LABOUR BULLETIN

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1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its March 2024 issue of the *Labour Bulletin*. The *Bulletin* contains articles that are relevant to the education sector.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone.

We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Dr. NO Foca (LLD)
ELRC, General Secretary

2. Remedial Principles and Meaningful Engagement in Education Rights Disputes

Introduction

In *Fose v Minister of Safety and Security* (*Fose*), the Constitutional Court encouraged the Courts to be creative and innovative in crafting remedial tools to ensure the effective vindication of constitutional rights. Courts have a responsibility to craft effective remedies when the legal process establishes an infringement of constitutional rights, particularly in a context "where so few have the means to enforce their rights through the courts."

The need for remedial innovation is particularly acute in the context of school governance disputes which implicate the complex set of educational rights entrenched in section 29 of the Constitution.3 Such disputes have brought into sharp relief the tensions between redressing the legacy of apartheid education, on the one hand, and respecting the integrity of local school governance, on the other.

Three significant educational rights judgments of the Constitutional Court – *Head of Mpumalanga Department of Education v Hoërskool Ermelo* (*Hoërskool Ermelo*), *Head of Department, Department of Education, Free State Province v Welkom High School* (*Welkom High School*), and *MEC for Education v Governing Body of the Rivonia Primary School (Rivonia*

Primary School) had their origin in challenges brought by school governing bodies to interventions by provincial heads of education departments in the language, pregnancy and admission policies adopted by the respective governing bodies. The Constitutional Court emphasised the importance of engagement and cooperation between the parties as a constitutionally required approach to resolving these disputes. In these contexts, meaningful engagement holds promise as an innovative remedial response to constitutional infringements of the educational rights in section 29 of the Constitution and related rights in the Bill of Rights. However, the role of engagement at the remedial stage of these cases raises a number of questions regarding its alignment with the norms of public law remedial decision-making.

Susan Sturm has developed a sophisticated framework for assessing participatory remedies in the light of general principles applicable to public law remedies. Drawing on her framework, this article evaluates meaningful engagement as a constitutional remedy in the context of the education rights cases referred to above. It commences by identifying a set of normative principles appropriate to evaluating participatory remedies such as meaningful engagement. It thereafter proceeds to analyse and evaluate the role which engagement has played in the three Constitutional Court judgments referred to above in the light of these remedial principles.

The article concludes by making proposals for the development of meaningful engagement as a participatory remedy in educational rights disputes.

2 Evaluative principles for constitutional remedies

The courts' power to grant remedies for infringements of constitutional rights are set out in sections 38 and 172(1) of the Constitution. The former provision gives a court the power to grant "appropriate relief, including a declaration of rights". The latter provision requires a court to "declare that any law or conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency" and permits it to grant "any order that is just and equitable." The central consideration for courts in crafting remedies for constitutional rights violations is to ensure the effective vindication and protection of the right violated. As the Constitutional Court has emphasised, this is important not only to the immediate victims of the relevant rights violations, but also to others similarly affected. In contrast to traditional private law remedies, the broader public interest is also a highly relevant factor in devising remedies to redress constitutional rights violations. The South African public has an interest in the effective protection of constitutional rights, which are fundamental to the fabric of our post-1994 constitutional democracy.

Susan Sturm has argued for the need for a distinctive normative theory of public law remedies precisely because their effective vindication involves considerations, information and processes different from those involved in the merits or liability stage of litigation. The gap between right and remedy in constitutional litigation is frequently broad, because a determination that a right is infringed does not dictate the form of the remedy. This is particularly so when the rights violation stems from systemic institutional or organisational failures. Although commonly associated with socio-economic rights cases, such failures lie at the heart of all complex, polycentric constitutional rights cases. More often than not, there will be no one obvious remedial solution for remedying a constitutional violation of this nature, and to "strike effectively at its source" will require processes of institutional reforms adopted over a period of time.

The structural remedies required to achieve such reforms depend on the participation of a broad range of organisations, institutions and stakeholders, some of whom may not have been represented at the merits stage of the litigation. As Sturm notes, "[t]he remedy may also affect the lives of individuals or groups who have no legal entitlement concerning the remedy but are in a position to block or disrupt its implementation." Incorporating a participatory dimension in constitutional remedies in this context thus make an important contribution to their effectiveness.

Sturm argues that the traditional binary, adversarial litigation process is not well suited to remedying structural constitutional rights violations. She accordingly develops an alternative model of participatory, deliberative public remedial decision-making. The latter classes of remedy resonate with the meaningful engagement remedy of the Constitutional Court, particularly in its judgment in the *Olivia Road* case.

Moreover, many of the principles articulated by Sturm for evaluating public law remedies are consonant with South African constitutional remedial jurisprudence as well as with widely

accepted principles of legitimate remedial decision-making.

Drawing on Sturm's analysis, four principles are identified for evaluating the role that meaningful engagement has played in the remedial phase of the three educational rights judgments referred to above. These principles are:

1) fair participation;

2) substantive judicial reasoning;

3) a "demonstrable relationship" between the constitutional infringement found at the merits stage and the remedy imposed by the court; and

4) respect for the separation of powers doctrine.

2.1 Full and fair participation

The principle of full and fair participation aims to ensure that all parties to the litigation as well as those with a substantial interest in the outcome of the litigation have an opportunity to participate in the remedial process. In addition to the participation of the parties and those substantially affected by the rights violation, the principle of ensuring an effective remedy suggests that a court should structure the remedial process in such a manner as to enable the participation of individuals, groups and organisations that are able to facilitate or block the implementation of the remedy.

Sturm describes the broader role of participation at the remedial stage of decision-making as being to promote cooperation amongst the different actors that must live by the plan. Related objectives of participatory processes include the "integrative function" [of] defining the community that is responsible for implementing the remedy, and the "educative function" of acquiring the information and developing the negotiation skills required to reform complex institutions and organisations.

Ensuring that the participation process is fair requires measures to ensure that representatives of groups or organisations involved in the deliberations are representative of and accountable to the constituencies they represent. It also requires the establishment of mechanisms to mitigate as far as possible the unequal power relations arising from differential access to resources, information and skills.

As Sturm observes:

> The plaintiffs frequently are poor, politically powerless, and unorganised, and thus may be less able to influence the remedial decision. Yet, the values served by participation at the remedial stage depend on some direct involvement of those who must live with the results. An important criteria of remedial participation, therefore, is the capability of a particular form of remedial practice to control for unequal power, resources and sophistication.

2.2 Substantive reasoning in remedial decision-making

Transparent, substantive judicial reasoning is not only critical to the legitimacy of judicial decision-making, but is also integral to the ethos of South Africa's transformative constitution. It gives effect in the context of adjudicatory decision-making to the "culture of justification," which should pervade all exercises of power under our constitutional order, including judicial power.

As Justice O'Regan observes:

> A constitutional order requiring openness and accountability in relation to the exercise of public power cannot tolerate judicial avoidance of reasoning on fundamental constitutional values.

The commitment to substantive reasoning should apply with equal force to both the merits and remedial phases of constitutional adjudication. In the remedial context, such reasoning would include, for example, elaborating on how the proposed remedy is related to the infringement of constitutional rights found at the merits stage, as well as a justification for the particular choice of remedy amongst the range of available remedial options.

It has been questioned whether participatory remedies (which attempt to stimulate agreement amongst the parties on the measures required to redress rights violations) are consistent with the principles of substantive judicial reasoning and the courts' interpretative responsibilities.

Thus Owen Fiss has argued that reliance on party negotiation and agreement in the remedial process may tempt courts into abdicating their responsibilities "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them." Whilst he acknowledges that parties cannot be forced to litigate, he draws attention to the public interest dimension of constitutional rights

enforcement, which may be sacrificed when parties settle for peace instead of pursuing justice. Fiss reminds us that the effective redress of human rights has a broader public dimension beyond the interests of the immediate parties to the dispute.

Sturm contests the view that participatory remedial processes are incompatible with the responsibility of the judiciary for ensuring that constitutional rights and values receive reasoned explication and vindication in litigation. She points out that adversarial legal processes are not the only way of ensuring substantive reasoning in the remedial process of adjudication. This is particularly the case when the vindication of a constitutional norm can be achieved through a broad range of means, and the presiding judge is not as well placed as the parties and other stakeholders to determine how best to remedy the rights violation.

In these contexts, Sturm argues that it is possible for a judge to enforce a fair deliberative process at the remedial stage of litigation whilst holding the parties accountable to substantively interpreted constitutional norms. In this regard, Sturm highlights the distinct judicial roles and objectives applicable at the merits and remedial stages of public litigation. In evaluating the engagement jurisprudence of the Constitutional Court in part 3 below, the author considers how judicial responsibility for ensuring that the remedy gives effect to substantively reasoned constitutional norms may be preserved.

2.3 A "demonstrable relationship" between right and remedy

Closely related to the previous principle of reasoned remedial decision-making is a demonstrable relationship between the remedial order and the substantive right found to be infringed at the merits stage of constitutional adjudication. Failure to adhere to this principle renders judges vulnerable to accusations of abusing their coercive authority and failing to give parties and those affected a proper opportunity to be heard on the remedial solution imposed by the court.

Again this is not an inevitable by-product of participatory remedial processes. It does caution, however, that such remedies should be structured so as to ensure that their relationship with the underlying constitutional norms that have been found to have been breached can be demonstrated. In addition, it cautions courts to ensure that all parties affected by the constitutional breach have been given a proper opportunity to be heard in relation to the proposed remedy. Finally, a transparent, substantively reasoned connection between the rights found to be breached at the merits stage of the judgment and the remedial order provides the court with a set of normative criteria for evaluating the outcomes of the participatory remedial process.

2.4 Respect for the separation of powers doctrine

Respect for the separation of powers doctrine is a principle which applies not only in the exercise of a court's constitutional review powers, but also in the remedial phase of a case. In the remedial context, the doctrine requires that courts fulfil their responsibility under the South African Constitution for crafting effective remedies for infringements of constitutional rights. This responsibility arises from the principle of constitutional supremacy in section 2 of the Constitution, combined with the remedial obligations of the courts in terms of sections 38 and 172(1).

However, in exercising these powers, separation of powers considerations caution courts to avoid usurping the legislative, executive or administrative functions of the coordinate branches of government. The legislature and executive enjoy greater democratic legitimacy as well as institutional capability in exercising these functions. Respect for the roles and functions of the legislature and executive as well as those of administrative bodies and organs of state constitutes the second significant separation of powers principle in a remedial context.

Reconciling the two principles of the separation of powers doctrine outlined above in the context of enforcing the positive duties imposed by rights in the Bill of Rights presents particular challenges for the judiciary. On the one hand, the courts must craft remedies that will provide effective relief for constitutional rights violations. On the other hand, they must avoid undue intrusions in the policy-making discretion of the relevant organs of state and afford them an appropriate latitude of policy choice and flexibility consistent with their mandate to govern effectively in the public interest. Meaningful engagement-style remedies offer a promising vehicle for reconciling these two principles. These remedies aim to stimulate participatory agreement on the precise policy measures required to remedy the rights violation identified by the courts at the merits stage. The court explicitly refrains from prescribing specific

policy solutions to the parties, but instead requires them to work out, through deliberative engagement, a detailed plan of action to give effect to the court's merits findings. Organs of state are accorded a broad discretion to work out, in partnership with rights beneficiaries and stakeholders, the policy measures required to remedy the rights violation. Participatory, engagement-style remedies thus represent a departure from a traditional "command and control" style of judicial remedy. Their primary objective is to stimulate the responsible organs of state to engage the rights beneficiaries, experts and other stakeholders to design an effective remedial plan of action.

However, the principle of ultimate judicial responsibility for ensuring an effective remedy implies that the court should retain supervisory jurisdiction so as to ensure that the agreed plan of action is consistent with the court's interpretation of the relevant rights at the merits stage. Without this supervisory element, participatory remedies run the risk of degenerating into privatised dispute-settlement. This would be contrary to the constitutional obligations of the courts to interpret and enforce fundamental rights.

The engagement process between the parties should be structured and guided by the substantive normative interpretation by the court of the relevant rights at the merits stage, and all elements of the remedial plan must be justifiable in terms of this interpretation. A well-structured remedial process should further generate a detailed record of the deliberations and how they relate to the merits judgment. This record can be of great assistance to the court in assessing the adequacy of the parties' agreed programme for remedying the rights violation.

2.5 Remedial principles: Summation

The abovementioned principles provide a basis for evaluating participatory remedies, particularly in complex, polycentric cases involving a range of stakeholders. These kinds of cases call for a departure from the traditional model of binary (between two parties), adversarial, once-and-for-all remedies. The remedial principles discussed in this part seek to satisfy the demands of remedial efficacy as well as key features of legitimate judicial decision-making in constitutional democracies. In the following part, the role that meaningful engagement has played in Constitutional Court education rights judgements is analysed, this role is evaluated in the light of the remedial principles discussed. All three cases unfolded against the backdrop of the complex, systemic problems besetting the education system in post-apartheid South Africa. As argued above, it is precisely this type of case which calls for innovative participatory remedies.

3. Evaluating meaningful engagement in education rights cases

3.1 Determining a school's language policy: Hoërskool Ermelo

3.1.1 Analysis

The case came before the Constitutional Court on appeal by the Head of the Mpumalanga (provincial) Department of Education ("HOD") against a judgment of the Supreme Court that it had acted unlawfully in revoking the function of the Hoërskool Ermelo public school to determine the language policy of the school and in conferring the function upon an interim committee appointed by him. The Supreme Court had set aside the intervention by the Head of Department as well as the decisions of the interim committee to amend the language policy of the school from Afrikaans single medium to English and Afrikaans parallel medium.

Underlying the dispute concerning government's powers to intervene in school governance was the excess classroom and learner capacity of Hoërskool Ermelo. In comparison, schools in the school circuit of Ermelo catering primarily to African pupils had much higher learner-to-teacher ratios due to a shortage of classrooms and high enrolment numbers. As Moseneke DCJ noted in his judgment for a unanimous court, these realities illustrate the vast disparities in educational resources and the quality of education - a direct historical legacy of apartheid. Educational inequality has profound social consequences as it "entrenches historical inequity as it perpetuates socio-economic disadvantage."

This situation came to a head when the Department sought to require the school in the 2007 new school year to admit grade 8 learners who could not be accommodated at any of the English medium schools in Ermelo because they were already full to capacity. The school adopted the stance that the learners would be eligible for admission only if they agreed to be taught in Afrikaans. An impasse developed, as the school refused to accede to the Department's demand to change its language policy to parallel medium in order to accommodate the stranded learners unable to gain admission to a school. The HOD

responded by purporting to withdraw with immediate effect the function of the school governing body to determine the school's language policy, and by appointing an interim committee for three months in order to perform the function of determining the school's language policy. The objective of the appointment of the interim committee was to change the language policy to include English as a medium of instruction so as to facilitate the admission of the learners who wished to be taught in English.

In this regard, the HOD purported to act in terms of sections 22(1) and (3) and 25(1) of the South African Schools Act 84 of 1996 (hereafter the "Schools Act"). The Constitutional Court noted that it was common cause that this new language policy was adopted without consultation with relevant stakeholders such as the school governing body, the teaching staff, the learners already admitted to the school, or their parents. The Constitutional Court held that the Supreme Court of Appeal had erred in finding that the HOD had no power under section 22(1) and (3) of the Schools Act to withdraw the power of the school governing body to determine a school's language policy.

If "reasonable grounds" exist and the procedural fairness requirements of s 22(3) are followed, the department's power to withdraw a function of a governing body extends also to the language policy of a school. The Court held that the conclusion was supported by a holistic construction of section 29 and the Schools Act, which requires that school language policies be designed so as to take into account the complex relationship between education in the language of one's choice, access to basic education by all children, the duty not to discriminate unfairly against any learners in admission to schools, and the imperatives of historical redress and transformation in the schooling system as a whole. Whilst governing bodies are intended to function as "beacons of grassroots democracy", the Court cautioned against a school's being governed "as a static and insular entity". A school is "a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our constitution."

However, the Court held that the HOD had acted unlawfully by invoking section 25 of the School's Act to appoint an interim committee to determine the school's language policy. This had also "contaminated" its recourse to section 22 of the Schools Act.68 Even if the appointment had been lawful, the Court held that the manner of its appointment and the way it proceeded to determine the new language policy did not satisfy the prescripts of procedural fairness.

According to a traditional remedial approach, the finding of unlawfulness and the dismissal of the HOD's appeal should have been the end of the case. The situation of the individual Grade 8 learners who had been enrolled in the school since January 2007 in terms of the parallel medium policy had been resolved by an agreed order between the parties. This order (which the Court affirmed) permitted the particular learners to continue to be taught and write exams in English until the end of their school careers.

However, the Court held that the facts of the case called for the making of further just and equitable orders. The Court derived the power to make just and equitable orders from section 172(1)(b) of the Constitution, which it held did not depend on a finding of the constitutionality of legislation or conduct in terms of section 172(1)(a).72 Moseneke DCJ held as follows:

> This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and it advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.

The Court held that it was just and equitable "to all concerned" to direct the school governing body to reconsider and determine the school's language policy in the light of the considerations articulated in the judgment. The Court suggested that the school governing body would need to give serious consideration to adapting its language policy to cater for these learners, given its dwindling enrolment numbers and the need to redress the unequal access to education perpetuated by the current Afrikaans-only language policy.

It noted that the underlying problem in the Ermelo school district was the shortage of classroom places for learners who choose English as their language of instruction. This situation was clearly a structural one relating to the legacy of disadvantage affecting mainly schools in the former black group areas. Without concerted action, the problem of the shortage of classroom places for black learners choosing to be educated in English in future was likely to persist, and securing additional places at Hoërskool Ermelo would afford only a partial alleviation of this problem.

The Department of Education bore constitutional and statutory duties to provide basic education in an official language of choice to everyone, where it was reasonably practical and just to do so. The Court was not satisfied that the Department had taken the necessary "proactive and timely steps" to secure sufficient Grade 8 English school places and to alleviate the high level of overcrowding in the Ermelo district high schools.

In the light of these considerations, after dismissing the appeal, the Court made further ancillary orders. The first order required the Hoërskool Ermelo School Governing Body to review and determine a language policy in terms of section 6(2) of the Schools Act and the Constitution, and to report back to the Court within 3 months on the process that had been followed to review its language policy, and attaching a copy of the language policy. Secondly, the Head of the Mpumalanga Department of Education was also ordered to lodge a report with the court within 3 months "setting out the likely demand for grade 8 English places at the start of the school year in 2010 and setting out the steps the Department has taken to satisfy this likely demand for an English or parallel medium high school in the circuit of Ermelo."

3.1.2 Evaluation

Although not expressly invoking the concept of meaningful engagement, the spirit of the judgment and supervisory orders envisages participatory processes. This is implicit in the requirement that in revising its language policy in accordance with the Constitution and relevant legislation, the school governing body should take into account not only the existing school community but also the broader needs of the community in which the school was located.

Furthermore, the provincial education department would have to embark on an information-gathering and broad consultative process in order to comply with the supervisory order requiring it to plan and report on the steps it was taking to satisfy the likely demand for grade 8 English places in the new school year.
These ancillary supervisory orders were made by the court in recognition of the underlying structural problems of educational access and quality in the Ermelo school district. An effective, sustainable solution to these structural problems required a broad-based participatory process for the reasons given by Sturm: garnering the requisite information from stakeholders; resolving differences through fair deliberative processes; and fostering broad "buy-in" to the proposed policy and programmatic solutions.

However, the judgment and relevant supervisory orders could have been more explicit regarding the requirement that the governing body and department engage meaningfully both with each other and other stakeholders with a substantial interest in educational rights in the Ermelo district. This would have clarified that the policy and planning processes envisaged in the orders should occur through a participatory process involving all individuals, organisations and institutions whose input was necessary to ensuring that the objectives of the supervisory orders were met.

As Sturm observes, the deliberative public law remedial model requires an assessment "of the individuals and organisations whose participation in the remedial stage is necessary to developing and implementing a fair and workable remedy." This may include the recruitment of parties at the remedial stage who were not involved at the liability stage.

In terms of the deliberative remedial model, the parties are also invited to consider how the participatory process could be structured so as to ensure fair participation by all relevant stakeholders. A more explicit incorporation of meaningful engagement in the remedial orders handed down in the *Hoërskool Ermelo* case would have given effect to the first remedial principle of fair participation discussed above.

The second criticism that could be levelled against the remedial orders in *Hoërskool Ermelo* is the lack of a demonstrable relationship between the findings at the merits stage of the judgment and the remedial orders. This implicates the third remedial principle discussed above. As noted above, the narrow issue before

the Court was the legality of the HOD's intervention, which was found to be in contravention of relevant provisions of the Schools Act. The HOD's appeal was accordingly dismissed (albeit on grounds different from those in the SCA's judgment).

The decision by the Court to make the further ancillary orders referred to above was based on the need both to resolve the underlying disputes between the parties by requiring the adoption of a constitutionally compliant language policy by the school, and for the Department to take proactive steps to secure sufficient English school places. As discussed above, the underlying purpose of ensuring a demonstrable relationship between constitutional breach and remedy is to safeguard the legitimacy of judicial orders, ensure fairness to the parties, and provide a transparent normative standard against which to test the outcomes of a participatory remedial process.

Arguably the underlying disputes which informed the ancillary orders were sufficiently closely connected to the legality dispute and had been adequately canvassed in the legal proceedings in three courts. The Court elaborated in some detail in its judgment the principles which governing bodies should take into account in formulating a language policy which is consistent with the provisions of section 29(2) of the Constitution.82 Arguably there was therefore sufficient normative guidance provided in the judgment both to the Hoërskool Ermelo Governing Body and to other governing bodies in South Africa on the formulation of constitutionally compliant school language policies. However, similar elaboration was not provided in the main judgment on the nature of the positive duties of the Department of Education to take "proactive and timely" steps to ensure sufficient school places for learners choosing English as their language of instruction. Such measures would entail a complex interaction and reconciliation of the duties imposed by sections 29(1)(a) and (2) respectively. The Department would need to engage in a procedurally fair manner with Afrikaans single-medium schools with excess capacity in an attempt to persuade them to adapt their language policy to accommodate learners who chose instruction in English. At the same time, it would have to procure additional resources so as to construct and establish one or more new English or parallel medium high schools. Scant guidance was provided in the judgment on the constitutional normative principles which would have to guide the Department in fulfilling its responsibilities in term of section 29. Given that these issues are also of significant public importance to both public educational authorities and all involved in education in South Africa, one would have expected greater elaboration on the obligations of the Department in terms of section 29(1) read with (2) of the Constitution.

The third point of criticism is that no further judgment was delivered by the Constitutional Court after issuing its supervisory orders. It is therefore unclear if the Court was satisfied that the content of the reports filed reflected adequate compliance with the constitutional principles outlined in its judgment. The supervisory orders issued by the Court demonstrate respect for the separation of powers doctrine by requiring the relevant organs of state to work out the details of the relevant educational policy and plans to give effect to the constitutional principles articulated in the judgment. However, the absence of any follow-up judgment assessing whether or not the reports of the parties evinced a satisfactory compliance with the initial judgment raises the question whether the Court fulfilled its own constitutional responsibility to ensure effective relief for the underlying constitutional issues identified in its judgment. This also implicates the fourth remedial principle concerning the separation of powers.

Moreover, a judgment by the court pertaining to the outcome of the supervisory orders issued by it would have given effect to the third principle concerning substantive judicial reasoning at the remedial stage of adjudication. Such a judgment could have provided guidance to all organs of state and stakeholders involved in the implementation of constitutional educational rights in South Africa, thereby vindicating the broader public interest in the remedy issued in the *Hoërskool Ermelo* case.

In conclusion, the supervisory orders issued in *Hoërskool Ermelo* represent a modest but nonetheless significant attempt to stimulate the parties to seek a solution to the underlying constitutional issues identified in the judgment. However, the reasons for making these orders could have been more substantive, and they could have been structured to give better effect to the four constitutional remedial principles discussed in part 2. The fact that the case was presented to the courts primarily as a dispute concerning the legality of the MEC's intervention in the language policy of the school meant that the case did not lend itself to a sustained focus on the structuring of the participatory aspects of the supervisory orders. It is commendable,

nevertheless, that the Constitutional Court engaged with the underlying structural causes of the dispute and their implications for section 29 rights.

The nascent potential of participatory engagement remedies in the context of structural educational rights disputes is evident in the *Hoërskool Ermelo* judgment. This remedy was developed further in another major Constitutional Court case concerning the impact of school governance policies on constitutional rights, the *Welkom High School* case.

4 Conclusion

Currently public schooling for the majority of overwhelmingly poor, black learners in South Africa is of a poor quality, whilst admissions in many well-resourced former Model C schools remain racially skewed.163 The legacy of apartheid education is far from being effectively redressed. In the powerful words of Moseneke DCJ:

> In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.

The language, gender and admission barriers to quality schooling must surely be critical elements in the constitutional imperative of educational transformation identified by the Deputy Chief Justice. However, as the three cases analysed and evaluated in this article show, there are powerful stakeholders in schools who seek to defend policies that are inconsistent with constitutional rights and values. Provincial education departments' attempts to counter these policies have been set aside because the relevant authorities failed to comply with the procedures laid down in the Schools Act and the procedural fairness obligations of PAJA.

Nevertheless, the Constitutional Court has sought in these cases to reach the underlying substantive issues in these cases by affirming a duty of all stakeholders to cooperate and engage meaningfully with one another. Beyond the virtues of engagement as a dispute-resolution mechanism, it also provides a structured, participatory remedial process for amending policies to give effect to the rights of learners to education on a non-discriminatory basis. As Sturm and others have noted, participatory remedies are well suited to redressing deeply entrenched patterns of institutional resistance to fundamental change.

Once and for all court orders are likely to be undermined by overt and covert forms of resistance. Engagement remedies have significant potential to promote the adoption of constitutionally compliant education policies through requiring sustained collaboration amongst a broad array of stakeholders in the sector. Collaborative (rather than unilateral, top-down) policy-making is more likely to be perceived to be legitimate by affected stakeholders, thus increasing their prospects of effective implementation over time. Moreover, as Froneman and Skweyiya JJ emphasised in their concurring judgment in the Welkom High School case, sustained communication between the parties is critical to protecting the learners' interests in a school governance dispute.

However, the analysis of the three cases demonstrates that the role of meaningful engagement as a remedy remains undeveloped, and its application falls short of the four core principles of remedial efficacy and legitimacy developed in part 2. In *Hoërskool Ermelo*, the significance of engagement was implicit in the reasoning of the Court in reaching the underlying language and access to education issues, but played no explicit part in the remedial reasoning or orders. In the *Welkom High School* case, meaningful engagement formed part of both the Court's reasoning and remedial orders. However, it incorporated only a limited range of stakeholders, and there was no follow-up judgment indicating whether the Court was satisfied with the outcome of the engagement process. It is unclear therefore whether the engagement process resulted in revised pregnancy policies which were consistent with the various constitutional obligations described in the main judgment.

In the *Rivonia Primary School* case, cooperation and engagement were again affirmed as constitutional obligation in dealing with systemic capacity issues in schools. However, the majority judgment did not clarify how such engagement relates to obligations of procedural fairness, and did not refer to engagement in its remedial reasoning and orders.

The valuable role which engagement can potentially play as a remedial mechanism in education rights disputes is best appreciated through understanding the different objectives pursued during the merits and remedial phase of a judgment. The merits phase of a judgment is

concerned with determining whether not a constitutional violation has been established. As such, it should contain a clear exposition of the normative values and purposes of the relevant rights, and the nature of the duties they impose on the parties. A court should proceed to explain why a party's acts or omissions constitute an infringement of the relevant duties. The court's role at the remedial stage is different as it seeks to devise a remedy which will be effective and legitimate.

In complex, polycentric cases such as those involving school governance and access to education, there will often be a range of policy choices to be made in giving effect to the relevant rights, and a number of interests to be considered and weighed. This is where participatory remedies such as engagement have an important and valuable role to play. They respond to separation of powers concerns by counselling judicial restraint in prescribing particular policy solutions, but preserve the court's constitutional role to ensure that the rights violation is effectively remedied. The recruitment of a broad range of stakeholders to participate jointly in (re-)designing and implementing constitutionally-compliant policies generates the information and skills necessary for sustainable solutions and, as argued above, promotes trust and buy-in amongst all affected stakeholders.

Although the role of meaningful engagement has been inconsistent and undeveloped in the cases reviewed, the Constitutional Court has affirmed its important role in resolving systemic educational disputes. This paves the way for the development of meaningful engagement as a fully-fledged participatory remedy in future education rights disputes. Such remedies constitute powerful vehicles for developing systemic policy reforms capable of advancing access to quality education for all South Africa's children.

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3. Questions & Answers

Dear General Secretary

Question:

Can you please give me clarity on what to do next, if the condonation was refused by the Commissioner?

Anonymous

Dear Anonymous

Kindly be advised that you may review the Commissioner's ruling at the Labour Court.

Question:

I wish to create a dispute. Please give me steps to follow.

Anonymous

Dear Anonymous

Please use the following link to lodge a dispute: https://iboscloud.co.za/ELRCDMS/Dispute/RegisterDispute

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Question:

I would like to know how do I go about putting in a complaint against the SGB at a public school. I cannot report them to the principal because the principal is involved with this unfair treatment against my son (15 years of age).

Anonymous

Dear Anonymous

Kindly note that the ELRC lacks jurisdiction on SGB matters. You may send your complaints to the Department of Education in your province.

Question:

I'm a PL1 educator employed in the North West Department of Education. I'm writing this email in relation to the unfair labour practice I'm experiencing at my place of work. I seek to do the following:

1. Challenge a letter of intention to charge dated 23/01/23
2. Challenge a verbal warning dated 10/05/23 for incapacity and poor work performance
3. Challenge the written warning received at work dated 2/11/23 of fails to carry out a lawful order and performs poorly

I would like to lodge a formal complaint as I'm not guilty of all the alleged misconducts and the matters I have mentioned have not been to a formal hearing therefore making me unable to refer this dispute on the DMS application.

In that regard please advise on which steps to follow to officially lodge my complaint.

Anonymous

Dear Anonymous

Kindly be advised that you may not challenge a letter of intent to discipline but rather respond to the letter. The two warning should be appealed through the departmental appeal committee.

Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to: enquiries@elrc.org.za

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