

University of the Western Cape

EXCLUSION BY DESIGN: A CONSTITUTIONAL ANALYSIS OF ADMISSION POLICIES AND PRACTICES IN SELECTED CAPE TOWN SCHOOLS



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ABSTRACT

School admission policies are powerful tools that can sometimes contain provisions that are in conflict with the Constitution of the Republic of South Africa and other legislation and policies which regulate education in South Africa. Provisions relating to fees, documents required for admission and specific admission practices may have the effect of excluding certain learners from admission to schools. Such practices include charging application fees, charging registration fees, administering admission tests and demanding only specific documents for proof of address. On the face of it, these practices may seem unproblematic, but in effect, they exclude certain learners. This may be contrary to South African Law. Section 36 of the Constitution allows for the limitation of rights. Differentiation or discrimination may be permissible; however, it is unfair discrimination that is prohibited. Consequently the constitutionality of these policies and practices investigated are measured against the protection afforded by the Constitution. This study identifies some of these exclusionary provisions and practices at schools and proposes possible ways to eradicate and combat them.

Because the exclusion of learners, whether through school admission policies or practices, may unjustifiably encroach upon the rights of such learners, this is an investigation into a legal issue and a legal theoretical lens must, therefore, be used to address this phenomenon. This qualitative study thus determines whether or not, and if so, how school admissions policies function to exclude learners from schools. The research is based on the comparative analysis of various public documents including the Constitution; legislation; judicial decisions; awards of cases of the Education Labour Relations Council (ELRC) and policies of the Western Cape Education Department school admission policies and practices from five high schools and five primary schools in the Western Cape were sampled and analysed. The focus of the research is public schools in the Western Cape Province including specialised schools referred to as focus schools.

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DECLARATION

I declare that Exclusion by design: A constitutional analysis of admission policies and practices in selected Cape Town schools is my own work. It has not been submitted before for any degree or examination in any university. All the sources I have used or quoted have been acknowledged and indicated as complete references.

Bernita Isaacs

Date: August 2019

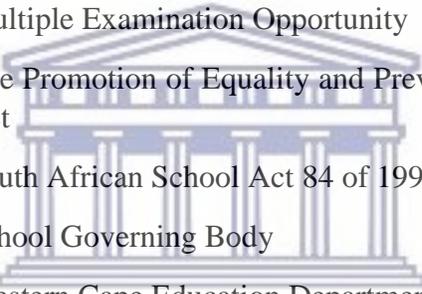
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GLOSSARY OF TERMS

BOR	Bill of Rights
CAPS	Curriculum and Assessment Policy Statements
CEM	Department of Education Ministers
CEMIS	Central Education Management Information System
CRC	Convention on the Rights of the Child
ECD	Early Childhood Development
ELRC	Education Labour Relations Council
FET	Further Education and Training
GRADE-R	Grade Reception
MEO	Multiple Examination Opportunity
PEPUDA	The Promotion of Equality and Prevention of Unfair Discrimination Act
SASA	South African School Act 84 of 1996
SGB	School Governing Body
WCED	Western Cape Education Department



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CHAPTER 1

INTRODUCTION AND OVERVIEW OF THE STUDY ON ACCESS TO SCHOOLS IN THE WESTERN CAPE

1.1 INTRODUCTION

This qualitative study identifies exclusionary provisions in school admission policies and other practices that may have the effect of excluding learners from admission to schools. The study furthermore aims to identify possible ways in which exclusionary provisions could be eradicated in policies. There are other factors that may result in the exclusion of learners to admission to schools such as overcrowding in schools, the lack of infrastructure and the fact that some parents fail to apply for admission timeously. The aforementioned factors do, however, not fall in the scope of this research.

School admissions policies and practices are formulated by the School Governing Body (hereafter SGB) of a school. The school admission policies and practices are subject to the Constitution of the Republic of South Africa of 1996 (hereafter Constitution). The Constitution contains provisions that protect the human rights of all citizens. The right to human dignity, equality, children's rights and the right to education all find protection in the Constitution.¹ The Constitution is the supreme law of South Africa and all other legislation must be consistent with it.² Any provision or practice of a school that may be exclusionary will therefore be unlawful if it cannot be justified in terms of section 36 of the Constitution.³ Any such provision or practice that is not justifiable under section 36 will either be struck down or amended to be consistent with the Constitution.

¹ Ss 9, 10, 28 and 29 of the Constitution.

² S 2 of the Constitution.

³ Ss 7-39 of the Constitution .

1.2 BACKGROUND AND RATIONALE

The research investigates exclusionary clauses and provisions in school admission policies that result in unfairly excluding learners from admission to certain schools. The study investigates whether or not the special provisions that are contained in Chapter 2 of the Bill of Rights are adhered to and whether all children are treated equally. The research demonstrates how differentiation is made between specific categories of learners and identifies the direct and/or indirect grounds on which this happens.

From Apartheid era to Democracy

In 1994, Apartheid ended and a democratic dispensation was introduced. It was a moment of great achievement with the possible realisation of a fair and more equal society. The schools that were accessible to the 'White' population group during the Apartheid regime were opened to all races.⁴ This did not happen unopposed as learners were not readily admitted to all schools. Some schools implemented exclusionary policies that prevented certain learners from entering schools. Examples of this will be provided later in this thesis.⁵ Some of the schools that were investigated incorporate provisions in their school admission policies that exclude learners on the basis of their nationality, social class, academic performance and other grounds that will be addressed at a later stage in this research.⁶

The Constitution is founded on the values of dignity, equality and freedom. The equality clause provides that, 'everyone is equal before the law and has the right to equal protection and benefit of the law'.⁷

The Constitution furthermore provides that

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.⁸

⁴ Schools cannot deny learners access based on their race anymore.

⁵ Chapter 4.

⁶ Chapter 4.

⁷ S 9 (1) of the Constitution.

⁸ S 9 (3) of the Constitution.

The right to education is enshrined in the Bill of Rights, which purports that everyone has the right to basic education.⁹ The right to basic education in the Constitution gives effect to the Convention on the Rights of the Child (hereafter CRC),¹⁰ which states that

parties recognise the right of the child to education, and with a view to achieving this right progressively and based on equal opportunity, they shall, in particular:(a) Make primary education compulsory and available free to all.¹¹

South Africa ratified¹² the CRC in 1995 and as such is under the obligation to implement legislation to give effect to this instrument.¹³

The Constitution furthermore contains protective provisions to ensure that the best interest of children is of paramount importance in all matters affecting children.¹⁴ A ‘child’ is defined as any person under the age of 18 years¹⁵ and it is therefore assumed that they will be treated without unfair discrimination at a state institution where learning must take place. This research will show that some of the policies and practices are unfair and have the effect of excluding certain learners. The learners who are compelled to attend school are treated differently from those who are not under such an obligation.¹⁶ It will be argued in this thesis that such policies and practices are in conflict with the Constitution.

Treating people differently only becomes unfair discrimination if it is based on any of the prohibited grounds found under section 9(3)¹⁷ of the Constitution. The Constitution and section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁸ (hereafter PEPUDA) lists a number of these grounds, gender, including race, colour, sex, age, pregnancy, marital status, ethnic or social origin, sexual orientation, disability, religion, conscience, culture, belief, birth and language. These prohibited grounds include the ‘listed grounds’ of discrimination, but not all distinctions made on the basis of these grounds are necessarily in conflict with the Constitution. One such example is the practice relating to public toilet facilities. It is accepted

⁹ S 29 (1) of the Constitution.

¹⁰ Article 28(1) of the United Nations Human Rights Council Convention on the Rights of the Child (1989).

¹¹ Article 28(1) of the United Nations Human Rights Council Convention on the Rights of the Child (1989).

¹² United Nations Human Rights available at <http://indicators.ohchr.org/> (accessed 12 April 2018).

¹³ S 28 of the Constitution .

¹⁴ S 28(2) of the Constitution.

¹⁵ S21 (3) of the Constitution.

¹⁶ Chapter 4

¹⁷ S 9(3) of the Constitution.

¹⁸ The Promotion of Equality and Prevention of Unfair Discrimination of 2000 available at <http://www.justice.gov.za/legislation/acts/2000-004.pdf> (accessed on 10 April 2019).

and necessary to have different toilets for female and male learners. This type of differentiation is not unfair discrimination because it protects the rights of the privacy of an individual.¹⁹

All of these abovementioned grounds have been used and continue to be used to oppress and marginalise people. Discrimination on the listed grounds amounts to unfair discrimination and it can present itself by direct discrimination and indirect discrimination on the basis of prohibited grounds. McConnachie explains clearly that

Direct discrimination occurs when prohibited grounds are used as the criteria for different treatment. For example, the apartheid education system directly discriminated on the basis of race, by allocating resources to schools according to the racial classification of their learners. We can say that race was used as the criterion of distribution.

Indirect discrimination occurs when rules or practices are ‘neutral’, meaning that they do not select people for different treatment on prohibited grounds, but they produce results that leave certain groups worse off than others.²⁰

One such example of indirect discrimination is when wealthy, well-resourced schools in mainly White areas provide in their school policies provisions that only learners who reside within 10 kilometres of the school will qualify for admission to the school. Even though the policy is not making a selection on the race of the learners, it has the effect of excluding other racial groups who do not reside within the area. This restriction amounts to indirect discrimination.²¹

For the purpose of this research, ‘exclusion’ refers to the prevention of admission of certain learners of the identified schools based on unfair discrimination. Any policy or practice of a school that may be exclusionary in its effect will, therefore, be unlawful if it cannot be justified in terms of the Constitution, and should be eradicated. This research intends to address the challenges that have the effect of excluding learners from attending schools and subsequently contribute to the dropout rate of learners in the Western Cape. The dropout rate is published,²² but it does not explain the reasons for this phenomenon or the possible solutions to lower this

¹⁹ McConnachie C ‘Equality and unfair discrimination in education’ available at <http://section27.org.za/wp-content/uploads/2017/02/Chapter-4.pdf> (accessed on 06 February 2019).

²⁰ McConnachie C ‘Equality and unfair discrimination in education’ available at <http://section27.org.za/wp-content/uploads/2017/02/Chapter-4.pdf> (accessed on 06 February 2019).

²¹ McConnachie C ‘Equality and unfair discrimination in education’ available at <http://section27.org.za/wp-content/uploads/2017/02/Chapter-4.pdf> (accessed on 06 February 2019).

²² Staff writer BusinessTech ‘Shocking drop-out rates: where in South Africa the fewest kids make it to matric’ BusinessTech 6 January 2017 available at <https://businesstech.co.za/news/general/149291/shocking-drop-out-rates-where-in-south-africa-the-fewest-kids-make-it-to-matric/> (accessed on 10 April 2019)

rate. The exclusion of learners from schools forces learners to stay at home until they are of age to find employment. The Centralised Education Management Information System (hereafter CEMIS) is designed in such a manner that each learner is allocated a unique identity number. The CEMIS can, therefore, determine how many learners are unaccounted for. The unique number allows a learner only to be enrolled at one school at a time. The CEMIS can, therefore, determine the number of learners that were deregistered at a school and not enrolled at another school. Such learners will be recorded as ‘drop-outs’ on the CEMIS. The exclusion of learners is maybe therefore linked to the drop-out or ‘push-out’ rate of learners. Drop-out refers to learners who choose to leave school. When a learner is ‘pushed out’ of schools, there is a force factor and it is against the will of the learner. This relationship between the drop-out rate, the ‘push-out’ rate and exclusion of learners requires further investigation, but this however does not fall within the scope of this research. There are, however, practices at schools that suggest that the learners are ‘pushed out’ of the education system in the Western Cape Province. This method of pushing out learners is motivated by schools to obtain the best matric results. In order to this, schools may also make use of the Multiple Examination Opportunity (hereafter MOE)

Schools may try to inflate their matric pass rate by excluding weaker learners or by manipulating the statistics. The objective is the same as it results in the exclusion of learners from being calculated as matric examination candidates registered at a specific school. This is an indication of how unwilling schools are to let weaker learners sit for matric examinations. Academically weaker learners are therefore excluded from admission or if they gained admission, and they are excluded from the statistics as learners who sat for the examination by registering such learners as MEO candidates.

BusinessTech reported that

The Department of Basic Education’s figures, show that 1,100,877 learners enrolled for Grade 10 in 2014, but only 610,178 enrolled for Grade 12 in 2016 – showing an alarming rate of 44.6% of learners either dropping out of the system altogether or remaining stuck in Grade 10 and 11.

Because the pass rate is expressed as a percentage of the learners who wrote, it doesn’t take into consideration the learners who didn’t make it to matric,” the DA said. Any assessment of performance must take into account the number of learners retained in the system. It has been raised by many critics that the matric results are easily ‘gamed’, where schools may prejudice their own learners in order to attain a high pass rate. This

would include cases where learners who submit a poor performance are kicked out of school, or held back so as not to bring down the general performance. The DA has called for an investigation into the high drop-out rate, and to look into whether schools have been ‘culling’ students’.²³

The matric pass rate appears to obscure the true dropout rate. This pass rate was questioned again by the Democratic Alliance, a South African political party, after the matric pass rate for 2018 was announced.²⁴ According to the Democratic Alliance the, 78.2% pass rate for the 2018 class is not the real pass rate and it was in fact only 37.6%.²⁵ This supports the earlier assertion that schools may have a motive to exclude some learners.

The matric pass rate is inflated as it does not take into account the learners that were enrolled at schools but did not sit for the national examination. Many learners are then registered as MEO candidates. This means that such candidates write their matric qualification over more than one year.²⁶ They are thus not calculated as matric examination candidates for that year and their results do not affect the statistics relating to the matric pass rate. This equates to the same principle of instructing academically weaker children to stay at home on the day of writing the provincial systemic tests. Their poor marks will not be considered with the calculation of the average mark of the class and the results will appear as if the learners performed well.

The Daily Maverick also reported that

Just after the announcement of the 2018 matric results, Stellenbosch University socio-economic researcher Nick Spaull tweeted: “Until the Minister starts reporting and emphasising the 400,000 kids that drop out of school (no proof of their educational status whatsoever, almost certainly unemployed, and they don’t go to FET, btw) I’ll keep

²³ Staff writer BusinessTech ‘Shocking drop-out rates: where in South Africa the fewest kids make it to matric’ BusinessTech 6 January 2017 available at <https://businesstech.co.za/news/general/149291/shocking-drop-out-rates-where-in-south-africa-the-fewest-kids-make-it-to-matric/> (accessed on 10 April 2019).

²⁴ Mduduzi M ‘Stop shouting that the real pass rate is less than 50%’ Dailey Maverick 7 January 2019 available at <https://www.dailymaverick.co.za/opinionista/2019-01-07-stop-shouting-that-the-real-pass-rate-is-less-than-50/> (accessed on 6 February 2019).

²⁵ Mduduzi M ‘ Stop shouting that the real pass rate is less than 50%’ Dailey Maverick 7 January 2019 available at <https://www.dailymaverick.co.za/opinionista/2019-01-07-stop-shouting-that-the-real-pass-rate-is-less-than-50/> (accessed on 6 February 2019).

²⁶ WCED Circular 0045/2018 ‘Commitment Agreement Relating to the progression Dispensation and the application of the multiple examination opportunity (MEO)’ available at https://wcedonline.westerncape.gov.za/circulars/circulars18/e45_18.html (accessed on 26 January 2019).

making these graphs...” Spauld posted a graph showing the number of learners who started school in 2007 in relation to those who wrote matric in 2018.²⁷ See Appendix A.

One explanation for the drop-out rate is related to the fact that they were calculated as Multiple Examination Opportunity candidates. The Western Cape Education Department (hereafter WCED) sent out a circular in 2018 relating to the Multiple Examination Opportunity (MEO) that explains the requirements and procedures to

Accommodate learners who are progressed from Grade 11 to Grade 12 but who, based on their performance in Grade 12, may show that they are unable to cope with the demand of writing all six subjects in one sitting. Such learners must be monitored and each quarterly report must indicate the subject(s) in which the learner is not performing well and the learner may consequently be requested to defer the writing of that subject(s) to the June examination of the following year.²⁸

The abovementioned practice makes it clear that there are learners who do write the matric examinations, but because they write it in two parts, their results are not calculated as part of the matric pass rate. This may create the assumption that the learners dropped out of school, but their results are omitted from the statistics to boost the matric pass rate.

At the time of my study the Department of Basic Education (hereafter DBE) announced that it will no longer offer the Multiple Examination Opportunity (MEO) to learners.²⁹ The MEO will not be available in 2020. The Minister of Basic Education, Angie Motshekga said the Council of Education Ministers (hereafter CEM) had to acknowledge that

Although the initiative was well intentioned; the Multiple Examination Opportunity is being used by some schools as a gatekeeping mechanism and not for its original intentions which were to allow weaker learners more than one opportunity over a longer period to write their national examination.³⁰

²⁷ Mduduzi M ‘ Stop shouting that the real pass rate is less than 50%’ Dailey Maverick 7 January 2019 available at <https://www.dailymaverick.co.za/opinionista/2019-01-07-stop-shouting-that-the-real-pass-rate-is-less-than-50/> (accessed on 6 February 2019).

²⁸ WCED Circular 0045/2018, Commitment Agreement Relating to the Progression Dispensation and the Application of the Multiple Examination Opportunity (MEO) Para 7 available at https://wcedonline.westerncape.gov.za/circulars/circulars18/e45_18.html (accessed on 26 January 2019).

²⁹ South African Government News Agency 8 March 2019 available on <https://www.sanews.gov.za/south-africa/dbe-scrap-multiple-examination-opportunity-2020> (accessed on 10 April 2019).

³⁰ Department of Basic Education Remarks at the media briefing hosted by Minister of Basic Education, Mrs. Angie Motshekga on the occasion of the last post-Council Of Education Ministers’ meeting held in Pretoria on the 8 March 2019 available at

Motshekga further stated that

Instead of assisting vulnerable learners to attain a matric certificate, it was allowing schools to cull learners through this process and not adequately support them through the multiple examination opportunities.³¹

The Minister of Basic Education's decision not to offer the MEO initiative as from 2020, therefore serves as evidence to the claim of the Democratic Alliance to the 'culling of students'.³²

There are various reasons that may explain the high dropout rate; for example, learners who are deceased for various reasons including the high rate of gang violence in certain areas. Some learners are also admitted to rehabilitation facilities for drug dependencies. Some learners in primary schools also refuse to be placed at the School of Skills because it is branded as the 'dom' (stupid) schools. This stigma attached to the Schools of Skills was evident according to a news report by Jenken who wrote that,

A dear friend of mine's child started remedial school this year. She felt, on some level, that she'd failed him, and that he'd bear the brunt of some weird societal practice that seems to pervade almost every suburban community-that children who attend remedial schools are stupid, slow or mentally deficient.³³

'The School of Skills has been designed to enable learners who continue their schooling to develop their potential based on a curriculum that supports their cognitive ability'.³⁴ Many learners cannot be accommodated at the Schools of Skills due to the shortage of such schools. The learners may be deregistered on the CEMIS when they are absent for more than ten

<https://www.education.gov.za/Newsroom/MediaReleases/tabid/347/ctl/Details/mid/8128/ItemID/6001/Default.aspx> (accessed on 13 May 2019).

³¹ South African Government News Agency 'DBE to scrap Multiple Examination Opportunity in 2020' 8 March 2019 available on <https://www.sanews.gov.za/south-africa/dbe-scrap-multiple-examination-opportunity-2020> (accessed on 10 April 2019).

³² Staff writer BusinessTech 'Shocking drop-out rates: where in South Africa the fewest kids make it to matric' BusinessTech 6 January 2017 available at <https://businesstech.co.za/news/general/149291/shocking-drop-out-rates-where-in-south-africa-the-fewest-kids-make-it-to-matric/> (accessed on 10 April 2019)

³³ Jenkin C "My Daughter is not stupid" *Parent24* 28 March 2013 available at <https://www.parent24.com/Learn/Learning-difficulties/My-daughter-is-not-stupid-20130327> (accessed 2 August 2019).

³⁴ Western Cape Government Adapted Curriculum and Assessment Policy statement for Schools of Skills and Schools with Skills Units available at <https://wcedonline.westerncape.gov.za/Specialised-ed/SpecialSchools/SchoolofSkills/SoS-Curr/Curr-Maintenance.pdf> (accessed on 13 May 2019).

consecutive days. There is a compulsory procedure, however, that schools must follow before such deregistration can be executed, but schools ignore these rules.

These factors are, however, not the focus of this thesis. It represents only a small percentage of learners who are excluded in comparison to the number of learners who drop out of the school system. The focus of this research is on specific exclusionary provisions that ultimately may lead to the drop-out of learners from schools. The findings of the study suggest an additional explanation of the exclusionary effects of the admission policies and practices of schools.

1.3 PROBLEM STATEMENT

International and domestic law requires that children be afforded an education. However, every year the WCED is faced with the challenge of placing learners at schools. It is reported that many learners find themselves without a school to attend at the beginning of each year due to the fact that they were excluded from admission to schools.³⁵ They are not accepted by schools for various reasons and some learners are not afforded the opportunity to apply for admission to certain schools. This study seeks to identify the possible exclusionary measures that schools may take to deny learners admission. It also questions whether such exclusions are constitutionally justifiable.

The main question of this study is 'How do school admission policies and practices function to exclude learners from admission to schools'?

Learners should not be excluded from admission to public schools if we have laws and policies in place to ensure that effect is given to the educational needs of all learners. These laws ought to give effect to the right to education. In terms of the Constitution,³⁶ 'everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms'.³⁷ The question therefore is, are school policies and practices in line with the Bill of Rights? In other words, are learners treated equally insofar as

³⁵ Pitt C 'More than 11 000 pupils yet to be placed in Western Cape schools' *News24* 23 January 2018 available at <https://www.news24.com/SouthAfrica/News/more-than-11-000-pupils-yet-to-be-placed-in-western-cape-schools-20180123> (accessed on 22 April 2019).

³⁶ S 9(1) of the Constitution.

³⁷ S 9(2) of the Constitution.

admission to the school is concerned? A public school must admit learners and serve their educational needs without unfairly discriminating against them. If this is what legislation prescribes, then are there constitutional justifiable reasons for such exclusions? How can these policies that exclude learners from admission to schools be eradicated if they are unconstitutional and in conflict with other legislation? Is it justifiable for the State to venture into initiatives such as focus schools if there are not enough schools to accommodate all learners who have a right to basic education?

1.4 METHODOLOGY

1.4.1 Research Design

This qualitative study is a constitutional analysis of school admission policies and practices of selected public schools in the Western Cape. The constitutional analysis refers to the process of making a claim and then to test such claim against the facts of the issue at hand. In this case, the issue is the constitutionality of exclusionary provisions in school admissions policies and practices. The facts are evaluated and a conclusion is made on whether the claim is unconstitutional or not. The schools are located in a combination of the sub-economic, middle class and upper middle class areas in Cape Town. The sample for the study consists of ten schools of which five schools are high schools and five are primary schools. Two of the high schools for this study are focus schools and the motivation for this was to determine the effect of testing of learners on the admission of learners. This was also done to determine the reasons for exclusions.

1.4.2 Data Collection

The samples of admission policies and application forms of ten public schools were retrieved from public websites. As abovementioned, the ten schools include primary schools and high schools. This study includes data from public records and documents. It includes legislation, case law, Education Labour Relation Council (hereafter ELRC) cases, policies and circulars of the WCED, school admission policies and school application forms.

I am aware of the possible loss of information that may occur with the storage of my data. I, therefore, took special care with data by storing it at different locations and in different forms. I stored data on flash drives, computer, hard copy and also had an electronic mail to gain access from any location if needed.

1.4.3 Data Analysis

This research aims to determine if there is a correlation or causal link between school admission policies and the unlawful exclusion of certain learners. The sources (i.e. provisions of admission policies) were therefore tested against the Constitution and other legislation.

Different school admission policies and practices were investigated for unlawful exclusionary provisions. These provisions were compared against cases that were heard in courts of law and the Education Labour Relations Council on similar issues pertaining to the admission policies of schools.

1.4.4 Research Ethics

All my information was gathered from public documents, which is considered public knowledge. These documents exist in the public domain and are available to members of the general public. No consent is thus required to use this data.

1.5 LIMITATIONS OF STUDY

There are other factors, as mentioned in the Introduction such in overcrowding of schools, lack of infrastructure and the fact that some parents do not apply to schools timeously, that also result in the exclusion of learners from schools. This research, however, focuses only on the admission policies and practices that exclude learners from schools.

The research is dependent on public records and documents only. Certain information is kept at school and district offices and is only made available on request with prior approval. The extent of the problem of exclusionary policies and practices may be more serious than what this thesis reveals, because it is only based on evidence that was found in the public domain. There is, however, information and statistics that is not disclosed to the public such as the disciplinary hearings

pertaining to exclusionary matters, the total number of learners that do not report exclusionary practices and inaccurate totals of teaching space at schools.

1.6 OUTLINE OF STUDY

Chapter 1 is an introduction of the study on access to public schools in the Western Cape. In this chapter, the issue of access to public schools is introduced. Chapter 2 is a literature review of previous research and cases that dealt with the issue of exclusion of learners. To build the framework for the study I approached the study through a legal lens. I compared the exclusionary policies and practices with legal principles and tried to make sense of the motivation for exclusionary practices and policies. Chapter 3 discusses the research design and methodology followed in conducting this research. This qualitative research is mainly based on the analysis of education policy documents and all the documents were published on the internet. The Constitution together with other sources of law and secondary sources were considered. Chapter 4 investigates the school admission policies and admission practices of selected schools to determine whether the schools are acting in conflict with the Constitution. Chapter 5 highlights the conflicting provisions and practices in school policies and provincial policies and unpacks the constitutional right to education. This is a discussion on the state's obligation to enforce socio-economic rights and it is discussed with reference to the landmark case of *Government of the Republic of South Africa and Others v Grootboom and Others*.³⁸ Chapter 6 is a summary of the research findings. Recommendations for future research and possible ways to eradicate exclusionary provisions and practices are provided.

³⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* of 2000 available at <http://www.saflii.org/za/cases/ZACC/2000/14.html> (accessed on 10 April 2019).

CHAPTER 2

ACCESS TO SCHOOLS: THE LEGAL AND SOCIAL LANDSCAPE

2.1 INTRODUCTION

It is becoming a challenge for many parents in the Western Cape to find placement at a suitable school for their child. Parents who are unable to secure placements for their children are faced with either enrolling them at Further Education and Training (hereafter FET) colleges, or at schools further away from home. The alternative to the challenge of finding placement at schools comes at a cost that many parents cannot afford. The distance and cost of travelling to and from school may become a tedious obstacle for some learners. Travelling costs is one of the sacrifices that parents make to secure an education and future for their children. However, in some households, the money spent on travelling may have been needed for the daily meal for a whole family. The conflict between education and food security is only one issue that households face as a result of the challenge of finding placement at nearby schools.

The challenge for learners to find placement at schools is an issue that is highlighted every year by the media. Not only do newspapers report on this issue, but parents also express their frustration about the struggle of securing placement at schools for their children on social media. One such example is reported by Pitt in January 2018 that states that

there are more than 11 000 pupils that are yet to be placed in Western Cape schools and about 11 200 pupils in the Western Cape that are still searching for schools, according to the Western Cape department of education.³⁹

The latest news reports in January, 2018⁴⁰ indicate that in the Western Cape, 1600 learners were not placed in schools in February 2019. Learners are faced with a challenge of finding a

³⁹ Pitt C 'More than 11 0000 pupils yet to be placed in Western Cape schools' News24 23 January 2018 available at <https://www.news24.com/SouthAfrica/News/more-than-11-000-pupils-yet-to-be-placed-in-western-cape-schools-20180123> (accessed on 22 April 2019).

⁴⁰ Chambers D 'Western Cape schools can't cope 'as pupils flood in from other provinces' Times Live 1 January 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-02-01-western-cape-schools-cant-cope-as-pupils-flood-in-from-other-provinces/> (accessed on 12 April 2019).

placement in schools not only within their local area, but also in the surrounding areas outside of their hometowns.⁴¹

Finding a placement at a school that is not in the area where a learner resides may also come with its own safety issues. In certain areas of the Cape Flats, irrespective of your affiliation or lack of affiliation to a gang, some learners are seen by gangsters as part of the gang that controls the area the learner lives in. Some learners are forced to be part of gangs or they choose to voluntarily join them for protection or for an income derived from illegal activities. Learners who become gang members are restricted to certain areas. Their freedom of movement is limited by their real fear of being attacked and killed in other areas. According to the National Institute of Justice

the association may provide physical protection of its members from others. The association may seek to exercise control over a particular geographic location or region, or it may simply defend its perceived interests against rivals.⁴²

Such learners will drop out of schools if they cannot find a school in the area where they reside due to their fear for their lives. Gaining admission to a suitable school is thus an important determining factor for either completing matric or dropping out of school for many learners.

In this chapter, the literature that has been reviewed for purposes of this study will be analysed under three headings namely; inclusive education, exclusive education and then post-1994 moral–legal dilemma.

2.2 INCLUSIVE EDUCATION

Inclusive education refers to the admission of all learners to mainstream schools. In this research mainstream schools are referred to as schools with general subjects, where no specialist intervention is provided from professionals to the needs of special learners

⁴¹ Chambers D ‘Western Cape schools can’t cope ‘as pupils flood in from other provinces ‘Times Live 1 January 2019 available at <https://www.timeslive.co.za/news/south-africa/2019-02-01-western-cape-schools-cant-cope-as-pupils-flood-in-from-other-provinces/> (accessed on 12 April 2019).

⁴² ‘What is a Gang’ National institute of Justice available at <https://www.nij.gov/topics/crime/gangs/pages/definitions.aspx> (accessed on 2 August 2019)

According to the Salamanca Statement and Framework for Action on Special Education, inclusive education means that

Schools should accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions. This should include disabled and gifted children, street and working children, children from remote or nomadic populations, children from linguistic, ethnic or cultural minorities and children from other disadvantaged or marginalised areas or groups.⁴³

This abovementioned article proposes that there should be no differentiation between learners based on any special needs they may have. Currently, this is not how the schooling system in the Western Cape operates. Some learners who are faced with physical and mental challenges are accommodated separately in special needs schools even though they are able to cope in mainstream schools. Street children who are still subject to compulsory schooling are not encouraged to attend schools.⁴⁴ It will also not be possible to place street children without the required documents.⁴⁵ Learners are tested for their language capabilities even though language is a skill that schools must teach.⁴⁶ The tests are especially difficult for learners from other countries who undergo even more rigorous tests on their language capabilities.⁴⁷ Learners from disadvantaged families are forced to pay registration fees and/or application fees that are sometimes unaffordable to them.⁴⁸ Paying lip service to the idea of inclusive education is a disservice to the right to an education of a learner. According to a conceptual paper on the website of United Nations Educational, Scientific and Cultural Organization, inclusive education is

concerned with providing appropriate responses to the broad spectrum of learning needs in formal and non-formal educational settings. Rather than being a marginal theme on how some learners can be integrated in the mainstream education, inclusive education is an approach that looks into how to transform education systems in order to respond to the diversity of learners. It aims to enable both teachers and learners to feel comfortable with

⁴³ *The Salamanca Statement and Framework for Action on Special Needs Education* para 3 available at http://www.unesco.org/education/pdf/SALAMA_E.PDF (accessed on 2 November 2018).

⁴⁴ We see young children that are not over the age of 14 roaming the streets every day.

⁴⁵ Chapter 4 discusses in more detail the various documents that schools require for admission to schools.

⁴⁶ Chapter 4 discusses in more detail the testing of learners that schools administer.

⁴⁷ Testing for English of Non-South African Learners.

⁴⁸ Chapter 4 discusses in more detail the different fees that school charges learners.

diversity and to see it as a challenge and enrichment in the learning environment, rather than a problem.⁴⁹

Learners who are currently in special institutions or schools because of their ‘special needs’ must motivate why they should be accommodated into the mainstream schools. However, all learners should be treated equally and should be accommodated into mainstream schools. If a learner’s needs are so different that it is in their best interest to attend specially adjusted schools, then special schools may be better suited to provide for those needs. Arguably, due to the financial implications placed on schools to accommodate learners with special needs, for example installing special ramps for wheelchairs, learners are, as a result of their special needs are automatically excluded from mainstream schools even though they are academically competent. This practice does not prepare the learners for the reality that they must face after their formal basic schooling. The exclusion may instil in them a need or desire to be isolated from other people. The isolation may prevent them from functioning in the community and having a meaningful life.⁵⁰ Despite these realities, there are attempts aimed at enforcing inclusivity through legislation.⁵¹

There are reasons for barriers to learning, according to the White Paper 6, that need to be addressed before such a model that is proposed by this White Paper 6, can be successful. The teacher’s attitude towards inclusive education must also be taken into account in order for such a model as proposed by the Education White Paper 6 to be accepted in South Africa. It is not only the enforcement of legislation that is important, but it is also an effective implementation by all stakeholders concerned that will lead to the success of inclusive education. Legislation on its own is not sufficient to bring about change.

⁴⁹ *Overcoming Exclusion through Inclusive Approaches in Education Conceptual Paper A CHALLENGE A VISION 2003 7* available at <http://unesdoc.unesco.org/images/0013/001347/134785e.pdf> (accessed on 2 November 2018).

⁵⁰ ‘Promoting the rights of children with disabilities’ available at <http://www.included.org.za/R2ecwdsite/docs/Factsheet%203.pdf> (accessed on 26 January 2019).

⁵¹ *Education White Paper 6 Special Needs Education, Building an Inclusive Education* (2001) Executive summary para 12.

2.2.1 Inclusivity attempts by enforcing legislation

Inclusivity was proposed through White Papers in order to regulate admission to public schools for learners with barriers to learning. The White Paper 6 was a response to

The post-apartheid state of special needs and support services in education and training. Two main findings were that only a small percentage of learners with disabilities were receiving specialised education and support, usually on a racial basis, and that the education system had generally failed to provide services appropriate to the diverse needs of learners. For most learners with disabilities, this meant they were ‘mainstreamed by default’ or that they did not attend school at all. The number of children with disabilities out of school at that time was estimated at 280 000. To address these problems, it was recommended that the system be changed to an inclusive one where all learners can access education and training no matter what their individual *needs are*. This change would permit all children, including children with disabilities, to “develop and extend their potential and participate as equal members of society”.⁵²

The White Paper 6 is therefore an attempt by the legislature to enforce a schooling system that accommodates the needs of differently-abled learners with learning barriers into a mainstream schooling system. The White Paper 6 attempts to provide an avenue to access the necessary services offered to schools. Full-Service/inclusive schools are described by the Department of Basic Education as ‘mainstream education institutions that provide quality education to all learners by supplying the full range of learning needs in an equitable manner’.⁵³ Full-Service schools are better equipped to support learners with specific learning needs. Specialists are allocated to Full-Service schools to work in smaller groups with learners which are more effective, because the child enjoys individual attention.

The Education White Paper 6 lists several possible reasons for barriers to learning such ‘as inappropriate languages or language of teaching and learning, inappropriate policies and legislation and inadequately and inappropriately trained education managers and educators’.⁵⁴

⁵² ‘Promoting the Right to Education for Children with Disabilities’ available at <http://www.included.org.za/R2ecwdsite/docs/Factsheet%203.pdf> (accessed 17 January 2019).

⁵³ DBE ‘Full Service Schools factsheet’ 2010 available at http://www.included.org.za/wp-content/uploads/2018/02/WEB_IESA_EU-Factsheet-03_Full-Service-School.pdf (accessed on 23 April 2019).

⁵⁴ Education White Paper 6 Special Needs Education, Building an Inclusive Education (2001) Executive summary 7 available at <https://wcedonline.westerncape.gov.za/Specialised-ed/documents/WP6.pdf> (accessed on 23 April 2018).

Training of education managers and educators is listed as one of the acknowledged learning needs. It is possible that a lack of adequate training contributes to mismanagement in schools. There are many training workshops offered to schools, but the training may not adequately prepare teachers to deal with the challenges. These training workshops provide teachers and schools with the bare minimum information ultimately leading to a limited skill set. Every year the schools must provide the WCED with a School Improvement Plan (hereafter SIP). The SIP is based on the needs of the school. The school must plan their areas for improvement, development and the management of learning. This development is offered through workshops to teachers by officials and staff of the district offices of the WCED. Many of the WCED employees that offer the training workshop have valuable experience but they themselves may have inadequate legal knowledge and skills to train educators and principals. They are obligated to provide training even though some of them may not be qualified on that subject matter. The requirements for employment of a Chief Education Specialist are for example,

A recognised three-year qualification (REQV 14) which must include appropriate training as an educator. Eight years teaching experience for CES, seven years teaching experience for DCES and six years teaching experience for SES. A valid driving license. Registration with SACE. Computer literacy.⁵⁵

There is no requirement for district officials to have legal qualifications, except for the officials who are employed as labour relations officials. Drafting of certain policies of the schools for example admission policies and financial policies, do require legal training.

The SBG is the body that drafts the admission policies and it is possible that some of the parents are even less skilled or trained than educators and principals. It is possible that members may lack the skills and knowledge to perform this function adequately, their input to the school policies may be minimal and they depend on the principal to guide them.

According to Dick S,

The fact that schools have the proper constituted School Governing Body does not mean that effective and efficient participation of parents is taking place. The parental governors are not contesting the space and power to participate due to their literacy levels and capacity to govern. Low social capital has undesired effects on the parental participation in school activities. The current capacity building approach is not yielding the expected

⁵⁵ Eastern Cape Education Department Vacancies available <https://www.eccurriculum.co.za/Bulletins/2016%20Curriculum%20Vacancies%20Sept%202016.pdf> (accessed on 2 August 2019)

results as required in terms of SASA. The incapacity of parent governors to govern the schools leaves the professional staff without an alternative but to excessively assist parents to govern public schools. Although the parent governors have the power to govern, they are unable to exploit it effectively and efficiently.⁵⁶

It is thus crucial that the SGB have the necessary skills and training to govern the school and its learners. Without proper training, they stand the risk of making decisions that could be disadvantageous to the well-being and education of the learners and they may exclude groups of learners. This is contrary to the aim of the White Paper 6. Inclusivity was promoted to include special needs learners based on their physical barriers and learning needs, but the evidence indicates a different reality.⁵⁷

The Education White Paper 6 makes provision for learners with physical and mental challenges. This policy aims to include special needs learners in mainstream schools and not at separate institutions.

Venter and Kgori identified the conflicting provisions in school admission policies on inequality based on the case of the *Federation of Governing Bodies for South African Schools v MEC for Education*.⁵⁸ In this case, the Constitutional Court held that

in terms of section 29 of the Constitution of the Republic of South Africa, 1996, access to basic education is a fundamentally important right – not only does it ensure that children in South Africa can one day take their places as informed citizens of the country, but it also ensures the growth and development of the country as a whole.

In addition, it is also important for the government to facilitate community participation in the management of public schools through its elected school governing bodies. However, when the admission policies of the government and school governing bodies collide, it raises difficult questions. To what extent may school governing bodies discriminate against prospective learners in the admission process? Furthermore, where does it leave school governing bodies with regard to their freedom to determine admission policies for their schools if they may not do so?⁵⁹

⁵⁶ Examining parental involvement in governance at primary schools: Case study of three township primary schools in the Western Cape (Master of Public Administration thesis, University of Western Cape, 2016) 55 available at https://etd.uwc.ac.za/xmlui/bitstream/handle/11394/5566/Dick_sl_mpa_ems_2017.pdf?sequence=1&isAllowed=y (accessed 1 August 2019).

⁵⁷ Education White Paper 6 Special Needs Education, Building an Inclusive Education (2001) Executive summary pg. 9 available at <https://wcedonline.westerncape.gov.za/Specialised-ed/documents/WP6.pdf> (accessed on 23 April 2018).

⁵⁸ *Federation of Governing Bodies for South African Schools v MEC for Education*, Gauteng (2016 4 SA 546 (CC)).

⁵⁹ Venter R and Kgori D, *Journal of South African Law / 2017 available at Tydskrif vir die Suid-Afrikaanse Reg, Volume 2017, Number 3*, Aug 2017, 662 - 679 2017.

The SGB must therefore only ratify school admission policies after there has been consultation with the parents. Parents perhaps believe that they cannot challenge the school policies once it has been ratified. It is possible that parents do not know how to follow appeal procedures when their children are denied access to schools.

2.2.2 Separate schools for learners with barriers

Padhi, an Indian scholar, looked at overcoming exclusion and marginalisation in education through inclusive approaches. After independence, the Indian national leaders formulated special provisions on education to enhance the socio-economic status of the most deprived social sections of their population. They were known as aboriginal or Scheduled Tribes. Padhi states that

Current strategies and programmes have largely been insufficient or inappropriate with regard to needs of children and youth who are vulnerable to marginalization and exclusion. It is recognised that current strategies and programmes have largely been insufficient or inappropriate with regard to needs of children and youth who are vulnerable to marginalisation and exclusion. Where programmes targeting various marginalized and excluded groups do exist, they have functioned outside the mainstream – special programmes, specialized institutions, and specialist educators. Notwithstanding the best intentions, too often the result has been exclusion: ‘second-rate’ educational opportunities that do not guarantee the possibility to continue studies, or differentiation becoming a form of discrimination, leaving children with various needs outside the mainstream of school life and later, as adults, outside community social and cultural life in general.⁶⁰

This abovementioned scenario shows similarity to our South African landscape where children with special educational and physical needs are accommodated separately from mainstream schools. They function in separate schools outside the mainstream with no real expectation that they will continue their educational growth beyond compulsory school attendance age. Special needs learners are taught skills such as landscaping and hairdressing while in mainstream schools learners are taught subjects such as Business Economics and Accounting. Learners at mainstream schools are taught substantive subjects which equip them with knowledge on how to start their own businesses. Special skills schools, on the other hand, prepare learners on how to

⁶⁰ *Overcoming Exclusion through Inclusive Approaches in Education Conceptual Paper A CHALLENGE A VISION* 2003 available at <http://unesdoc.unesco.org/images/0013/001347/134785e.pdf> (accessed on 2 November 2018).

be employees of others which could create an inferiority complex amongst learners. The ultimate aim is for these learners to take up their places as meaningful contributors to society, but these special programmes do not guarantee continued studies or an independent life.

Kern's study investigates the attitudes of teachers towards the inclusion of children with special educational needs into the mainstream after they had been taught in an inclusive education system for a year.⁶¹ She found that teachers in the study felt competent regarding their knowledge of and ability to teach in an inclusive education model that includes learners with physical and mental barriers.⁶² The test results of the study indicated that their attitudes were significantly positive towards inclusive education. The two groups did not show a significant statistical difference.⁶³ The findings of Kern's research, therefore, indicate that teachers are not opposed to teaching learners with barriers provided that the necessary resources are available.

In spite of literature and research that promotes inclusivity, there was no substantive research that could identify ways of ensuring that learners are all treated equally. Learners are still excluded even with the protection they are afforded through legislation. 'Inclusion' per se does not mean equal treatment.

Apart from the problematic inclusionary measures discussed above, there are also certain practices and policies which result in the exclusion of certain learners from some schools. For example, primary school learners who function on an average level in their grade may be excluded from applying for admission to certain mainstream high schools. At Spine Road High and Mondale High in Mitchell's Plain, for example, learners are required to take a competency test for Mathematics and English Language before they are admitted to Grade Eight. The schools

⁶¹ Kern E 'Survey of Teacher Attitude Regarding Inclusive Education within an Urban School District' (unpublished PhD dissertation, Philadelphia College of Osteopathic Medicine available at https://digitalcommons.pcom.edu/cgi/viewcontent.cgi?article=1069&context=psychology_dissertations (accessed on 23 April 2019).

⁶² Kern E 'Survey of Teacher Attitude Regarding Inclusive Education within an Urban School District' (unpublished PhD dissertation, Philadelphia College of Osteopathic Medicine available at https://digitalcommons.pcom.edu/cgi/viewcontent.cgi?article=1069&context=psychology_dissertations (accessed on 23 April 2019).

⁶³ Kern E 'Survey of Teacher Attitude Regarding Inclusive Education within an Urban School District' (unpublished PhD dissertation, Philadelphia College of Osteopathic Medicine available at https://digitalcommons.pcom.edu/cgi/viewcontent.cgi?article=1069&context=psychology_dissertations (accessed on 23 April 2019).

only select the best candidates based on their academic performance.⁶⁴ The selection is done on academic standards regardless of a learner showing sufficient proof that they will be able to cope at the institution. This practice gives the impression that certain schools exclude learners from admission who are performing on an average and below-average level as they are deemed to be academically weak and may present challenges at a later stage. Subsequently, such learners are at risk of failing their matric examination. Should they fail; the school will lose their incentive from the Department of Education. The exclusion of learners due to the risk that they pose to school's chances of receiving an incentive from the government based on their matric pass rate will be discussed in greater detail at a later stage in this research.⁶⁵

2.3 EXCLUSION OF LEARNERS

This study will only deal with the exclusion of learners at primary schools and secondary schools. With reference to the secondary schools, the focus on exclusion will be based on the testing of learners at specialty schools such as focus schools.

The WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools puts focus schools in the position where they can choose the learners they want to admit by a selection criterion. According to this policy, the exclusion is justified. The policy states that

Only learners with specific aptitudes will be admitted to attend a focus school. This implies that even if such a school is the nearest school, not every learner will be entitled to education at an agricultural, Dinaledi or focus school. Also, not every learner will be entitled to equal access to a focus school without meeting the subject ability requirements to benefit from such schools. There could thus be fair discrimination in terms of admissions to focus schools based on aptitude. Learners may be requested by the Head of Education or delegate to undergo a competence test to assist a placement decision.⁶⁶

While the *WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools* allows for these admission tests and calls it fair discrimination to tests learners, it is in conflict with the SASA that prohibits testing of learners.⁶⁷ The WCED decided

⁶⁴ Chapter 4.

⁶⁵ Chapter 4.

⁶⁶ WCED *Policy for the Management of admission and registration of learners at ordinary public schools* available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 10 April 2019).

⁶⁷ S 5(1) of the South African Schools Act 84 of 1996.

that this is fair discrimination and the validity of this opinion was never contested at any forum or court of law. The WCED's Admission Policy also does not make provision for testing of learners in schools unless they are focus schools. It is, however, evident from the school admission policies of schools that do not have the status of focus schools that testing and screening do take place. The issue of testing and screening will be analysed at a later stage in this research.⁶⁸

2.3.1 Testing of learners as an admission criteria in focus schools and non-focus schools

The objective of focus schools is to offer specialised learning to learners of disadvantaged groups. Whether this initiative is successful is questionable. The fact that this initiative excludes so as to cater for learners that are regarded as better equipped to deal with the demands of specialised schools, is also questionable. Van der Westhuizen and Barlow concluded that testing of learners before the entrance to a special programme, is not a valid admission criterion.⁶⁹ Jones, challenged the assumption that Mathematics scores in the final year of schooling can be used as a criterion for admission to study at universities in South Africa.⁷⁰ Higher education institutions show low success rate scores because of the abstract nature and content of the programming courses. Jones further agrees that pre-university education is also inadequate to prepare students for the required cognitive skills in these programming courses.⁷¹

Van der Westhuizen and Barlow tested a single independent variable, 'performance in high school mathematics', and its relationship to performance in two computer-programming

⁶⁸ Chapter 4.

⁶⁹ Maharaj M. University of KwazuluNatal *An Investigation into the Performance of First Year, First Entry Students in Information Systems and Technology in Relation to their Matriculation Results* available at https://www.researchgate.net/publication/237760113_An_Investigation_into_the_Performance_of_First_Year_First_Entry_Students_in_Information_Systems_and_Technology_in_Relation_to_their_Matriculation_Results (accessed on 12 April 2019).

⁷⁰ Van der Westhuizen D & Barlow- Jones, G (2015) . High school mathematics marks as an admission criterion for entry into programming courses at a South African university. *The Independant Journal of Teaching and Learning*, . 37-58. available at <http://iiespace.iie.ac.za/bitstream/handle/11622/54/High%20School%20Mathemantics.pdf?sequence=1&isAllowed=y> (accessed on 2 November 2018).

⁷¹ Van der Westhuizen D & Barlow- Jones, G (2015) . High school mathematics marks as an admission criterion for entry into programming courses at a South African university. *The Independant Journal of Teaching and Learning*, 37-58. available at <http://iiespace.iie.ac.za/bitstream/handle/11622/54/High%20School%20Mathemantics.pdf?sequence=1&isAllowed=y> (accessed on 2 November 2018).

courses.⁷² The marks of the students who did Mathematics and students who did Mathematics Literacy were correlated after they did a programming course.⁷³ Their study concluded that the mark achieved for school Mathematics in high school could not be considered as a valid admission criterion for programming courses in the South African context.⁷⁴

According to Machucho, there are various factors that influence test scores of the learners e.g. the overall intelligence of learners, familiarity with the testing materials, the ability to focus, the state of mind, socioeconomic factors and other factors.⁷⁵

It is possible to argue that academically good students, due to circumstances beyond their control, may perform poorly in admission tests. The reason for their poor performance may be due to the emotional state when they write admission tests. They may make careless mistakes, or write the test without any preparation or assistance from educators. Some of the content of the admission tests may also include content that was not covered by the educator yet.

According to Maharaj

As has been shown in other studies, Mathematics is not a good predictor of success in IS&T at University, we have furthermore shown that Mathematics is not even a good predictor of the IS&T scores for any students irrespective of race group. For the African race group, Mathematics may not be used to draw any conclusions whatsoever. In fact the requirement of Mathematics as a matriculation subject for this race group is questionable. Clearly the total absence of any correlation between the matriculation Mathematics

⁷² Van der Westhuizen D & Barlow- Jones, G (2015) . High school mathematics marks as an admission criterion for entry into programming courses at a South African university. *The Independent Journal of Teaching and Learning*, 37-58.available at <http://iiespace.iie.ac.za/bitstream/handle/11622/54/High%20School%20Mathemantics.pdf?sequence=1&isAllowed=y> (accessed on 2 November 2018).

⁷³ Van der Westhuizen D & Barlow- Jones, G (2015) . High school mathematics marks as an admission criterion for entry into programming courses at a South African university. *The Independent Journal of Teaching and Learning*, p. 37-58.available at <http://iiespace.iie.ac.za/bitstream/handle/11622/54/High%20School%20Mathemantics.pdf?sequence=1&isAllowed=y> (accessed on 2 November 2018).

⁷⁴ Van der Westhuizen D & Barlow- Jones, G (2015) . High school mathematics marks as an admission criterion for entry into programming courses at a South African university. *The Independent Journal of Teaching and Learning*. 37-58.available at <http://iiespace.iie.ac.za/bitstream/handle/11622/54/High%20School%20Mathemantics.pdf?sequence=1&isAllowed=y> (accessed on 2 November 2018).

⁷⁵ Factors That Affect Students' Test Scores Machucho M *Owlcation* available at <https://owlcation.com/academia/Factors-That-Affect-Students-Test-Scores> (accessed on 2 August 2019)

results and the IS&T results may indicate the need for directed and specific interventions for African students.⁷⁶

Even though this study was done at a university, it is also relevant to high schools. This study confirms that the criteria for admission to schools should not be based solely on a learner's performance, which is often linked to a social class. According to Spaul, 'the poor quality of education that learners receive helps drive an intergenerational cycle of poverty where children inherit the social standing of their parents or caregivers, irrespective of their own abilities or effort'.⁷⁷ The list of focus schools in the Western Cape indicates that schools are located in areas predominately attended by Black and Coloured learners that come from historically disadvantaged races. The testing of high school learners can thus be linked to specific races (see Appendix B).⁷⁸

There are more than 70 focus schools in the Western Cape (see Appendix B). Admission to such schools is guided by grading criteria and competency of skills that will aid the workforce and the needs of the country. The issues of the different subject choices in focus schools and how such schools are infringing on the rights of other learners which results in the exclusion of learners that has a right to basic education. The difference of subjects in focus schools as opposed to other mainstream schools has a negative effect on the education of learners. The exclusion of certain subjects could be argued as being an infringement of a learner's right to education. To fully understand this, the exclusion should be understood from a rights perspective. This will be discussed next.

⁷⁶ Maharaj M .University of KwazuluNatal *An Investigation into the Performance of First Year, First Entry Students in Information Systems and Technology in Relation to their Matriculation Results* available at https://www.researchgate.net/publication/237760113_An_Investigation_into_the_Performance_of_First_Year_First_Entry_Students_in_Information_Systems_and_Technology_in_Relation_to_their_Matriculation_Results (accessed on 12 April 2019).

⁷⁷ Schooling in South Africa: How low-quality education becomes a poverty trap Spaul N, University of Stellenbosch available at http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2015/Child_Gauge_2015-Schooling.pdf (accessed on 8August 2019) .

⁷⁸ WCED Minute DOD/0071/2007 Focus schools: providing access to excellence available at https://wcedonline.westerncape.gov.za/circulars/minutes07/lgsp.html#edcd71.pdf*e_inf_top.html#edcd71_07.html (accessed on 02 November 2018).

2.3.2 Subject choices at focus schools and non-focus schools

When learners reach Grade Ten, they are required to make a selection of subject choices to carry them through to matric. Some schools prohibit a learner from continuing to study certain subjects such as Mathematics if they did not attain a certain average for that subject the previous year. They may then be offered subjects that include Mathematics Literacy and subject streams that are also offered at schools that are non-focus schools.⁷⁹

The objective of the focus school seems futile in the light of learners that end up with subject choices that are the same as non-focus schools. These learners were tested before they were admitted to Focus schools. They were the top-performing learners and were supposed to get specialised teaching and coaching, and from that excel in their schooling career. However, the same learners are ending up with the same results and subject choices as learners from non-focus schools.⁸⁰ The idea of testing learners for admission to focus schools is thus not supported by the matric results of focus schools when learners do the same subjects as other non-focus schools. Therefore, there can be no reason for excluding learners from focus schools based on their academic performance that is based on a test that the school administers when they are in Grade Seven.⁸¹

Focus schools may have a better matric pass rate than other schools,⁸² but this is because focus schools only select learners who do not show signs that they may need support with their education. The fact that learners score well in their admission tests serves as an indication to schools that such learners will not require additional support from the school. These learners then pass their matric examination because they were recruited by the schools based on their academic abilities. The fact that some of these learners fail their matric examination must be questioned as it indicates that challenges were presented during their academic years at the focus

⁷⁹ My son is currently opting to do exactly the same subjects as his sister that attended a focus school but he is not in a focus school.

⁸⁰ Learners are tested for Mathematics at Dinaleni schools. They are schools that specialises in Mathematics and Sciences. Learners start at grade 8 by doing pure Mathematics. In Matric, however, many learners do the same subjects as other learners at non-focus schools which include Mathematics Literacy.

⁸¹ My daughter was tested for admission at a Dinaleni school. She was accepted based on her results. In grade 11, however, she changed to Mathematics Literacy because she was struggling with Mathematics.

⁸² WCED Minute 0069/2004 Establishing the capacity of a public ordinary school in the Western Cape available at https://wcedonline.westerncape.gov.za/circulars/2004/e69_04.html (accessed on 23 April 2019).

schools. Spine Road High school is a focus school in Mitchells Plain but did not obtain a 100% matric pass rate in 2018.⁸³

2.3.3 Focus schools infringing on other learner's right to basic education

The Constitution guarantees that 'everyone has the right to basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible'.⁸⁴

The SASA is the statute that gives effect to the protection afforded by the constitutional right to basic education. The SASA, therefore, enforces education by providing that school attendance is compulsory until learners reach the age of fifteen or the ninth grade, whichever occurs first.⁸⁵

Although the legal and constitutional provisions guarantee a basic right to education, South African learners are facing the challenge to find placement in schools. There are simply not enough schools to accommodate all learners. Schools were originally built to host about twenty-five learners in a class. The actual classroom space now has to accommodate thirty-nine learners or more.⁸⁶ In earlier years, when there was no shortage of schools in the Western Cape and schools recruited all learners with a valid school report and birth certificate. If the total number of learners at the school dropped, it had an effect on the educator posts which then became redundant. It was seldom that a learner was turned away because of a lack of space. With the growing demand for more schools, learners are now faced with the challenge to find placement in other schools. It is therefore not justifiable to venture into the experimenting of focus schools and exclude learners based on aptitudes. Their right to basic education should take preference over creating focus schools that cater for a minority group of learners who do not have any right to specialised education. All learners who are excluded from schools, because of the lack of space must first be accommodated at schools before the state can experiment with initiatives such as focus schools.

⁸³ Parker B 'These are the government schools that got a 100% matric pass rate in 2018'! Parent 24 5 February 2019 <https://www.parent24.com/Learn/Matric-past-exam-papers/these-schools-got-a-100-matric-pass-rate-in-2018-and-we-couldnt-be-prouder-20190108> (accessed on 10 April 2019).

⁸⁴ S 29(1) of the Constitution of the Republic of South Africa, 1996.

⁸⁵ S 2 (3) of the SASA 84 of 1996.

⁸⁶ In the last 10 years of teaching I always had 38 learners or more in my class. This year I have a total of 40 learners in my class.

According to the research study by Larey,

The educators at Merriman High observed that most of the 400 focus school learners that attended the school had not been trained earlier in their lives in any of the focus school subjects. Many of them needed extra tuition, which required extra time. They also did not perform well in academic subjects. Given the legacies and challenges that learners from historically disadvantaged communities daily faced, educators noted that learners thus needed even more attention than at mainstream schools.⁸⁷

If these learners needed more attention than at mainstream schools, then why should we even venture on initiatives such as focus schools? These are the same learners that were tested to recruit the best learners. Although these learners gained entrance to these schools based on their excellent academic performance, their performance deteriorates to such a standard that they often switch their subjects after Grade Ten.⁸⁸ The reason for this is not clear, but they are often forced to do Mathematics Literacy in order to pass their grades. All learners then should be afforded the same time and effort from educators.

Kolver stated that

there were 298 621 candidates who wrote mathematics in the 2008 NSC examinations, a number that is unprecedented in the history of the country. Of all the candidates who wrote mathematics, 136 503 passed the examination. Of the 53 469 learners in Dinaledi schools who wrote the mathematics examinations, 30 786, or 57, 5%, passed. However, 22 683 learners in Dinaledi schools failed mathematics, which makes up 14% of the total number of learners (162 168) who failed in the subject.⁸⁹

This should also be an indication that learners who possess the aptitude for focus school subjects, still underperform in other subjects. They need extra tuition and support with these subjects. The same time and effort should be given to learners who are excluded from focus schools. Their needs to basic education should be met first. If other children are not even placed in a school, then learners in focus schools should not be granted the privilege of specialised education that

⁸⁷ Larey, P 'Focus Schools and Vocational Education in the Western Cape' unpublished Med thesis, University of Stellenbosch, (2012) 59 available at file:///C:/Users/B.Isaacs/AppData/Local/Microsoft/Windows/INetCache/IE/81514P4R/larey_focus_2012.pdf (accessed on 23 April 2019).

⁸⁸ Some of my former learners and my daughter opted to switch to Mathematics Literacy, because they were certain that they would fail Mathematics. The extra time they spent on extra tutoring affected the time they could spend on their other subjects. They took a risk to fail Mathematics as well as the other subjects they neglected. This would have the result of repeating a grade if they did not meet the pass requirements.

⁸⁹ Kolver L, 'Dinaledi 'Schools initiative boosts maths, science pass rates' Engineering News 2009 available at https://www.engineeringnews.co.za/article/dinaledi-schools-initiative-boosts-maths-science-pass-rates-2009-08-14/rep_id:4136 (accessed on 23 April 2019).

requires extra time, teachers and budget allowances to fund these specialised education programmes. The excluded learners could possibly perform equally well with the extra support in focus school subjects if they were allowed admission to these schools. This is an indication that admission tests are therefore unreliable and futile.⁹⁰

2.4 POST-1994, MORAL-LEGAL DILEMMA

After 1994, the transition to democracy signified opportunities to address past injustices under Apartheid. Schools were now governed by provincial departments and not according to segregated racial groups. Equality was legally required and structures were put in place to eradicate these past injustices. The structures were aimed at compensating for past injustices through funding to historically disadvantaged schools and providing specialised schools. The aim was to improve the knowledge and skills in fields of study that the state needs for the advancement of the economy of the country.

2.4.1 Funding for schools

After 1994, schools were open to all learners regardless of race. Not all learners could however enter the schools of their choice due to financial constraints that prevented them from travelling and paying school fees. The fact that schools were now open to all learners regardless of race, did not guarantee equality in schools as schools were historically not equally equipped with the same resources. The economic inequalities stem from the Apartheid-era when there was a differentiation in funding for different schools according to race. The schools for Black learners were thus not able to acquire the same resources as for White learners. The parents of learners also came from a disadvantaged socio economic background and could not aid in the funding of schools. These resources that previously advantaged schools acquired, was enjoyed by generations of a privileged minority group.

The lack of money can be a barrier to schooling in South Africa where the majority of children live in poverty and therefore the quintile system was part of the National Norms and Standards

⁹⁰ Discussed in Chapter 4.

for School funding introduced in 1998 with the aim to improve equity in education.⁹¹ Schools are awarded funding that is based on their status. The status of schools is separated into quintiles ranging from one to five. Schools ranking in quintile one receive more funding per learner than schools ranked in quintile five. The quintile to which a school was assigned was based on the rates of income, illiteracy and unemployment within the school’s catchment area. Every year this amount per learner is adapted to keep up with inflation and the needs of schools.⁹² This is to accommodate for the disparities in the income of schools. The following table indicates the amounts per learner that schools will receive until 2020 for funding according to the various quintiles that schools are placed. (See Table 1)

Table 1: National table of targets for the school allocation (2018 – 2020)⁹³

	2018*	2019*	2020*
<i>NQ1</i>	<i>R 1,316</i>	<i>R1,390</i>	<i>R1,468</i>
<i>NQ2</i>	<i>R 1,316</i>	<i>R1,390</i>	<i>R1,468</i>
<i>NQ3</i>	<i>R 1,316</i>	<i>R1,390</i>	<i>R1,468</i>
<i>NQ4</i>	<i>R 660</i>	<i>R697</i>	<i>R736</i>
<i>NQ5</i>	<i>R 228</i>	<i>R241</i>	<i>R254</i>
<i>No fee threshold</i>	<i>R 1,316</i>	<i>R1,390</i>	<i>R1,468</i>
<i>Small schools: National fixed amount</i>	<i>R 30,490</i>	<i>R32,197</i>	<i>R34,000</i>

⁹¹ Collingridge L ‘School quintile system to change’? Corruption Watch 6 November 2013 available <https://www.corruptionwatch.org.za/schools-quintile-system-to-change/> (accessed 12 December 2018).

⁹² South African Schools Act 84 of 1996 Amended National Norms and Standards for School funding.

⁹³ WCED circular 0041/22006 Section 21 Schools: Norms and Standards Funding for Schools Grades 1–12 — Financial Allocation for the 2017/18 Financial Year available at https://wcedonline.westerncape.gov.za/circulars/circulars16/e41_16.html (accessed on 15 May 2019).

The inquiry that should be tended to is whether these amounts that are dispensed per school will at any point place schools in an equivalent position as schools that have generational wealth in assets. If this is not achieved through the allocation of funds according to the quintile scale, justice can only be achieved by the equal distribution of resources.

Schools often experience a shortage of funding and principals are opting to enforce payment of school fees in order to supplement this income of the school. The financial allocation that the schools receive from the state also comes with clear prescriptive measures as to what the funding may be allocated for. The payment of staff for services, loans or advance of salaries is prohibited and principals and the school governing bodies tend to act in conflict with these provisions.⁹⁴ The schools are in great need of more state funding.

A few cases of misconduct were brought to the Education Labour Relations Council against principals who forced learners to pay school fees. In these cases, the learners were eligible to be exempted from school fees but their parents and guardians were coerced to sign agreements to pay school fees in order for the learners to be gain admission to schools.⁹⁵

It is likely that the abovementioned cases will pioneer other cases with regard to school admission policies. There is limited research on this issue. The research was conducted on the exclusion of learners based on other grounds, but there is very little research that was conducted on the exclusionary provisions in school policies. In most instances, the victims who suffer from these infringements on their constitutional rights are either from disadvantaged backgrounds and they cannot afford to bring the matter to the court or they might not be aware of how a policy is infringing on their rights.

⁹⁴ WCED Circular 0023/2017 Non-Section 21 Schools: Norms and Standards Funding for Schools Grade 1-12 – Financial Allocation available at https://wcedonline.westerncape.gov.za/circulars/circulars17/e32_17.html (accessed on 10 April 2019).

⁹⁵ *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 06 November 2018) I will discuss this issue in more detail under Chapter 4.

2.4.2 Establishment of Focus schools

The objective for creating focus schools were with the best of intentions, however, the needs of a specific minority group who performed better in an admission test, should not take preference over another group that function on a normal level or below-average level.

The establishment of specialised focus schools after 1994 is not in line with the realisation of the duty that is placed by the Constitution on the state to provide access to basic education, if the need for schools to deliver basic education is not yet met.

According to the article, *Shifts in education policy* by ZENEZ Foundation provides some insight

The Dinaledi Schools Programme, launched in 2001, was an attempt at increasing performance of historically disadvantaged learners in Senior Certificate mathematics and physical science in a selected number of schools. The project had mixed results and only about one-third of Dinaledi schools increased the number of learners that passed higher grade mathematics and science.⁹⁶

These specialised schools also need special resources to teach subjects such as special computer programmes, instruments, sports equipment and technical equipment, which are not provided to them. They become dependent on funding of corporate businesses to provide the resources that the state fails to provide.

Schools in the same quintile are awarded the same allocation per learner per year. There is no extra allocation for specialised schools to purchase extra resources. Schools try to achieve a high matric pass rate. The desire to do so may be bolstered by certain incentives that they receive for such achievements. Schools receive awards as well as monetary incentives for learners.⁹⁷ Every year the Department of Education announces the categories for awards and the schools who are awarded these certificates.⁹⁸ Learners who obtain average marks and below-average and who poses a risk to a school's chances of securing such incentives may, therefore, be targeted for

⁹⁶ Zenex Foundation 'Shifts in education policy (1994 - 2012)' by ZENEZ Foundation available at <https://www.zenexfoundation.org.za/newsroom/news/item/117-shifts-in-education-policy-1994-> (accessed 23 April).

⁹⁷ Western Cape Education Department National Senior Certificate Examinations 2017, Awards to Learners available at <https://www.westerncape.gov.za/news/western-cape-2017-national-senior-certificate-awards> (accessed on 10 April 2019).

⁹⁸ Western Cape Education Department National Senior Certificate Examinations 2017, Awards to Learners available at <https://www.westerncape.gov.za/news/western-cape-2017-national-senior-certificate-awards> (accessed on 10 April 2019).

exclusion. Such learners may be denied admission to schools based on the admission tests required by certain schools and they are forced to join the workforce at an early age.

Some schools were, however, looking at alternative ways of increasing the pass rates without attempting any new approaches, which may require greater effort, time or resources from schools themselves. Given the workload of teachers, it is not surprising that schools take on this approach. One such method was by giving preference to the learners with higher test results. This presents a moral dilemma where we wish to have better results in the national senior certificate examination, but with the least of effort and resources possible. Schools are required to have an acceptable pass rate irrespective of their circumstances and history. Schools need money for resources and the source of the income must derive from the parents in the form of school fees or from the Education Department in the form of incentives and annual allocation for norms and standards. As shown in Chapter 4, the consequence is, however, that learners are excluded from schools based on their test results, affordability of fees and other factors.

2.4.3 School admission and authority

The admission of learners to schools is regulated by different statutory provisions. I will discuss the provisions as provided by; the Constitution, Section 5(2) of SASA, the Western Cape Education Department Policy for the Management of Admission and Registration of Learners at ordinary Schools and the Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter PEPUDA).

First, the Constitution is the supreme law of our country. Section 9 of the Constitution guarantees that, ‘everyone is equal before the law and has the right to equal protection and benefit of the law’.⁹⁹ Equality, as guaranteed by the Constitution, includes the full and equal enjoyment of all rights and freedoms. The testing of learner’s abilities before they are allowed access to schools is proof that they are not treated equally. They are forced to find schools that are further away and thus have to pay transport expenses that most of them cannot afford to pay.

Secondly, there is the South African Schools Act (SASA) that governs all schools. In terms of Section 5(2) of the SASA,

⁹⁹ The Constitution.

the governing body of a public school may not administer any test relating to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such a test.¹⁰⁰

This rule was always applied nationally at all schools. Although the Act does not explain the reason for this provision, it could be argued that the purpose is based on affording all learners equal treatment regardless of their cognitive abilities. It also gives effect to the constitutional imperative that ‘everyone has a right to a basic education’.¹⁰¹

Thirdly, there is the policy of the Western Cape Education Department. According to a media release of the WCED, focus schools are high schools that specialise in certain learning areas.¹⁰² These schools were initiated with the objective to offer quality education to ensure excellence in the nurturing and comprehensive training of learners with exceptional talent, interest or aptitude.¹⁰³

The testing is only concluded at focus schools in all areas of the Western Cape Province when they apply for admission to the High schools when the learners are Grade Seven. The testing of learners gives them an advantage over other learners who do not have the same capabilities in certain areas for example Mathematics. If learners score average or below average, they are excluded from admission to these schools.

The Western Cape Education Department Policy for the Management of Admission and Registration of Learners at Ordinary Schools conflicts with the SASA. Policies must be in line with the national legislation. The abovementioned policy of the WCED states that

only learners with specific aptitudes will be allowed to attend an agricultural, Dinaledi or focus school. Thus, not every learner will be entitled to education at an agricultural, Dinaledi or focus school, even if such a school is the nearest school; nor will every learner be entitled to equal access to a focus school without meeting the subject ability

¹⁰⁰ S5 (2) of the South African School Act 84, 1996.

¹⁰¹ S2 of the Constitution.

¹⁰² WCED Media Release Arts and Culture Focus Schools and Music Schools. 23 February 2007 available at https://wcedonline.westerncape.gov.za/comms/press/2007/21_arts&cul.html (accessed on 6 April 2019).

¹⁰³ WCED Media release Arts and Culture Focus schools and Music schools. 23 February 2007 available at https://wcedonline.westerncape.gov.za/comms/press/2007/21_arts&cul.html (accessed on 6 April 2019).

requirements to benefit from such access. There could thus be fair discrimination in terms of admissions to focus schools based on aptitude.¹⁰⁴

The WCED Policy for the Management of Admission and Registration of Learners at ordinary Schools appears to be in conflict with the SASA. The SASA prohibits testing of learners for the admission of a learner to a public school. On the other hand, the Policy for the Management of Admission and Registration of Learners at ordinary Schools maintains that not every learner will be entitled to equal access to an agricultural focus school without meeting the subject ability requirements to benefit from such access. The WCED acknowledges in its policy that the testing of learners is discriminatory but it presupposes that it is 'fair' discrimination.¹⁰⁵ As I will argue in Chapter 5, this discrimination is unfair, because many children's right to basic education is denied. They are forced to leave school when they are not successful in getting admission to high schools and their parents or guardians cannot afford to enrol them at FET colleges. The differentiation is likely to affect the dignity of learners concerned. Instead of introducing discriminatory measures, the state should introduce ways of supporting learners who are struggling academically. The WCED should only consider the operation of focus schools once it can accommodate all learners at schools that have the right to a basic education. Specialised schools such as focus schools are not a basic right or a necessity now.

Lastly, the PEPUDA prohibits discrimination on the grounds of gender, race, ethnic or social origin, colour, culture, and language, (amongst others) and is aimed at giving effect to section 9 of the Constitution. It also prohibits discrimination that causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner.¹⁰⁶ Learners who are excluded based on their abilities do not have equal enjoyment of their rights. Their right to basic education is compromised to accommodate learners who excel in certain areas of education.

¹⁰⁴ Western Cape Education Department Policy for the Management of Admission and Registration of Learners at Ordinary Schools available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 2019).

¹⁰⁵ Western Cape Education Department Policy for the Management of Admission and Registration of Learners at Ordinary Schools available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 2019).

¹⁰⁶ S 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 available at <http://www.justice.gov.za/legislation/acts/2000-004.pdf> (accessed on 23 April 2019).

When discussing the education of learners it must be acknowledged that there is a shortage of schools to accommodate all learners in the Western Cape and that the exploration of innovative education models is therefore necessary. We must also acknowledge that such explorations may pose certain risks to the future of learners. Based on the above mentioned it was reported that in January 2018 there were about 11 000 pupils in the Western Cape who were still searching for schools according to the Western Cape Department of Education. Existing schools ought not to unfairly exclude learners as this only exacerbate the problem. Furthermore, exclusion based on the learner's lack of aptitude and skills arguably conflict with the right to basic education. As long as the WCED cannot provide schools to learners who are required by law to attend school, denying the learners admission to certain schools because they do not have the desired aptitudes or skills, providing focus schools will be in conflict with their constitutional right to basic education.

Whether the approach is to include all learners or allow learners to be excluded, the final decision must be based on what is prescribed by law, policies and the Constitution of South Africa. The practices and internal policies of schools must be subject to legislation to give legal certainty. Except for a recent court case of the *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*¹⁰⁷ with regards to the authority of the admission policy of school governing bodies, this phenomenon of final authority on admission was however seldom tested before, in a court of law. In the aforementioned case, the court found that the final decision of admission to a school lies with the Head of Education.¹⁰⁸ Schools do, however, decide on their own criteria as to when they declare a school is full. Some schools will quote formulas and room space to justify why they declare their school to be full.¹⁰⁹ This will issue will be discussed in Chapter 4.

In the abovementioned case, the respondents relied on the Admission Policy for Ordinary Public Schools. The Head of Department must determine a process of registration for admission to public schools. This process must enable the admission of learners to take place in a timely and

¹⁰⁷ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*, CCT 135/12 of 2013 available at <http://www.saflii.org/za/cases/ZACC/2013/34.html> (accessed on 23 April 2019).

¹⁰⁸ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*, CCT 135/12 of 2013 available at <http://www.saflii.org/za/cases/ZACC/2013/34.html> (accessed on 23 April 2019).

¹⁰⁹ Will be discussed in greater detail in Chapter 4.

efficient manner in the preceding school year. The Head of Department may delegate this function to school officials of the Department. The admission policy of a public school is determined by the governing body of the school in terms of section 5(5) the SASA. The policy must be consistent with the Constitution, the SASA and applicable provincial law.

The Constitution is placing a duty on the state to provide basic education to all, which subsequently places an obligation on the state to provide sufficient schools to learners to provide them with basic education. This legal obligation of the state is discussed in greater detail in Chapter 5.



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CHAPTER 3

EXCLUSIONARY SCHOOL PRACTICES AND POLICIES THROUGH A LEGAL LENS: THE METHODOLOGY

This chapter describes the research methodology. This will be done by analysing the various documents used at arriving at a conclusion. This qualitative study on access to education is based on the analysis of education policy documents (at national, provincial and school levels) as well as relevant case law on admission to schools.

3.1 DATA COLLECTION

The qualitative study includes data from public records and documents. The Constitution is our supreme law and any law, regulation or policy that is in conflict with the Constitution will be declared unconstitutional and invalid by the courts and therefore admission policies of various schools were analysed in order to determine whether there are any provisions that are in conflict with the Constitution.

In order to reach an informed outcome, it was necessary to critically engage with various legal documents and policies (Legislation, Case Law, Policies of the Western Cape Education Department, Education Labour Relations Council cases, and School Admission Policies and Application forms).

3.1.1 Legislation

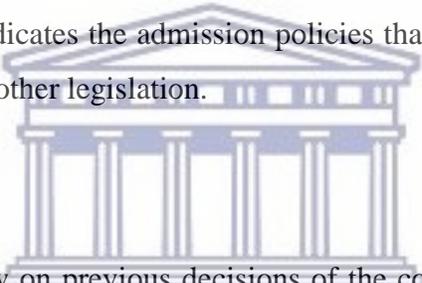
The Constitution serves as the foundation to test the validity of any legal provision. Legislation pertaining to the general governance of public schools was analysed and compared to the admission policies set out under the provisions of the following Acts:

- South African Schools Act 84 of 1996
- Western Cape Provincial Education Act of 1997
- The National Education Policy Act 27 of 1996

- Western Cape Provincial School Education Amendment Act 7 of 2010
- Education Laws Amendment Act 48 of 1999
- Further Education and Training Act 98 of 1998

All data collected is available as public documents. The legislation and the national and provincial policies of the Department of Education are available on the internet. Many schools publish their admission policies on their official websites which is freely available to the public. Furthermore, parents have a right to request that schools supply admission policies.

A checklist of relevant laws pertaining to admission to schools was made in order to determine whether a school's admission policy contains any conflicting provision to the relevant legislation. All the conflicting provisions in the admission policies were checked whether there were any court decisions dealing with issues based on the same merits. The findings are presented in Chapter 4 and it indicates the admission policies that contain conflicting provisions in terms of the Constitution and other legislation.



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3.1.2 Case law

I also included relevant case law on previous decisions of the courts on this issue pertaining to admission to schools.

In the case of *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*, the Court confirmed that the Head of Education is the final authority who decides on the admission to a school if the schools policy is in conflict of the provisions of the Constitution.¹¹⁰

3.1.3 Policies of Western Cape Education Department (W.C.E.D)

Various policies of the WCED were examined. The policies that the WCED communicates to schools via circulars and minutes are available and updated on a regular basis on the

¹¹⁰ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* Par 123-125 (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).

Department's website and are also issued to schools to inform and enforce the laws pertaining to education.

Policies that determine the admission of learners to public schools include:

- Western Cape Education Department, Policy for the Management of Admission and Registration of learners at ordinary public Schools.
- Western Cape Education Department, Admissions of over age learners to public schools, Circular 0240/2003
- Western Cape Education Department, Unlawful practices associated with school admissions, the payment of school fees and the levying of other fees, Circular 0036/2013
- Western Cape Education Department policy on managing learner pregnancy in public schools, Circular 0121/2003
- Western Cape Education Department, Admission policy for pre-Grade-R and Grade-R learners to ordinary public schools. Circular 0046/2004

3.1.4 Education Labour Relations Council cases (ELRC)

The ELRC promotes the maintenance of labour peace in the public education sector and it provides dispute resolution and prevention services. It also promotes harmony in the public education sector through the facilitation of negotiations between trade unions and the state as the employer.¹¹¹

This study includes a case of a principal that was charged with misconduct and one of the charges relates to forcing parents to pay school fees. One particular case that I based my study on is available on public records is the case of *L. Naidoo v HOD Gauteng Department of Education*.¹¹²

¹¹¹ ELRC available at <http://www.elrc.org.za/about-us> (accessed on 23 April 2019).

¹¹¹ *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 06 November 2018).

¹¹² *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 6 November 2018).

After complaints, some principals were charged with misconduct and dismissed for forcing learners to pay school fees. Although my study only refers to one documented case, there are many cases but they are not documented in the public domain. Only the cases that are heard by the ELRC after principals or other employees appeal on the sanctions imposed by the employers are documented in the public domain. The cases I refer to are related to learners who were supposed to be automatically exempted from paying school fees but their guardians were forced to approach 'loan sharks' to pay school fees. If these drastic measures were not taken to source money for school fees, these learners would have been excluded from admission to the school.¹¹³

3.1.5 School Admission Policies and application forms

The WCED has a large number of learners who are not allocated placement at schools at the beginning of each year. My data were gathered from different school admission policies of schools in the Western Cape. This study includes five High schools and five Primary schools in order to determine the different reasons for the exclusion of learners. As aforementioned, I included two focus schools in my study to determine the extent to which the practice of testing learners is excluding learners from admission to certain schools.

Application forms are a valuable source of information on the process and other admission practices of the school. These forms refer to the required amount needed for the application fee, the testing procedure and dates thereof and other relevant information.

3.2 DATA ANALYSIS

A qualitative study was undertaken to determine whether school admission policies are excluding learners from schools. This is an investigation into a legal issue that requires a theoretical analysis of the law and the application of the law which was applied to this study. A Constitutional analysis of the provisions of school policies and application practices in schools was applied to this study.

¹¹³ *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 06 November 2018).

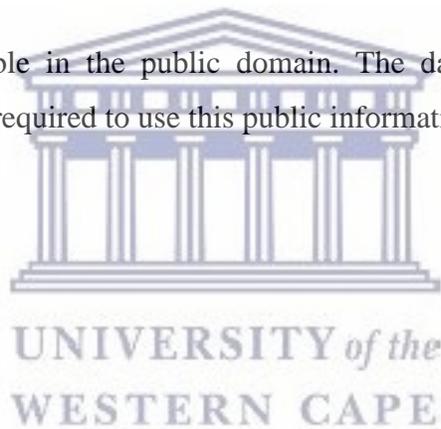
Primary sources, such as case law has been used. It is deemed to be recorded as accurate and correct.

This research aims to determine if there is a correlation between school admission policies and the unlawful exclusion of certain learners. The sources, such as the admission policies, must be compared to the Constitution and other legislation.

In order to determine a causal link between admission policies and the unlawful exclusion of certain learners, I studied the different school admission policies and identified unlawful exclusionary provisions. The court's reasoning on the same or similar issues will be considered and analysed.

3.3 RESEARCH ETHICS

All this information is available in the public domain. The data was gathered from public documents. No consent is thus required to use this public information in my research.



CHAPTER 4

INVESTIGATING SCHOOL ADMISSION POLICIES AND ADMISSION PRACTICES

4.1 BACKGROUND TO THE STUDY

In order to understand exclusionary admission policies and practices at school, I shall share some of my experiences as an educator.

I attended a session of the SGB training as a governing body member in 2013 and found it too rudimentary to ensure compliance with national laws. I deemed the training inadequate, because not all applicable laws were cited and exceptions to the rules were not mentioned at all. One such example is when a learner is absent for more than ten consecutive days, the learner may be deregistered from the school.¹¹⁴ The procedure that must be followed before deregistration of the learner and the consideration of valid reasons for the absence of a learner was not discussed as it is prescribed by the WCED.¹¹⁵ It is possible that members of the governing body left the workshop with the understanding that learners may be deregistered after ten days of absenteeism and if they are over the compulsory school age, they can refuse to admit a learner that was deregistered on the CEMIS. This is one example that may have an adverse effect on learners.

The WCED regularly circulates information regarding policies that must be drafted, subject to certain Acts of parliament. They will provide the relevant legislation that governs policies, but for the reasonably educated layperson who lacks a legal background, it may not be easy to comprehend these provisions and draft policies in line with the provisions contained in the relevant Acts. Hence the mere provisions of the relevant sources of law to schools do not suffice in ensuring that the law is applied and in line with the Constitution. School staff ought to be knowledgeable and capable of implementing the law. This may be a shortcoming in the basic

¹¹⁴ WCED Policy on Learner Attendance para.51(b) available at https://wcedonline.westerncape.gov.za/circulars/circulars10/lgsp.html#e29_10_B.pdf*e_inf_top.html#e29_10.html (accessed on 1 April 2019).

¹¹⁵ WCED Policy on Learner Attendance para.51 (b) available at https://wcedonline.westerncape.gov.za/circulars/circulars10/lgsp.html#e29_10_B.pdf*e_inf_top.html#e29_10.html (accessed on 1 April 2019).

training of teachers and tertiary institutions must play a bigger role in providing teacher education programmes that can equip teachers with training to, for example, draft education school policies. A further example of non-compliance with the law and exclusion of learners by the SGB will be provided next.

The South African Schools Act deals with admission to public schools and all of the provisions must be applied. All of these provisions are equally important to provide protection to the learner from unfair discrimination. The South African School Act, therefore, provides that

- (1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.
- (2) The governing body of a public school may not administer any test related to the admission of a learner to a public school or direct or authorise the principal of the school or any other person to administer such test.
- (3) No learner may be refused admission to a public school on the grounds that his or her parent-
 - (a) is unable to pay or has not paid the school fees determined by the governing body under section 39;
 - (b) Does not subscribe to the mission statement of the school; or
 - (c) Has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner.¹¹⁶

The above provision gives effect to the constitutional principles of equality, the right to basic education and human dignity. Many schools, however, implement school policies that are in conflict with the Constitution. Some schools deny learners access based on financial reasons that are in conflict with the SASA which is a key argument that will be developed in this chapter based on evidence from different school policies. This is, however, not an exhaustive list of possible clauses in admission policies that have the effect of excluding learners from admission to schools.

Section 20 of the SASA determines various functions applicable to all SGB's.¹¹⁷ One such function is to draft and implement school admission policies. The admission policy is a powerful instrument in the control of the SGB as they are the body to determine who may gain access to the school. They also decide on the criteria for admission to the school. The SGB of a

¹¹⁶ S 5 of the South African Schools Act 84 of 1996.

¹¹⁷ S 5(5) of the South African Schools Act 84 of 1996.

mainstream school comprises of two teacher representatives, one non-teaching staff member, a student representative (in the case of a high school) and five parents.¹¹⁸ While the admission of new learners to schools is done in accordance with policies that are determined by the SGB, these policies may have the effect and purpose to exclude certain learners from schools, which may be in conflict with existing law.

Despite the protection afforded to learners against exclusion to schools under the SASA, it is reported via the media every year that learners in South Africa are denied admission to public schools. This usually occurs at the commencement of each academic school year. Parents and guardians are often blamed for not applying on time for admission to schools or not adhering to the application procedure. The learners who are denied access to schools constitute a silent minority. Unfortunately, these learners tend to fall through the cracks of bureaucracy. Learners need to follow procedures that the district requires and the procedures are not always clear. Sometimes the district offices require learners to approach different schools and provide proof that the school refused them admission as a result of schools being full.¹¹⁹ By the time when this information is provided to the district office, the learner would have already lost out on valuable teaching time. The procedures also do not guarantee placement at a school. It appears that bureaucracy is mostly survived by the more educated and privileged whom are knowledgeable on the system. The more vulnerable learners are excluded due to different practices and policies used by schools. These exclusionary practice and policies are in conflict with the Constitution and the relevant Acts which governs education.

4.2 EVIDENCE OF UNLAWFUL ADMISSION POLICIES AND PRACTICES

It appears that schools use different strategies to exclude learners. Admission policies are given force by including provisions which directly and indirectly exclude learners. With my investigation, I found evidence of school admission policies and practices that are in conflict with legislation. The evidence of unlawful admission policies and practices which I will discuss relates to: charging of fees; requirements of certain documents; interviewing and screening of learners and lastly the testing of learners. I will also discuss how this non-compliance to the

¹¹⁸ S 23(1) of the South African Schools Act 84 of 1996.

¹¹⁹ I have met with parents that come to school and requested proof from the school that they have approached the school for admission.

requirements affects the admission of learners. All these provisions are in conflict with legislation.

4.2.1 Charging of fees

The following is an abstract of a recent article by Rhamphele which demonstrates the conflicting provisions in school policies.

No learner should be discriminated against due to non-payment of fees. Grade R learners from Koos Sadie Primary School in Goodwood on Wednesday were allegedly prevented from attending classes all because their fees were outstanding. The principal of the school in response says the school has been struggling with parents who simply don't want to pay school fees. Some of the children who did not pay were sent home when their parents brought them to school and others were put in a different classroom, separate from their normal classes.

— Bronagh Hammond, Director of Communications at Western Cape Education Department ¹²⁰

The abovementioned school blatantly disregarded legislation. Unless a formal complaint is lodged by a parent, the principal will not be formally disciplined. Not only are learners selected for admission based on their ability to pay school fees, but they are also facing forceful removal from schools if they are admitted and cannot pay school fees.¹²¹

Fees represent the currency of worthiness that is attached to a learner in order to gain admission to schools. There are different provisions in the law that regulate school fees. The most crucial provisions that regulate the payment of exemption from paying school fees are made available via a circular and also the exemption of such obligation to paying school fees were made available to schools via a circular as well as the SASA.¹²²

The SGB of the schools may enforce the payment of school fees on parents. SASA provides that:

¹²⁰ Ramphele L. *WCED: No learner should be discriminated against due to non-payment of fees Cape Talk 67, 2018* available at <http://www.capetalk.co.za/articles/313858/wced-no-learner-should-be-discriminated-against-due-to-non-payment-of-fees> (accessed on 05 December).

¹²¹ Ramphele L. *WCED: No learner should be discriminated against due to non-payment of fees Cape Talk 67, 2018* available at <http://www.capetalk.co.za/articles/313858/wced-no-learner-should-be-discriminated-against-due-to-non-payment-of-fees> (accessed on 05 December). The article states that children were sent home and some children were put in different classes.

¹²² WCED Regulations for the Exemption of Parents from the Payment of School Fees 00036 of 2013 https://wcedonline.westerncape.gov.za/circulars/circulars06/e58_06.html

39. (I) Subject to this Act, school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in section 38(2).
- 40.(1) A parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act.
41. The governing body of a public school may by process of law enforce the payment of school fees by parents who are liable to pay in terms of section 40.¹²³

There is thus a clear obligation on the parents to pay school fees unless they are exempted from payment in terms of the SASA. Schools may take legal action against parents who do not fulfil their obligation to pay school fees as they often do.

There are many parents who do qualify for different exemptions. Persons may be exempted from paying school fees if they meet the requirements in terms of section 40 of the SASA. The *Regulations for the Exemption of Parents from the Payment of School Fees*¹²⁴ make provision for three different categories of exemptions. First, there is partial exemption where the financial concession may be granted to a parent in terms of which he or she is liable for the payment of only a portion of school fees. The second one is the conditional exemption where an exemption may be granted based on certain criteria, for example, the parent may qualify for a partial exemption but, owing to personal circumstances beyond his or her control, cannot pay even the reduced amount. Lastly, there is the total exemption which means the financial concession is granted to a parent in accordance with the calculation result contemplated under regulation 6(3),¹²⁵ or available to a parent as a result of his or her qualifying for the automatic exemption. The automatic exemption is available to

- a) a person who has the responsibility of a parent in respect of a child placed in:
 - (i) a foster home;
 - (ii) a youth care centre;
 - (iii) a place of safety; or
 - (iv) an orphanage;
- b) person who is a kinship caregiver of an orphan or of a child who -
 - (i) has been abandoned by his or her parents; and
 - (ii) is without any visible means of support;

¹²³ South African schools Act 84 of 1996, Ss 39-40

¹²⁴ Regulations for the Exemption of Parents from the Payment of School Fees 0036 of 2013 available at <https://www.education.gov.za/LinkClick.aspx?fileticket=13Lz9dUopfM%3D&tabid=193&mid=485> (accessed on 16 June 2019).

¹²⁵ Regulations for the Exemption of Parents from the Payment of School Fees 0036 of 2013 available at <https://www.education.gov.za/LinkClick.aspx?fileticket=13Lz9dUopfM%3D&tabid=193&mid=485> (accessed on 16 June 2019).

- c) person who receives a social grant on behalf of a child; or
- d) child who heads a household¹²⁶

Persons in the abovementioned categories are usually required to present proof that they fall within the category in order to be exempted. This kind of exemption is not subject to any kind of calculation or formula. The SASA and the WCED gave effect to this provision by issuing a circular which sets out the categories of persons who may be exempted from paying fees. The exemption of school fees must, therefore, be administered according to the provisions of the WCED.¹²⁷ Schools cannot act outside these provisions and force parents to pay school fees if they should be exempted from paying school fees. Such practices are unlawful. I will discuss examples of how learners are excluded due to the charging of school fees.

Some schools propagate the idea to parents that they do not receive any income from the state for school fees and that the fee-paying parents are subsidising the exempted parents.¹²⁸ One such school, Bay Primary School, states on its application form that it, 'is the responsibility of every parent to pay school fees. It is a reminder that the parents, who qualify for financial assistance, are subsidised by the fee-paying parents of the school, not by the Government'.¹²⁹

This statement could result in the stigmatisation of some parents and learners. Even if this abovementioned statement was true, this affects the dignity of those who are supposedly subsidised by others. This may also result in the unequal treatment of the learners. The WCED circular,¹³⁰ however, provides the opposite to this school's practice. The WCED does, in fact, compensate schools for their loss of income for granting exemptions to learners. This is evident from the circulars that the WCED publishes every year via its website to schools on matters

¹²⁶ Regulations for the Exemption of Parents from the Payment of School Fees 0036 of 2013 available at <https://www.education.gov.za/LinkClick.aspx?fileticket=13Lz9dUopfM%3D&tabid=193&mid=485> (accessed on 16 June 2019).

¹²⁷ Regulations for the Exemption of Parents from the Payment of School Fees 0036 of 2013 available at <https://www.education.gov.za/LinkClick.aspx?fileticket=13Lz9dUopfM%3D&tabid=193&mid=485> (accessed on 16 June 2019).

¹²⁸ Bay Primary School School fee responsibility Social and Moral acknowledgement available at https://www.bayprimary.co.za/assets_bay/resources/2020%20-%20Bay%20Primary%20Application%20Form.pdf (accessed 14 June 2019).

¹²⁹ Bay Primary School School fee responsibility Social and Moral acknowledgement available at https://www.bayprimary.co.za/assets_bay/resources/2020%20-%20Bay%20Primary%20Application%20Form.pdf (accessed on 14 June 2019).

¹²⁹ WCED Circular 0005/2018 Compensation for School fee Exemptions available at https://wcedonline.westerncape.gov.za/circulars/circulars18/e5_18.html#a (accessed on 10 November 2018).

regarding the procedures for schools to apply for compensation for exemption of school fees.¹³¹ Schools must complete and supply the relevant information and documents to the WCED and may then receive an amount as compensation to the schools according to the number of exemptions that they granted to learners.

This issue is announced publically on the website of the Western Cape Government. It states that

There are currently 574 public ordinary fee-paying schools in the Western Cape. This year the WCED has paid out fee compensation to 554 of these schools. This means that the WCED is assisting 96.5% of fee paying schools. Compensation for school fee exemptions is made available retrospectively for the previous school year, e.g. compensation paid in 2017 is for exemptions granted in the 2016 school year.¹³²

The abovementioned circular serves as evidence that what is claimed by Bay Primary school in their admission application form is not true. Schools can apply for compensation for exemptions to school fees in order to mitigate their loss of income due to exemptions of school fees.

Some learners may be eligible for automatic exemption from paying school fees. To apply for exemption, however, they must first be registered at a school. By not admitting the learners to a school they are precluded from making such applications. This dilemma appears to affect the most indigent learners as they are often prevented from even applying for admission to such schools because they cannot afford to pay for application forms, deposits and other preliminary costs. These issues are discussed later in the chapter.

Schools not only prevent persons from applying for exemptions, but they also enforce fees that do not fall within the ambit of what legislation prescribes. Some schools charge application fees and or re-registration fees. The charging of application fees and re-registration fees are unlawful.¹³³ I will discuss the two popular types of fees i.e. application fees and re-registration fees that schools are charging in terms of the SASA and the WCED policies, next.

¹³¹ WCED Circular 0005/2018 Compensation for School fee Exemptions available at https://wcedonline.westerncape.gov.za/circulars/circulars18/e5_18.html (accessed on 11 July 2019).

¹³² WCED Circular 0005/2018 Compensation for School fee Exemptions available at https://wcedonline.westerncape.gov.za/circulars/circulars18/e5_18.html (accessed on 11 July 2019).

¹³³ WCED Policy for the Management of Admission and Registrations of Learners at Ordinary Public School available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed 10 November 2018).

4.2 1.1 Application fees

The general practice is for learners to apply to at least three different high schools in order to increase their chances for placement. Learners who cannot pay these application fees are automatically excluded from such schools. Some schools charge a non-refundable deposit.

In terms of the WCED Policy for the management of Admission and Registrations of Learners at Ordinary Public Schools (hereafter WCED Admissions Policy), ‘neither school fees nor any other fees are payable on application for admission’.¹³⁴ Schools, however, disregard this rule. This is evident through effective journalistic investigations. Journalists are also instrumental in bringing about change when these unlawful practices become exposed to the public. Social media also plays a vital part in exposing these unlawful practices. Fort reported that

This comes after it came to light that Mondale High School, in Portland, had asked parents to pay a R20 administration fee to cover printing costs and processing more than 500 application forms of prospective pupils.¹³⁵

Although this application fee was subsequently reimbursed, it was done after the due date for submission of application for admission to the school. This fee was payable on application and without this application fee, the form was not accepted by the school. The learners who did not have that fee at the time of application were already excluded as they were not afforded the opportunity to apply at this school. They were thus treated unfairly. Whether or not disciplinary action was taken against the principal for this unlawful practice remains unclear. When there is no action taken against the principal the practice continues as in the case of the next example of schools that charge registration fees.

4.2 1.2 Registration and re-registration fees

According to the SASA, charging registration and re-registration fees is unlawful.¹³⁶ In practice, this provision does not deter some schools from charging registration fees unlawfully from

¹³⁴ WCED Policy for the Management of Admission and Registrations of Learners at Ordinary Public School available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed 10 November 2018).

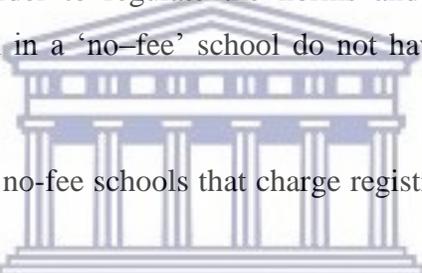
¹³⁵ Fort F ‘School slammed for R20 admin fee’, Plainsman Community Newspaper, 2017 available at <https://www.plainsman.co.za/news/school-slammed-for-r20-admin-fee-7501357> (accessed on 10 November 2018).

¹³⁶ S 39 (5) of the South African Schools Act 84 of 1986.

parents and guardians. Schools try to circumvent the law and implement strategies in order to force parents to pay unlawful fees. These strategies include, first, charging registration fees even though they are afforded the status as a no-fee school. Secondly, some schools require re-registration fees. A third strategy is to change the terminology and disguise school fees as a payment that does not appear on the face of it to be school fees. Schools may charge for example, computer fees that are in actual fact part of school fees. Lastly, certain schools enforce a registration fee to secure a place at a school. I will discuss these four strategies to exclude learners from admission separately below.

The first strategy to enforce the payment of unlawful fees is when non-fee schools charge registration fees. The government has come up with a 'no fee-schools' strategy to address the inability of poor parents to pay school fees. This strategy was implemented by adding an amendment to the SASA in order to regulate the norms and standards for school funding accordingly. Parents of children in a 'no-fee' school do not have to pay school fees for their child(ren).¹³⁷

This research found practices at no-fee schools that charge registration fees. Fredericks reported in 2005 that



parents have accused a Delft primary school of breaking the law by charging parents a registration fee for their children and denying access to those who are unable to pay. One parent, who did not want to be named, told the Cape Argus that 'while Hindle Road West Primary is a no-fee school, he had been charged a R150 registration fee for his child. He said he had paid the money and his child was enrolled, but other parents, who were unable to pay the fee, were turned away.'¹³⁸

This school acted in conflict with the SASA¹³⁹ for two reasons. First, Hindle Road Primary School is a 'no-fee school' and therefore charging school fees at this school is prohibited.

¹³⁷ S 45 of the South African Schools Act of 1996 (act no 84 of 1996) Amended National Norms and Standards for school Funding available at https://wcedonline.westerncape.gov.za/circulars/circulars17/lgsp.html#./circulars08/GG29179.pdf*e_inf_top.html#e33_17.html (accessed on 1 April 2019).

¹³⁸ Fredericks I 'No fee school slammed for registration fee' IOL News 2015 available at <https://www.iol.co.za/news/south-africa/western-cape/no-fee-school-slammed-for-registration-fee-1810307> (accessed on 11 November 2018).

¹³⁹ S 39 (5) of the South African Schools Act 84 of 1986 states that no public school may charge any registration, administration or other fee, except school fees as defined in section 1.

Parents may give donations at 'no-fee schools', but school fees are not enforceable on parents. Secondly, the charging of registration fees at such schools is also unlawful.

Some schools require that learners pay a re-registration fee before they are issued with their final report. One such school is Spine Road High School that charges re-registration fees and it is clearly in conflict of the SASA and the WCED Admission Policy. This particular school states that learners/parents will be allowed to collect report cards if:

- Parents will be liable to pay R200 per textbook for textbooks not returned.
- If the R750 re-registration fees are paid on or before the re-registration day
- Reports will NOT be handed to learners in. All text books have been handed in.
- Where parents are unable to pay the re-registration fees by the given dates, parents MUST meet with Ms. Hendricks, in person, between 8:30 and 11:30 daily to make the arrangements to pay off the re-registration fees. The arrangements must be made before the re-registration date.¹⁴⁰

Section 39(5) of the South African Schools Act 84 of 1986, states that no public school may charge any registration, administration or other fee, except school fees as defined in section 1.¹⁴¹

These provisions do not only speak to the issue of unlawful re-registration practice, but it also brings to light other unlawful practices with regards to withholding report cards. In terms of section 41 (7) of the SASA,¹⁴²

a learner may not be deprived of his or her right to participate in all aspects of the programme of a public school despite the non-payment of school fees by his or her parent and may not be victimised in any manner, including but not limited to the following conduct:

- (a) Suspension from classes;
- (b) verbal or non-verbal abuse;
- (c) denial of access to:
 - (i) cultural, sporting or social activities of the school; or
 - (ii) the nutrition programme of the school for those learners who qualify in terms of the applicable policy; or
- (d) denial of a school report or transfer certificate.

With reference to section 41(7) (d) above¹⁴³ the practice of this school highlights the total disregard for policies and legislation. Not only is this practice of withholding report cards

¹⁴⁰ Spine Road High School Urgent Notice to all Parents at <http://spineroadhighschool.co.za/?p=1073> (accessed on 23 April 2019).

¹⁴¹ S 39 (5) of the South African Schools Act 84 of 1996.

¹⁴² S 41 (7)(d) of the South African Schools Act 84 of 1996.

¹⁴³ S 41 (7)(d) of the South African Schools Act 84 of 1996.

unlawful, but it also prevents a learner from being admitted to a new school. This is particularly damaging to Grade Seven learners who may lose their Grade Eight place at a new school as they are transferring to high schools. This is a denial of the right to education. The Constitution guarantees the right to basic education and denying this right to basic education is a constitutional encroachment on the learner's right.

Thirdly, as already alluded to, some schools disguise school fees by changing the terminology. School fees are defined as 'any form of a contribution of a monetary nature made or paid by a person or body in relation to the attendance or participation by a learner in a programme of a public school'.¹⁴⁴

Some schools charge separate fees which are in fact school fees but they refer to it to as something else. Groote Schuur High School's policy states that the 'school fees in 2018 are R23 900 as well as a voluntary I.T. Resource Levy of R800 and this will be required within 7 days of acceptance of the learner'.¹⁴⁵

If we compare this to the definition provided by SASA and the WCED¹⁴⁶ of school fees, then I.T Resource levy is part of school fees because it relates to the learner's school attendance. The school must afford the parents the opportunity to apply for exemption and cannot enforce payment from parents within 7 days as is required by the school in their policy.

The fourth strategy used to enforce unlawful fees is to charge a registration fee to secure a place at school. Learners who are accepted at certain schools, (after the required documents were submitted, tests and interviews were administered) will receive communication on their successful acceptance. This may be subject to registration fees that must be paid before the school commences or they forfeit their place.¹⁴⁷ Learners may be required to pay an amount towards school fees, but their acceptance and admission may never be dependent on them paying

¹⁴⁴ WCED Circular 0016/2007 Defining School Fees.

¹⁴⁵ Groote Schuur High School Application for admission 2019 available at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjmvauu-7hAhVJZFAKHbPEAQYQFjAAegQIAhAC&url=http%3A%2F%2Fwww.grooteschuurhigh.co.za%2FPortal-Downloads%2Fdbcd8836-1971-4fbc-961f-575006d32986.pdf&usq=AOvVaw3BR8kx1_cjaxeSUd0I7zV (accessed on 23 April 2019).

¹⁴⁶ WCED Circular 0016/2007 Defining School Fees. https://wcedonline.westerncape.gov.za/circulars/circulars07/e16_07.html available at (accessed 3 April 2018)

¹⁴⁷ My son received such letter on acceptance for two schools indicating that the school assumes he will not attend the school if the fee is not paid at a certain date.

a registration fee. At such a request, parents and guardians must be informed of their right to apply for exemption and issued with the necessary forms should they wish to apply for exemption of school fees.

The above strategies lead to the exclusion of the most indigent learners. Schools deliberately implement these strategies in order to ensure that they derive an income from the fees paid by parents and guardians.

4.2.2 Documents required for application for admission to schools and the effect of incomplete applications

Some schools require different documents with their application for admission to schools. The non-compliance with these requirements will negatively affect the application. The documentation required often prevents a learner from gaining admission which results in the exclusion of certain learners.

4.2.2.1 Documents required for application for admission to the school

Schools require additional documents, to what the WCED requires, in order to admit a learner. The SGB may draw up their admission criteria, but it must not be in conflict with relevant legislation. Some schools, however, draft policies that require documents that are unreasonable, because they are either difficult or impossible to obtain or they infringe on the human rights of the parents of the learners. The non-compliance of parents to provide the required documents effectively excludes learners from schools. Due to the financial implications of obtaining the documents and the family structures of learners, it is challenging for parents to complete their applications. Some of the documents that pose challenges to submit are: identity documents and / or unabridged birth certificate; proof of address; and proof of immunisations. Non-South Africans require additional documents with their application for admission. Some schools also force parents and guardians to consent to a credit check. I will discuss these documents under separate headings and their significance in an application for admission below.

a) Identity Documents and Unabridged Birth Certificate

The WCED Admission Policy requires an official abridged birth certificate or identity document. In the absence of such documents, official proof that application has been made to the Department of Home Affairs for a birth certificate or identity document may be presented.¹⁴⁸ Some schools require unabridged birth certificates only. The following are examples from different schools where the requirements regarding the birth certificate may pose a challenge for parents.

- Trafalgar High School requests ‘an official, unabridged birth certificate of the learner’.¹⁴⁹
- De Kuilen Primary School states that ‘certified copies (not older than 2 months) of the following documents must be enclosed: Learner’s complete birth certificate, with both parent’s information (unabridged)’.¹⁵⁰ This is a challenge for parents to acquire in cases where the parent is untraceable or the parent is unknown.
- Bergvliet Primary School requires a certified birth certificate or identification document and if the learner is a non-South African then a relevant Home Affairs Residence or study permit must be provided’. No mention is made of a requirement pertaining to proof of application for a temporary acceptance until these documents are provided.¹⁵¹

The challenge in obtaining these documents lies with the process of obtaining the documents and also the financial implications that accompany obtaining these documents. Parents must pay for the application of these birth certificates and the processing of the unabridged birth certificates varies.¹⁵² It may take up to six months or longer according to the Department of Home Affairs. Parents may also not have the finances to pay for these documents as many come from destitute communities. Schools, however, require these documents on application. Proof of application at the Department of Home Affairs for these documents is not considered. Schools require all the

¹⁴⁸ Western Cape Education Department Policy for the Management of Admission and Registration of Learners at ordinary Schools available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 2019).

¹⁴⁹ Trafalgar High School admission procedure available at <http://trafalgarhigh.co.za/admission-procedure/> (accessed on 23 April 2019).

¹⁵⁰ De Kuilen Primary School available at <http://www.dkps.org.za/2012-11-07-09-20-38/application-for-admission.html> (accessed on 23 April 2019).

¹⁵¹ Bergvliet Primary School Application form available at <http://bergvlietprimary.co.za/wp-content/uploads/2019/02/Admission-application1.pdf> (accessed on 3 April 2018).

¹⁵² Western Cape Government available at <https://www.westerncape.gov.za/service/applying-birth-certificate-south-africa> (accessed on 23 April 2019).

documents and non-compliance will result in the application not being accepted and thus being unsuccessful.

b) Proof of address

All schools require proof of address. This requirement in itself is not problematic as schools need to ascertain whether learners are complying with their school's policy's criteria with regards to the radius of school and feeder zones.¹⁵³ It becomes problematic as the type of proof burden of proof required may sometimes be unreasonable. Schools may be of the opinion that parents may give false information and therefore they exclude learners whose parents cannot provide a utility bill or lease agreement as proof of address.¹⁵⁴ A small percentage of parents that may be desperate for their child to be admitted make themselves guilty of providing false information. It is thus unfair to place this stringent burden of proof on law abiding citizens. Schools also have legal remedies should they discover that parents made false statements. They may also require affidavits from parents. Making a false statement under oath is a crime under South African common law. The common law is supplemented by statutory law¹⁵⁵ which makes it a crime to make a false statement in an affidavit. Some schools only accept a utility bill or rental agreement as proof of address. Schools make it clear on their application forms that these are the only proof of address that they will accept. Some schools have different requirements based on the type of property rights parents have over a dwelling; for example, as an owner, lessee or sub-lessee consider the following examples:

Groote Schuur High School requires: 'A municipal account (rates/water) or lease document). No other documents will be accepted'.¹⁵⁶

Fish Hoek High school on the other hand requires:

completed forms and requested documents such as certified copies of unabridged birth certificate or identity documents.¹⁵⁷ This school also requires, "proof of residence (e.g.

¹⁵³ Feeder zones are the geographical areas from which a school admits learners. The WCED, however, does not determine feeder zones.

¹⁵⁴ This is based on my own experience when I applied at schools for my own children. I had to provide the utility bill or lease agreement.

¹⁵⁵ S 319(3) of the Criminal Procedure Act 56 of 1955.

¹⁵⁶ Groote Schuur High School available at <http://www.grooteschuurhigh.co.za/gshs/home/admissions/school-admissions> (accessed on 26 April 2019).

rates account or lease agreement)'. If not the owner of the property at which the pupil resides, proof of lease is required in the name of the family applying to the school. If the lease terminates before the start of the year in question, any acceptance would be provisional until the extended lease is submitted. No pupil will be allowed to attend the school until such time as the extended lease is tabled.¹⁵⁸

Excelsior Primary School requires a 'proof of permanent residential address: Certified copy of the recent municipal account or certified copy of legal rental agreement'.¹⁵⁹

De Kuilen Primary School requires proof of residential address/ legal guardians:

- Home owners- latest municipal account (both sides) not older than 2 months
- Medical aid card (both sides) if applicable.¹⁶⁰
- Tenants – valid lease agreement. If not agent or lawyer's agreement, the owner's ID and latest municipal account must accompany the lease agreement.
- "Informal" (persons who do not have a formal contract with the owners) tenants ALL of the following:
 - ID of home owner/tenant
 - Sworn affidavit of BOTH the owner/tenant AND parents/guardians of learner.
 - Latest municipal account (not older than 2 months) or valid lease agreement or legal owner or tenant.
 - Statements (e.g. Edgars, MTN, Bank) of the past 3 months of parents/guardians as proof of parents /guardians of address

De Kuilen Primary School differentiates between formal and informal tenants. Parents who reside in informal settlements will, therefore, be automatically excluded from admission due to the fact that they do not have rental agreements or utility accounts (municipal accounts), because already to this logic, they are unlawfully occupying the land.

Bay Primary School requires 'a municipal rates account, lessees (rented accommodation): Copy of lease agreement plus a copy of electricity / telephone (not more than 3 months old)'.¹⁶¹

Parents who reside in informal settlements are unlikely to have electricity or telephone accounts,

¹⁵⁷ Fish Hoek High Admission Policy available at <https://fishhoekhighschool.co.za/school-history/admission-policy/> (accessed on 6 April 2019).

¹⁵⁸ Fish Hoek High School Admission Policy available at <https://fishhoekhighschool.co.za/school-history/admission-policy/> (accessed on 6 April 2019).

¹⁵⁹ Excelsior Primary School available at <https://www.exprim.co.za/> (accessed on 26 April 2019)

¹⁶⁰ De Kuilen Primary School De Kuilen Primary available at <http://www.dkps.org.za/2012-11-07-09-20-38/application-for-admission.html> (accessed on 23 April 2019).

¹⁶¹ Bay Primary School Application form checklist available at https://www.bayprimary.co.za/assets_bay/resources/2020%20-%20Bay%20Primary%20Application%20Form.pdf (accessed on 26 April 2019).

because they mostly make use of gas or illegal connections for power. When they occupy land unlawfully, they do not receive municipal accounts.

The additional requirement of a lease agreement has substantive legal consequences to the parents or guardians that are forced to sign a lease in order to meet the admission requirements of schools. A written lease is not a mandatory legal requirement when renting residential property in South Africa. It is only recommended that everything is committed to writing by a lease agreement.

Parents who have a verbal agreement will thus have no proof of an agreement. This may be for various reasons that are not due to their fault. It may not be possible to locate the lessor of the property at the time of application for admission at schools for different reasons. The lessor of the property might be out of the country, or in prison. It is possible that the lessor is deceased and the executor of the estate is not yet appointed to sign the agreement. Notwithstanding the benefits of a written lease agreement, it is untenable for schools to require such agreements from parents. These requirements impact on the parent's contractual freedoms.

There are various reasons or motivations why people do not want to enter into a written agreement it has agreement has different consequences or obligations in terms of certain laws such as the Consumer Protection Act. The lessor may refuse to enter into an agreement that will bind him for a contractual period that is longer than he wishes. The lessee can terminate a lease by giving 20 days written notice. The lessor, however, must honour the lease agreement unless there is a breach in the agreement. The rental agreement is more in favour of the lessee with regards to termination of the contract. It is, therefore, possible for the lessee to refuse to enter into a formal rental agreement.¹⁶²

The school requires the identity document of the lessor and a municipal account. This can be challenging if there is conflict and animosity amongst the parties involved and the lessor refuses to make copies of these documents available. There is also no legal obligation on the lessor to make these documents available to the lessee for this purpose. This infringes upon the lessor's

¹⁶² S 14 (2) Consumer Protection Act 68 of 2008 available at https://www.gov.za/sites/default/files/gcis_document/201409/321864670.pdf (accessed on 23 April 2019).

right to privacy. Furthermore, due to the problems people are facing with identity fraud, some people may also refuse to make such copies available to third parties.

These strict and unreasonable requirements make it difficult for parents to comply with the application requirements, and those learners do not stand any chance in being successful in their applications without these required documents.

The learners who live in informal settlements are from the outset excluded from admission because they cannot provide a proof of address in the manner that the school policy requires.

c) **Proof of Immunisations**

Another document that schools require is the health care clinic card of learners. When the child applies for admission to a school, the WCED requires proof that the child has been immunised.¹⁶³ The admission policy of the WCED states that ‘written proof of immunisation against the following contagious diseases: measles, polio, tuberculosis, tetanus, diphtheria and Hepatitis B’ is required.¹⁶⁴

The National Education Policy Act states that a parent must provide proof that a learner was immunised against the abovementioned contagious diseases. If the parent cannot provide such proof then the principal must advise the parent to have the child immunised.¹⁶⁵

In South Africa, certain religions object to vaccinations. Religious objections to vaccines are based generally on the ethical grounds associated with using human tissue cells to create vaccines. Some people believe that the body is sacred and therefore should not receive certain chemicals, blood or tissues from animals.¹⁶⁶

¹⁶³ Policy for the Management of Admission and registrations of Learners at Ordinary Public School available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 27 April 2019).

¹⁶⁴ WCED Policy for the Management of Admission and registrations of Learners at Ordinary Public School available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 27 April 2019).

¹⁶⁵ Ss 14-21 the National Education Policy Act of 1996 available at <https://www.elrc.org.za/sites/default/files/documents/NEPA.pdf> (accessed on 27 April 2019).

¹⁶⁶ Croatian Medical Journal_ *Religious exception for vaccination or religious excuses for avoiding vaccination* 2016 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5141457/> (accessed on 18 November 2018).

The Admission Policy for Ordinary Public schools ¹⁶⁷also lists the immunisation card as one of the required documents learners must submit at registration. There is no suggestion by the policy that acceptance to school is dependent on immunisation. Some schools do, however, refuse to accept learners who do not submit proof of immunisations because of the risk that such learners pose to others. The parents are not advised on having the learner immunised as part of the free primary health care programme as provided for in the National Educational Policy Act 27 of 1996.

Some schools force parents to immunise their children by including provisions in policies such as ‘accept responsibility for immunising the learner against contagious diseases and produce proof thereof, if required to do so’.¹⁶⁸ Such an order from the school automatically excludes learners who are not immunised. Whether these schools accept other proof for immunisation for learners who lost their clinic cards, is not clear. Other alternatives are not mentioned so the assumption can be made that an affidavit will not suffice. Without such proof, they will be excluded from admission.

d) **Documents required for Non–South African Learners**

Non–South Africans have different requirements from South African citizens pertaining to the documents they require. Schools require on application a permit for residence from the parent or a study permit for learners who are not residents of the country. Some schools do not make provision for illegal immigrants as provided for by the WCED admission Policy.¹⁶⁹ This policy states that

persons classified as illegal immigrants must, when they apply for admission to a school for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Immigration Act, 13/2002 or the Refugees Act, 130/1998.¹⁷⁰

¹⁶⁷ S 16 of the National Education Policy Act of 1996.

¹⁶⁸ Excelsior Primary School Admission Policy available at <https://www.exprim.co.za/> (accessed on 27 April 2019).

¹⁶⁹ WCED Circular 0240/2000 The Western Cape Education Department, Admissions of over Age Learners to Public Schools https://wcedonline.westerncape.gov.za/circulars/2003/e240_03.html (accessed on 27 April 2019).

¹⁷⁰ WCED Policy for management of Admission and Registration of Learners at Ordinary Public Schools para 8 available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 27 April 2019).

There is thus a clear conflict between the WCED policy and the school practice. The absence of these required documents on the application will result in the non-acceptance of the application by the schools. These learners, therefore, do not have a chance to be admitted to such schools.

e) **Undertaking to do a credit check signed agreement**

Differentiation between learners and classes of learners is often made based on the social status of the parents, the income of the parents and the cognitive abilities of learners. At some schools, parents must give permission, on the application for admission, that schools may do a credit check on them. This information can only be beneficial for the school to determine the financial position of parents and how it will affect their ability to pay school fees. Children whose parents do not have a good credit record may thus be less likely to be successful in their application to those schools. Some schools require learners to pay part of their school fees upon acceptance to the school. Children, whose parents are unemployed and cannot raise the necessary funds to pay the fee, subsequently forfeit their place at the school after they were accepted.

Credit checks are usually associated with financial institutions and acquiring debt due to financial agreements. Some schools have the requirement for parents or the person responsible for the payment of the school fees to sign an undertaking to consent to a credit check. One such school has this provision in its application for admission form and it stipulates that 'I do consent to a credit check'.¹⁷¹

First, such a provision is problematic because schools are not financial institutions and as such should not treat school fees as a credit. The relationship between the school and the parent is not that of a consumer and service provider. Secondly, the credit history and information of any person is confidential. When parents apply for an exemption or partial exemption of school fees, then only the information pertaining to their income and expenses is required. Forcing parents to sign an undertaking to give consent to a credit check is a violation of their right to privacy. The refusal of parents to sign this consent will result in an incomplete application and the school will not accept the application. The learner is thus excluded from applying at such schools.

¹⁷¹ Groote Schuur High School available at <http://www.grooteschuurhigh.co.za/gshs/home/admissions/school-admissions> (accessed on 26 April 2019).

This question of what happens to the incomplete application forms thus arises. This will be discussed next.

4.2.2.2 Effect of incomplete application forms

Many of the schools stipulate requirements and written agreements in their admission policies and /or practices. The signed documents must accompany the application for admission forms. Failure to agree to these terms will render the application unsuccessful. Some schools refuse to accept applications without all the required documentation. Schools have different provisions to cause this effect in their admission policies or application forms. I will discuss some of these provisions that are worded differently, but ultimately have the same effect.

Groote Schuur High School's admission policy states that, 'only applications that have been completed in full and with all the above-mentioned documents will be accepted'.¹⁷²

Fish Hoek High School states in its admission policy that, 'the completion of the application forms and the submission of all the required documents including those identified in the admission policy for ordinary public schools issued in terms of the National Education Policy is compulsory'.¹⁷³ Without the necessary documentation, the application will thus not be accepted.

Table View Primary School's application form states that, 'failure to fully complete the prescribed application form shall render the application null and void'.¹⁷⁴ Here is evidence again that incomplete applications will not be accepted. Another provision or requirement is that

both parents must indicate their agreement by signing the application form. In the case of divorced/ separated Parent, it is the responsibility of the Parent applying for application at the school to obtain a signed copy of the application form from their divorced / separated partner.¹⁷⁵

¹⁷² Groote Schuur High School available at <http://www.grooteschuurhigh.co.za/gshs/home/admissions/school-admissions> (accessed on 26 April 2019).

¹⁷³ Fish Hoek High School Admission Policy available at <https://fishhoekhighschool.co.za/school-history/admission-policy/> (accessed on 27 April 2019).

¹⁷⁴ Table View Primary School website available at <https://www.tableviewprimary.co.za/admissions> (accessed on 12 April 2019).

¹⁷⁵ Table View Primary School website available at <https://www.tableviewprimary.co.za/admissions> (accessed on 12 April 2019).

This provision which is related to exemption of school fees needs to be highlighted as it is in conflict with the latest decision of the case of *Head of Department: Western Cape Education Department & another v M S*, which dealt with a case of a single parent who applied for exemption of school fees.¹⁷⁶ The court held that single parents may apply for exemption of school fees and that such an application must be processed based on the information of one parent, if the parent is unable to submit the information of the other parent.

In terms of the Regulations Relating to the Exemptions of Parents from Payment of School Fees in Public Schools as contained in the SASA, ‘no applicant may be disqualified on the ground that his or her application is either incomplete or incorrectly completed’.¹⁷⁷

Should learners be able to supply all the required documents at the application phase, they are still not secured admission to schools. They will have to meet additional criteria such as screening and tests.

4.2.3 Screening and /or interviews with learners

According to the WCED Admission Policy, schools should not use interviews with parents or learners prior to the admission of the learner as a form of screening. The exception is for learners with learning barriers who wish to enter an ordinary public school and learners wishing to enter schools offering specialist subjects, such as Dinaledi focus schools.¹⁷⁸

Inclusive education should accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions. Learners with barriers should not be treated differently from other learners. As mentioned earlier, research indicates that the testing of

¹⁷⁶ *Head of Department: Western Cape Education Department & another v M S* para 83 available at <http://www.saflii.org/za/cases/ZASCA/2017/187.html> (accessed on 16 June 2018).

¹⁷⁷ Regulations relating to the Exemptions of Parents from Payment of School Fees in Public Schools in Government Gazette 29311 of 18 October 2006 s 9(3) available at https://wcedonline.westerncape.gov.za/circulars/circulars06/lgsp.html#.../documents/school_fees/Exemptions_from_School_Fees.pdf*e_inf_top.html#e58_06.html (accessed 14 April 2019).

¹⁷⁸ WCED Policy for management of Admission and Registration of Learners at Ordinary Public Schools available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 12 April 2019)

learners could not be considered as a valid admission criterion for programming courses in the South African context.¹⁷⁹

The provision of this policy of the WCED is clear that there should be no interviews with parents or learners prior to the admission of the learner as a form of screening, but the WCED provides an exception to this rule.¹⁸⁰ The exception is that focus schools may test learners.¹⁸¹ This policy is in conflict with the Bill of Rights which purports that everybody should be treated equally. The testing of only certain learners with the aim of selecting a specific group of learners based on their cognitive abilities and skills does not constitute equal treatment and everyone has the right to basic education.

Internal school policies include provisions that allow schools to interview learners, even if it is against the WCED Admission Policy. The following school policies make provision for interviews and /screening to be conducted:

a) Trafalgar High School

Trafalgar High School's procedure for admission states that,

the applicants will be screened for eligibility in terms of the Admission Criteria and eligible learners and their parents may be invited to attend an information session before a decision on admission is made.¹⁸²

The abovementioned provision serves as evidence of a screening process in the form of interviews. This school also submits that 'preference will be given to applicants with a suitable reference from their current school'. This provision implies that the current school must give a report or complete a questionnaire about the learner.¹⁸³

¹⁷⁹ Van der Westhuizen D. & Barlow-Jones, G (2015) High school Mathematics marks as an admission criterion for entry into programming courses at a South African university. The Independent Journal of Teaching and Learning Vol 10/2015 available at https://journals.co.za/docserver/fulltext/jitl1/10/1/jitl1_v10_a3.pdf?expires=1557415138&id=id&acname=guest&checksum=C58D2C416BB04CA1FE2E0CBC4391C73B (accessed on 2 November 2018).

¹⁸⁰ WCED Policy for management of Admission and Registration of Learners at Ordinary Public Schools available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 12 April 2019).

¹⁸¹ WCED Policy for management of Admission and Registration of Learners at Ordinary Public Schools available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed on 12 April 2019).

¹⁸² Trafalgar High School Admission Policy available <http://trafalgarhighschool.co.za/> (accessed 12 April 2019).

¹⁸³ Many learners come to school asking the grade 7 educators to complete forms that attest to their behaviour and work ethic.

The school may also require the learner to give more details of him or herself in order to screen the learner for admission purposes. Trafalgar High School requires the learners to complete a questionnaire without assistance and states that the form is to ‘get to know you better, so please complete annexure B as honestly as possible in your own handwriting’.¹⁸⁴ The questions are related to family life, curfews, drugs and smoking. This information will assist the school to determine the type of character the learner may portray should the learner be granted admission to the school. From this type of information, the school will be able to determine whether the child will be taking part in sports or if the child will have challenges with discipline and substance abuse. Children that portray characteristics that may pose a possible challenge in the future are less likely to gain admission to this school. Children are judged on social conditions which may in all likelihood be beyond their control. This too amounts to direct and sometimes indirect unfair discrimination in terms of section 9 of the Constitution.

b) Groote Schuur High School

Groote Schuur High School states in its admission process that ‘applicants who are shortlisted will be invited for an interview. Parents/legal guardians of shortlisted applicants are obliged to attend the interview’.¹⁸⁵ This provision indicates that interviews are conducted and this is against the WCED Policy, as mentioned above.

Groote Schuur High School also allows for screening. It is conducted in the form of questionnaires or reports that the learner’s previous teachers must complete and return to the school where the application is filed. Learners and parents must ensure that their teachers complete these forms or their application will not be considered. The application form states to the teacher that

one of your school’s learners has applied for admission at Groote Schuur High School.
The evaluation, as stipulated in Annexure A, forms part of our interview at the School.
The information in this report will enable us to plan more accurately in order to better

¹⁸⁴ Groote Schuur High School available at <file:///C:/Users/B.Isaacs/AppData/Local/Microsoft/Windows/INetCache/IE/K970IA5R/Admission%20Policy.pdf> (accessed on 12 April 2019).

¹⁸⁵ Groote Schuur High School available at <http://www.grooteschuurhigh.co.za/gshs/home/admissions/school-admissions> (accessed on 26 April 2019).

accommodate new entries. Please complete this annexure and fax it to the school directly.¹⁸⁶

c) De Kuilen Primary School

De Kuilen Primary School's Admission Policy states that the school in 'the appropriate circumstances, invite any child and his/her parents to an interview at the school. A child invited to such an interview will not be admitted until it has actually taken place'.¹⁸⁷ This provision provides a condition to admission that is in conflict with the SASA and the WCED policy.

Unfortunately, the challenge to gain entry to admission to a school does not end here. Should the learner be able to provide all required documentation and pass the screening test; the learner may still be required to battle for space. This is a result of other learners who are also competing for space in the same position as the learner who provided all documentation and passed the screening test. Furthermore, some non-focus schools as well as focus schools, require the learner to write a competency test. This will be discussed next.

4.2.4 Admission tests

The testing of learners is prohibited in terms of the SASA. In terms of section 5(2) of the SASA 'the governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test'.¹⁸⁸ There is, therefore, a prohibition on schools on the testing of learners for admission purposes.

According to the research study of Larey :

Political, socio-economic, cultural and historical contextual factors continue to shape the influence that vocational programmes can potentially have in the lives of learners from historically disadvantaged communities. Because communities are well aware of previous forms of provision and their potential (or lack of it) for changing their lives, many learners and their parents continue to regard vocational projects like focus schools as 'for

¹⁸⁶ Trafalgar High School Admission criteria available at <https://trafalgarhigh.co.za/admission-policy/> (accessed on 27 April 2019).

¹⁸⁷ De Kuilen Primary School Admission Policy available at <http://www.dkps.org.za/attachments/article/68/Admission%20Policy%202020%20%20.pdf> (accessed 12 April 2019).

¹⁸⁸ S 5 (2) of the South African Schools Act 85 of 1996.

coloureds’ – which many learners regarded as ‘trying to keep them in their place and in low-level labour’.¹⁸⁹

According to the research of van der Westhuizen, the establishment of focus schools ‘was an attempt at increasing the performance of historically disadvantaged learners in Senior Certificate mathematics and physical science in a selected number of schools’.

According to the abovementioned research of Van der Westhuizen and Larey, the aim of the establishment of focus schools was never to create an elitist group of schools that functions by selecting only the academically strong learners.¹⁹⁰ The provision of the WCED Admission Policy gives focus schools the authority to create elitist specialised schools to the detriment of other learners that cannot gain entry to such schools.

Schools are using this method to select learners for admission purely based on how these learners will benefit and contribute to the prestige of the school. I did not come across any research that addressed this flaw in the establishment of focus schools.

In terms of the Admission Policy for Ordinary Public Schools Act

The governing body of a public school may not administer any test relating to the admission of a learner to a public school, or direct or authorize the principal of the school or any person to administer such a test. Where placement in a specific course or programme, e.g. technical field of study, dance or music, is required and where it would be in the educational interest of he or she may be requested by the Head of Department to undertake a suitable test to assist a placement decision.¹⁹¹

The abovementioned policy and the WCED Admission Policy were subsequently used as a reference to justify the testing at the experimental focus school initiative.

According to the Guidelines for Focus Schools

A process of auditions/portfolios, aptitude tests (e.g. PACE) and interviews should be conducted to ensure that learners are committed and competent to study in the chosen

¹⁸⁹ Larey P *Focus Schools and Vocational Education in the Western Cape* M.Ed. University of Stellenbosch 2014 available at https://scholar.sun.ac.za/bitstream/handle/10019.../larey_focus_2012.pdf?...isAllowed (accessed on 24 August 2018).

¹⁹⁰ Larey P *Focus Schools and Vocational Education in the Western Cape* M.Ed. University of Stellenbosch 2014 available at https://scholar.sun.ac.za/bitstream/handle/10019.../larey_focus_2012.pdf?...isAllowed (accessed on 24 August 2018).

¹⁹¹ Admission Policy for Ordinary Public Schools Act par 11 (published in G.N. 2432 of 1998 published in The Government Gazette No. 19377 dated 19 October 1998) available at <https://www.elrc.org.za/sites/default/files/documents/NEPA.pdf> (accessed 12 April 2019).

subject/s of the focus-learning field. The audition/interview criteria and processes should be sensitive and inclusive. No learner may be excluded on an unfair basis. In line with the national admission policy for ordinary public schools paragraph 11, the Head of Department of the school must set up aptitude tests for selection of learners into focus subjects in focus schools. Acceptance into focus subjects should be based on an initial screening application form to determine: interest in and enthusiasm in the focus field/subject, prior knowledge and academic or practical track record in the focus field/subject (at least a level 3 in the relevant learning area), learner's personal motivation for selection, learner's commitment to extended notional hours and results of undergoing the PACE career guidance questionnaire.¹⁹²

The tests that are administered at schools, however, are not done according to these criteria. First, the focus schools comprise of different streams namely Arts and Culture, Engineering, Mathematics and Science and Technology and Business, Commerce Management. Focus schools are testing Mathematics and Language with the purpose to select only the best learners.¹⁹³ Secondly, these tests all vary at different schools. The different focus schools write different tests.¹⁹⁴ This indicates that the Head of Education did not draw up these tests as it was envisaged by the Guidelines for Focus Schools of the Western Cape Education Department.

In order to ascertain the validity and the consequences of admission tests, I will look at the legislation and policies that regulate these practices that exclude learners from admission to schools. There are conflicting provisions that regulate the testing of learners in mainstream schools that goes against the provisions of the SASA¹⁹⁵ and the Admission Policy for Ordinary Public Schools.¹⁹⁶ Both the SASA prohibits testing of learners as an admission criterion and the Admission Policy for Ordinary Public Schools provides for the testing of learners as an admission criterion.

¹⁹² Guidelines for Focus Schools of the Western Cape Education Department 2005 available at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiEsIPJ4_LhAhWISRUIHdssCZOQFjAAegQIAhAC&url=http%3A%2F%2Fwww.wcedcurriculum.westerncape.gov.za%2Findex.php%2Fcomponent%2Fdownloads%2Fsend%2F1298-dramatic-arts-focus-schools-for-the-arts%2F11296-focus-school-guidelines&usq=AOvVaw1tjy_VMOTm3juIewmxcmas (accessed on 27 april 2019).

¹⁹³ My own children were tested at the same Dinaledi School. One was successful and the other one not. Only the top learners are selected. There is no criterion that includes the average learner for admission even though they will be able to cope in a Mathematics Focus school.

¹⁹⁴ Learners compared the tests at different schools after writing tests at numerous schools. The tests are all different.

¹⁹⁵ S 5 (2) of the South African Schools Act 84 of 1996.

¹⁹⁶ The Admission Policy for Ordinary Public Schools par 11 (published in G.N. 2432 of 1998 published in Government Gazette No. 19377 dated 19 October 1998) available at <https://www.elrc.org.za/sites/default/files/documents/NEPA.pdf> (accessed 12 April 2019).

In this research, I found two different groups of learners that are subjected to testing for the purposes of admission to schools. The first group consists of learners who had applied to Focus schools. The second consists of learners who are non-South Africans. These learners are tested for admission purposes, as I will discuss below.

a) Testing at Focus schools

The schools in my target group who administer tests on the learner for admission purposes are Mondale High school and Spine Road High school.

The WCED Focus schools conceptual plan aims through the focus school project to

increase the participation and success rates of learners, especially previously disadvantaged learners, expand the number of FET learners who qualify to enter higher education and the world of work and to improve access to higher education especially learners from poor families.¹⁹⁷

Focus schools administer written tests in order to test learners' abilities. The policy makes provision for schools to test learners to ascertain if they meet the subject's ability requirements to benefit from such access to these schools. These tests are conducted on entry and it is becoming a norm to administer these tests when learners are in Grade Seven. There are, however, no guidelines on the ability requirements or the pass requirements for such tests. There is no specific pass percentage required for learners to score in order to gain entry to these schools. The results of these tests are not disclosed and parents cannot get the scores if the learner is denied access to these schools based on their poor performance.¹⁹⁸ The lack of transparency appears legally suspect. It appears that the main purpose of these tests, is to admit the learners with the best scores. Schools are reluctant to admit students who may compromise the school's chances of achieving this goal.

This policy was never challenged in any court and until such legal action is taken, the testing of learners in Focus schools will continue. As long as there is no legal certainty on this issue,

¹⁹⁷ The Western Cape Education Department 'Focus schools: Conceptual Plan' 2016 available

<http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjNkKyy5vLhAhWtQhUIHcZECooQFjAAegQIAhAC&url=http%3A%2F%2Fwww.wcedcurriculum.westerncape.gov.za%2Fdownloads%2FDramaticArts%2FDramatic%2520Arts.%2520Focus%2520Schools%2520for%2520the%2520Arts%2FFocus%2520School.%2520Conceptual%2520Plan..doc&usg=AOvVawIkwoZEMlITCsTqHTD40UxX> (accessed on 27 April 2019).

¹⁹⁸ When my own child wrote the admission test, no results were issued.

learners will be excluded from schools. Learners constitutional right to basic education will continue to be violated.

b) Testing of non-South Africans

In terms section of 5(2) of the SASA, ‘public schools may not administer any test relating to the admission of a learner to a public school’.¹⁹⁹ There are some schools that disregard this provision and test non-South Africans only.²⁰⁰ Table View Primary school provides in their Admission Policy that

no applicant learner, other than a foreign citizen whose home language is not English, shall be required to write any entrance tests. Where such an applicant does not display a sufficient command of the English language, they may be refused entry in terms of the requirements set out by the Department of Home Affairs.²⁰¹

This policy does not state its source of reference and it is not clear what criteria it is referring to that justify the provision to exclude learners that are not competent in English. This is discriminatory on the basis of language and social origin.²⁰²

The School Policy further states that

only biological children of Non-South African Citizens/Foreign nationals will be considered for enrolment, subject to the relevant legal documentation being in order and their biological parents residing in South Africa. In addition, Non-South African citizens/Foreign Nationals who apply for admission to the School may be required to undergo an English proficiency test.²⁰³

This provision in the school admission policy is in conflict with the SASA in two ways. First, it provides that only foreign nationals may be required to undergo an English proficiency test. Secondly, it provides that only the biological children of non-South African or foreign nationals

¹⁹⁹ S 5(a) of the South African Schools Act 84 of 1996

²⁰⁰ Table View Primary Admission Policy available at <https://www.tableviewprimary.co.za/admissions> (accessed on 12 April 2019).

²⁰¹ Table View Primary Admission Policy available at <https://www.tableviewprimary.co.za/admissions> (accessed on 12 April 2019).

²⁰² S 9 of the Constitution of the Republic of South Africa of 1996.

²⁰³ Table View Primary Admission Policy available at <https://www.tableviewprimary.co.za/admissions> (accessed on 12 April 2019).

may apply for admission at this school. This is problematic and in all likelihood contrary to the best interests of the child, which is a constitutional imperative.²⁰⁴

Schools may not use the academic performance of learners to determine admission to a school.²⁰⁵ Additional requirements for admission to schools for non-South Africans raise the following questions:

1. How long does it take to master a new language?

If all non-South-Africans must be tested and found not to be competent in the English language, then all such learners will be excluded from public schools even if they are at subject to the law of compulsory schooling. This also is a violation of South Africa's obligation in terms of the Convention on the Rights of the Child. Parties to this Convention must 'take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'.²⁰⁶

The learners should be accommodated at schools and their language barrier to learning should be addressed with the use of intervention programmes and special learning programmes. Language barriers are not mental challenges where the learner struggle with the learning of new content and skills. Young learners in primary schools are able to master new languages without significant difficulty.²⁰⁷ There are different views on how fast a person can learn a new language. Some views reflect people's personal experience and they are of the opinion that it is possible to learn a new language in less than a year. According to one person, 'if you move to a country that only speaks that language, 10 hours a day being exposed to the language is not that hard to

²⁰⁴ S 28(2) of the Constitution.

²⁰⁵ WCED Policy for the management of Admission and registrations of Learners at Ordinary Public School para 6 available at https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed 10 November 2018).

²⁰⁶ Convention on the Rights of the Child available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed on 02 April 2019).

²⁰⁷ I have experienced this with a learner that came from Congo. She mastered the English language within a year and was one of the top students the following year in my class.

believe' to learn a new language in a few weeks.²⁰⁸ Learning a new language may also be dependent on how much time you engage with the language.

2. Is it not unequal treatment to test non-South Africans only?

Most learners are admitted to school with having only mastered one language. Many learners in the Western Cape speak Afrikaans or Isi-Xhosa at home. They are, however, enrolled in English single medium schools or parallel medium schools without having mastered the English Language, but they are not required to write an English test. This is indicative of unfair discrimination against foreign nationals. This testing thus amounts to unequal treatment and learners are excluded based on their ability to speak English.

Section 6 (3) of the SASA deals with the language policy of schools and it provides that: 'no form of racial discrimination may be practiced in implementing policy determined under this section'. If the language is attached to a race, in this case non-South Africans then the discrimination will be based on race. If the abovementioned school policy provides for such a provision, then it is in conflict with the SASA and the Constitution.²⁰⁹ There is thus clear discrimination based on language and their nationality.

3. Who must teach learners English if it is not the obligation of public schools?

The question then arises as to whose obligation it is to teach these learners English if they are excluded from the public schools because they do not display a sufficient command of the English language. In my opinion the obligation to teach, is on the schools. Learning English is part of basic education and as such everyone has a right to basic education.

When the SGB determines language policy, they must consider what is fair, practicable and will enhance historical redress. Non-South Africans do not require the school policy to change its language policy. In the case of *Hoërskool Ermelo v The Head of Department of Education:*

²⁰⁸ Kaufman S *How long should it take to learn a Language?* <https://blog.thelinguist.com/how-long-should-it-take-to-learn-a-language> (accessed 10 April 2018).

²⁰⁹ S 6(3) of the South African Schools Act 84 of 1996.

Mpumalanga,²¹⁰ the learners required an English medium class and the school was instructed to change its language policy. When non-South Africans apply for admission to schools, they do not demand the language of instruction to be changed. Language should not be used as an exclusionary or punitive measure.

The learner may have a challenge with the language, but as mentioned above, language can be learned. If the only other school that can offer the learner the language in his mother tongue is in his country of origin, then any school in South Africa will have to suffice as his only option will be to drop out of school if the parents cannot afford home schooling.

The Constitution provides that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.²¹¹

It is clear that the Constitution affords these rights to all people in this country. These rights do not differentiate between citizens and non-citizens. It also further provides that everyone has the right to basic education.²¹² The objective is, therefore, to provide that all learners have equal right to the enjoyment of the rights to education. This right may not be subject to whether a child is a biological child, adoptive child or foster child.

SASA also defines 'parent' as

- (a) the parent of 'guardian of a learner (b) the person legally entitled to custody of a learner; or (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school.²¹³

A provision that excludes such learners who are not biological children from parents from applying to a school is unfair and in conflict with the Constitution as well as the SASA.

It illustrates the above-mentioned conflicting provisions.

²¹⁰ *Hoërskool Ermelo v The Head of Department of Education: Mpumalanga* available at <http://www.saflii.org/za/cases/ZASCA/2009/22.html> (accessed 10 April 2018).

²¹¹ S 7(1) of the Constitution.

²¹² S 29 of the Constitution .

²¹³ Definition section of the South African Schools Act of 1996.

4.2.5 Summary of conflicting provisions found in the target group

Table 2 provides a synopsis of the conflicting provisions I found in the admission policies and practices of my target group of research. It is clear that schools have numerous conflicting provisions contained in their admission policies.

Table 2: Conflicting provisions found in admission policies and admission practices

SCHOOL	FOCUS SCHOOL	APPLICATION FEE	RE-REGISTRATION	ID. DOCUMENTS BOTH PARENTS	MUN. ACCOUNT / LEASE	PROOF OF IMMUNISATION	CONSENT TO CREDIT CHECK	TESTS	SCREEN & INTERVIEW	UNABRIDGED BC.
EXC				X	X	X				
DKP				X	X				X	X
TVP				X	X	X		X		X
BP				X	X	X				
BVP					X					
MHS	X	CANCELLED			X			X		
SPINE	X		X		X			X		
THS					X				X	X
GSHS					X		X			
FHHS					X					

KEY

1. Excelsior Primary school (EXC)
2. De Kuilen Primary (DKP)
3. Table View Primary (TVP)
4. Bergvliet Primary (BP)
5. Bay View Primary (BVP)
6. Mondale High School (MHS)
7. Spine Road High School (SPINE)
8. Trafalgar High School (THS)
9. Groote Schuur High School (GSHS)
10. Fish Hoek High School (FHHS)

By investigating the admission policies, I came to three conclusions. First, all the provisions indicated with an X, are in conflict with legislation. Secondly, schools together with their principals are ignoring these conflicting provisions. Thirdly, the principals are not deterred by possible sanctions that may be imposed on them by their employer. The principals are employees of the WCED and the WCED should act to eradicate these unlawful practices.

These practices leave learners in an unfavourable position, as it does not afford them any protection of their socio-economic rights. In order for them to enjoy protection, it needs the force of some sphere of the state to enforce the protection of these rights that our leaders of our country historically fought for. Only obtaining these fundamental rights through the enactment of our Constitution is not sufficient if the society tramps on these rights. There is a positive obligation to protect these socio economic rights that I will discuss in the next chapter.

4.3 STATE'S RESPONSE TO UNLAWFUL ADMISSION POLICIES AND PRACTICES

The WCED must be informed when principals and the SGB's act in conflict with legislation and policies. One of the recourses available to parents of learners to address unlawful policies is to lodge formal complaints at the district offices or the head office of the WCED. Many parents turn to social media to voice their frustration with unlawful policies with the hope that their issue will be escalated and be addressed at the correct forum. The journalists will follow up with the relevant authorities regarding the issues they pick up on social media and report their findings in newspapers. These complaints are usually addressed by the WCED by circularising a general circular to all schools to prohibit unlawful practices.²¹⁴

One such circular is clear evidence that the state is aware of these illegal policies and practices. Circular 0036/2013 of the WCED²¹⁵ cautions schools not to engage in unlawful practices but this is not enough to deter schools from implementing them. The concerned circular addresses issues regarding unlawful practices with regards to admission of school fees.

²¹⁴ WCED Circular 0036/2013 available at https://wcedonline.westerncape.gov.za/circulars/circulars13/e36_13.html (Accessed on 07 November 2018).

²¹⁵ WCED Circular 0036/2013 available at https://wcedonline.westerncape.gov.za/circulars/circulars13/e36_13.html (Accessed on 07 November 2018).

It is evident from this communication from the WCED to schools that parents complained highlights the unlawful practices and gives clear instructions to schools to refrain from doing so. about unlawful practices. Many principals are however not held personally accountable or disciplined regarding these unlawful practices. There are a few instances where principals were charged with misconduct and sanctions were imposed. This only happens if formal procedures are lodged by parents at the WCED. Unfortunately, many parents are not aware of this procedure or are intimidated by the process and therefore principals and the SGB's continue to disregard the law.

4.3.1 Cases that addressed unlawful conduct

In the case of *L Naidoo v HOD, Gauteng Department of Education*²¹⁶ the Department of Education responded to complaints about principals and the SGB who acted contrary to the law.²¹⁷ The employer (WCED) acted strictly on misconduct charges relating to school fees. The misconduct related to school fees and resulted in the dismissal of the principal that should serve as a deterrent of such behaviour.²¹⁸ In this case, the principal of Sandringham High School was charged with misconduct for 11 different charges. I will only address the charges relating to school fees as this is my focus. The principal of the aforementioned school was charged with misconduct for the following:

Allegation1

it is alleged that you abused your position as Principal in that you unlawfully pressurized parents into “donating” money to the school in contravention of the regulations relating to exemption of parents from payment of school fees in public schools.²¹⁹

Evidence was produced and:

Ms. Malala testified that at the time when she paid the donation, she was earning an income of R2500 per month. She was the only breadwinner in her house and her mother

²¹⁶ *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 6 November 2018).

²¹⁷ *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 6 November 2018).

²¹⁸ *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 6 November 2018).

²¹⁹ *L Naidoo v HOD, Gauteng Department of Education* Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-pses-611-1314gp> (accessed on 6 November 2018).

and three daughters lived with her. The mother received a monthly pension of R1300. This evidence was not challenged, and there is no reason for me not to accept it. For Ms. Malala and her family to survive on such a meager income, it must have been extremely difficult.²²⁰

This situation is not unique to Gauteng Province but it is the reality of thousands of families in the Western Cape.²²¹ To bring relief to the percentage of the population that suffers due to socio-economic challenges, legislation and policies were designed and enacted to alleviate their financial burden.²²² Even with the protection afforded to them through legislation, this vulnerable group are still targeted by those that are supposed to enforce policies and legislation. The assumption is that principals are educated and informed and therefore will enforce and act on policies and legislation, but sometimes this is not the case.

The next allegation is indicative of the disregard some principals show for laws and policies that are enacted to protect the most vulnerable groups.

Allegation3

It is alleged that around 13 January 2010 you contravened legislation in that you unlawfully withheld the admission of an orphan resident from Nomonde's HIV/AIDS Children's Home in Lombardy East who had applied for enrolment. You insisted that she paid R5000.00 before being admitted even though she qualified for an automatic exemption.²²³

The reason for the decision of the commissioner narrows it down to the magnitude of the abuse that communities in sub-economic areas are dealing with. The Commissioner stated that the

applicant's misconduct in relation to charge 3 is equally reprehensible. I have held that he knew that he was dealing with an orphanage and knew that orphanages are exempted from paying school fees. Despite the fact that she told him that she runs an orphanage and that she never pays school fees, he still insisted that she must pay R5000. She did not have enough cash and had to go and borrow money in order to pay the R5000. To date this money has not been repaid to her.²²⁴

²²⁰ L Naidoo v HOD, Gauteng Department of Education Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-611-1314gp> (accessed on 6 November 2018).

²²¹ This scenario above reflects the reality of one of many households that I have observed in Mitchell's Plain.

²²² The Western Cape Education Department, Regulations for the Exemption of Parents from the Payment of School Fees, circular 0036 of 2013.

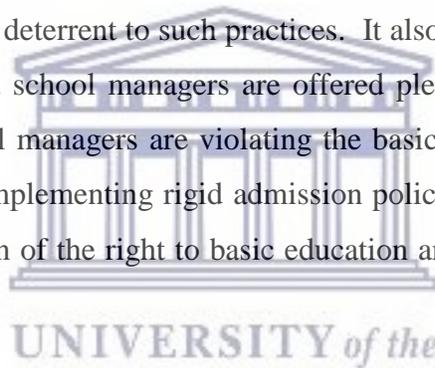
²²³ L Naidoo v HOD, Gauteng Department of Education Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-611-1314gp> (accessed on 6 November 2018).

²²⁴ L Naidoo v HOD, Gauteng Department of Education Case No PSES 611-13/14GP of 2014 available at <http://www.elrc.org.za/awards/award-611-1314gp> (accessed on 06 November 2018).

The abovementioned case illustrates the abuse of false authority. This false authority is created when the less informed and less educated assumes that the person in the management position will enforce the laws properly. Their ignorance is exploited and it is used to extract their last financial means from them. The destitute become more destitute as a result of this abuse of false power.

The abovementioned case is only one of many cases. My research is dependent on public records and only the ELRC cases are public records on an employment regulatory level. The cases heard at the Education Employee Relations Department are, however, not public. Many cases of charges of misconduct are mediated and educators are offered plea bargains by the WCED. This means that educators plead guilty to charges and an agreement to pay a fine is negotiated.²²⁵

Even though the state is aware of unlawful practices, the sanctions they impose for transgressions do not serve as a deterrent to such practices. It also does not aid the eradication of such practices if educators and school managers are offered plea bargains and remain in their positions. Educators and school managers are violating the basic right to education by denying learners access to schools by implementing rigid admission policies. Exclusionary practices and policies in schools is a violation of the right to basic education and this socio-economic right to education must be protected.



4.4 UNPACKING RIGHTS RELATED TO LEARNERS

Human rights are claims that every human being is entitled to, in order to live a peaceful and free life. Traditionally human rights have been classified into civil and political rights (first generation rights) and socio-economic rights (second generation rights). The exclusion of learners from admission to schools impacts on the first generation rights as well as the second generation rights which I will discuss consecutively.

²²⁵ This is common knowledge among educators that the department of Education offers plea bargains when you enter a plea of guilty I know of a few educators that entered into a plea bargain and was issued with a fine.

Table 3: List of Social & Economic rights and Civil and Political rights²²⁶

Social and Economic Rights	Civil and Political Rights
<ul style="list-style-type: none"> • Right to education • Right to food • Right to health • Right to land • Right to water • Environmental Rights • Right to social security • Right to housing 	<ul style="list-style-type: none"> • Human dignity • Freedom of security of person • Privacy • Freedom of religion, belief and opinion • Freedom of expression • Assembly, demonstration, picket and petition • Freedom of association • Political rights • Citizenship • Freedom of movement • Freedom of trade, occupation and profession • Labour rights

This separation does not mean that some rights are more important than others. All rights are universal, fundamental, and equally important for all human beings and cannot be separated from each other. These rights are also intertwined, for example, if the right to food and education is violated, then the right to dignity will be negated.

These rights are afforded to all persons, but are futile if learners are prevented from enjoying these rights. The following rights are a great concern in its application in school policies and practices.

4.4.1 Equality

Section 9 (2) of the Bill of Rights provides that

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.²²⁷

²²⁶ South African Human Rights Commission available at <https://www.sahrc.org.za/home/21/files/Civil%20and%20Political%20Rights%20Report%20Final%20Version.pdf> (accessed 27 April 2019).

²²⁷ S 9(2) of the Constitution.

Learners who are deprived of admission to certain schools in my target group of research are from historically disadvantaged communities. They are disadvantaged by discriminatory admission policies as mentioned earlier in this research. Here I refer to the requirement of many schools that proof of address is produced in the form of a municipal account or lease agreement. It is clear that a learner living in an informal settlement in the close vicinity of the school will not be able to meet the admission criteria. Such learners for obvious reasons cannot produce the required documents.

The Bill of Rights places a positive obligation on the state to promote the achievement of equality by providing measures to protect these learners that are excluded from schools, due to the fact that they are not on an equal class of learners, because their parents do not own houses or are not able to rent houses. Based on this, section 9(3) of the Constitution further provides that

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.²²⁸

This provision prohibits unfair discrimination and with my investigation, I found that schools test learners who are non-South Africans on their English language ability. The provision prohibits discrimination on the ground of language. Language is also attached to a certain race as non-South Africans are predominantly Black Africans that seek admission to public schools. Although the language is not directly mentioned in these policies and regulations, it is implied and because of that, section 9(4) of the Constitution provides that

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.²²⁹

This provision gives an order to the state to enact legislation to prevent this kind of discrimination against learners before admission to schools. This is given effect through the SASA but it does not deter schools from this kind of discriminatory practices. Based on these

²²⁸ S 9(3) of the Constitution.

²²⁹ S 9 (4) of the Constitution.

discriminatory practices, such schools can be held accountable on the basis of section 9(5) of the Constitution which provides that

discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.²³⁰

The WCED Admission Policy decided that testing for the purpose of placing learners in Focus schools is fair discrimination. I strongly disagree with this statement and the implementation of this practice. In terms of section 3 of the South African Schools Act 84 of 1996

Every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.²³¹

The basic right to education is not a limited right and as long as there are not enough schools to accommodate all school learners that are compelled to attend school; such experimental initiatives will be unfair discrimination. The functioning of specialised Focus schools can never take preference over mainstream schools if there is a need for learners to be placed at schools. The needs of learners who are subject to statutory school attendance must be met first. It is not fair or reasonable of the state to promulgate laws that enforce statutory school attendance, but the same state does not make provision for sufficient schools.

4.4.2 Human Dignity

Section 10 of the Constitution provides that ‘everyone has inherent dignity and the right to have their dignity respected and protected’.²³²

This provision affords the right to dignity to everyone and thus including the learners with the right to inherent dignity and respect. The exclusion from admission to schools in itself is also an attack on their dignity. It is, therefore, the State’s obligation to ensure to protect this right. When schools provide that the parents of fee-paying children are subsidising the learners that do not pay school fees, that is degrading and an attack on their dignity. Since schools know this

²³⁰ S (5) of the Constitution.

²³¹ S 3 of the South African Schools Act 84 of 1996.

²³² S 10 of the Constitution .

²³² S 9 of the Constitution.

statement to be untrue, the statement seems malicious. The financial constraints of a non-fee paying parent can be substituted by the school applying for a contribution from the WCED towards the loss of income due to the exemption of school fees that were granted.

4.4.3 Education

The Bill of Rights guarantees that everyone has the right to ‘a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible’.²³³

This provision refers back to the point of the right of education that takes preference over the right of learners that attend specialised schools namely focus schools. As abovementioned, the needs of learners that have a right to basic education must first be met before the state can venture into experimental specialised schools. The South African Human Rights Commission stated that

in order to fully recognise the right to education and to promote interdependence in human rights, the right to education must be prioritised both with a conception of rights in education, and with an understanding of the relationship between the right to education and other human rights. The right to education does not exist in a vacuum, but is intrinsically related to other widely recognised human rights. Realisation of the right to education facilitates the realisation of other human rights, and vice versa.²³⁴

The right to education is automatically linked to all children as the SASA makes school attendance compulsory to all children.

4.4.4 Children

Children are afforded special protection through section 28 (2) of the Bill of Rights as it provides that ‘a child's best interests are of paramount importance in every matter concerning the child’. Practices and policies which arbitrarily prevent learners from receiving a formal education violate this constitutional right. It cannot be in the learner’s best interests if they are excluded from admission to schools.

²³³ S 28 (2) of the Constitution.

²³⁴ South African Human Rights Commission available on https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_7.pdf (accessed on 04 November 2018).

The SASA provides that school attendance is compulsory from ‘the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first’²³⁵ In my view the aim of this provision is to ensure that children attain a basic level of education. The provision serves to protect them. It should not be understood to mean that if a child is older than fifteen; their right to access to learning institutions and schools is diminished. This provision is mere enforcement of their right to basic education, but it does not imply that should they wish to continue their education, that this right ceases to exist when they go beyond school compulsory age.

A ‘child’ is defined as a person under the age of 18 years old’.²³⁶ When learners are denied admission to school and they are over school compulsory age, schools and district offices will first accommodate learners under the age of fifteen years. According to Circular 0240/2003, ‘over-age learners who are 16 years and older may not be admitted to a school, and must be referred to an ABET centre of WCED’.²³⁷ Such learners are compelled to seek education in FET institutions that obviously implies costs such as tuition and travelling. If the age of a child is defined as a person under the age of eighteen, then children should be accommodated in mainstream schools if they need to do so or if it is in their best interest.

There are different reasons why learners are older than other learners. The reasons vary from repeating grades to starting school at a later age. Learners repeat grades, because of lack of progress, pregnancy, relocation to different areas and they cannot find placement in new schools until the next year, absence of reliable transport to schools, gang violence that keeps the communities hostage when they cannot leave their houses. Some learners who live on farms and rural areas have a history of starting their formal education at a later stage. Many parents are not comfortable to send their children to hostels at a young age or they simply cannot afford to do so. All the abovementioned reasons are not in the control of the child. The child should not be disadvantaged if he/she does not complete his basic education in the expected timeframe.

²³⁵ S 3(1) of the South African Schools Act 84 of 1996.

²³⁶ S 28(3) of the Constitution of the Republic of South Africa, 1996.

²³⁷ Circular 0240/2013 of WCED available https://wcedonline.westerncape.gov.za/circulars/2003/e240_03.html (accessed on 2 August 2019).

This research found motivations for the exclusionary measures at schools. The reasons for the exclusions are related to the inability of schools to derive an income from school fees. Schools compete to obtain the best matric pass rate and subsequently get funding from the Department of Education in the form of awards. Schools also select the best learners to make their task easier. Irrespective of the reasons for exclusion of learners from schools, the Constitution is the supreme law of our country and the right of basic education is an unlimited right and should be jealously protected at all costs by the state. This obligation is placed on the state and it should not be negotiable or taken lightly. The next chapter is dedicated to the duty of the state to protect the right to basic education.



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CHAPTER 5

A RIGHT TO EDUCATION: AN OBLIGATION OF THE STATE

There is no limitation to the basic right to education. This right may only be limited in terms of law of general application to the extent that the limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors’.²³⁸ The Constitution puts four different types of obligations on the State namely; that the State must respect, protect, promote and fulfil the rights in the Bill of Rights.²³⁹ This chapter seeks to analyse the abovementioned obligations in the following way. First, the issues to the right to education and whether the right can be limited will be discussed. Secondly, there will also be an analysis on the State’s obligation to give effect to socio-economic rights. Thirdly, an investigation on how the State disregards the violation of learners’ socio-economic rights by allowing exclusionary provisions in school admission policies. Finally, there will be an analysis of whether there are any effective applicable remedies available to learners who have had their socio-economic rights violated.

5.1 NO LIMITATION TO THE RIGHT TO BASIC EDUCATION.

The right to basic education is the protection afforded to every learner through the Constitution. The section, therefore, prohibits schools from implementing and enforcing any exclusionary policies and practices that may have the effect of violating this right. Mtswesi explains the right to education and the duty of the state in relation to the right.

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to reasonable legislative measures’.

This means unlike other socio-economic rights where the state need only demonstrate that it has allocated resources rationally, the right to basic education must be prioritised regardless of the State’s other budgetary commitments.²⁴⁰

²³⁸ S 36 of the Constitution.

²³⁹ S 39(2) of the Constitution.

²⁴⁰ Mtswesi A *The Right to basic Education* Helen Suzman Foudation. available at <https://hsf.org.za/publications/hsf-briefs/the-right-to-basic-education> (accessed on 5 December 2018).

Mtwesi demonstrates how the State has to put structures in place in order to prevent measures that may impede a learner's right to education. Preventative measures can be put in place by designing viable solutions that prevent the exclusion of learners from schools. The duty of the State is therefore twofold. The state must prevent exclusionary practices and also promote inclusionary practices. The State cannot use the excuse of budgetary constraints as a reason for the lack of schools and use that as a justification for excluding learners from schools. The Constitution does not place an internal limitation on the right to education as it does with other socio-economic rights.

The Constitutional Court examined section 29(1) (a) of the Constitution in the case of *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*. Unlike some of the other socio-economic rights, this right is immediately realisable. The Court held that

there is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1) (a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.²⁴¹

5.2 THE STATE'S OBLIGATION TO GIVE EFFECT TO SOCIO-ECONOMIC RIGHTS

The right to basic education has a special aim that encompasses all other socio-economic rights. Mtwesi argues that

The right to education must be understood in light of the aim of education. Education should be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. The right to education as described above is based on the premise that education is a precondition for the exercise of other rights.²⁴²

²⁴¹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) par 37 available at <http://www.saflii.org.za/za/cases/ZACC/2011/13.html> (accessed 12 April 2019).

²⁴² Mtwesi A *The right to basic Education* Helen Foundation available at <https://hsf.org.za/publications/hsf-briefs/the-right-to-basic-education> (accessed on 5 December 2018).

The obligation of the state in the realisation of socio-economic rights was addressed in two landmark cases; *Soobramoney v Minister of Health*²⁴³ and *Government of the Republic of South Africa v Grootboom*²⁴⁴ Both of these cases address the issue on the duty of the State to ensure the realisation of socio-economic rights. The Constitution provides the protection of all socio-economic rights subject to limitation. The Courts are, however, granted the jurisdiction to interpret rights and to adjudicate upon whether a limitation infringes or violates a right. The courts are authorised by the Constitution to give appropriate remedies when a breach of the rights is established. Socio-economic rights are violated when the State fails to meet its obligations required by national legislation.

In the case of *Soobramoney v Minister of Health*²⁴⁵ a patient who was refused dialysis approached the court for relief. The Court held that it is not within its available resources to achieve the progressive realisation of the rights of this patient namely right to life and right to health care in terms of section 27 of the Constitution.²⁴⁶ It was therefore accepted that socio-economic rights such as the right to housing, the right to food and clothing were widely considered judicially unenforceable.²⁴⁷ There is however an internal limitation on the right to health care which is not placed on the right to basic education.²⁴⁸

In a later landmark case of *Government of the Republic of South Africa v Grootboom*, the court had a different approach. This case is recorded as the first time in any nation that a constitutional

²⁴³ *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) available at <http://www.saflii.org/za/cases/ZACC/1997/17.html> (accessed 12 April 2019).

²⁴⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) available at <http://www.saflii.org/za/cases/ZACC/2000/19.htm> (accessed on 05 December 2018).

²⁴⁵ *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) par 59 available at <http://www.saflii.org/za/cases/ZACC/1997/17.html> (accessed 12 April 2019).

²⁴⁶ S 27 of the Constitution of the Republic of South Africa, 1996.

²⁴⁷ *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 para 11 available at <http://www.saflii.org/za/cases/ZACC/1997/17.html> (accessed 12 April 2019).

²⁴⁸ *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 para 11 available at <http://www.saflii.org/za/cases/ZACC/1997/17.html> (accessed 12 April 2019).

court enforced a socio-economic right. It gave legitimacy to the so-called second-generation citizen rights.²⁴⁹ The Court held

the order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.²⁵⁰

Even though this order was made on the right to housing, similar principles can be applied to the right to education. With this order of the Constitutional Court in place, we can now apply the legal principles to this scenario. The legal issue at hand is the inability of the State to provide schools to learners. As long as there is a shortage of schools, the SGB's of schools have the privilege to dictate and select learners of their choice for admission to their schools. The need for more schools allows for the opportunity of schools to exclude certain learners from their institution. This exclusion by means of policy provisions and practices is a violation of a learner's right to basic education. There is also a close relationship between the right to basic education and other socio-economic rights such as a right to equality which includes the right to not be treated unfairly, and the right to human dignity.

The Court confirmed the States' obligation to enforce the protection of socio-economic rights in the case of *Grootboom*. However, this research seeks to advocate specifically for a child's rights to education, which as previously mentioned is not limited by the progressive realisation requirement as in the case of *Soobramoney*. There is also a direct link between their right to education and the constitutional imperative of a right to have a child's best interests considered in all matters concerning them. As provided in the Constitution, children should, therefore, have direct access to public schools. When a child is left without a school to attend or forced to attend a school that is not in their vicinity, the State fails to meet its obligations required by the Constitution. This failure violates the constitutional rights of the child's access to basic education.

²⁴⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 96 available at <http://www.saflii.org/za/cases/ZACC/2000/19.html> (accessed 12 April 2019).

²⁵⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR Par. 96 available at <http://www.saflii.org/za/cases/ZACC/2000/19.html> (accessed 12 April 2019).

This research argues that there is a clear violation of the right to basic education. The State's intervention is needed in order to prevent the exclusion of learners. The State should further ensure that there is access to basic education to those who cannot find any placement in schools due to the lack of schools in the country.

The right to basic education should be prioritised as an important and significant human right. The right to basic education sets the foundation to gain the knowledge required to learn about your human rights. These rights mean very little if a person is not aware and educated on such rights. The right to education is, therefore, the trigger to the enforcement of other human rights. If a person, for example, needs to enforce his right to health or housing, he must be aware of his rights and what those rights mean. This can only be achieved by exercising your right to education.

5.3 EXCLUSIONARY PROVISIONS IN SCHOOL ADMISSION POLICIES.

Schools face many challenges with regards to finances, academic standards and discipline. It is therefore not an uncommon practice at schools to select learners that will contribute in a positive way to the school. This research identifies three main reasons motivating the implementation of exclusionary policies at schools. First, there is a challenge with the shortage of schools. Secondly, there is a link to the income that schools derive from school fees. Thirdly, schools compete to obtain the best matric pass rate in order to receive financial incentives. There are other reasons why schools exclude learners from admission. This research, however, focuses on the three aforementioned reasons for exclusions.

5.3.1 Shortage of schools

Geach reported that

Education Minister Debbie Schäfer said the province was reeling under the sheer numbers of applicants, with 5700 pupils still unplaced. The schooling system in this province has increased by 18285 learners compared to last year, 16285 of which are from

outside the province, Schäfer said. Realistically, to accommodate this growth, we would need approximately 15 new additional schools and over 480 teachers.²⁵¹

There are simply not enough schools to accommodate the number of learners, especially in the Western Cape. A shortage of space at schools creates the opportunity for schools to be selective and to recruit only the best and most suitable learners. They select the learners who will contribute financially to the school and will increase the academic standards of the school. Schools introduce additional selection criteria such as; fees, testing, proof of address and extra documents in order to exclude certain learners. Learners have to compete to gain entry into a school based on academic performance and dedication in already intolerable conditions. If a learner has the ‘wrong address’ and do not have the required documents that are required by schools, all the hard work and dedication is in vain.

5.3.1.1 A classroom or an instruction space

Despite the shortage of schools offered as the reason for the non-placement of learners, there are other possible spaces that can be used to accommodate these learners. This is evident in the WCED Circular 0069/2004 which states the following:

A classroom or an instruction space

Instruction space is defined in Circular 0240/2003 as the space in any classroom, including laboratories, specialist rooms and other suitable rooms in a school building that can be used for the teaching of learners. (School halls and forums are excluded.)²⁵²

This abovementioned circular makes it clear that where lecture space is available at school, the school must make use of this space to accommodate learners. It is not clear that schools necessarily make if they reject learners on the basis of limited or no space available. Many schools converted classrooms into halls but it's not utilised for the purpose that they were built for such as functioning as a lecture space.

²⁵¹ Geach C *Cape schools cannot cope with influx of pupils from other province* IOL news 2 February 2019 available at <https://www.iol.co.za/weekend-argus/news/cape-schools-cannot-cope-with-influx-of-pupils-from-other-provinces-19094629> (accessed on 12 April 2019).

²⁵² WCED Policy: Admission of Over-Age Learners to Public Schools available at https://wcedonline.westerncape.gov.za/circulars/2004/lgsp.html#./2003/e240_03_sp.html*e_inf_top.html#e69_04.html (accessed on 14 May 2019)

5.3.1.2 Classrooms built with funds from agents other than the State

Schools are reluctant to use lecture space allocated for specialised teaching purposes. Available space is sometimes used as school halls and storing space. Some schools argue that the WCED cannot prescribe to them on the use of buildings that the school has acquired through their own income. Section 13 of the SASA provides that such buildings are the property of the State.

The WCED Circular 0069/2004 states that

all assets acquired by a public school ...are the property of the school". As public schools are on State land, the WCED/MEC may prescribe how the buildings should be used. All classrooms at a school will therefore be considered when determining the minimum number of learners per class.²⁵³

The abovementioned WCED circular provides for schools to offer space for learners by making use of the spaces defined as lecture space. Arguably schools could convert halls into lecture spaces. This is one way of creating space for students. According to the abovementioned circular and the SASA, these should be utilised to accommodate learners.

The Grade Reception (Grade-R hereafter) also occupies much-needed space in schools that should be allocated to learners that must attend school. Schools gain access to funds through fundraisers and donations they receive. Many schools allocate such funds to the building of Grade-R rooms. Grade-R learners are not subjected to compulsory schooling yet. Although there are plans to implement two years of compulsory Early Childhood Development (hereafter ECD) for all children before they enter Grade One, the plans are still in the process of being confirmed.²⁵⁴ There is a challenge in realising this goal as the State cannot provide enough schools to meet the current demand to place learners at school.

Schools are reluctant to give up the space that is allocated to Grade-R classes. Schools that are not declared no-fee schools may charge fees from the parents of Grade-R learners. Schools

²⁵³ WCED Circular 0064/2004 *Establishing the capacity of a public ordinary school in the Western Cape* para 3.2.2. available at https://wcedonline.westerncape.gov.za/circulars/2004/e69_04.html (accessed on 05 December 2018).

²⁵⁴ *Two years to pre-school prep to become compulsory-Ramaphosa* All Agency News Polity available at <https://www.polity.org.za/article/two-years-of-pre-school-prep-to-become-compulsory-ramaphosa-2019-02-08> (accessed on 8 August 2019).

generate a substantive amount of money from charging school fees for Grade-R learners.²⁵⁵ The WCED allocates funding every year to Grade-R learners but schools that are declared no-fee schools, however, may not charge school fees for Grade-R learners.

While there may be limited space, interim solutions such as the use of halls can be introduced in order to avoid the exclusion of learners. Long-term solutions such as building more schools must be a priority in order to give effect to learner's right to education.

5.3.2 Income from school fees

There are various methods of raising funds for schools, school fees are, however, the most simple form. According to the National norms and standards for school funding,²⁵⁶ the State provides a specific percentage per learner. However, schools are advised in terms of section 46 of the National norms and standards for school funding to supplement their income with additional funding for the basic functionality of the school. The additional funding that the school acquires is often allocated towards the employment of additional educators. In some schools, the additional teachers are employed in order to reduce the number of learners per class. This does not apply to the economically disadvantaged communities.

According to Circular 0069/2004,

the guideline for establishing the capacity of public ordinary schools in 2005 is a sliding scale of 35-38. In other words, the capacity of a school for 2005 is a classroom: learner ratio of 1:35 to 38 for all schools.²⁵⁷

It appears that it is less likely to find public schools in poorer communities where the ratio teacher per learner is less than the required 1:38 even though additional educators are employed at the school. For example, at Bergville Primary School there are more than 70 learners in a

²⁵⁵ Uitsig Primary school website Grade-R fees available at <http://www.uitsig-primary.co.za/index.php/features-mainmenu-47/school-fees-1#grade-r-fees> (accessed on 8 August 2019).

²⁵⁶ S 46 of the South African Schools Act 84 of 1996 schedule National norms and standards for school funding.

²⁵⁷ Circular 0069/2004 Establishing the Capacity of a Public Ordinary School in the Western Cape par 4 available at https://wcedonline.westerncape.gov.za/circulars/2004/e69_04.html (accessed on 11 March 2019).

class.²⁵⁸ In the poorer communities, it appears that the additional educators are employed only to relieve the principal and management team from teaching duties in order to perform their extra duties and responsibilities. In essence, the school is raising funds to employ additional educators to perform the teaching duties of the management team. Their teaching duties are made substantially less than a post level 1 educator to give them more administrative periods in order to perform management duties. This funding is therefore hardly beneficial to the learner to facilitate smaller classes.

5.3.3 Obtaining the best matric results

Schools compete with one another to obtain the best matric pass rates. The competitiveness arises from the status that the principals enjoy as a result of being the manager of a school that reaches high matric pass rates. The success is beneficial to principals because the more successful the pass rate is, the more successful the principal's application to other promotional posts will be. The incentives that the school receives from WCED also play a role. In order to secure the best pass rate, it is not uncommon for schools to exclude learners who are preventing them from reaching this objective.

What is important to note from the three reasons for exclusions of learners is that all have a strong connection to the issue of funding. The urgent need for more State schools to be built is an obligation that the State needs to fulfil. The income derived from school fees are linked to the best learners a school can recruit. Selecting the "best" learners maybe seem to secure a better matric pass rate for the school, which translates to the school receiving more incentives. The question arises as to who is responsible to ensure that schools are built, that schools are funded with sufficient resources to operate and ensures that those resources are used effectively to ensure quality education that leads to the required pass rates.

²⁵⁸ South African Ground up "Overcrowded Bergville Primary School to get additional teacher" WCED 13 January 2019 <https://www.thesouthafrican.com/overcrowded-bergville-primary-school-additional-teacher-says-wced/> (accessed on 12 April 2019).

5.4 THE STATE'S VIOLATION OF THE SOCIO-ECONOMIC RIGHTS OF LEARNERS

According to the United Nations Human Rights Commission

A violation of economic, social and cultural rights occurs when a State fails in its obligations to ensure that they are enjoyed without discrimination or in its obligation to respect, protect and fulfils them. Often a violation of one of the rights is linked to a violation of other rights. One example of a violation of economic, social and cultural rights includes: 'Systematically segregating children with disabilities from mainstream schools (the right to education)'.²⁵⁹

The following can be used as a guideline to identify instances when the State is in violation of socio-economic rights.²⁶⁰

The State is in violation of the socio-economic rights if

a) *It fails to take measures required for the promotion and protection of economic and social rights.*²⁶¹

Even though the WCED is taking steps to deter persons from violating the rights of learners, by for example, charging school fees for learners, it does not serve as a deterrent as these practices still continue. The sanctions after following disciplinary hearings, that the WCED imposes on schools and its employees do not have the desired effect as violations persist. The State is thus failing in its duty to take effective measures to prevent these exclusionary practices from occurring.

b) *It fails to remove promptly obstacles which it is under a duty to remove in order to allow immediate fulfilment of a right.*²⁶²

²⁵⁹ United Nations Human Rights Commission available at <https://www.ohchr.org/en/issues/escr/pages/whatareexamplesofviolationsofescr.aspx> (accessed on 12 March 2019).

²⁶⁰ *Violation of social and economic rights*, Chapter 5 available at https://www.westerncape.gov.za/text/2005/3/chap5_socio_economic_rights.pdf (accessed on 5 December 2018).

²⁶¹ United Nations Human Rights Commission available at <https://www.ohchr.org/en/issues/escr/pages/whatareexamplesofviolationsofescr.aspx> (accessed on 12 March 2019).

²⁶² United Nations Human Rights Commission available at <https://www.ohchr.org/en/issues/escr/pages/whatareexamplesofviolationsofescr.aspx> (accessed on 12 March 2019).

This refers to the duty to remove any obstacles that may prevent the fulfilment of a right. Principals who remain in their management position after they are found guilty of misconduct for violating socio-economic rights for excluding learners from school, should not be offered plea bargains and continue management of schools. The SGB's should be removed or retrained in order to effectively fulfil their duties if they are found guilty of implementing these exclusionary practices.

c) *It fails to implement without delay a right which it is required to provide immediately.*²⁶³

This guideline requires that governments move hastily towards providing the realisation of the right to education. When parents turn to the available organisations, it is time consuming and the opportunity of the realisation of that right is not satisfied. This is the case when the learner is excluded due to discriminatory exclusionary provisions but when the process of filing a complaint is followed, the school may have reached its capacity or the learner may have lost out on valuable teaching time. Parents of learners who are suffering as a result from the injustices of exclusionary school policies are usually the ones that cannot afford immediate legal services in order to prevent the injustice. If such learners are fortunate enough, they will then often register at another school that is far away and thus put a financial strain on their budget. At a later stage they may drop out due to financial challenges. Once the learner is registered in a school, they do not have a claim for their right to education and have to suffer the financial burden of travelling fees. This is, therefore, a case of justice delayed is justice denied.

d) *It wilfully fails to meet an acceptable minimum standard of achievement, which is within its powers to meet.*²⁶⁴

The guideline relates to the possibility of the State to meet the obligation. Classrooms converted to school halls and other venues can be used as lecture space to accommodate learners. The State can act immediately on removing exclusionary provisions and it is within its means to do so. If

²⁶³ United Nations Human Rights Commission available at <https://www.ohchr.org/en/issues/escr/pages/whatareexamplesofviolationsofescr.aspx> (accessed on 12 March 2019).

²⁶⁴ United Nations Human Rights Commission available at <https://www.ohchr.org/en/issues/escr/pages/whatareexamplesofviolationsofescr.aspx> (accessed on 12 March 2019).

such exclusionary provisions are practiced even after clear instruction from the WCED, such practices must be made punishable by law.

e) *It deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted or due to a lack of available resources.*²⁶⁵

The guideline supports the view that sometimes the limitation of a right is permitted due to a lack of available resources. Certain socio-economic rights are subject to this limitation for example right to health as seen in the case of *Government of the Republic of South Africa v Grootboom*. The right to basic education however is an unlimited right. It is not subject to available resources. The State is thus under an obligation to ensure that there are enough schools to accommodate all learners so that they are excluded from schools. The State is therefore halting the progressive realisation of this right if it maintains that due to budgetary constraints it cannot fulfil this right.

Based on the abovementioned arguments as explained from (a) to (e), the State is in clear violation of the socio-economic rights of learners.

5.5 REMEDIES FOR THE VIOLATION OF SOCIO-ECONOMIC RIGHTS.

The available remedies for a violation of socio-economic rights, include the following; ‘rehabilitation, satisfaction or guarantees of non-repetition, mediation, arbitration, restitution and compensation’.²⁶⁶

These abovementioned are the remedies that are offered to persons when their basic human rights are violated. However, the remedies cannot always be instituted for various reasons such as a lack of knowledge, intimidation of process and lack of skill of policymakers (SGB) that will be analysed.

²⁶⁵ United Nations Human Rights Commission available at <https://www.ohchr.org/en/issues/escr/pages/whatareexamplesofviolationsofescr.aspx> (accessed on 12 March 2019).

²⁶⁶ Western Cape Government *Violation of social and economic rights*, Chapter 5 available at https://www.westerncape.gov.za/text/2005/3/chap5_socio_economic_rights.pdf (accessed on 5 December 2018).

First, the remedies are often problematic if the group of people whose rights have been violated do not know that their rights have been infringed. Should they not have an understanding of their rights, they would not know what those remedies are and how to institute it. These already destitute groups of people are usually the same people who cannot find placement in schools for their children.

Secondly, the parents may also be intimidated by the processes and underlying inequality when it comes to accessing legal remedies. Schools are not accommodating when parents wish to inform the schools about their financial and personal positions. It is granted that some parents will try to neglect their obligation to pay for school fees and provide the necessary documents. However, there are many parents who are unable to satisfy the requirements of the school. These requirements are exclusionary in nature and should be eradicated. Parents, in their individual capacity, who go against the policy of a school often struggle because they are less equipped to argue the matter. It is therefore recommended that parents challenge schools with exclusionary admission policies with a class action.

Lastly, the State has a duty to protect socio-economic rights. This will never be realised if these exclusionary practices are still applied and adopted and included in school admission policies. The state must, therefore, put structures in place to ensure that the school admission policies are in compliance with the Constitution and relevant legislation. It is not enough to merely inform schools that the admission policies must be in line with the Constitution and legislation, there has to be effective implementation of this prohibition. School admission policies should be subjected to scrutiny by competent persons who are knowledgeable about the law. If the schools do not have the legal knowledge to draw up admission policies, they can acquire the services of such persons that render these services. If schools cannot afford such services, the State should provide proper training with the help of professionals to the SGB to teach them these skills.

CHAPTER 6

CONCLUSION

6.1 FINDINGS

The research aimed to identify exclusionary policies and practices that cause the indirect and direct exclusion of learners from admission to certain schools. This study identified exclusionary provisions and practices relating to school admission policies. These provisions are in direct conflict with the Constitution and other relevant legislation.

Some of these provisions in school policies are given force by provincial legislation that allows, for example, the testing of learners at specialised schools. The provisions, such as testing learners, are in conflict with the SASSA and therefore the Constitution. Many learners who are excluded from admission to schools based on their performance may not be able to attend schools further away from home and this may result in the drop out of learners. The exclusionary practices will be tolerated as long as there is a shortage of schools and it will contribute to the ‘push out’ of learners. We as a society cannot tolerate the inequalities that violate human dignity. The protection that is afforded by the Constitution must be effectively enforced by the courts and the legislature. When the State fails to fulfil its obligation and does not govern in terms of the citizen’s needs, the State serves no purpose and must be challenged. We saw this in the recent student uprisings with the no-fee campaigns at South African universities.

6.2 RECOMMENDATIONS

There are already non-governmental initiatives addressing these injustices in schools.²⁶⁷ It is, however, time consuming and costly to the organisations to deal with individual cases. There should be a single class action to address these exclusionary policy issues evident in our schools. A mechanism should be put in place (for example a special directorate or ombudsman) to enforce compliance of school policies with legislation, and penalties awarded to those who do not comply with the law.

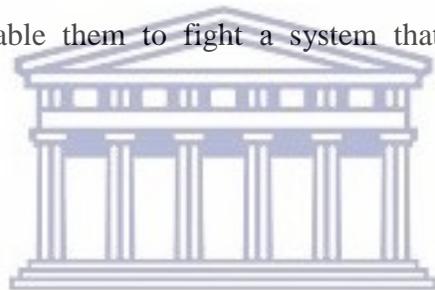
²⁶⁷ Equal Education Law Centre website available at <https://eelawcentre.org.za/> (accessed on 8 August 2019).

Teacher training programmes should inform teachers about exclusionary practices, and how to identify and address unlawful exclusionary practices.

The issue of focus schools must be addressed by the Courts to determine whether the establishment of Focus schools which only benefit a certain group of learners, is in conflict with the constitutional right of other learners. The Constitutional Court can provide legal certainty on this issue.

6.3 PERSPECTIVES AND INSIGHTS

As an educator and academic, this research brought to light the need for universities and other academic institutions to equip educators with the necessary skills and knowledge to empower learners to exercise their basic human rights. Teachers have a duty to educate the destitute on their human rights and to enable them to fight a system that can only be beaten through education.



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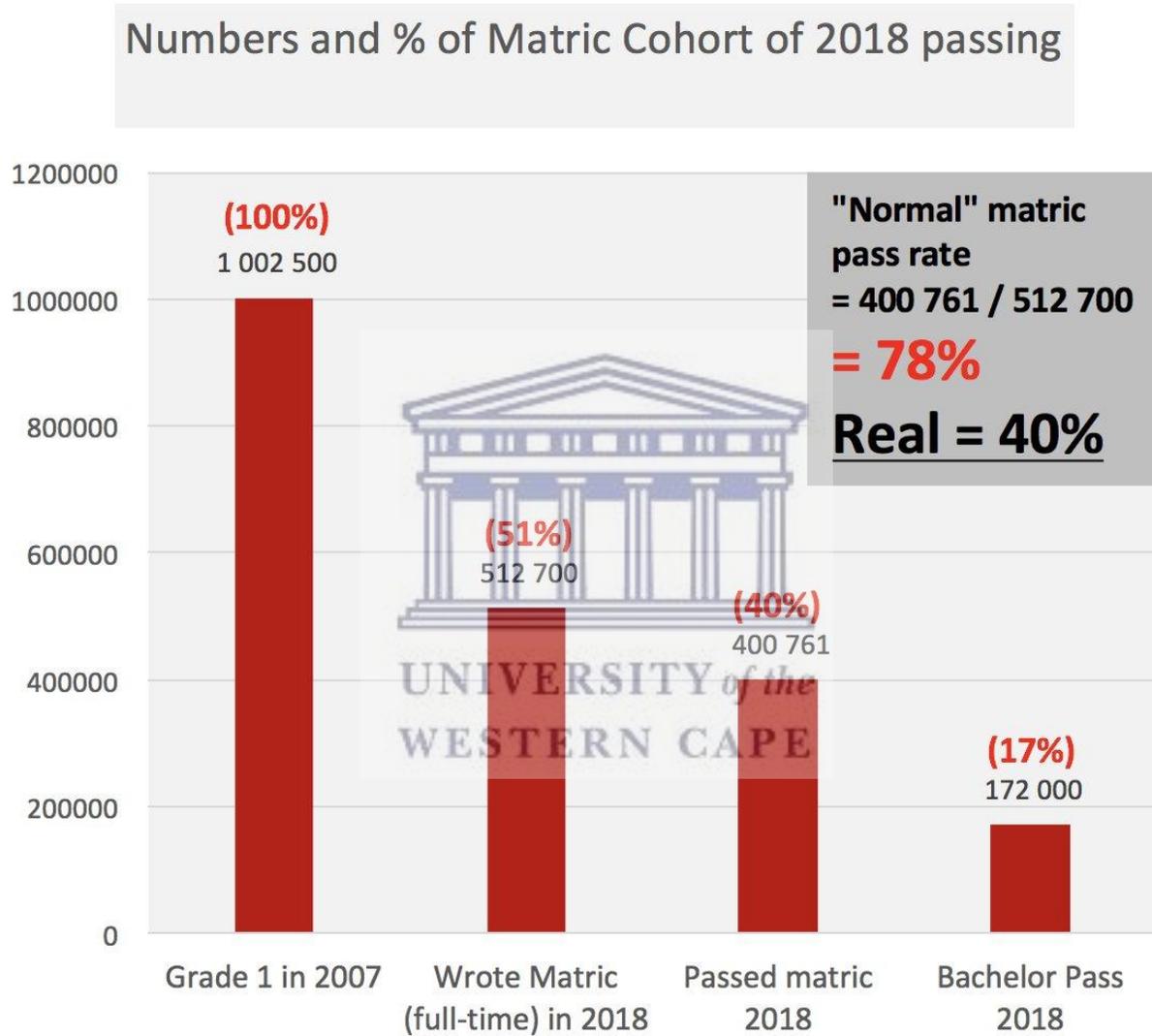
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APPENDICES

Appendix A: Numbers and % of Matric Cohort of 2018 passing



Note: Sourced from Mbiza M Stop shouting that the 'real' pass rate is less than 50% available at <https://www.dailymaverick.co.za/opinionista/2019-01-07-stop-shouting-that-the-real-pass-rate-is-less-than-50/> (accessed on 10 April 2019).

Appendix B: Focus schools in the Western Cape

District /EMDC	School	Area	Learning Field / Focus
Central	Alexander Sinton Secondary	Athlone	Arts & Culture
	Gardens Commercial High	Cape Town	Business, Commerce & Management
	Spes Bona Secondary	Athlone	Engineering & Technology
	Belgravia Secondary	Athlone	Maths, Science & Technology
	Garlandale Secondary	Athlone	Maths, Science & Technology
	Harold Cressy High	Cape Town	Maths, Science & Technology
	Kensington Secondary	Kensington	Maths, Science & Technology
	Livingstone High	Claremont	Maths, Science & Technology
	Rhodes High	Mowbray	Maths, Science & Technology
	Rylands High	Gatesville	Maths, Science & Technology
	Sinethemba Secondary	Gugulethu	Maths, Science & Technology
	Thandokhulu High	Mowbray	Maths, Science & Technology
East	Chris Hani Secondary	Khayalitsha	Arts & Culture
	Eerste River Secondary	Eerste River	Arts & Culture
	Bernadino Heights Secondary	Kraaifontein	Business, Commerce & Management
	Joe Slovo Secondary	Khayelitsha	Business, Commerce & Management
	Zola Secondary	Khayelitsha	Business, Commerce & Management
	Western Cape Sports School	Kuils River	Engineering & Technology
	Bulumko Secondary	Khayelitsha	Sport
	COSAF	Khayelitsha	Maths, Science & Technology
	Harry Gwala Secondary	Khayelitsha	Maths, Science & Technology
	Hottentots-Holland High	Somerset West	Maths, Science & Technology
	Kwamfundo Secondary	Khayalitsha	Maths, Science & Technology
	Luhlaza Secondary	Khayelitsha	Maths, Science & Technology
	Malibu Secondary	Blue Downs	Maths, Science & Technology
	Matthew Goniwe High	Khayelitsha	Maths, Science & Technology

	Manyano Secondary Sarepta Secondary	Khayelitsha Kuils River	Maths, Science & Technology Maths, Science & Technology Maths, Science & Technology
North	Belhar Secondary Elsies River Secondary Proteus Secondary St Andrews Secondary Atlantis Secondary Kasselsvlei Comprehensive Ravensmead Secondary Settlers High	Belhar Elsies River Atlantis Elsies River Atlantis Bellville Ravensmead Bellville	Arts & Culture Business, Commerce & Management Engineering & Technology Engineering & Technology Maths, Science & Technology Maths, Science & Technology Maths, Science & Technology Maths, Science & Technology
South	Cedar Secondary South Peninsula High Wynberg Secondary ID Mkhize Secondary Oval North Secondary Princeton Secondary Gugulethu Comprehensive Cape Academy Fezeka Secondary Grassy Park Secondary Heathfield High Mondale High Muizenberg High Oscar Mpetha High Rocklands Secondary Sophumelela Secondary Norman Henshilwood High.	Mitchells Plain Diep River Wynberg Gugulethu Mitchells Plain Mitchells Plain Gugulethu Constantia Gugulethu Grassy Park Heathfield Mitchell's Plain Muizenberg Gugulethu Mitchell's Plain Philippi Plumstead	Arts & Culture Arts & Culture / Maths, Science & Technology Arts & Culture Business, Commerce & Management Engineering & Technology Engineering & Technology Engineering & Technology Maths, Science & Technology

Breede River & Overberg	Worcester Secondary Esselen Park Secondary Groenberg Secondary Breederiver Secondary Langeberg Secondary	Worcester Worcester Grabouw Worcester Ashton	Arts & Culture Business, Commerce & Management Engineering & Technology Maths, Science & Technology Maths, Science & Technology
West Coast & Winelands	Schoonspruit Secondary Bergrivier Secondary Weston Secondary Desmond Mpilo Tutu Secondary Klein Nederburg Secondary New Orleans Secondary Wesbank Secondary Vredendal Secondary Diazville High Luckhoff Secondary	Malmesbury Wellington Vredenburg Mbekweni (Paarl) Paarl Paarl Vredenburg Vredendal Saldanha Stellenbosch	Arts & Culture Business, Commerce & Management Engineering & Technology Maths, Science & Technology
South Cape & Karoo	George Secondary Bridgton Secondary Môrester Secondary Percy Mdala High Sao Bras High	George Oudtshoorn Oudtshoorn Knysna Mossel Bay	Arts & Culture Business, Commerce & Management Engineering & Technology Maths, Science & Technology Maths, Science & Technology ²⁶⁸

²⁶⁸ WCED Minute DOD/0071/2007 FOCUS SCHOOLS: PROVIDING ACCESS TO EXCELLENCE available at https://wcedonline.westerncape.gov.za/circulars/minutes07/lgsp.html#edcd71.pdf*e_inf_top.html#edcd71_07.html (accessed on 02 November 2018).