.

[257] It is true that the appellants did not ask for an order setting aside the implementation plan in their notice of motion nor did they ask for an order that they be consulted. It is also true that they could have amended their notice of motion to incorporate such relief. But what they asked for in their affidavit though not in their notice of motion was that the implementation should be renegotiated. It is implicit, if not explicit, in what they say in their papers that they require consultation on the implementation plan and that the plan be set aside. This is the essence of their complaint. The fact that they have asked for an order for the employment of their general assistants, should not be allowed to conceal their complaint that they should be consulted and the implementation plan should be renegotiated.

[258] Finally, there can be no prejudice to the parties if both are granted leave to adduce further evidence necessary in order for this Court to properly determine the appropriate relief. Moreover, further evidence is required on a narrow issue, namely, the appropriate relief having regard to the nature of the violation of the appellants' constitutional rights. To prepare and furnish such further evidence should not take long and it is unlikely that a conflict of a nature that cannot be resolved on the affidavits will arise in such evidence.

[259] For all these reasons, and having regard to the duty of this court to protect and enforce constitutional rights, viewed against the need to redress the wrong occasioned

by the violation, there is good reason in the circumstances of the present case to have evidence placed before the Court that is necessary in order to determine the appropriate relief. I am accordingly satisfied that the interests of justice demand that the parties be allowed the opportunity to submit further evidence, which must be done by way of affidavit.

[260] In the event I would set aside the order of the High Court dismissing the application; declare that the failure by the WCED to consult with the appellants on the determination of the plan to implement the PPM infringed the appellants' constitutional rights to administrative justice in terms of section 33; and direct the parties to file further affidavits and argument dealing with appropriate relief in light of the finding of the violation of the appellants' constitutional rights to administrative justice.

For the appellants: JP van den Berg and RF van Rooyen instructed by Mostert & De Swart Attorneys, Kraaifontein

For the respondents: AM Breitenbach instructed by the State Attorney, Cape Town