*1995 SACLR LEXIS 256, **

Motala and Another v University of Natal

Supreme Court, Durban and Coast Local Division

1995 (3) BCLR 374 (D); 1995 SACLR LEXIS 256

JUDGMENT DATE: 24/02/1995

CATCHWORDS:

[*1] Constitution generally application and development of the common law section 35(3) of the Constitution framers of the Constitution intending to make courts the custodians of the fundamental rights not the intention that legislature should bear the burden of bringing the common law into conformity with the Constitution effect of Constitution to alter relative priorities of some of the entrenched fundamental rights compared to the priorities previously accorded them by the common law task of the courts, armed with the powers conferred by sections 7, 33 and 35, to define the limits of the fundamental rights where they appear to encroach upon each other and simultaneously to blend them into the common law, modifying the common law wherever necessary so as to achieve a harmonious amalgam such not the task of the legislature.

Education section 32 of the Constitution Court expressing the view that the expression "educational institutions" in section 32(a) is to be read in the context of basic education and does not include institutions of higher learning if, however, the expression "educational institutions" includes institutions of higher learning, then the right of equal access to educational **[*2]** institutions guaranteed by section 32(a) is limited by the provisions of section 8(3) which validate otherwise unequal treatment on one of the grounds set forth in section 8(2) in the case of measures designed to achieve the advancement of groups of persons previously disadvantaged by unfair discrimination held accordingly that the selection procedures adopted by respondent university in order to compensate for the greater disadvantage suffered in the past by African pupils as distinct from Indian pupils not amounting to unfair discrimination in terms of section 8(2).

Equality unfair discrimination section 8(2) of the Constitution policy adopted by respondent university for selection of first year medical students challenged on basis that it amounted to unfair discrimination between members of the African community and those of the Indian community Court holding in circumstances in casu that policy not unfairly discriminatory section 8(3)(a) of the Constitution permitting such policy evidence establishing that African pupils more severely disadvantaged then Indian counterparts under apartheid system.

Fundamental rights generally whether the fundamental rights provisions apply **[*3]** not only as between the State and individuals, that is "vertically", but also between private entities, that is "horizontally" held that the fundamental rights provisions in Chapter 3 of the Constitution do not have exclusively vertical operation section 7(1) of the Constitution providing that "this chapter shall bind all legislative and executive organs of State" not precluding on the basis of expressio unius exclusio alterius the

horizontal application of fundamental rights purpose of section 7(1) merely to stress that the State and its organs are to honour the entrenched rights both in legislation and administration those fundamental rights which by their nature are enforcable not only against the State, are enforcable against individuals, natural or juristic, who may be disposed to interfere with their exercise in particular, the rights contained in section 8 (equality) and section 32 (education) apply horizontally.

Editor's Summary

Applicants, the parents of F, a minor, brought an urgent application against Respondent, arising from Respondent's refusal of F's application for admission to Respondent's faculty of medicine.

Applicants sought inter alia an order directing Respondent **[*4]** to admit their daughter to the medical school and also sought interim relief to the same effect. The judgment deals with Applicants' entitlement to this interim relief.

It was common cause that F was a highly gifted pupil. At the end of 1993 she passed her Standard 9 examination with an aggregate of 81%. In the matriculation examination at the end of 1994, conducted under the aegis of the education department of the former House of Delegates Administration, she achieved 5 A's and a B, all in higher grade subjects. She achieved A's in all the science examinations which she sat.

The parties were not agreed on what selection procedure Respondent used and on whether certain statements regarding admission procedure attributed to the Dean and the Assistant Dean of the Faculty of Medicine were accurate. However, for the purposes of interim relief Applicants were prepared to base their contentions upon the procedure described in the answering affidavits.

Respondent, in its answering affidavits, maintained that it had, for a number of years, been faced with a dilemma regarding the selection of students for first year medicine. The cause of this dilemma was the very poor standard of education **[*5]** available to African students under the aegis of what was previously known as the Department of Education and Training. The Dean of the Respondent's Faculty of Medicine stated that Respondent had endeavoured to circumvent this difficulty by means of "an affirmative action programme" in the following terms:

"(a)The programme is an attempt to take into account the educational disadvantages to which certain students have been subjected and is directed at determining the true potential of each aspirant student.

(b)The faculty evaluates the performance at school of African students in a way which is different to that employed in relation to students schooled under other education departments.

(c)The matriculation results of accepted African applicants will in almost all cases be lower than those of other applicants who are accepted, and indeed lower than those of other applicants who are not accepted.

(d)By these means it is possible to identify a pool of African students who satisfy the

university's requirements for admission to the medical faculty.

(e)The principal difficulty then becomes a matter of comparing students who have been assessed on different bases and it is **[*6]** almost impossible to do this. A policy decision has to be made.

(f)If it is safe for Respondent to assume that there is no question of the selection process being unfair for so long as the numbers chosen from a particular cultural group, expressed as a percentage of the total admission, does not exceed the representation that cultural group has in society".

Applicants' attack on the policy and procedure adopted by Respondent, for the purposes of interim relief, amounted to the following:

(a)On the assumption that the dealings between Applicants and Respondent were subject to the provisions of the Constitution, the decision to reject F's application fell to be set aside because -

(i)it was based upon a discriminatory practice in conflict with the provisions of section 8(1) and 8(2) of the Constitution;

(ii)it was an infringement of the right to "equal access to educational institutions" entrenched in section 32(a) of the Constitution.

(b)If the Constitution did apply, then a selection policy was ultra vires of the Respondent's council because it involved a racially discriminatory procedure which the council did not have express statutory authority to use.

(c)Accepting **[*7]** that Applicants had shown a prima facie right, the balance of convenience strongly favoured the grant of an interim order.

The Court accepted that central to the issues raised in (a) above was the question of whether the provisions of the Constitution applied to the dealings between Applicants and Respondent. Respondent's contention was that the fundamental rights defined in Chapter 3 of the Constitution were personal rights which operated, and could only be exercised, against the State and its "organs" and were of no application between an autonomous corporate body such as the University of Natal and people who aspire to contract with it for the purpose of obtaining a higher education. This amounted to a contention that these rights had only "vertical application". Applicants contended that the rights had "horizontal" application.

Applicants relied on, inter alia, Gardner v Whitaker 1994 (5) BCLR 19. Respondent relied on De Klerk and Another v Du Plessis and Others 1994 (6) BCLR 124 at 133 and the Canadian case of McKinney v The Board of Governors of the University of Guelph (1991) 2 CRR (2D) 1.

The Court rejected the argument that the expressio unius exclusio alterius principle **[*8]** was to be applied to section 7(1), which specifically provided that organs of State were bound by the Constitution. It also held that the view expressed in De Klerk's case that rights and obligations defined in the common law were to continue to govern interpersonal relationships and that it was for Parliament to legislate in those instances where the common law fell short of the standards of conduct and freedom envisaged in Chapter 3, was not tenable. Having regard to the

combined effect of the third paragraph of the preamble, read with sections 4, 33(1), 33(2), 33(3) and 35 of the Constitution, the rights in Chapter 3 applied both vertically and horizontally. The Court observed that one of the primary objectives of the Constitution was to replace the system of parliamentary supremacy with one of constitutional supremacy. The Court was of the view that the reason for the presence of section 7 was to stress that the State and its minions were to honour the entrenched rights both in legislation and administration.

The Court rejected the view expressed in De Klerk's case that the applicability of the entrenched rights inter personas would have a chaotic effect on the common law. The **[*9]** Court was of the view that the Constitution intended to make the courts the custodians of the rights in Chapter 3, some of which, at least in essence, were recognised by the common law. Although the effect of the Constitution must undoubtedly be to alter the relative priorities of some of the entrenched rights compared with the priorities previously accorded to them by the common law, it was the task of the courts, armed with the powers conferred on them by sections 7, 33 and 35, to define the limits of the entrenched rights where they appeared to encroach upon each other and at the same time to blend them into the common law, bringing about whatever adjustments were necessary to achieve a harmonious amalgam.

The Court held that the rights in issue before it, namely those entrenched in sections 8(1), 8(2) and 32, applied both vertically and horizontally.

Respondent did not seriously dispute that the procedure adopted by it in order to compensate for the defect in the education available to African matriculants, involved assessing African applicants on a different basis to Indian applicants. For the purposes of its decision, the Court assumed that this was a discriminatory procedure **[*10]** and that the presumption in section 8(4) operated against Respondent.

The Court was satisfied that the policy described by Respondent was a "measure designed to achieve the adequate protection and advancement of . . . a group . . . of persons disadvantaged by unfair discrimination" within the meaning of that expression in section 8(3)(a) of the Constitution. Although the Court accepted that the Indian community had been decidedly disadvantaged by the apartheid system, it held that the evidence established that the degree of disadvantage to which African pupils had been subjected, was significantly greater than that suffered by their Indian counterparts. Accordingly, the Court held that a selection system which compensated for this discrepancy would not run counter to the provisions of sections 8(1) and 8(2) of the Constitution.

As to the submissions based on section 32(a), the Court was of the view that the expression "educational institutions" had to be read in the context of the reference to "basic education". In any event, the Court held that even if the reference in section 32(a) to educational institutions was to be taken to include a reference to "institutions of higher **[*11]** learning" the right in section 32(a) would have to be limited by the provisions of section 8(3) in circumstances such as those faced by Respondent.

The Court was of the view that there was insufficient evidence before it to support the contention that it was an unreasonable administrative procedure for Respondent to rely upon Standard 9 results as part of its selection criteria for members within

the Indian community.

The Court concluded that the Applicants had failed, on the papers as they stood, to establish the existence of "a prima facie right open to some doubt" and accordingly refused to grant interim relief.

CASES REFERRED TO:
The following cases were referred to in the above judgment:

Southern Africa

De Klerk v Du Plessis 1994 (6) BCLR 124 (T)

Gardener v Whitaker 1994 (5) BCLR 19 (E)

Traube v Administrator, Transvsaal 1989 (1) SA 397 (W)

Canada

McKinney v Board of Governors of the University of Guelph (1991) 2 CCR (2d) 1

Before : NV Hurt, Judge

JUDGMENT BY: Hurt J,

JUDGMENTS: Judgment

BY Hurt J This matter came before me as one of urgency on 15 February 1995. Arrangements were then made for the respondent, the University of Natal, to prepare and deliver answering affidavits **[*12]** and for the applicants to reply and the matter was adjourned to be heard as an opposed motion on 24 February 1995. By that date, although fairly lengthy affidavits had been delivered, the parties were ad idem that there had been insufficient time to gather all of the factual material relevant to a final decision of the dispute. I was accordingly asked to rule only on the question of whether there should be interim relief, on the understanding that both parties would be delivering further affidavits and a decision would thereafter be taken as to the procedure which should be adopted to dispose of the case.

Having heard argument on 24 February 1995, I indicated to counsel that I was not disposed to grant interim relief in the matter and the application was then adjourned to 6 March 1995 to enable counsel to discuss and, if possible, decide upon, the future procedure to be adopted.

These are my reasons for refusing interim relief.

It is common cause that Fathima **Motala,** the daughter of the applicants, is a highly gifted pupil. At the end of 1993 she passed her standard nine examinations with an

aggregate of 81%. In the matriculation at the end of 1994, conducted under the aegis **[*13]** of what is referred to in the papers as the "ex-house of delegates", she achieved five A's and a B, all in higher grade subjects. These subjects were all in the "pure science matriculation course (course S17)", which is specifically intended for pupils intending to take a degree in medicine. She achieved A's in all the science courses for which she sat. During 1994, and prior to obtaining these excellent results, she had applied for admission to the faculty of medicine at the University of Natal. This application met with a somewhat terse refusal; no reasons were given and her father, the first applicant, was asked not to contact the medical faculty about any second choice she might make as a proposed course of study. At about the end of January 1995, the applicants learnt of another prospective student, Karen Singh, who, like Fathima, had achieved excellent matriculation results in the ex-house of delegates examination and who had likewise been refused admission to the faculty of medicine. They learnt, apparently from a Mr K Pillay who, in an affidavit in these proceedings, describes himself as "a community leader in the Indian community in Durban", that the representatives of the **[*14]** University of Natal in the faculty of medicine had been approached for an explanation for their refusal of Karen Singh's application. Mr Pillay had been given certain explanations which he and those whom he represented had regarded as unsatisfactory. I quote Mr Pillay's evidence in this regard:

"On Friday, 13 January 1995, I met with Professor Loening, the chairman of the selection committee for the admission of first year medical students (and assistant dean undergraduate) at the University of Natal. He informed me that:

(a)By reason of the affirmative action policy of the University of Natal only forty Indian students would be accepted.

(b)More black, coloured and white students would be accepted.

(c)Only Indian students with six 'A' passes in the ex-house of delegates matriculation examination would be considered for admission.

On Monday, 16 January 1994, I met with the dean of the faculty of medicine, Natal, Professor Van Dellen, who informed me:

(a)Over the years many Indian doctors had qualified at the medical faculty of the University of Natal, and relatively, not many blacks and coloureds had qualified. It was therefore the policy of the faculty to admit more blacks **[*15]** and coloured students. Only forty Indian students would be admitted.

(b)The selection of first year students was based on their standard nine results."

The applicant learnt from Mr Pillay that Karen Singh had applied to this Court to have the decision to refuse her admission set aside, and the applicants decided to take similar action on behalf of Fathima. I should mention that, in the mean time, Karen Singh's application to this Court has fallen away because she has been admitted to the medical faculty.

The applicants founded their application on one or more of the following contentions:

(a)that the limitation of the number of Indian students to be admitted to the faculty amounts to discrimination on a racial basis and is accordingly contrary to the

provisions of the Constitution Act 200 of 1993;

(b)that the use of standard nine results as a basis for selecting candidates in the first year of medicine was, to quote the founding affidavit, "discriminatory, unequal and arbitrary". In amplification of this contention, the applicants point out that there was no provision made for a "uniform" examination in standard nine and that results, and the level of achievement, could **[*16]** be expected to differ from school to school;

(c)the policy of only admitting candidates who had passed the matriculation examination with six A's, without having regard to such candidates' aggregates in the subjects which were most important for the purpose of future medical study is capricious, arbitrary and discriminatory.

The respondent replied to the applicants' contentions at some length. It emerges from the answering affidavits that the respondent has, for a number of years, been faced with a dilemma about the selection of students for first year medicine. The source of this dilemma is the very poor standard of education available to African students under the aegis of what was previously known as the Department of Education and Training. Professor Van Dellen, the dean of the respondents' faculty of medicine, describes how the respondent endeavoured to circumvent this difficulty by means of what he describes as "an affirmative action programme", in the following terms:

"25The university's affirmative action programme is an attempt to take into account the educational disadvantages to which students have been subjected in certain of the school education departments, and **[*17]** is directed at determining the true potential of each aspirant student. In the faculty of medicine, this means that an attempt must be made to evaluate the potential the student has to succeed in his/her university studies, and the potential he or she has to be a good medical doctor. A similar situation obtains in other faculties.

26(a)The faculty evaluates the performance at school of African students in a way which is different to that employed in relation to students schooled under other education departments.

(b)Since 1951 the respondent's school of medicine has trained the most African doctors in South Africa. I believe that it is therefore in a better position than any other medical faculty to make an evaluation of the potential of aspirant African medical students.

(c)It follows, from what I have said above, that the matriculation results of accepted African applicants will in almost all cases be lower than those of other applicants who are accepted, and indeed lower than those of other applicants who are not accepted.

27By these means, it is possible to identify a pool of African students who satisfy the university's requirements for admission to the medical faculty."
[*18]
Professor Van Dellen goes on to explain the procedure which is then adopted, as follows:

"30(a)The principal difficulty then becomes the matter of comparing students who have been assessed on different bases. It is almost impossible to do this. A policy decision has to be made.

(b)In the ideal world, if all students had the same educational background, and each could be compared to any other on his/her academic performance at school, one would expect to find that the top 120 students, graded according to their matriculation results, would constitute a cultural mix which is more or less the same as the cultural mix of the society from which they are drawn.

(c)That being the case, if the respondent starts its selection process by looking at any one of the cultural groups involved, it is safe for the respondent to assume that there is no question of the selection process being unfair for so long as the numbers chosen from that cultural group, expressed as a percentage of the total admission, does not exceed the representation that cultural group has in society. There is no other way of overcoming the circumstance that it is almost impossible to compare potentials across the cultural **[*19]** groups emanating from the various educational systems."

There is a dispute, on the papers, about whether Mr Pillay's account of what he was told by Professors Loening and Van Dellen is an accurate one, nor are the applicants prepared to admit, for the purposes of final adjudication on the application, that the selection procedure in fact used by Respondent is that described by the respondent's deponents and set out above. Both parties have reserved their rights to amplify and challenge the evidence on this aspect. But, for the purpose of adjudication on the question of interim relief, the applicants were prepared to base their contentions upon the procedure described in the answering affidavits. Accepting that the selection for 1995 was not, on the basis of an outright quota, the applicants' attack on the policy and procedure adopted by the respondent was modified, in the argument ably presented by Mr Harcourt and Mr Ngcobo on behalf of the applicants, to the following:

(a)On the assumption that the dealings between the applicants and the respondent are subject to the provisions of the Constitution of South Africa Act 200 of 1993 ("the Constitution") the decision to reject Fathima's **[*20]** application falls to be set aside because:

(i)it was based, fundamentally, upon a discriminatory practice in conflict with the provisions of sections 8(1) and 8(2) of the Constitution;

(ii)it was an infringement of the entrenched right to "equal access to educational institutions" in section 32(a) of the Constitution.

(b)If the Constitution does not apply, then the selection policy is ultra vires of the respondent's council because it involved a racially discriminatory procedure which the council does not have express statutory authority to use.

(c)Accepting that the applicants have shown a prima facie right the "balance of convenience" strongly favours the grant of an order directing the respondent to accept Fathima as a first year medical student in the interim until the application is finally disposed of.

Central to the resolution of the issues raised in (a), and, in my view, to the decision in this part of the application, is the question of whether the provisions of the Constitution affect the dealings between the applicants and the respondent relating to Fathima's admission to the first year of study in the medical faculty. The

respondent's contention was that the **[*21]** fundamental rights defined in Chapter 3 are personal rights which operate, and can only be exercised, against the State and its "organs" and that these rights are of no application between an autonomous, corporate body such as the University of Natal and people who aspire to contract with it for the purpose of obtaining a higher education. The principle has come to be described, in the rash of commentary which preceded and succeeded the coming into effect of the Constitution, as the theory of "vertical application". There is an opposing theory to the effect that the fundamental rights in Chapter 3 have both "vertical" and "horizontal" application, the latter being the term used to describe the operation of the rights as between persons other than the State and its "organs". I was referred to decisions in which South African Courts have decided that certain of the rights defined in Chapter 3 have, to extend the metaphor, "two dimensional application" (that is Gardener v Whitaker 1994 (5) BCLR 19 (E)) and another to the effect that "the fundamental rights set out in Chapter 3 of the Constitution are intended to be of vertical application only". (De Klerk v Du Plessis 1994 (6) BCLR 124 **[*22]** (T) at 113.) Not surprisingly, Mr Olsen, who appeared for the respondent, submitted that the De Klerk decision, a judgment by Van Dijkhorst J, is the correct one. He contended that the respondent was not an "organ of State" within the meaning of that expression as used in section 7(1) of the Constitution, read with the definition section, section 233(1)(ix). In this regard he relied upon a decision by the Supreme Court of Canada in the case of McKinney v The Board of Governors of the University of Guelph (1991) 2 CRR (2d) 1 at 30. It was therefore inappropriate, so the argument ran, for the applicants to endeavour to rely upon any provision of the Constitution as a basis for the prima facie right requisite for the grant of interim relief.

I am acutely aware of the far-reaching consequences of a conclusive decision as to whether the "fundamental rights" (or any of them) operate only vertically or "two dimensionally". It was, however, essential for me to form a view on the matter for the purpose of deciding whether the applicants can found a prima facie right on the provisions of Chapter 3 and, in particular, on sections 8 and/or 32. In my view, these sections do not have exclusively **[*23]** "vertical" operation. Since this view is formed as a precursor to a decision in urgent proceedings, it is with considerable diffidence that I set out, very briefly, my reasons for holding it.

As I understand the argument for exclusively vertical operation of Chapter 3, it is based on the contention that the expressio unius exclusio alterius principle is to be applied to section 7(1). (See De Klerk's case (supra) at 131.) The view expressed by the learned Judge in De Klerk's case is to the effect that the framers of the Constitution intended the rights and obligations defined in our common law to continue to govern interpersonal relationships and that it is open to Parliament to legislate in those instances where the common law falls short of the standards of conduct and freedom envisaged in Chapter 3. (See De Klerk's case at 132D-H.)

With all due respect, I cannot accept that such an approach is compatible with the combined effect of the third paragraph of the preamble, read with sections 4, 33(1), 33(2), 33(3) and 35 of the Constitution. One of the primary objectives of the Constitution was to replace the system of parliamentary supremacy with one of constitutional supremacy. **[*24]** This was achieved in section 4. With a metaphorical stroke of the pen, the framers avoided "any law or act inconsistent with" the provisions of the Constitution "to the extent of the inconsistency". Section 33(2) expressly stipulates that the rights entrenched in Chapter 3 are not to be limited, save in terms of subsection 33(1), by any law "whether a rule of the

common law, customary law or legislation". Section 35(3) charges courts to "have due regard to the spirit, purport and objects of this Chapter". Having regard to these admonitions, I do not consider that it was intended or contemplated that the courts would leave it to the legislator to pass legislation aimed at bringing the common law into conformity with Chapter 3. By giving the judicial arm of the State the power to avoid or ignore statutory provisions inimical to the Constitution, and more particularly to the rights entrenched in Chapter 3, it seems clear to me that the framers of the Constitution intended to make the Courts the custodians of those rights. Approached from this viewpoint, it seems to me that the reason for the presence of section 7(1) is to stress that the State and its minions are to honour the entrenched **[*25]** rights both in legislation and administration. Given the high-powered, perhaps almost frantic, milieu in which the Constitution was forged (graphically alluded to in De Klerk's case) it would be a mistake, I venture to suggest, to attribute too much significance to the presumption against redundancy and some of the other highly clinical tenets of interpretation at the risk of attributing too little to the professed spirit and objects of the enactment. And it seems to me, with the greatest respect, that this is the error into which proponents of an exclusively "vertical" operation fall. Nor am I persuaded that applicability of the entrenched rights inter personas will have the chaotic effects on the common law so direly predicted in De Klerk's case. As Van Dijkhorst J said, our common law has a comprehensive system of well-defined and equitably limited rights and obligations including, at least in essence, all of the rights entrenched in Chapter 3. The effect of the Constitution must undoubtedly be to alter the relative priorities of some of the entrenched rights compared with the priorities previously accorded to them by the common law. It must, in my respectful view, be the task **[*26]** of the courts, armed with the powers conferred on them by sections 7, 33 and 35 (and not the task of Parliament) to define the limits of the entrenched rights where they appear to encroach upon each other and at the same time to blend them into the common law, modifying the latter wherever necessary so as to achieve a harmonious amalgam.

It goes without saying that many of the entrenched rights are, by their very nature, exclusively "vertical" in their operation. But many of them are, in my view, not. For the purpose of furnishing these reasons I need only say that I consider that the rights entrenched in sections 8(1), 8(2) and 32, which are the only entrenched rights in issue before me, are enforceable not only against the State or its organs as defined, but also against individuals, natural or juristic, who may be disposed to threaten them or interfere with the exercise of them.

It was not seriously disputed in argument that the procedure adopted by the respondent in order to compensate for the defect in the education available to African matriculants, involves assessing African applicants on a different basis to Indian applicants. Although the respondent was inclined to demur **[*27]** at the suggestion that this was a discriminatory procedure, I assumed, for the purposes of my decision, that it was. I also assumed, in keeping with the submissions by Mr Harcourt, that the presumption in section 8(4) would operate against the respondent. In this regard, the principal submission on behalf of the applicants was that the Indian community had itself suffered substantial disadvantages as a result of discrimination prior to April 1994. Accordingly, it was contended, discrimination between members of the African community and those of the Indian community under the policy adopted by the respondent for selection of first year medical students was "unfair discrimination" which fell to be prohibited by the operation of sections 8(1) and 8(2). Furthermore, it was submitted, the procedure constituted an infringement of the right to "equal access to educational institutions" entrenched in

section 32(a) of the Constitution.

On the papers before me I was satisfied that the policy described by the deponents for the respondent was a "measure designed to achieve the adequate protection and advancement of . . . a group . . . of persons disadvantages by unfair discrimination" within **[*28]** the meaning of that expression as used in section 8(3)(a) of the Constitution. The contention by counsel for the applicants appears to be based upon the premise that there were no degrees of "disadvantage". While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the "four tier" system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of sections 8(1) and 8(2). As to the submissions based on section 32(a), as I read that section, the expression "educational institutions" is to be read in the context of the reference in this subsection to "educational institutions" and is to be taken to include a reference to "institutions of higher learning" (the expression used in section 14(1)), then it seems to me that the right in section 32(a) would have to be limited by the provisions of section 8(3) in circumstances such as those faced by the respondent.

Mr Ngcobo presented **[*29]** a neat argument on behalf of the applicants based on the assumption that the provisions of Chapter 3 of the Constitution did not apply as between the applicants and the respondent. On the view which I have taken, namely that sections 8(1) and 8(2) apply, it is not necessary for me to deal with this aspect of the argument.

As to the question of whether it was an unreasonable administrative procedure for the respondent to rely upon standard nine results as part of its selection criteria for members within the Indian community, I understood Mr Harcourt to concede that, on the evidence, as it stands at present, the applicants do not have a very strong case if they have a case at all. It seems to me that an attack on the selection procedure on this ground would depend on adducing evidence to establish that the result of the application of the "policy" was so unreasonable that there must be an inference that the decision to refuse Fathima's admission must be flawed. I do not think that the evidence before me at the moment gets anywhere near establishing this.

In all the circumstances I concluded that the applicants have failed, on the papers as they stand, to establish the existence **[*30]** of "a prima facie right open to some doubt".

Even if my conclusion about the absence of a prima facie right is incorrect, however, there is, in my view another insuperable obstacle in the applicants' path to interim relief. As indicated earlier the object of bringing the application for interim relief as a matter of urgency was to obtain an interim order in terms of paragraph 1(b) of the notice of motion which reads:

"The respondent is ordered to admit the applicant as a first year student in the faculty of medicine of the University of Natal for the academic year 1995."

The purpose of such an order would have been to enable Fathima to commence her studies on 27 February pending the final determination of this application.

Mr Olsen contended that any interim relief which the Court might be disposed to grant would be confined to setting aside the decision to refuse Fathima's application for enrolment. I think that this submission is correct. (See Traube v Administrator Transvaal 1989 (1) SA 397 (W) at 405F-H and the cases there cited.) This Court should not, and cannot, I think, usurp the function of the selection panels appointed by the respondent by deciding whether a particular **[*31]** student is to be admitted. All it can do is to intervene, in appropriate cases, where it forms the view that an unlawful procedure has been followed for the purpose of deciding on any particular application for admission. In the circumstances, even if the applicants had established some sort of prima facie right, I do not think that this would have entitled them to an order that Fathima be admitted to the course of study.

In fine I think it is appropriate for me to record, in these reasons, my gratitude to the legal representatives on both sides for the careful and helpful manner in which they presented the affidavit evidence and the arguments under pressingly urgent conditions.

SOLICITORS:
For the applicants:

AWM Harcourt and SS Ngcobo instructed by Pat Poovalingam and Company

For the respondent:

P Olsen SC instructed by Shepstone and Wylie

1/31/96