IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no.: 55070/21

In the matter between –

THE AFRICAN CHRISTIAN DEMOCRATIC PARTY (THE ACDP)	First Applicant
FREE THE CHILDREN – SAVE THE NATION NPC	Second Applicant
CARING HEALTHCARE WORKERS COALITION	Third Applicant
COVID CARE ALLIANCE NPC	Fourth Applicant

and

THE MINISTER OF THE NATIONAL DEPARTMENT OF HEALTH (DoH) DR M PHAAHLA	First Respondent
THE ACTING DIRECTOR-GENERAL OF THE NATIONAL DEPARTMENT OF HEALTH DR N CRISP	Second Respondent
THE SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY (SAHPRA)	Third Respondent
SECTION27	*Amicus Curiae*

SECTION27's HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1 In this application, the African Christian Democratic Party ("the ACDP") and its three co-applicants seek an order that would – in effect – put an end to the rollout of COVID-19 vaccines to children aged between 12 and 17, pending the final outcome of a statutory appeal against a decision of the South African Health Products Regulatory Authority ("SAHPRA") to authorise the use of the vaccine (known as Cominarty) in that particular age group.[1]

2 The appeal in question was noted by the second applicant, purportedly in terms of section 24A of the Medicines and Related Substances Act 101 of 1965 ("the Medicines Act"). According to prayer 2 of the notice of motion, interim interdictory relief is sought pending the finalisation of the appeal *"and <u>any legal processes pursuant thereto</u> (including any review application and appeals)"*.[2] As we explain below, these legal processes could take years to unfold.

3 The application was intended to be heard as a matter of extreme urgency. In terms of the notice of motion,[3] notices of intention to oppose were to be delivered by the morning after the proceedings were initiated, with answering affidavits being delivered by the close of business two days later, a replying affidavit by noon of the following day, and a hearing just three court days later.[4] Such an ambitious timetable was never going to work.

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[1] Notice of motion, prayer 2, p 003-2
[2] *Ibid* (our emphasis)
[3] Notice of motion, p 003-1
[4] Sujee affidavit, para 5, p 030-23

4 On 10 November 2021, by agreement between the parties, the application was postponed *sine die*. Once SECTION27 became aware that the matter had been postponed, it sought the parties' consent to be admitted as *amicus curiae* (*"amicus"*). Pursuant to directions issued by the Deputy Judge President on 22 November 2021,[5] SECTION27 filed an application to be admitted as *amicus* in terms of rule 16A(5). Amongst other things, it sought an order –

4.1 directing that the evidence that formed part of the founding papers in that interlocutory application be included in the record of proceedings in this application; and

4.2 granting it leave to file heads of argument in, and make oral submissions at the hearing of, this application.

5 On 22 February 2022, SECTION27 was admitted as *amicus*. In terms of the order granted by Tolmay J,[6] *"[t]he evidence that forms part of the founding papers in SECTION27's application for admission as amicus ... is included in the record of proceedings in [this] application."*[7] In addition –

5.1 the parties were *"granted leave to answer the allegations contained in the new evidence"*;[8] and

5.2 SECTION27 was granted leave to –

[5] Sujee affidavit, para 8, p 030-24
[6] See pp AA1 – AA2
[7] Para 2
[8] Para 3

5.2.1. reply, should any of the parties deliver an answering affidavit;[9]

5.2.2. file heads of argument in this application;[10] and

5.2.3. make oral submissions at the hearing of this application.[11]

6 Only the applicants filed answering papers.[12] In turn, SECTION27 filed its reply.[13]

7 In these heads of argument, filed in terms of paragraph 5 of Tolmay J's order, we consider the following five issues in turn:

7.1 First, a brief overview of this application and SECTION27's intervention;

7.2 Second, the scope of SECTION27's intervention, including a summary of its new evidence;

7.3 Third, the requirements for an interim interdict;

7.4 Fourth, a consideration of the implications of the various rights on which SECTION27's intervention is primarily grounded; and

7.5 Finally, standing to bring an (internal) appeal in terms of section 24A of the Medicines Act.

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[9] Para 4
[10] Para 5
[11] Para 6
[12] See pp 017-4 to 17-9
[13] See pp 015-4 to 015-10

BRIEF OVERVIEW OF THIS APPLICATION

8 Purportedly brought in terms of rule 6(12), this application primarily seeks to stop the rollout of COVID-19 vaccines to all eligible children, regardless of their and/or their parents' (or legal guardians') choices, pending the final outcome of the second applicant's internal appeal purportedly brought in terms of section 24A of the Medicines Act. Although styled as an interim interdict, the relief sought – if granted – could potentially remain in place for years.

9 While the internal appeal could indeed be decided within months, if not sooner, the ACDP and its co-applicants make it plain that the interdictory relief they seek could last much longer; the relief they seek – if granted – would remain in place pending *"any legal processes pursuant [to the internal appeal] (including any review application and appeals)"*. This could include, for example –

9.1 a review application in the High Court, brought in terms of rule 53;

9.2 one or more applications for leave (and/or special leave) to appeal;[14] and

9.3 one or more appeals, before the full court of this division, the Supreme Court of Appeal ("SCA"), and/or the Constitutional Court.

[14] See sections 16(1)(a) and 16(1)(b) of the Superior Courts Act 10 of 2013, and rule 19 of the Rules of the Constitutional Court.

10 In addition to interdictory relief, the applicants seek declaratory relief relating to the *"emergency use of and administration of the vaccine on a case by case basis"*. In their notice of motion delivered on 1 November 2021, the applicants contemplated such use only being granted in these exceptional circumstances:[15]

10.1 authorisation being sought (presumably from SAHPRA), by a health practitioner, for a specific child;

10.2 the child in question having *"COVID 19 co-morbidities"*;

10.3 the child and their parents or guardians being *"fully informed of the risks associated with the use of the vaccine"*; and

10.4 the child and their parents or guardians being provided with certain specified information, such as –

10.4.1. *"children generally are at effectively no risk from the SARS-CoV-2 virus"*;

10.4.2. *"children generally do not require vaccination for their own protection from the SARS-CoV-2 virus"*; and

10.4.3. "society at large does not require children to be vaccinated to prevent the spread or transmission of the SARS-CoV-2 virus."

[15] Notice of motion, prayer 4, p 003-3

11 On 24 November 2021, the applicants delivered a notice of amendment in terms of rule 28. The respondents were given ten days (i.e. until 8 December 2021) to oppose, failing which the amendment would be effected.[16] The record reflects that there was no opposition to the applicants' contemplated amendment.

12 Although somewhat internally contradictory, the notice appeared to seek an amendment resulting in prayer 4 now reading as follows:

> *"That the aforesaid interdict and restraint does not extend to the emergency use of and administration of the vaccine on a case-by-case basis to children aged 12 – 17 years of age with COVID 19 co-morbidities as prescribed by section 21 of the Medicines and Related Substances Act, No 101 of 1965".*

13 It is not clear what is meant by *"prescribed by section 21"*. We assume that what is contemplated is a case-by-case authorisation in terms of section 21 of the Medicines Act, which is ordinarily sought by a medical practitioner on behalf of a particular patient. What is clear is that the applicants are no longer seeking an order directing that authorisation may only be granted subject to the provision of specified "information" to children and their parents or guardians.

14 Even in its amended state, the nature of the relief sought is quite extraordinary. On the basis of an internal appeal brought by a then two-month-old organisation that purports to act in the best interests of children (but has put up no evidence in support of this claim),[17] the applicants seek to put an effective end to a vital

[16] Record, pp 012-7 to 012-10
[17] See founding affidavit, para 27, p 003-16

public health intervention, relying on questionable "experts",[18] and in the absence of any challenge to the lawfulness of the decision to implement the intervention.[19]

15 It is deeply disturbing that we know very little about all but one of the applicants: the ACDP, a political party represented in parliament, that claims to have been *"inundated with pleas from its constituency to intervene on their behalf and defend their right to choose that they and their children not be forced to take into their bodies any substance, remedy, or medication they do not approve of, fear or do not know the true efficacy or safety of."*[20]

16 This case has nothing to do with forcing anyone to be vaccinated against their will; it concerns the extension of an existing voluntary vaccination programme to children aged between 12 and 17. It is ironic that this application seeks to ensure – for an indefinite period of time – that those who do not share the beliefs of the ACDP and its constituency are denied their choices to protect themselves, their children, and/or their fellow learners, teachers, and/or community members.

17 Insofar as the other applicants are concerned, we are simply told that –

17.1 The aims and objectives of the second applicant, a not-for-profit company only registered in 2021, *"include promoting, protecting, and upholding the best interests and rights of the children of South Africa"*;[21]

[18] First and second respondents' answering affidavit, para 12, p 009-6
[19] First and second respondents' answering affidavit, para 140, p 009-56
[20] Founding affidavit, para 12.2, p 003-12
[21] Founding affidavit, para 13, p 003-12

17.2 Mr John Taylor, the public face of the second respondent, is –

17.3 *"an adult male businessman ... residing at Paarl, Western Cape Province"*, and a *"duly authorised representative of the second applicant"*;[22] and

17.4 *"an adult engineer by profession and a founding member and CEO of the second applicant"*;[23]

17.5 The third applicant, *"a voluntary association and universitas personarum"*, *"is an organization of medical doctors, specialists, nurses and frontline workers in South Africa"* which *"stands for the health, wellness and protection of its members and their patients and people who have and will suffer Covid"*;[24] and

17.6 The fourth applicant, another not-for-profit company only registered in 2021, *"is based on an alliance network of various groups and individuals, professionals like attorneys, advocates, alternative practitioners, medical doctors, scientists, and parents, representing people and organisations who seek to help and protect persons affected by Covid including promoting, protecting, and upholding the best interests of the children"*.[25]

[22] Taylor confirmatory affidavit, para 1, p 003-210
[23] Reply to SAHPRA's answering affidavit, para 1, p 014-2
[24] Founding affidavit, para 14, pp 003-12 to 003-13
[25] Founding affidavit, para 15, p 003-13

18 We are given no documentary evidence to support any of these unsubstantiated allegations: no constitutions; no memoranda of incorporation; no membership lists; and no reports of any previous work done. Instead, we are told that –

18.1 All the applicants are public interest organisations that *"all act in pursuit of their mandates by their members and constituencies"*;[26]

18.2 Part of each applicant's mandate *"is to act in [the] public interest by protecting the vulnerable and act[ing] as a voice for the voiceless"*;[27]

18.3 Each applicant's mandate is *"directed at advocating for the best interests of children and protecting these children from being used and abused by adults for their own ends"*;[28] and

18.4 All the applicants *"bring this application in the public interest, in order to protect children, between twelve and seventeen, from being vaccinated against Covid, where it is unnecessary and it is detrimental to their health and well-being, to be vaccinated."*[29]

19 In short, the applicants all purport to act in the public interest, but have failed to provide any evidence that they do so. And yet the relief they seek, if granted, would have profound ramifications for the country's response to the pandemic. It was with this in mind that SECTION27, which since its inception in 2011 has

[26] Founding affidavit, para 16, p 003-13
[27] Founding affidavit, para 17, p 003-13
[28] Founding affidavit, para 18, pp 003-13 to 003-14
[29] Founding affidavit, para 19, p 003-14

been working to ensure that the health and education rights of children are respected, protected, promoted, and fulfilled,[30] sought to intervene as *amicus*:[31]

> *"Given its history of advocacy and litigation in respect of education and health rights broadly, and how they play out in the context of the COVID-19 pandemic in particular, it follows that SECTION27 has a clear interest in the main application. In addition to making certain legal submissions, SECTION27's interest – to advance social justice, and improve the conditions of learning in schools so that learners may thrive and attend schools in safety – will be furthered by placing relevant expert and other evidence before this Court."*

20 The role of the *amicus* is to promote and protect the public interest:[32]

20.1 *"by ensuring that courts consider a wide range of options and are well informed"*; and

20.2 *"by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues."*

21 Importantly, the *amicus "joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court"*, and *"chooses the side it wishes to join unless requested by the Court to urge a particular position."*[33] It is not required to be agnostic as to the outcome of any particular case; its role is to help promote and protect constitutional rights.

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[30] See section 7(2) of the Constitution
[31] Founding affidavit, *amicus* application, para 18, p 013-13
[32] See *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* 2013 (2) SA 620 (CC) at para 26
[33] See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 63

22 The mechanism by which this is done is by allowing any party interested in a constitutional issue raised in existing proceedings to be admitted to make factual and/or legal submissions that put the court in a better position to adjudicate on these issues than would be the case were the admission denied. This is precisely the role that SECTION27 intends to play.

SECTION27's INTERVENTION AND SUMMARY OF NEW EVIDENCE

23 If they are to succeed in obtaining the interdictory relief they seek, the applicants will have to satisfy the requirements for the grant of an interim interdict as set out in *Setlogelo*,[34] and later refined in *Webster*:[35]

23.1 a *prima facie* right, even if it is open to some doubt;

23.2 a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted;

23.3 the balance of convenience favouring the grant of the interdict; and

23.4 the availability of no other satisfactory remedy.

[34] *Setlogelo v Setlogelo* 1914 AD 221
[35] *Webster v Mitchell* 1948 (1) SA 1186 (W). See also *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 41

24 In *Annex Distribution (Pty) Ltd v Bank of Baroda*,[36] Fabricius J noted that *"[m]ost applications for an interim interdict are decided on the basis of the balance of convenience"*. It is with this in mind that SECTION27's intervention is primarily focused on this key requirement for the grant of interim interdictory relief.

25 In terms of the order granted by Tolmay J on 22 February 2022, SECTION27 was admitted as *amicus* to –

25.1 introduce new evidence to the record; and

25.2 make written and oral submissions on two sets of legal issues:

25.2.1. the impact of the order sought by the applicants, if granted, on the rights of learners as entrenched in sections 9, 27, 28, and 29(1)(a) of the Constitution; and

25.2.2. whether the second applicant has standing to use the internal appeal process contemplated by section 24A of Medicines Act.

26 The first set of legal submissions, which relies on the newly-admitted evidence, is relevant to a consideration of the balance of convenience; the second set of legal submissions, which stands independently of the new evidence, is relevant to whether the applicants have established a *prima facie* right.

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[36] *Annex Distribution (Pty) Ltd and Others v Bank Of Baroda* 2018 (1) SA 562 (GP) at para 9, cited with approval in *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others* 2019 (4) SA 608 (GJ) at para 77

27 If we are correct that the second applicant had no standing to bring the internal appeal, then it follows that the applicants cannot obtain interim interdictory relief. They have not sought to invoke any right to review a decision of one or more of the respondents, and therefore cannot rely on public interest standing in terms of section 38 of the Constitution.

28 SECTION27's new evidence is contained in the founding affidavit in its *amicus* application, as well as in the expert affidavits on which that application relied.

28.1 The first type of evidence in the founding affidavit concerns the context within which the new evidence is to be considered.[37]

28.2 This is then followed by evidence pertaining to –

28.2.1. the adverse impact of COVID-19 on schooling, and in particular, the adoption of rotational learning in schools;

28.2.2. the impact of physical non-attendance at school on learners' access to food;

28.2.3. the impact of physical non-attendance at school on learners' mental health; and

28.2.4. COVID-19 and teenage pregnancies.[38]

[37] Founding affidavit, *amicus* application, paras 30 – 35, pp 013-19 to 013-21
[38] Founding affidavit, *amicus* application, paras 36 – 85, pp 013-21 to 013-42

28.3 The evidence in the founding affidavit is underpinned and supplemented by expert affidavits, as deposed to by –

28.3.1. Professor Thomas Moultrie, a professor of demography who is the director of the Centre for Actuarial Research at the University of Cape Town;[39]

28.3.2. Dr Sara Muller, an academic specialising in education policy who is based at the Centre for Education Rights and Transformation at the University of Johannesburg;[40] and

28.3.3. Dr Shaheda Omar, the clinical director of the Teddy Bear Clinic for Abused Children.[41]

29 In the months that have passed since SECTION27 initiated its application to intervene as *amicus*, circumstances have changed. With effect from 7 February 2022, rotational learning came to an end.[42] Mindful of these changes, and their implications for this case, we provide a summary of SECTION27's new evidence in what follows below. We also consider the applicants' response to the new evidence, and the evidence in SECTION27's reply.[43]

[39] Record, pp 013-462 to 013-515
[40] Record, pp 013-516 to 013-547
[41] Record, pp 013-548 to 013-562
[42] SECTION27's reply, para 21, p 030-11
[43] This reference is to SECTION27's replying affidavit to the applicants' answer to the new evidence.

Context within which the new evidence is to be considered

30 This context is informed by evidence regarding the manner in, and extent to which, vaccines have thus far been rolled out to children aged between 12 and 17,[44] as well as relatively recent evidence of SARS-CoV-2 infections amongst young people.[45] It is important to recognise that these are both moving targets.

The vaccine rollout to children aged between 12 and 17

31 The information provided in the founding affidavit in the *amicus* application was based on what was publicly available as at 17h00 on 25 November 2021. At that time, the evidence showed that –

31.1 girls were more likely to be vaccinated than boys (54% v 46%);[46]

31.2 a significant majority of the children getting vaccinated were doing so in the public health sector;[47] and

31.3 in more rural provinces, such as the Eastern Cape and Limpopo, over 90% of all children were getting vaccinated in the public sector.[48]

[44] Founding affidavit, *amicus* application, paras 30 – 33, pp 013-19 to 013-20
[45] Founding affidavit, *amicus* application, paras 34 – 35, pp 013-20 to 013-21
[46] Founding affidavit, *amicus* application, para 30, p 013-19
[47] Founding affidavit, *amicus* application, para 32, p 013-19
[48] Founding affidavit, *amicus* application, para 33, p 013-20

32 SECTION27's reply shows that as at 17h00 on 4 March 2022, some 14 weeks later, these patterns largely remain. Girls are still more likely to be vaccinated than boys,[49] a significant majority of those getting vaccinated are still doing so in the public health sector,[50] and in the Eastern Cape and Limpopo, over 90% of (first) vaccinations are still being administered in the public health sector.[51] (Unfortunately, access to second doses in the public sector is much lower.)[52]

33 What this evidence shows is that should the applicants succeed in obtain the interdictory relief they seek, the impact of any such order will be largely felt by children who are girls, poor, and/or living in rural areas. In all likelihood, these children would be least likely to be able to deal with any adverse consequences.

SARS-CoV-2 infections amongst young people

34 The expert evidence in Professor Moultrie's affidavit shows that children have always been at risk of getting infected with SARS-CoV-2.[53] Over the three-month period preceding his first affidavit, *"the age groups with the highest proportion of tests returning positive were those of adolescents aged 10 to 19."*[54] Other than an unsubstantiated, non-expert attack on the accuracy of testing data,[55] which Professor Moultrie addresses in reply,[56] there is no answer to these allegations.

[49] SECTION27's reply, para 31.2, p 030-14
[50] SECTION27's reply, para 31.3.1, p 030-14
[51] SECTION27's reply, para 31.3.3, p 030-15
[52] SECTION27's reply, para 31.3, p 030-14
[53] Moultrie affidavit, paras 18-19, p 013-467
[54] Moultrie affidavit, para 20, p 013-467
[55] Applicants' answering affidavit, paras 78-79, pp 029-30 to 029-31
[56] Moultrie replying affidavit, paras 40-41, p 030-114

35 Professor Moultrie refers to a statement issued by the World Health Organization ("the WHO") that sets out the benefits of vaccinating children and adolescents.[57] In addition to direct health benefits for children themselves, the WHO statement draws attention to reductions in transmission between children, and from children to adults, how COVID-19 vaccines *"may help reduce the need for mitigation measures in schools"*, and how this may minimise disruptions to education.[58]

36 In his expert affidavit, filed as part of SECTION27's reply, Professor Madhi confirms these key aspects of the WHO statement.[59] We return to his affidavit below, in dealing with the role that the vaccine programme is expected to play in mitigating the impact of the pandemic, in particular in (public) schools.

The adverse impact of COVID-19 on schooling

37 This evidence, which begins with an overview of the South African schooling context during the COVID-19 pandemic, focuses on two main issues: the state of overcrowding in our (public) schools; and the adverse impact of rotational learning (in public schools), and closures, on education.

38 What is abundantly clear is that COVID-19 has had a profoundly negative impact on the majority of South Africa's children, with those who attend well-resourced (ordinarily private) schools being insulated to a significant degree. Put simply, the educational gaps between rich and poor have been exacerbated.

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[57] Moultrie affidavit, para 24, pp 013-468 to 013-469
[58] *Ibid*
[59] Madhi affidavit, pp 030-50 to 030-57

39 It is with this in mind that we draw attention to Dr Sara Muller's expert affidavit, in which she makes this key point: in a context where the operational conditions for the vast majority of schools were already not fit for purpose, the pandemic has meant that learners have not been getting much learning done.[60]

40 In the main, the applicants do not take issue with this evidence. Instead, their approach is to pour scorn on the state's decision to close schools, and thereafter, to institute rotational learning. According to Mr Taylor, *"the impact on schooling is not a result of COVID-19 but government's response to COVID-19."*[61]

41 There is no need for us to address this point because circumstances have now changed. With schools back to full in-person learning, it is now important to focus on ensuring a safe learning and teaching environment, and giving peace of mind to those who are worried about learners returning to overcrowded schools.

42 In his affidavit, Professor Madhi makes it clear that –

42.1 *"[t]he main goal of vaccinating children aged between 12 and 18 is to reduce the risk of them being infected, as well as reducing the chances of them spreading the virus if there are breakthrough infections"*;[62]

[60] See founding affidavit, *amicus* application, para 57, p 013-30
[61] Applicant's answering affidavit, para 35, p 029-15
[62] Madhi affidavit, para 21, p 030-56

42.2 *"vaccinated people are still less likely to be infected, or to transmit the virus"*;[63] and

42.3 *"despite the widespread force of past infection, the vaccination of children aged between 12 and 18 would still be beneficial in reducing the risk of children being infected, and passing on the virus, both to each other, and to adults"*.[64]

43 Professor Madhi ends his affidavit by stating that *"every attempt should be made to avoid large clusters of cases that could precipitate further disruptions of schooling."* In his expert opinion, *"[a] key way to mitigate that risk would be by ensuring that the majority of children are indeed vaccinated against Covid."*[65]

The impact of non-attendance at school on access to food and mental health

44 Non-attendance at schools has also limited access to food provided by the National Schools Nutrition Programme ("the NSNP"). And despite various legal steps having been taken to compel the basic education authorities to implement the NSNP, problems have persisted.[66] In addition, non-attendance at schools has also affected the mental health of many learners, as have various aspects of the COVID-19 pandemic more broadly.[67]

[63] Madhi affidavit, para 22, pp 030-56 to 030-57
[64] Madhi affidavit, para 23, p 030-57
[65] Madhi affidavit, para 24, p 030-57
[66] See founding affidavit, *amicus* application, paras 66-69, p 013-33 to 013-34
[67] See founding affidavit, *amicus* application, paras 71-80, pp 013-35 to 013-40

45 Now that schools are back to full in-person attendance, every effort should be made to ensure that there are no further disruptions. As is clear from Professor Madhi's evidence, that includes taking all reasonable steps to ensure that most eligible children are vaccinated against COVID-19.

The applicants' answer to the evidence

46 The applicants' approach to the newly-admitted evidence does not assist their case. As SECTION27's replying affidavit explains:[68]

> *"13 In large part, the applicants have chosen not to engage SECTION27 on its new evidence. That is their choice. But choices have consequences. In this case, it means that such evidence, including that which deals with the state of South Africa's public schools, must now be taken as fact.*
>
> *14 Where the applicants have sought to engage, they have adopted a twofold approach: first, they have attempted to discredit the experts by whatever means they deem appropriate; and second, they have sought to bombard this Court with a wide range of material that is not attached, properly considered, or explained."*

47 Professor Moultrie is the primary target of the applicants' misguided attempts at character assassination. In the absence of any good cause, his independence

[68] SECTION27's replying affidavit, paras 13-14, pp 030-8 to 030-9

and expertise are unfairly attacked. In his affidavit filed as part of SECTION27's reply, Professor Moultrie explains why these attacks have no merit.[69]

48 Insofar as the applicants' new material is concerned, none of it can be accepted as expert evidence. We make this submission for two reasons.

48.1 First, Dr Berlyn's supporting affidavit, which makes *"common cause with the case [Mr Taylor] makes out in his affidavit"*, does not transform it into expert evidence. To do that, Dr Berlyn would (a) have to be an expert himself; and (b) identify what in particular he confirms.

48.2 Second, Dr Berlyn is not an expert in any relevant field.[70] Moreover, he has put up nothing *"to show that a respectable body of expert opinion [stands] behind his [main] conclusion."*[71] One of the experts on whom he relies, Professor Madhi, comes to the exact opposite conclusion.

REQUIREMENTS FOR AN INTERIM INTERDICT

49 As we have already noted, for the applicants to succeed, they must establish (a) a *prima facie* right, even if open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c)

[69] Moultrie replying affidavit, paras 5-7, 15-21, 24-25, and 32-34, pp 030-103 to 030-104, 030-108 to 030-109, and 030-111 to 030-112
[70] SECTION27's replying affidavit, para 39, p 030-17. See *MEC for Health and Social Development, Gauteng v TM obo MM* [2021] ZASCA 110 at paras 125-126
[71] Ibid at para 126

that the balance of convenience favours the grant of the interdict; and (d) that they have no other appropriate remedy.

50 In *National Treasury v Opposition to Urban Tolling Alliance*,[72] the Constitutional Court was called upon to consider the grant of an interim interdict against the exercise of statutory power. Moseneke DCJ recognised that the *Setlogelo* test long predated "*the normative scheme of our democratic Constitution"*, and was "*initially fashioned for and ideally suited to interdicts between private parties."*[73]

51 Prior to the Constitution coming into effect, our courts had already been called upon to consider claims for interdicts against the exercise of statutory power. In *Gool*, for example, Ogilvie-Thompson J held that in the absence of any allegation of *mala fides*, a court would not readily grant an interdict restraining the exercise of statutory powers;[74] such an interdict would only be granted *"in exceptional circumstances and when a strong case is made out for relief."*[75]

52 With *Gool* in mind, Moseneke DCJ continued:[76]

> *"The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the*

[72] See above n 35
[73] At para 42
[74] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688F-G
[75] At 689C
[76] At para 44 (our emphasis)

> *legislative branches of government unless the intrusion is mandated by the Constitution itself."*

53 We return to *National Treasury* below, in dealing with two of the requirements for the grant of an interim interdict: the existence of a *prima facie* right, and the balance of convenience. In short, we submit that there is no *prima facie* right on which the applicants may rely, and the balance of convenience does not favour the grant of the interim interdict.

***Prima facie* right**

54 In *National Treasury*, Moseneke DCJ held that under the *Setlogelo* test, the *prima facie* right that the applicant in that case had to establish was not merely a right to approach a court for the relief sought in the main (review) application, but rather a *"right to which, if not protected by an interdict, irreparable harm would ensue."*[77] He explained:[78]

> *"An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."*

55 In *South African Informal Traders Forum*,[79] Moseneke ACJ held that *"[a] prima facie right may be established by demonstrating prospects of success in the*

[77] At para 50
[78] *Ibid*
[79] *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at para 25

review." While an applicant for an interim interdict needn't establish reasonable prospects of success,[80] it must – at the very least (and subject to a consideration of the balance of convenience) – establish that it has a plausible case. As Holmes J held in *Olympic Passenger Service*: *"where [the applicant's] prospects of ultimate success are nil, obviously the Court will refuse an interdict."*[81]

56 Insofar as the *prima facie* right is concerned, our concern is limited to one point: whether the second applicant had any standing to bring its internal appeal in terms of section 24A of the Medicines Act. If, as we submit, it did not, then it must follow that the applicants have no *prima facie* right, because the prospects of success in that internal appeal would be nil. On this basis alone, this application should be dismissed.

Balance of convenience

57 In considering where the balance of convenience lies, a court *"must first weigh the harm to be endured by an applicant, if interim relief is not granted, as against the harm a respondent will bear, if the interdict is granted."*[82] In addition, *"the broader public interest, and not only the interests of the litigating parties, must be placed in the scales when weighing where the balance of convenience lies."*[83]

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[80] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1995 (2) SA 813 (W) at 832D – 833H, a full court decision cited with authority by Moseneke ACJ
[81] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D
[82] *National Treasury* at para 55 (our emphasis)
[83] *Cipla Medpro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 (4) SA 579 (SCA) at para 46, read with para 52. See also, *Bicacon (Pty) Ltd v City of Tshwane Metropolitan Municipality and Others* [2019] ZAGPPHC 433 at para 23, *Thornburn Security Services (Pty) Ltd v South African Revenue Service and Others* [2018] ZAGPPHC 370 at para 28, and *Bank of Baroda* at para 84

Importantly, *"a court must assess all relevant factors carefully in order to decide where the balance of convenience rests."*[84]

58 There is an inverse relationship between the *prima facie* right to be established, and the balance of convenience.[85] As *Olympic Passenger Service* explains:[86]

> *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him."*

59 While the ordinary requirements for an interim interdict remain in place, additional considerations must now inform the balance of convenience analysis:[87]

> *"The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our*

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[84] *National Treasury* at para 55
[85] See *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd* 2019 (2) SA 577 (GJ) at para 49
[86] At 383C – G (our emphasis), cited with approval in *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA) at para 45, n 42
[87] *National Treasury* at paras 45 – 47 (our emphasis)

Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."

"Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought."

"The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights."

60 In considering whether to grant the interdict sought by the applicants, this Court must consider the separation of powers harm identified by the first and second respondents.[88] And given that the broader public interest must also be considered in determining where the balance of convenience lies, it follows that another important consideration is whether the grant of the interim interdict would amount to a breach of constitutional rights.

[88] First and second respondents' answering affidavit, para 119, p 009-49

61 Where one person's rights may conflict with another's, the Constitution does not envisage a zero-sum game. Instead, it contemplates a careful balancing of rights. Importantly, *"[o]ur Constitution does not envisage a hierarchy of rights where courts simply prefer one right over the other."*[89] Or as Navsa JA noted in *Qwelane v South African Human Rights Commission*,[90] *"we do not have a hierarchy of rights with one trumping another."*

62 What this means is that when considering whether to grant an interim interdict, such as the one sought by the applicants, a court would ordinarily focus its attention on the balance of convenience, where the balancing of competing interests (and rights) is done. We submit that this will mean considering how – and to what extent – the interdictory relief sought by the applicants, if indeed granted, could infringe on any of the rights on which SECTION27 relies.

THE CHILDREN'S RIGHTS ON WHICH SECTION27 RELIES

63 We submit that, at the very least, the grant of the interdict sought by the ACDP and its co-applicants would result in a breach of the following fundamental rights:

63.1 the right to equality, in section 9 of the Constitution;

63.2 the right to have access to health care services, in section 27; and

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[89] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at para 125

[90] *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA) at para 82, relying on *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at para 47

63.3 the right to a basic education, in section 29(1)(a).

64 Moreover, it would be in breach of section 28(2), which provides that *"[a] child's best interests are of paramount importance in every matter concerning the child"*.

65 We now consider each of these constitutional provisions in turn, mindful that –

65.1 courts have recognised the interdependence and interrelatedness of all fundamental rights,[91] including in respect of equality and human dignity, which in addition to being self-standing substantive rights, are also foundational constitutional values;[92] and

65.2 section 7(2) of the Constitution requires all organs of state to *"respect, protect, promote and fulfil"* the rights in the Bill of Rights, thus imposing both positive and negative obligations on all organs of state.

The right to equality

66 Section 9 of the Constitution provides:[93]

> *"(1) Everyone is equal before the law and has the right to <u>equal protection and benefit of the law</u>.*

[91] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) at para 55, cited with approval in *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (4) SA 319 (CC) at para 50
[92] *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) at paras 58 – 64
[93] Our emphasis

> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
>
> *(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
>
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
>
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

67 The Constitution favours substantive over formal equality. As Moseneke J[94] explained in *Minister of Finance and Another v Van Heerden*:[95]

> *"Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."*

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[94] As he then was
[95] 2004 (6) SA 121 (CC) at para 31. See also, paras 26 – 27 (our emphasis)

68 When read together with section 7(2), the prohibition on unfair discrimination in section 9(3) imposes both positive and negative obligations on the state:[96] not only must the state remove barriers to the enjoyment of all rights, on an equal basis, but it must also take measures designed to ensure that the opportunity to realise these rights equally is meaningful.

69 As Professor Cathi Albertyn has noted:[97]

> *"Substantive equality is understood as a remedy to systemic and entrenched inequalities. This requires that judges and lawyers understand the context in which inequality occurs, and identify the social and economic conditions that structure action and create unequal and exclusionary consequences for groups and individuals."*

70 Closely related to the context in which inequality occurs, Albertyn explains, is the *"impact of the impugned action on the individual or group"*.[98] A contextual analysis of the impact of the impugned action is thus crucial to addressing structural inequality.

71 The SCA adopted this approach in *Minister of Basic Education v Basic Education for All*,[99] when it found that the state's failure to deliver textbooks to learners in Limpopo constituted unfair discrimination.[100] It did so with these facts in mind:[101]

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[96] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at para 42, cited with approval in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 90
[97] C Albertyn, "Substantive equality and transformation in South Africa" (2007) 23 *SAJHR* 253 at 259
[98] *Ibid*
[99] *Minister of Basic Education and Others v Basic Education for All and Others* 2016 (4) SA 63 (SCA)
[100] The SCA also based its decision on other rights violations.
[101] At para 3

> *"[I]t is common cause that the affected learners are from poor communities and are mostly, if not exclusively, located in rural areas. They are also overwhelmingly, if not exclusively, black learners. The schools in question are 'no fee' schools and were not granted permission ... to purchase textbooks, educational materials or equipment for the school on their own."*

72 Put simply, context and impact matter. When the particular circumstances of this case are considered, it becomes abundantly clear that should the vaccine rollout to those aged between 12 and 17 be suspended indefinitely, predominantly poor black learners, who attend under-resourced and overcrowded public schools, will bear its brunt. And that impact will be brutal.

73 Unlike their counterparts at well-resourced (ordinarily private) schools, they will have to deal with rotational learning and/or school closures should there be such a need in the event of cluster outbreaks; they stand to lose valuable teaching and learning time, and potentially have limited access – once again – to the NSNP.

74 In contrast, the privileged, who in the main have not been adversely affected by rotational learning (because of better school infrastructure and/or access to online learning), and who do not rely on the NSNP to meet one of their most basic needs, will have the benefit of little to no disruption of their schooling.

75 Overcrowding in schools, which in the main affects historically disadvantaged schools serving black learners, is a legacy of apartheid. As Nkabinde J explained on behalf of a unanimous Constitutional Court in *Juma Musjid*:[102]

> *"The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."*

76 Similarly, in *Hoërskool Ermelo*, Moseneke DCJ noted:[103]

> *"It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education."*

77 It is with this in mind that the Constitution, and the rights it entrenches, must be understood. As Moseneke DCJ explained in *Hoërskool Ermelo*:[104]

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

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[102] *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 42 (footnote omitted; our emphasis)
[103] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo* and Another 2010 (2) SA 415 (CC) at para 46
[104] At para 47 (footnotes omitted; our emphasis)

> *warranties. I cite only a handful. Section 1(a) entrenches respect for human dignity, achievement of equality and freedom. Section 6(1) read with section 6(2) warrants and widens the span of our official languages from a partisan pair to include nine indigenous languages which for long have jostled for space and equal worth. Sections 9(1) and (2) entitle everyone to formal and substantive equality. Section 9(3) precludes and inhibits unfair discrimination on the grounds of, amongst others, race and language or social origin. Section 31(1) promises a collective right to enjoy and use one's language and culture. And even more importantly, section 29(1) entrenches the right to basic education and a right to further education which, through reasonable measures, the state must make progressively accessible and available to everyone."*

78 When understood in this light, mindful of the nature and extent of the impact that any indefinite suspension of the vaccine rollout is likely to have for poor (black) children,[105] it is readily apparent that the interdict – if granted – would serve to violate their right to equality, by unfairly discriminating against them on various enumerated grounds, including – in particular – race and social origin. They stand to benefit the most from the vaccine rollout; they can least afford any suspension.

The right to have access to health care services

79 There are two provisions in the Constitution that deal expressly with the right to health care services: section 27(1)(a) , which entrenches everyone's right to have access to health care services, including reproductive health care, and section 28(1)(c), which recognises that every child has the right – amongst others – to basic health care services.

[105] See founding affidavit, *amicus* application, paras 44 – 57, pp 013-24 to 013-30

80 While the state is obliged to respect, protect, promote and fulfil both rights,[106] its obligations in respect of section 27(1)(a) are qualified by section 27(2), which imposes an obligation to *"take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right]."* The same qualification does not apply to section 28(1)(c).

81 In *Treatment Action Campaign*,[107] the Constitutional Court was called upon to determine the scope of these rights. In that case, the issue for determination was whether the state had complied with its constitutional obligations regarding the prevention of mother-to-child transmission of HIV. In its order,[108] the Court held that the Constitution required the state –

> *"to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV."*

82 The Court considered the nature of section 28(1)(c), and on whom it imposes obligations; the state had argued that the provision *"imposes an obligation on the parents of the newborn child, and not the State, to provide the child with the required basic health care services."*[109] The Court responded as follows:[110]

> *"[77] While the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in Grootboom that*

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[106] See section 7(2)
[107] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721
[108] At para 135
[109] At para 76
[110] At paras 77 – 79 (footnotes omitted)

> *'(t)his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by their parents or families'.*
>
> *[78] The provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine.*
>
> *[79] The State is obliged to ensure that children are accorded the protection contemplated by s 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them."*

83 We submit that when considered through the lens of either section 27(1)(a) or 28(1)(c), the state had no choice but to devise and implement a national COVID-19 vaccination programme, free at the point of service, that covers all for whom the vaccines in question are either registered or authorised for use. In a different time, dealing with a different communicable disease, the state has now shown that it has the will and ability to discharge its constitutional obligations.

84 Having done that, it now founds the programme under attack from those who not only wish to prevent their own children from being vaccinated, but insist on all other children being excluded, regardless of the wishes of such children and/or their parents or legal guardians. Put simply, the ACDP and its co-applicants seek

not only to limit children's access to health care services, but also to make it impossible for the state to discharge its constitutional obligations.

85 If the applicants were to succeed in their crusade to block children's access to COVID-19 vaccines, they would also, tragically, succeed in limiting access to mental health and reproductive health services, and in increasing the need for both types of services. This is made clear in the founding affidavit in the *amicus* application,[111] as well as in Dr Omar's expert affidavit.[112] And as we all know, the Constitution guarantees access to both.

85.1 A range of international and regional human rights instruments, which in terms of section 39(1)(b) of the Constitution must be considered when interpreting the Bill of Rights, entrench the right to the highest attainable standard of health that includes both physical and mental health.[113]

85.2 In guaranteeing everyone a right to have access to health care services, section 27(1)(a) expressly extends that right to reproductive health care.

86 Put simply, if the ACDP and its co-applicants were to secure the interdict they seek, this would result in various violations of children's constitutionally-entrenched rights to health care. On this basis alone, we submit that the balance

[111] Founding affidavit, *amicus* application, paras 84-85, pp 013-41 to 013-42
[112] Omar affidavit, paras 20-25, 27, pp 013-554 to 013-556
[113] See, for example, Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, Article 16(1) of the African Charter on Human and Peoples' Rights, and Article 14(1) of the African Charter on the Rights and Welfare of the Child.

of convenience does not favour the grant of an interim interdict. Accordingly, we submit that the application ought to be dismissed.

The right to basic education

87 The right to basic education is entrenched in section 29(1)(a). Unlike all other socio-economic rights in the Constitution, including the right to further education, the right to basic education is unqualified; it is neither subject to the availability of resources, nor to progressive realisation. Instead, it is immediately realisable; its realisation cannot be delayed.[114]

88 The courts have further adopted a content-based approach to the right to basic education – as opposed to reasonableness review in respect of the qualified rights – by identifying the different components that make up the right.[115] In particular, the Constitutional Court has identified access to school as one of the essential components of the right to basic education.[116]

> *"[B]asic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."*

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[114] *Juma Musjid Primary* at para 37
[115] See, e.g., *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC) at para 35; and *Minister of Basic Education v Basic Education for All* at para 50.
[116] *Juma Musjid* at para 43 (footnote omitted; our emphasis). See also, *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) at paras 18-19

89 The extent to which valuable learning time has been lost as a result of school closures and/or rotational learning is set out in the new evidence.[117] Should the interdict be granted, this would serve to ensure that poor (black) children run the risk of being denied access to schools again. The state's attempt to discharge it constitutional obligations, by making schools safer, would simply be thwarted.

90 In addition to access to schools, the right of a learner to basic nutrition has also been identified as a necessary component of the right to basic education. As Potterill ADJP explained in *Equal Education v Minister of Basic Education*:[118]

> *"On the Department's own documents the stance that the nutritional aspect of the NSNP is just a by-product of their duty to educate is simply wrong. The Department's own policy statements reflect basic nutrition as a component of basic education. State policy is instructive on the content of the right to education and in the policies the provision of basic nutrition is inextricably linked to the fulfilment of basic education."*
>
> *"For many years this Department has taken on the duty to educate children in terms of s 29(1)(a) and the right to basic nutrition (s 28(1)(c)) through the NSNP. It is thus evident that the state through this Department and the NSNP has exercised its supplementary role to provide basic nutrition. The Department as educator listed its achievements via the NSNP as providing basic nutrition. The content of the s 29(1)(a) right is thus not only determined by the policies of the Department, but also by the actions of the Department."*

91 Potterill ADJP also noted that the right of a child to basic nutrition is expressly entrenched in section 28(1)(c) of the Constitution as a self-standing, independent right. As with the right to basic education, this is unqualified and immediately

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[117] Founding affidavit, *amicus* application, paras 53-56, pp 013-28 to 013-29
[118] *Equal Education and Others v Minister of Basic Education and Others* 2021 (1) SA 198 (GP) at paras 40-41 (footnotes omitted)

realisable. And as *Treatment Action Campaign* explains, the state is obliged to ensure that children are accorded the protection contemplated by the right in circumstances where their parents and/or legal guardians are unable to do so.[119]

92 SECTION27's evidence highlights the extent to which learners who qualify for the NSNP have not been able to access it, either at all, or on a regular basis, as a result of COVID-related school closures and/or rotational learning. Despite the reinstatement of the NSNP, food insecurity has persisted.[120] Now, with rotational learning having come to an end, full access to the NSNP should return. But if the applicants secure the interdict they seek, such access could easily disappear.

The bests interests of the child

93 At the heart of this matter is the unsubstantiated claim that the ACDP and its co-applicants are acting in the best interests of children. This is made both in their founding affidavit,[121] and in their rule 16A notice.[122] According to the applicants, *"the decision to permit vaccination of the children is detrimental to these groups and ... should be reversed."*[123] We submit that the evidence supports the exact opposite: that having access to vaccines is in children's best interests.[124]

94 The principle that the best interests of the child are paramount in every matter concerning the child is entrenched in section 28(2) of the Constitution. This has

[119] At para 79
[120] Founding affidavit, amicus application, paras 55-70, pp 013-29 to 013-34
[121] Founding affidavit, paras 49-55, pp 003-21 to 003-23
[122] Rule 16A notice, pp 012-1 to 012-6
[123] Founding affidavit, para 55, p 003-23
[124] See Madhi affidavit, para 24, p 030-57

significant implications for learners' rights. As education rights scholars Rosaan Kruger and Chris McConnachie explain:[125]

> *"Learners' constitutional rights are, predominantly, children's rights. Therefore, these rights must be understood in a way that takes account of children's needs and vulnerabilities. In particular, these rights must give effect to the s 28(2) right and principle that the best interests of the child must be paramount in every matter concerning the child."*

95 Professor Ann Skelton of the Centre for Child Law at the University of Pretoria has also noted the importance of interpreting the right to basic education in a child-centred manner, in accordance with section 28(2) of the Constitution:[126]

> *"Due to the 'expansive guarantee' provided by section 28(2), it is clear that this principle – which has also been interpreted by the Constitutional Court to be a self-standing right – is a central feature in litigation relating to children's right to education."*

96 What this means is that these rights are closely intertwined and interdependent. This has been repeatedly affirmed in the developing jurisprudence on the right to basic education.[127] In *AB v Pridwin Preparatory School*, the Constitutional Court considered whether the exclusion of two brothers from an independent school had violated their rights. Writing on behalf of the majority, Theron J explained why both sections 28(2) and 29(1)(a) had been violated:[128]

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[125] Kruger and McConnachie, "Chapter 18: The Impact of the Constitution on Learners' Rights", in Boezaart (ed.), *Child Law in South Africa* (2ed) (Juta, Cape Town: 2018) at 537
[126] A Skelton, "The role of the courts in ensuring the right to basic education in a democratic South Africa: A critical evaluation of recent education case law" (2013) 1 *De Jure* 1 at 7 (footnotes omitted)
[127] See, for example, *Juma Musjid* at paras 66 and 71
[128] *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) at para 209

> *"Pridwin's decision to terminate the Parent Contract was unconstitutional due to the failure to afford the applicants an opportunity to be heard on the best interests of the boys, in breach of ss 28(2) and 29(1)(a) of the Constitution. In addition, the decision was unconstitutional as, absent a fair process, it was self-evidently and objectively not in the best interests of DB and EB and, moreover, in violation of Pridwin's obligation not to interfere with the boys' right to a basic education, in the absence of any appropriate justification."*

97 Accordingly, what is required in this case – as a central part of the balance of convenience inquiry – is an analysis that considers whether it would be in the best interests of children indefinitely to suspend the rollout of the vaccination programme insofar as it concerns those aged 12 to 17. We submit that this analysis is to be done mindful of two bodies of evidence:

97.1 the expert scientific evidence put up by the first and second respondents regarding the safety, efficacy, and medical benefits of Cominarty;[129] and

97.2 the expert and other evidence put up by SECTION27 regarding the likely impact of any suspension of the vaccination programme on children's rights to equality, health care services, and basic education.

98 Based on these two bodies of evidence, we submit that this Court can only reach one conclusion: that the best interests of children require that the application for an interim interdict, pending the final outcome of the internal appeal in terms of section 24A of the Medicines Act, be dismissed.

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[129] See first and second respondents' answering affidavit, paras 25, 81 to 105, pp 009-35 to 009-43

SECTION 24A OF THE MEDICINES ACT

99 Section 24A of the Medicines Act provides that *"[a]ny person aggrieved by the decision of the Authority may appeal against such decision*.[130] Section 1 of the Medicines Act defines "Authority" to mean SAHPRA. In what follows, we explain why the second applicant is not an aggrieved person for purposes of this section.

100 The Medicines Act does not provide a definition of the phrase *"person aggrieved"*, which is to be found in three separate places: in section 24(1), dealing with appeals against decisions of the Director-General, and in sections 24A(1) and 24A(5), dealing with appeals against SAHPRA decisions.

101 In the absence of a clear legislative intention to the contrary, a particular word should bear the same meaning whenever used in a statute.[131] Only in exceptional circumstances will a court deviate from this presumption.[132]

102 The presumption is strengthened in dealing with the proximate recurrence of the same word. As the SCA explained in *Commissioner for Customs and Excise and Another v Kemtek Imaging Systems Ltd*:[133]

> *"There is … a well known presumption that where the Legislature uses the same word in the same enactment it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout*

[130] Our emphasis
[131] See *Hoërskool Ermelo* at para 70
[132] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at para 47
[133] 1999 (4) SA 906 (SCA) at para 15

the enactment. This would apply with even greater force where the word is used in two tariff headings the one following upon the other".

103 There is nothing in section 24A to suggest that the phrase *"person aggrieved"* should be interpreted to mean anything different from the meaning of the phrase in section 24(1). On the contrary, the legislative histories of both sections show that the two phrases were intended to carry the same meaning: section 24 was replaced, in its entirety, by section 30 of the Medicines and Related Substances Amendment Act 72 of 2008; and section 24A was introduced to the Medicines Act by section 31 of that Amendment Act.

104 This is further strengthened by section 35(1)(xxxiii) of the Medicines Act, which empowers the Minister, in consultation with SAHPRA, to make regulations *"relating to appeals against decisions of the Director-General or the Authority"*. Like sections 24 and 24A, the precise wording of that provision was also introduced to the Medicines Act by the Medicines and Related Substances Amendment Act 72 of 2008.

105 Section 24 of the Medicines Act provides:

> *"(1) Any person aggrieved by the decision of the Director-General may within the prescribed period and in the prescribed manner make written representations with regard to such decision to the Minister.*
> *(2) The Minister shall, after considering representations made in terms of subsection (1), confirm, set aside or vary the decision of the Director-General."*

106 The Medicines Act empowers the Director-General to make decisions relating to the following matters:

106.1 issuing (or revoking) permits in terms of section 22A(7), (9), and/or (11), concerning the control of medicines and scheduled substances;

106.2 authorising the importation or exportation of preparations containing certain substances, in terms of section 22A(12);

106.3 issuing permits to persons or organisations performing health services, in terms of section 22A(15);

106.4 issuing licences to specified categories of health care professions to compound and dispense medicines, in terms of section 22C(1)(a);

106.5 directing by when an application for the renewal of a compounding or dispensing licence may be submitted, in terms of section 22D;

106.6 suspending or cancelling compounding or dispensing licences, in terms of section 22E;

106.7 exempting wholesalers from the provisions of section 22H(1) dealing with the purchase and/or sale of medicines, medical devices, and/or IVDs, in terms of section 22H(3);

106.8 authorising the disclosure of certain information acquired by a person *"in the exercise of [their] powers or the performance of [their] functions under [the Medicines] Act"*, in terms of section 34; and

106.9 delegating certain powers, in terms of section 34A(2).

107 If section 24A of the Medicines Act were to be interpreted in a manner that would allow the second applicant to appeal against a decision relating to an application to which it was never party, then so too should section 24 be interpreted to allow for any person, purportedly acting in the public interest, to appeal against any one of the various decisions that the Director-General is empowered to take.

108 But such an interpretation could result in absurd consequences. For example, any organisation purporting to act on behalf of children could launch an internal appeal against a decision to refuse to issue a dispensing licence to a general practitioner who attends to children, regardless of the general practitioner's wishes, and regardless of the basis for the decision.

109 Our law cautions against interpreting provisions of statute such that their ordinary grammatical meaning results in an absurdity.[134]

110 But even if it does not give rise to any absurdity, the ordinary meaning must give way to an interpretation that is in accordance with the following requirements:[135]

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[134] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28
[135] *Ibid*

110.1 statutory provisions should always be interpreted purposively;

110.2 the statutory provision in question must be properly contextualised; and

110.3 all statutes must ordinarily be interpreted in line with the Constitution.

111 The phrase *"person aggrieved"*, as used in other statutes, has ordinarily been interpreted somewhat narrowly, in line with an understanding of the use of such provisions as being limited to the party at whose instance the decision was taken, and/or in respect of whom the decision has a direct, legal effect.

112 In *Francis George Hill Family Trust v South African Reserve Bank and Others*,[136] for example, the then Appellate Division considered similar wording in regulation 22D of the Exchange Control Regulations promulgated under the Currency and Exchanges Act 9 of 1933. In terms of that provision –

> *"any person who feels himself aggrieved by the attachment of money or goods … may … bring an application in a competent court for the review of any such attachment"*.

113 Hoexter JA explained:[137]

> *"Leaving aside the significance of statutory context in particular cases, the tenor of decided cases in South Africa points, I think, to the general conclusion that the words 'person aggrieved' signify someone whose legal rights have been*

[136] 1992 (3) SA 91 (A)
[137] At 102C – E (our emphasis)

infringed – a person harbouring a legal grievance. ... Viewed against the background of the regulations as a whole, that is the proper meaning which in my judgment should be assigned to the words in reg 22D in the present case."

114 A similar position has been adopted in various decisions of the High Court:

114.1 In *Janse van Rensburg v The Master*,[138] Patel J considered the meaning of *"person aggrieved"* in section 371(1) of the Companies Act 61 of 1973 ("the old Companies Act"), which entitled –

> *"[a]ny person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, … within a period of seven days from the date of such appointment or refusal [to] request the Master in writing to submit his reasons for such appointment or refusal to the Minister."*

114.2 In coming to the conclusion that the applicant was not *"a person aggrieved"*, Patel J explained as follows:[139]

> *"The phrase 'person aggrieved' certainly does not mean that he or she is a person who is disappointed or disgruntled because of a benefit which he or she might have received. A 'person aggrieved' must surely be a person who has a legitimate legal grievance, for example, a person against whom a decision has been pronounced that wrongfully deprives him or her of something, for instance an entitlement, benefit or right, or unlawfully accuses him or her of something, or wrongfully affected his or her title to do something. … The expression must be interpreted in the context of the statutory provisions in which it is used".*

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[138] *Janse van Rensburg v The Master and Others* 2004 (5) SA 173 (T)
[139] At para 23 (our emphasis). See also, *Neuhaus v The Master of the High Court and Another* 1932 SWA 30, on which Patel J relied

114.3 In *LL Mining Corporation Ltd*, Davis J considered section 387(4) of the old Companies Act, which entitled *"[a]ny person aggrieved by any act or decision of the liquidator [to] apply to the Court after notice to the liquidator"*:[140]

> *"It has been held that the words [person aggrieved] include a person who has a genuine grievance because an order has been made which prejudicially affects his interests, it being simply a question of looking at the facts and asking whether the person who is making the application has a genuine interest in maintaining it."*

114.4 David J then cited *Francis George Hill Family Trust* with approval, in which Hoexter JA – as already indicated – stated:[141]

> *"Leaving aside the significant statutory context in particular cases, the tenor of decided cases in South Africa points … to the general conclusion that the words 'person aggrieved' signifies someone whose legal rights have been infringed".*

115 In *City of Cape Town v Reader*,[142] an appeal against a High Court decision in a PAJA review, the SCA considered an internal appeal mechanism granted to *"[a] person whose rights are affected by a [particular] decision"*. Writing for the majority, Lewis JA considered whether section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") afforded the applicants (in the review) a right of appeal.

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[140] *LL Mining Corporation Ltd v Namco (Pty) Ltd (in liquidation) and Others* 2004 (3) SA 407 (C) at 414B – D

[141] See above n 137 (our emphasis). See also *Sage Schachat Pension Fund and Others v Pension Funds Adjudicator and Others* 2004 (5) SA 609 (C) at paras 83-85

[142] *City of Cape Town v Reader and Others* 2009 (1) SA 555 (SCA)

116 Section 62(1) of the Systems Act provides:

> *"A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision."*

117 Lewis JA explained why *"[s]ection 62 … grants no viable appeal at all to a person not party to the planning permission application"*:[143]

> *"Although on an initial reading it might appear that anyone who is in some way affected by a decision to grant permission to build (a neighbour, say, who believes that his or her property rights are in some way diminished) may appeal, that cannot be. How can a person not party to the application procedure itself appeal against the decision that results? And the Constitutional Court held in Walele … that neighbours in the position of the applicants (although they may later challenge the lawfulness and regularity of the permission accorded) have no entitlement to be party to the approval process itself."*[144]

> *"It seems plain that the purpose of s 62 as a whole is to give to the dissatisfied applicant for permission – and to no one else – an opportunity for the matter to be reheard by a higher authority within the municipality. It is only the aggrieved applicant, who has failed to secure the permission sought in his or her application, who is afforded a right of appeal under s 62."*[145]

[143] At para 32
[144] At para 30
[145] At para 31

118 More recently, in *JDJ Properties CC v Umngeni Local Municipality*, the SCA reaffirmed the position adopted by the *Reader* majority:[146]

> *"This court has held, however, in City of Cape Town v Reader and Others that this appeal [in terms of section 62(1) of the Structures Act] is only available to an unsuccessful applicant for planning permission and not to a person who was not party to an application for planning permission, such as a neighbour. The crux of the reasoning, in the majority judgment of Lewis JA, was that, in Walele's case, the Constitutional Court had held that objectors to the grant of planning permission (such as the appellants in this case) have no right to take part in the approval process, although they may subsequently challenge the validity of the approval after it has been granted, and so a person who was not a party to the application process cannot appeal against the result. Section 62 is not available to the appellants. It is not an internal remedy in their hands for purposes of s 7(2) of the PAJA."*

119 The SCA also considered the internal appeal contemplated by section 9(1) of the National Building Regulations and Building Standards Act 103 of 1977:

> *"Any person who –*
>
> *(a) feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;*
> *(b) feels aggrieved by any notice of prohibition referred to in section 10; or*
> *(c) disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law,*
>
> *may, within the period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board."*

[146] *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA) at para 40 (footnotes omitted; our emphasis)

120 Plasket AJA (as he then was) explained why this provision similarly only provides an internal remedy to those whose applications have been unsuccessful:[147]

> *"[42] Sections 9(1)(a) and (b) are not of application because they apply expressly to persons who have applied unsuccessfully for approval for the erection of a building or have been prohibited from either commencing or continuing with building operations. I turn to consider whether s 9(1)(c) applies to the appellants.*
>
> *[43] It appears to me that there are two reasons why s 9(1)(c) does not apply to the appellants. The first flows from the reasoning in Reader. How can a person appeal against a decision taken in proceedings in which he or she was not a party? The essence of an appeal is a rehearing (whether wide or narrow) by a court or tribunal of second instance. Implicit in this is that the rehearing is at the instance of an unsuccessful participant in a process. Persons in the position of the appellants cannot be described as unsuccessful participants in the process at first instance and do not even have the right to be notified of the decision."*

121 A contextual analysis of section 24A of the Medicines Act makes it clear that it is not meant to be used by a third party who had no right to participate in the process in terms of which SAHPRA authorised the use of, or registered, any medicine. Instead, the provision seeks to provide a speedy remedy to those unhappy with the outcome of the applications they placed before SAHPRA. In the result, the second applicant had no standing to bring the internal appeal.

CONCLUSION

122 Accordingly, we submit that this Court ought to dismiss the application.

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[147] At paras 42 – 43 (footnotes omitted; our emphasis)

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10 March 2022

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