IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 18902/2013

In the matter between:

EVELYN WILHELMINA PEASE	1st Applicant
PROGRESSIVE PRINCIPALS' ASSOCIATION	2nd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
MINISTER OF BASIC EDUCATION	2nd Respondent
MEC FOR EDUCATION: EASTERN CAPE	3rd Respondent
MEC FOR EDUCATION: FREE STATE	4th Respondent
MEC FOR EDUCATION: GAUTENG	5th Respondent
MEC FOR EDUCATION: KWAZULU-NATAL	6th Respondent
MEC FOR EDUCATION: LIMPOPO	7th Respondent
MEC FOR EDUCATION: MPUMALANGA	8th Respondent
MEC FOR EDUCATION: NORTHERN CAPE	9th Respondent
MEC FOR EDUCATION: NORTH WEST PROVINCE	10th Respondent
MEC FOR EDUCATION: WESTERN CAPE	11th Respondent
MINISTER OF FINANCE	12th Respondent
MINISTER OF SOCIAL DEVELOPMENT	13th Respondent
PUBLIC PROTECTOR	14th Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	15th Respondent
AUDITOR-GENERAL	16th Respondent

FIRST TO THIRTEENTH RESPONDENTS' HEADS OF ARGUMENT
(Enrolled for hearing on 19 May 2014)

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INTRODUCTION

1 This application seeks *"radical"* and wide-ranging relief,[1] impacting on numerous national departments, provincial departments in each province of the country, standard-setting and supervisory bodies, and organised labour.[2] It concerns what the applicants concede is a *"specialised field"*.[3] The field is basic education, and the relief sought is conceded by the applicants as *constituting "radical … intervention by this … Court"*.[4] Basic education is not only a dynamic field of specialisation in which commentators, politicians, teachers, parents, school governing bodies, legislatures and laymen often hold different (and sometimes equally valid) views.[5] It is also a field of historic and

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1 Structural relief is sought from this Court to supervise the respondents' constitutional role in relation to the development of children's numeracy and literacy skills; the delivery of text books and other teaching materials; the development and equipment of teachers; curbing teacher absenteeism, unaccountability and unprofessionalism; the development of all official languages and "adequate grounding" of children in their mother tongue; and making available "comprehensive early childhood development services" (prayers 2.1 to 2.6 of the notice of motion, at Record pp 2-3). The relief is sought on a "nation-wide" scale (Record p 17 para 22), requiring this Court to supervise its structural interdict throughout other provinces, most notably the Eastern Cape and Limpopo (where most of the problems complained of are experienced). So extensive is the supervisory relief sought by the applicants that they themselves contemplate that this Court would have to order its counterparts in other provinces to supervise its order (Record p 90 para 144), should the three Chapter 9 institutions cited as fourteenth to sixteenth respondents be unable to do so.

2 Record pp 1130-1131 paras 48-49; Record pp 1227-1228 paras 310-311. Indeed, as the applicants' replying affidavit envisages (on the authority of a *Mail & Guardian* advertisement), "for example, the Department of Public Works …, the Department of Water and Environmental Affairs …, the Department of Arts & Culture" and "[t]ransport authorities of all levels of Government" will be affected by this Court's order and indefinite supervisory order. The relief accordingly requires this Court's day-to-day supervision of "[m]ultiple organs of state" (*ibid*).

3 Record p 10 para 4.

4 Record p 2800 para 15.

5 Malherbe "Centralisation of power in education: have provinces become national agents? (2006) 2 *TSAR* 237 at 251, describing education as "a matter close to most people's hearts" which is to be decentralised as much as possible.

current emotive and political contestation,[6] as the tone deployed by the applicants confirm.[7]

2 As the applicants accept, the exploitation of basic education by the apartheid regime as a tool social engineering is a reality.[8] This reality is prominently recognised in the Constitutional Court's own judgments in this field.[9] This application should be approached from the same departure point, eschewing any *a priori* notion regarding the state of basic education deduced from what the applicants describe as a "media hype",[10] on which they seize.[11]

3 Thus, the correct legal departure point is section 29 of the Constitution (which governs basic education),[12] as interpreted by the

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6 Courts have repeatedly recognised the emotive nature of basic education (see e.g. ***Hoërskool Ermelo v Head, Department of Education, Mpumalanga*** 2009 (3) SA 422 (SCA) at para 4; ***Welkom High School v Head, Department of Education, Free State Province*** 2011 (4) SA 531 (FB) at para 22. The annexures to the founding and answering papers further demonstrate the politically-charged atmosphere in which basic education is commented on in the press (e.g. Record p 118 lines 8-9: "damning indictment of the [Limpopo] province's political leadership, which is blamed for the mess").

7 E.g. "false", "obfuscation", "emaciated", "ill-informed" (Record p 2796 para 8); "unforgivable", "incompetence", "ineptitude" (Record p 2799 para 13).

8 Record p 2830 para 102.

9 See e.g. ***MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School*** 2013 (6) SA 582 (CC); and Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC).

10 Record p 41 para 65.1.

11 Some of which only in reply, and without as much as annexing a specimen of the patent hearsay somehow considered admissible (e.g. Record p 2849 para 144).

12 Section 29 provides:

> *"(1) Everyone has the right –*
> *(a) to a basic education, including adult basic education; and*
> *(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.*
> *(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –*
> *(a) equity;*
> *(b) practicability; and*
> *(c) the need to redress the results of past racially discriminatory laws and practices.*

Constitutional Court itself[13] and applied to the dispositive facts.[14] The most recent judgment by the Constitutional Court applying section 29 is *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School*.[15] The judgment commences:

> *"Section 29 of the Constitution guarantees everyone the right to a basic education. That is the promise. In reality, a radically unequal distribution of resources – related to a history of systematic discrimination – still makes this constitutional guarantee inaccessible for large numbers of South Africans."*[16]

4 The *Rivonia Primary School* judgment reiterates the Constitutional Court's judgment in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*,[17] identifying unequal access to opportunity, vast discrepancies in access to public and private resources, and how this impact on education.[18] *Hoërskool Ermelo* confirmed that *"[w]hile much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us."*[19] *Hoërskool Ermelo* further

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(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.
(4) Subsection (3) does not preclude state subsidies for independent educational institutions."

13 Record p 1122 para 14.

14 As we shall demonstrate, the founding papers either ignore or omit to disclose many material facts, all of which must be approached on the respondents' papers (***Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited*** 1984 (3) SA 623 (A) at 634E-635C; ***Thint (Pty) Ltd v National Director of Public Prosecutions*** 2009 (1) SA 1 (CC) at para 8).

15 2013 (6) SA 582 (CC).

16 Id at para 1.

17 2010 (2) SA 415 (CC).

18 Id at para 45.

19 Ibid.

confirmed what *Rivonia Primary School* held *"should be emphasised"*,[20] namely that education litigation must be considered

> *"within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."*[21]

5 It is these judgments, and others to be discussed in due course, which provide the compass bearings for any resort to court involving the specialist field of basic education. The judgments confirm that various stakeholders are engaged in the specialist field of basic education, that a diversity of interests exists, and that competing visions prevail – all of which result in inevitable tensions.[22] Dealing with the issue of *"the quality of … children's education"*, the Constitutional Court formulated the State's constitutional obligation thus: *"to ensure that all learners have access to basic schooling."*[23] The motion record demonstrates the respondents' significant achievements in this regard.[24]

6 On the other hand, the founding papers, replying affidavit and heads of argument for the applicants do not demonstrate a proper recognition of the Constitutional Court's binding case law. It is indeed common cause that this application had been prepared long

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[20] Supra at para 41.
[21] ***Ermelo (supra)*** at para 61.
[22] ***Rivonia Primary School (supra)*** at para 2.
[23] Id at para 3.
[24] As has correctly been observed by academic commentators: "With the dawn of democracy in 1994, this unsatisfactory situation in education [the education system established under apartheid, resulting in 'the quality of education for blacks [being] dismally poor'], as in many spheres of life, had to be addressed boldly and unwaveringly, and the elimination of the apartheid legacy in education was and still is one of the main priorities of the democratic government" (Malherbe "Centralisation of power in education: have provinces become national agents? (2006) 2 TSAR 237 at 237).

before the Constitutional Court's most recent judgments in this field. Inexplicably, even the applicants' heads of argument demonstrate insufficient recognition of the most recent Constitutional Court judgments.[25]

7 The very long delay in instituting the application renders it not only discordant with subsequent Constitutional Court case law. It also results in a failure to address many factual developments occurring in the interregnum. This renders the application materially moot and inconsistent with ***Administrator, Transvaal v Theletsane***,[26] as we shall show below. These manifest defects apart, the application is also otherwise factually flawed and legally misconceived.

8 In demonstrating this, our submissions follow the scheme set out in the index hereto.

OVERVIEW OF APPLICATION AND BASES OF OPPOSITION

9 In broad overview, the application is opposed for being legally and factually untenable. We develop the arguments more fully in the subsequent sections, but provide the outline of the argument at the outset to introduce clarity in the legal argument.

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[25] The only Constitutional Court judgment on the applicants' list of authority which deals with section 29 is ***Juma Masjid Primary School v Essay NO*** 2011 (8) BCLR 761 (CC), a judgment already analysed in the respondents' answering affidavit – demonstrating that this judgment defeats rather than supports the basis on which this supposed test litigation is brought.

[26] 1991 (2) SA 192 (A).

The application was instituted on a misconceived legal premise

10 It is common cause that this application was brought in the expectation that it would serve as a test case for this Court to pronounce on a *"crucial question"*:[27] whether the right to education is subject to progressive realisation.[28] It was on this presumed premise[29] (ascribing a particular legal view to the Minister) that this application was conceived over fourteen months prior to its institution (purportedly on an urgent basis). First, the basis on which the legal stance is attributed to the Minister is factually unfounded.[30] Second, the legal position has been authoritatively stated by the Constitutional Court.[31]

11 The legal premise on which this application has been instituted, and on which structural relief is sought, is accordingly flawed. Hence the undisputed submission in the answering affidavit that, apart from being factually unfounded, the application is also *legally* moot.[32]

The application was instituted on a flawed factual premise

12 Four[33] (sometimes inconsistently presented by the applicants as six)[34] causes of action underlie so-called "discrete" components of a

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27 Record p 57 para 95.
28 Record p 1235 para 331, not denied at Record p 2905 para 315.
29 Record p 57 para 97.
30 Record p 1236 para 333, not denied at Record p 2905 para 315.
31 ***Juma Masjid Primary School v Essay NO*** 2011 (8) BCLR 761 (CC) at para 37; ***KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*** 2013 (4) SA 262 (CC) at para 38.
32 Record p 1237 p 335, not disputed at Record p 2905 para 315.
33 Record p 39 para 60.
34 Record pp 2-3 para 2. The replying affidavit however limits the applicants' case to ECD, mother-tongue education, teachers' professionalisation, and the delivery of teaching material (Record p 2884 para 252).

single assertion. We deal with these causes separately below, but first consider the underlying assertion – demonstrating that the applicants' approach is precluded by *Administrator, Transvaal v Theletsane*.[35]

13 The common denominator underlying the four cases of action is that basic education is not being delivered by the respondents. The assertion rests on allegations that:

13.1 "none of the proposals made in respect of ECD in the NDP [the National Development Plan] have [sic] either been taken up, or acted upon";[36]

13.2 "the NDP [proposals] have not, in any material respects, been implemented or acted upon by any of the role players in the public administration";[37]

13.3 "solutions are not rolled out across the land";[38] and

13.4 "[n]othing concrete has been done to address the recommendations in the [2012 ANA] Report".[39]

These allegations were squarely met on a factual level, demonstrating extensive policies and plans and their implementation.[40] As a result, in their replying affidavit, the applicants were driven to resort to drawing an *"inference [which] is a*

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35 1991 (2) SA 192 (A).
36 Record p 50 para 79.
37 Record p 53 para 85.
38 Record p 58 para 98.
39 Record p 74 para 101bis.
40 E.g. Record p 1116 para 18; Record p 1161 para 131.

matter of the interpretation and proper appreciation of the ANA results."[41] This is not only a significant shift in the applicants' case. It also falls foul of the legal test for drawing inferences,[42] to the very limited extent permissible in motion proceedings.[43]

14 But yet more importantly, it violates a fundamental principle of civil procedure – which applies *a fortiori* in constitutional litigation.[44] The applicable principle requires that a case be made out in the founding papers,[45] and that a case made out on the basis of a *failure to act* cannot be converted in reply into a case of *unsuccessful action*.[46]

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41 Record p 2813 para 50. The resort to inferential reasoning permeates the case to which the applicants are driven in reply. For instance, at Record p 1822-1823 para 78 the deponent seeks to infer from the general unemployment rate, university drop-out rate and school drop-out rate that basic education is not being provided. There are many reasons for unemployment (e.g. a lack of job opportunities) and for dropping out of school (e.g. truancy, pregnancy etc) and university (e.g. financial constraints) which militate against an inference of the State's failure to provide basic education. Even poor performance in numeracy and literacy is not a conclusive basis for inferred non-compliance with section 29(1)(a), because many factors impeding learning are beyond the control of the respondents (as even the annexures to the replying affidavit must admit: Record p 2997 para 6). At Record p 2827 para 90 the replying affidavit again resorts to drop-out rates and unemployment to infer non-delivery of basic education. Had drop-out rates or unemployment truly been an issue from which an inference could be drawn, the Ministers responsible for labour and higher education should have been cited. Absent their input, it is not open to the applicant to seek to draw inference – especially not in their replying affidavit, as they are significantly driven to do. The resort to inferential reasoning is again repeated at Record p 2887 para 261, arguing that because the ANA results are unsatisfactory, therefore systemic failure is to be inferred. The logic does not follow: interventions demonstrate a functional system.

42 As stated in ***Govan v Skidmore*** 1952 (1) SA 732 (N) at 734C-D, and confirmed by the Supreme Court of Appeal on numerous occasions. The test requires that the inference sought to be drawn be the more natural or plausible. In circumstances where it is common cause that many competing factors frustrate children's school progress (see e.g. Record p 1138 para 73, note denied at Record p 2841 paras 120-122), ANA results which do not improve at an expected rate does not logically support a conclusion that previous ANA reports' recommendations have not been implemented.

43 Motion proceedings are not conducive to resolving disputes of fact (***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) at paras 26-27), and resorting the inferential reasoning to resolve factual disputes despite concrete evidence contradicting the inference sought to be drawn is accordingly generally impermissible.

44 ***MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School*** 2013 (6) SA 582 (CC) at paras 101-104, and authorities there collected.

45 ***Coffee, Tea & Chocolate Co Ltd v Cape Trading Co*** 1930 CPD at 82.

46 ***Administrator, Transvaal v Theletsane*** 1991 (2) SA 192 (A).

15 In short, the case made out in the founding papers was one of inaction; the case in reply shifted to inferences of inadequate implementation or defective policies. This notwithstanding, no act or omission in relation to implementation is sought to be reviewed, nor is any part or contended hiatus of any policy (or statute) impugned.[47] Directly impugning the measures and their implementation was necessary, because the mere inference of flawed system does not necessarily render it *"unreasonable in the constitutional sense, provided the State has shown a sufficient seriousness of purpose and commitment to improving the lives of its citizens."*[48]

16 Furthermore, the factual premise underlying this application requires a court of law to analyse education results and draw conclusions from annual assessments to establish whether or not basic education has been *"delivered"*. Not only does this approach repudiate the Constitutional Court's repeated warning that *"a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government"*.[49] It also disincentives political target-setting and internal assessments, because internal

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[47] We clarify at the outset that the respondents use legal terms like "review" and "impugn" in their ordinary legal sense. In law, for an action to be reviewed or a measure to be impugned, it must form the subject-matter of relief set out in the notice of motion for which a case is made out in the founding papers. The applicants adopt a different approach. For them "review" apparently means something like subjecting to the views of commentators, and asserting commentators' conclusions as conclusive (but without requesting a declaration that any particular measures is invalid) (see e.g. Record p 2896 para 288); and "impugn" appears to mean unidentified measures standing between an applicant and the relief set out in the notice of motion, but not attacked in the notice of motion (see e.g. Record p 2824 para 84, suddenly suggesting in reply that "the policies are impugned"). This approach is not only contrary to Theletsane, it is also contrary to the principle of subsidiarity (which we discuss below).

[48] Keightly "The Challenges of Litigating Socio-Economic Rights in South Africa" 2011 NZ Law Review 295 at 313-314, citing ***Mazibuko v City of Johannesburg*** 2010 (4) SA 1 (CC) at para 164.

[49] ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at para 48.***

assessments which demonstrate that a political target has not been achieved inferentially proves non-*"delivery"* of constitutional rights.[50] This is not only bad legal policy. It is also bad logic. The more natural inference is that consistent annual internal assessments evidence the State's concern for constitutional rights and constitute a measure to fulfil constitutional rights. It is therefore unsurprising that the Constitutional Court held that target-setting is to be encouraged to ensure democratic accountability, and that the Executive's "programmes and promises … are subjected to democratic popular choice,"[51] not judicial intervention.

17 Accordingly, at the outset, the mutation of the applicants' case and the inferential reasoning to which the applicants are driven in reply are untenable. So too is each separate cause of action.

Textbooks

18 As we shall show in in dealing with jurisdiction, the cause of action based on textbooks, workbooks and other teaching and learning materials (in short, *"textbooks"*) has no connection with the Western Cape province. Yet this Court's jurisdiction is invoked. Courts of competent jurisdiction have already been approach well before the institution of this application, and the implementation of their orders are being monitored by those courts themselves.

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[50] As the replying affidavit confirms, this is exactly what this application is "about": the ANA results (Record p 2860 para 174).

[51] ***Mazibuko (supra)*** at para 61.

Mother-tongue education

19 On a factual level, the respondents have demonstrably adopted and implemented measures to further indigenous languages and mother-tongue education. As a matter of law, the choice of language of learning is not one which the respondents may impose on schools or learners; and the Constitution does not require mother-tongue education. Instead, it is education in an official language which section 29(2) of the Constitution contemplates. Section 29(2) further clearly states that the official language intended is the one "*of choice"* of the learner (which choice is in practice exercised by the parent). Section 29(2) further subjects this entitlement to that which *"is reasonably practicable."* There is accordingly no constitutional entitlement to immediate mother-tongue education.[52] This is further supported by international law.[53]

Teachers' equipment, absenteeism, accountability and professional development

20 This, too, is a matter met by the respondents both on a factual and legal level. The answering affidavit demonstrates considerable

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[52] Bekker "The right to Education in the SA Constitution" Centre for Human Rights Occasional Papers:

> "*The Constitution does not guarantee mother tongue education for minorities, as does, for example, section 23 of the Canadian Charter of rights and freedoms. The Constitution, however, guarantees the right in public institutions to education in the language of one's choice. This is limited to education in an official language or languages and is further limited by the proviso – "where reasonably practicable"*"

[53] In its judgment in the case *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, judgment of the European Court of Human Rights held that there is no legal duty under the European Convention on Human rights and Fundamental Freedoms to provide education in any particular language. See Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (23 July 1968), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57525#{"itemid":["001-57525"]}.

measures and their implementation which address all issues relating to teachers.[54] None of these measures is impugned, nor is any measures' implementation reviewed. Nor is the statutory body responsible for teachers' development (South African Council for Educators, *"SACE"*) cited.[55] The response by the applicants, after this defect in its case has been pointed out in the answering affidavit, is a bald allegation in reply. It is that SACE is *"dysfunctional"*.[56] There is no evidence to this effect, however, and SACE has not been cited to refute this.

Early childhood development

21 This cause of action similarly falters on each level. Factually, a remarkable commitment to early childhood development has been demonstrated (as we shall show below). This renders the allegation that nothing has been done to give effect to the National Development Plan's prioritisation of ECD unfounded.

22 The applicants' further contention that NDP requires a *"shift"* which *"will require the amendment of the legislative framework"*,[57] is legally flawed. As the answering affidavit demonstrates, the Children's Act 38 of 2005 is the applicable legal (as opposed to *political*) norm. It vests in the provincial departments of social development (none of which is cited) the statutory responsibility for early childhood

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[54] Prayers 2.3 and 2.4 in the notice of motion split the cause of action based on teacher issues in two. The founding affidavit and replying affidavit however confirm that it is one cause of action.
[55] Record p 1130 para 48; Record p 1137 para 71.
[56] Record p 2840 para 118.
[57] Record p 2798 para 12.

development in respect of pre-school children. In the absence of a constitutional challenge to the Children's Act, there is no legal basis for relief which subjugates an Act of Parliament to a high-level Executive policy.[58]

Quality of education: numeracy and literacy

23 In their founding affidavit, the application vacillates between asserting an unarticulated "quality of education" which the applicants allege the State fails to deliver,[59] and asserting that the State has failed to take reasonable measures to deal with the four issues which constitute its causes of action.[60] In their replying affidavit, the applicants expressly stated that they *"are not advocating the delivery of quality education"*,[61] and confirm that their case is limited to early childhood development, mother-tongue education, teachers' development and textbook delivery.[62] The notice of motion nevertheless seeks a declarator relating to numeracy and literacy.[63]

24 To the extent that something may remain of the contentions regarding the quality of numeracy and literacy results, this aspect of the applicants' case (a) falls foul of the principle of subsidiarity; (b) is inconsistent with Constitutional Court case law rejecting a directly realisable minimum core contents for socio-economic rights; (c)

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58 ***Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*** 2001 (4) SA 501 (SCA) at para 7, confirmed in ***Head of Department, Department of Education, Free State Province v Welkom High School*** 2014 (2) SA 228 (CC) at para 217 (per Zondo J; Mogoeng CJ, Jafta J and Nkabinde J conc).

59 Record p 19 para 25.1.

60 Record p 20 paras 25.3, 25.4 and 25.5.

61 Record p 2812 para 47.

62 See e.g. Record p 2879 para 239, suggesting that the application is limited to "the four topics set out in the Applicants' relief".

63 Prayer 2.1 of the notice of motion.

impermissibly resorts to political targets from which a justiciable core content is contrived; and (d) fails to account for considerable measures formulated and implemented to improve numeracy and literacy.

***IN LIMINE* ISSUES**

25 The fatal defects in the application raise fundamental issues of constitutional litigation. Constitutional litigation is concerned with instances in which the judicial arm of government orders other arms of government how and when and whether to exercise their constitutional functions attributed by the Constitution not to the judiciary but to the Executive or Legislature.

26 The *in limine* issues (and related matters) are accordingly not capable of being diminished as *"technical points"*, as the applicants "fervently" *"hope[s]"* to do[64] – by broad strokes with the tar-brush. *A fortiori* when it is common cause that the respondents have responsibly identified the *in limine* issues to assist this Court in dealing with fundamental issues for *mero motu* consideration, as identified by the Constitutional Court itself.[65] Our submissions on these issues are made on this basis, and we respectfully ask that they be considered in this light.

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[64] Record p 2908 para 322.
[65] Record p 1128 para 40, note denied at Record p 2827 para 92.

Jurisdiction: extraterritorial causes of action; and ordering other divisions of the High Court to supervise structural interdict

27 The two intertwined bases for contending that this Court has jurisdiction[66] have already been dealt with in the answering affidavit.[67] They clearly have no merit, as stated in ***National Arts***,[68] a decision by this Court, rejecting an assertion that it had jurisdiction in review proceedings purporting to impugn a decision by the responsible Cabinet member seated in Pretoria (where the decision was taken).

28 In their heads of argument, the applicants take none of these bases any further. They only refer in the most general terms to *Rail Commuters Action Group* and what is termed "*Glenister II and III*"; invoke *forum conveniens*; and resort to section 19(1)(b) of the Supreme Court Act 59 of 1959. None of these arguments is tenable.

29 Firstly, *Rail Commuters Action Group* concerned *"violence on commuter trains in the Western Cape."*[69] Violence on trains in an area within this Court's geographical remit is clearly a matter falling squarely within this Court's jurisdiction. And the genesis of the *Glenister* litigation is a challenge to the introduction of a Bill in

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66 The first is that Parliament is situated in Cape Town (Record p 23 lines 1-2); the second is that the eleventh respondent is situated in Cape Town (ibid).

67 Record pp 1211-1212 paras 270-274: first, the seat of Parliament confers no jurisdiction over a different arm of government (the Executive), whose seat is elsewhere; second, the Western Cape Education Department is not responsible for the ECD sought in prayer 2.6, is not implicated in the relief sought in prayer 2.2, and is not itself directly responsible for most of the relief set out in the notice of motion – as is to be expected in the case of an application brought on a "nation-wide" scale.

68 ***National Arts Council v Minister of Arts and Culture*** 2006 (1) SA 215 (C) at paras 14-15, 20-21, 35, 39, 46.

69 ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail*** 2005 (2) SA 359 (CC) at para 4.

Parliament (seated in Cape Town).[70] Nevertheless, the application was initially instituted in the North Gauteng Division of the High Court, where Cabinet (who was responsible for the Bill) is seated.[71] But even were either of these examples of a past litigious *modus operandi* in point, they are only of anecdotal value absent any ruling on jurisdiction in any resulting judgment.

30 Secondly, the reliance on the doctrine of *forum (non) conveniens* is misguided. To the extent that the doctrine might apply,[72] it does not confer jurisdiction. It serves as a basis for a court with jurisdiction to decline exercising it.[73] Nowhere in the pleadings or the heads of argument is it suggested that the two considerations informing a court, convenience and common sense,[74] supports a Full Bench of this Court supervising the delivery of textbooks in those very few provinces in which problems have occurred.[75] Not only are all of those areas outside of this Court's jurisdiction. Those courts which are *"immediately at hand and easily accessible"*[76] and *"with which the [matter] ha[s] the most real and substantial connection"*[77] are already seized with the problems experienced in those provinces. Non-delivery of textbooks in other provinces does not have any

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70 ***Glenister v President of the Republic of South Africa*** 2009 (1) SA 287 (CC) at para 2.
71 Ibid.
72 South African law as it stands requires to be developed for this doctrine to be applied (Forsyth Private International Law 5th ed (Juta & Co Ltd, Cape Town 2012) at 184).
73 Forsyth op cit at 184.
74 ***Estate Agents Board v Lek*** 1979 (3) SA 1048 (A) at 1067E.
75 The respondents' submissions to the contrary are not seriously disputed (see e.g. Record p 1195 para 222; Record p 1196 para 224). The traversal of para 224 of the answering affidavit is a bald allegation that all issues are ubiquitous (Record p 2873 para 215). This is demonstrably incorrect: no suggestion exists on the papers that textbook delivery problems have been experienced or is threatening in the majority of provinces.
76 ***Estate Agents Board v Lek*** (supra) at 1067D/E.
77 The Abidin Daver [1984] AC 398 at 415.

connection with this Court or any person within its jurisdiction. Accordingly this Court is not the *forum conveniens*.

31 Finally, the Supreme Court Act 59 of 1959 was repealed *in toto* by the Superior Courts Act 10 of 2013, which commenced on 23 August 2013 – almost three months before the institution of this application. Section 21(2) of the latter deals with the subject-matter of section 19(1)(b) of the former. Both provisions require that the court have jurisdiction over a cause (i.e. textbook delivery) to which the third party is joined.[78] This Court does not have jurisdiction over textbook deliveries in other provinces.

32 Nor does this Court have jurisdiction to direct other divisions of the High Court to supervise this Court's structural interdict. It appears from the applicants' heads of argument that this suggestion in the founding affidavit[79] has now implicitly been abandoned.[80]

Litigation history: *res judicata* and *lis alibi pendens*

33 The applicants not only concede that the *"systemic problem"* underlying their application "*has been litigated in some provinces"*,[81] they actively rely on the fact that the very cause of action invoked in

[78] These sections do not deal with the joinder of causes of action.
[79] Record p 90 para 144.
[80] The applicants' heads of argument are silent on what the founding affidavit envisaged as a necessary consequence in the event that the Chapter 9 institutions are unsuitable supervisory bodies in the current circumstances.
[81] Record p 19 para 25.2.

these proceedings (textbook delivery in Limpopo) is currently being litigated before another division of the High Court.[82]

34 It is systemic failures which warrant granting a structural interdict. It is this extraordinary relief which this application seeks. The applicants lay claim to a systemic problem, because *other* litigants have demonstrated in *other* courts that in *other* provinces problems have been experienced *in the past*. The applicants invoke these historic failures (only one of which unresolved) to request this Court to exercise supervisory jurisdiction over situations which exist or existed exclusively in provinces outside of this Court's jurisdiction. This while other courts in those provinces have already exercised, are still in the process of exercising, or may in the future exercise their jurisdiction.

35 The attempt to either re-litigate, parallel litigate or anticipate litigation before courts of affected provinces is impermissible. It wastes scarce judicial resources; risks contradicting findings of fact or law; and potentially subjects the respondents to different court orders.

Mootness/staleness of substantive application's substrata

36 This application seeks relief which must necessarily impact adversely on the respondents' policies, plans and intervention measures. This raises not only the issue of the judicial arm of government affording the appropriate measure of respect for respondents' institutional

[82] Record p 2848 para 144. As the replying affidavit set out, the hearing was held on 22 April 2014 and continued into a second day. Structural relief has been sought, and the judgment is reserved.

expertise in the expert field of basic education. It also raises the need for policies and intervention measures to be capable of implementation and application in a flexible manner which addresses special needs as they arise in different part of the country, and changing circumstances over a period of time. Any application seeking relief which impact on the adaptability of the executive's exercise of its constitutional and statutory functions must at the very least be based on accurate contemporary evidence.

37 The founding affidavit fall far short of this entry-level requirement. There have been significant developments since the confirmatory affidavits purporting to support the founding affidavit have been deposed to,[83] and the founding affidavit does not properly account for these developments.

38 One example is the mother-tongue cause of action. To the extent that the applicants appear to suggest (inconsistently)[84] that the Incremental Introduction of African Languages in South African Schools (IIAL) draft policy has no bearing on the issue, this is clearly wrong.[85] The answering affidavit demonstrates that a particular problem in this field is parents' perceptions of mother-tongue

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[83] Record p 1197 para 227.

[84] At Record p 2869 paras 201-202 the applicants "welcome" this policy (and record that they are "gratified to see that the introduction of mother-tongue education is regarded as an important intervention measure"), yet they assert – in reply for the first time – that two criticisms may be raised against it.

[85] Record pp 1185-1186 paras 189-192.

education.[86] This is one of the express policy aims identified in the IIAL.[87]

39 A further example is the outdated opinion evidence on which the founding affidavit rests. One such opinion is the very first substantive annexure, marked "EP3a" to the founding affidavit. It was written in *"2008/2009"*, and accordingly cannot reflect any of the many developments of the subsequent five years. The article was written to reflect the position under dated sources.[88] Inexplicably the applicants purport to present this annexure as evidence of the state of basic education, and the legal and policy infrastructure governing it, when this application was instituted over five years later.

Legal standing

40 The second applicant's standing is disputed on the bases set out in the answering affidavit.[89] In short, the second applicant's constitution limits its membership to four specific areas in the Western Cape provinces. Its constitution clearly does not contemplate the institution of legal proceedings dealing prominently with an issue which has never manifested in the Western Cape. Yet, textbook delivery forms a material part of the fourfold cause of action. This cause of action is

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[86] Record pp 1184-1185 paras 186-187.

[87] Record p 1556 para 1(4). The policy is expressly formulated in response to the recommendation to strengthen African language teaching to improve learning outcomes (Record p 1556 s.v. "Background").

[88] Record p 1203 para 249.

[89] Record pp 1201-1202 paras 243-245. The applicants have conceded the "inadequacy" in relation to authorisation and now seek this Court's condonation (Record p 2909 para 324). The respondents do not oppose it. There is accordingly no responsible basis for seeking in the applicants' heads of argument to accuse the respondents of obstructionism.

the subject matter of pre-existing litigation in courts of competent jurisdiction over the affected areas.

41 In their replying affidavit, the applicants only seek to purge the second applicant's standing to the extent that it is impugned by virtue of the failure to authorise its attorneys. They acknowledge the need for condonation in this regard. The respondents do not oppose the condonation application. Whether the second applicants' constitution authorises litigating on issues exclusively arising well beyond the confined parts of the Western Cape in which its members operate is questionable. This question is however fully subsumed in the *in limine* issue dealing with jurisdiction. Accordingly, in the exercise of judicial economy, it requires no finding.

Non-joinder

42 It is common cause that this application concerns separate organs of State, some of which operate in different spheres. For instance, textbook delivery directly impacts on the Department of Public Service and Administration;[90] early childhood development is the statutory responsibility of provincial departments of social development;[91] indigenous languages is the constitutional and statutory responsibility of the Pan South African Language Board;[92] teachers' development and professionalisation is the statutory

[90] Record p 1178 para 171.
[91] Sections 92(2) and 93 of the Children's Act.
[92] Section 6(5) of the Constitution; section 3(a)(v) of the Pan South African Language Board Act 59 of 1995.

responsibility of SACE.[93] None of these entities have been cited as respondents, despite a long list of other respondents having been identified as necessary parties.

43 This defect is not merely one of non-joinder. It permeates the entire application and manifest also as a violation of the principle of subsidiarity. It also violates the constitutional division of powers between different spheres of Government. For instance, the founding affidavit attributes a legal responsibility which the South African Schools Act (in due recognition of education being a concurrent national and provincial competence)[94] vests in the relevant MEC directly on the first respondent (the Government of the Republic of South Africa) and therefore seeks relief exclusively against the first respondent.[95] This simultaneously short-circuits the South African Schools Act (which violates the principle of subsidiarity);[96] ignores the concurrent competence of the provincial sphere of government (which ignores the principle of co-operative government); and results in the wrong relief being sought against the wrong party, to the exclusion of a necessary but absent party (which constitutes a non-joinder).

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93 Section 2(b) and (c) of the South African Council for Educators Act 31 of 2000.

94 Malherbe "Centralisation of power in education: have provinces become national agents? (2006) 2 TSAR 237 at 239.

95 Record p 1198 paras 231-232.

96 Accordingly, the issue of joinder is not a "technical" one, as the applicants' heads of argument misconstrues it. Nor is it purely procedural in the current context. It has substantive application, because it relates to the statutory allocation of functions to different spheres of government – which involves the doctrine of separation of powers; the principle of subsidiarity; and co-operative governance, pursuant to the constitutional scheme of qualified federalism (see e.g. ***Mashavha v President of the Republic of South Africa*** 2005 (2) SA 476 (CC) at para 49.

44 The applicants' heads of argument concede that the South African Schools Act vest certain statutory powers in the Council of Education Ministers.[97] Yet, no argument is provided in defence of the failure to join e.g. the South African Council of Educators, the Pan South African Language Board – both of which entities, it is common cause,[98] hold statutory mandates under the unimpugned statutory scheme. The high-water mark of the applicants' argument is that ***Helen Suzman Foundation v President of the Republic of South Africa*** supports them. Unsurprisingly the applicants could cite no paragraph in this judgment which suggests that a statutory entity vested with a particular statutory power is not a necessary party when relief is sought which directly impacts on a matter squarely under the statutory power of that entity. This is because *Helen Suzman Foundation* only dealt with the non-joinder of Parliament.[99] It is not Parliament's participation which is in issue here.

45 Nevertheless, far from supporting the applicants, *Helen Suzman Foundation* has the opposite effect. The judgment in fact confirms what the Constitutional Court has held,[100] namely that the entity responsible for the administration of an impugned statute is a necessary party. What is in issue here is not an impugned statute, but *inter alia* the professionalisation of teachers and the development of indigenous languages. As mentioned, these are matters within the statutory competence of *inter alios* the South African Council of

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97 Para 43 of the applicants' heads of argument.
98 Record pp 1130-1131 para 48, not disputed at Record p 2829 para 98.
99 ***Helen Suzman Foundation (supra)*** at para 13.
100 ***Mabaso v Law Society, Northern Provinces*** 2005 (2) SA 117 (CC) at para 13.

Educators[101] and the Pan South African Language Board.[102] These entities are accordingly necessary parties, but have not been cited.

Urgency

46 The answering affidavit pointed out that no proper case for condonation on the basis of urgency was made out in the founding papers. The replying affidavit provided only three responses.

47 The first is an assertion that section 9 of the Children's Act supports them.[103] However, section 9 does not provide that matters affecting children *per se* require *"urgent attention"*, as the deponent erroneously argues.[104] It deals with the best interests of the child, without suggesting that courts should always deal with matters affecting children on an urgent basis. Accordingly the ordinary rules governing urgency applies.[105] Thus the degree of urgency depends on the factual basis made out for urgency in the founding affidavit.

48 Second, the applicants retort that interim relief was not sought, because a timetable was agreed upon.[106] This makes no sense.

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[101] Referred to in section 27 of the Employment of Educators Act 76 of 1998, and whose continued existence is governed by the South African Council for Educators Act 31 of 2000.

[102] Conceived by section 6(5) of the Constitution and established by the Pan South African Language Board Act 59 of 1995.

[103] Record p 2829 para 99.

[104] See e.g. In re Confirmation of Three Surrogate Motherhood Agreements 2011 (6) SA 22 (GSJ) for a case under the Children's Act where condonation on the basis of urgency was refused.

[105] It is not correct (as the applicants assert) that semi-urgency is a peculiarity to this Court, or that this contended uniqueness detracts from procedural rights of respondents or any of the non-cited parties who may otherwise have sought to intervene. See e.g. ***KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*** 2013 (4) SA 262 (CC) at para 116; ***Absa Bank Ltd v Dlamini*** 2008 (2) SA 262 (T) at para 1; and ***Johannesburg Municipal Pension Fund v City of Johannesburg*** 2005 (6) SA 273 (W) at para 1, argued on the basis of semi-urgency in three other Divisions of the High Court.

[106] Record p 2906 para 317.

Interim relief – like all relief – is of course to be set out in a notice of motion. And a notice of motion logically precedes any timetable on which parties can reach agreement. Thus, the absence of interim relief in the preceding notice of motion cannot seriously be attributed to the respondents' accommodation of the applicants by subsequently reaching an agreement on a timetable. All that it demonstrates is the respondents' amenability to co-operate and accommodate the applicants, and to facilitate a hearing on the merits of the application – should the merits be reached.

49 The third assertion is that because the respondents have accommodated the applicants, urgency has somehow evaporated.[107] This is wrong. It is for this Court to decide whether its process has correctly been invoked, and whether condonation should be granted. There can moreover be no suggestion that the respondents' co-operation to agree a timetable somehow constitutes a waiver of an objection to urgency.[108] Waiver has not been pleaded, and it is not lightly inferred.[109]

50 In circumstances like the present, where

50.1 there is no interim relief sought;

50.2 the founding papers have been prepared over a period of fourteen months; and

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[107] Record p 2906 para 317.
[108] ***Powell NO v Van der Merwe NO*** 2005 (5) SA 62 (SCA) at para 49.
[109] ***Laws v Rutherford*** 1924 AD 261 at 263 and Borstlap v Spangenberg 1974 (3) SA 695 (A) at 704G.

50.3 indefinite structural relief is the only specified executive relief claimed,[110]

50.4 it is incumbent upon an applicant to provide a proper basis for a court to grant an indulgence – lest the administration of justice be overburdened, and the constitutional right of other litigants of access to court be compromised. Also the rights of children are prejudiced by urgent proceedings, because procedural rights of institutional litigants to intervene (whether as *amici curiae* or parties in own right) are adversely affected. Urgent proceedings in fact threaten depriving children of a voice in proceedings affecting them, preclude wider participation, threatens prejudicing incumbent parties (were application to intervene be made within a limited time before the hearing), and may compromise the quality of the resulting judgment.

51 The respondents nevertheless abide the Court's exercise of its discretion to grant an indulgence. We nevertheless submit that no proper case is made out for such indulgence in the founding papers. Instead, the applicants have demonstrated through their conduct that the speed with which they suddenly seek to proceed is grossly

[110] See in this regard the applicants' extensive reliance in reply on the nature of policy and how it requires management; resources; training; and informing, equipping and empowering necessary structures in order to be implemented (Record p 2834 para 111.2).

disproportionate to the fourteen months they have afforded themselves for preparing and instituting this application.[111]

Strike-out

52 The applicants have been afforded an opportunity to file a supplementary founding affidavit, despite the fact that they have already assumed an entitlement to period of over fourteen months in which to prepare their founding papers. This was for the limited purpose of placing before court the latest ANA results. Repudiating their formal undertaking to limit the supplementary affidavit to this material,[112] the applicants sought to introduce other material.[113]

53 Compounding this *modus operandi*, in the replying affidavit many further facts and annexures were impermissibly sought to be introduced. Apart from resulting in a replying affidavit of over 120 pages, a further 390 pages of annexures have thus been introduced – resulting in what the applicants describe as *"bulky"* papers.[114]

54 The extent of the new matter of fact introduced in reply is identified in the notice of strike out filed evenly. The respondents are prejudiced in being unable to respond during the Easter weekend and subsequent holiday period to the new allegations, especially in circumstances where heads of argument must simultaneously be

[111] Record p 1131 para 51; not disputed at Record p 2829 para 99.
[112] Record p 73 para 98bis.
[113] The inadmissible matter (and the basis for strike out) is identified at Record pp 1245-1246 paras 361-363 (hearsay); Record p 1246 para 364 (hearsay); Record pp 1247-1248 paras 368-369 (irrelevance); Record p 1248 paras 372-374 (irrelevance and vexatiousness).
[114] Para 3 of the applicants' practice note.

prepared and the national election is being fought during the same period leading to the imminent court hearing.

55 In anticipation of the inevitable strike-out application, the applicants' heads of argument by Freudian slip attributes to the respondents some reliance on ***Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa***,[115] suggesting that a strike-out would be *"ill-advised"*.[116] ***Swissborough Diamond Mines*** was recently applied by a Full Bench of this Court in a judgment the applicants invoked in the context of non-joinder, but are careful to avoid in the context of strike-out. In *Helen Suzman Foundation v President of the Republic of South Africa* it was held

> *"The crucial consideration of course is whether the Minister is prejudiced in the conduct of his case if the offending material is allowed to stand. Mr Hoffman, Glenister's lead counsel, adopted the view that there could be no possible prejudice to the Minister since he could quite easily have dealt with these allegations. He went further, and urged us to accept them as uncontested because the Minister had not done so. In our view, however, this approach overlooks what is required of a litigant in motion proceedings, namely that: (a) the facts or allegations must be set out simply, clearly, in chronological sequence and without argumentative matter; and (b) it is not open to a party to merely annex documentation and to request the Court to have regard to it, given that what is required is the identification of the portions thereof on which reliance is placed, and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed, and a party would not know what case must be met (see Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999 (2) SA 279 (T) at 324D-G [also reported at [1998] JOL 4144 (T) – Ed]). There can be little doubt that*

[115] 1999 (2) SA 279 (T).
[116] Para 47 of the applicants' heads of argument.

> *Glenister in making sweeping allegations based on unverified opinion has failed to meet these requirements; and that the Minister has been severely prejudiced in the conduct of his case as a result."*[117]

56 The Full Bench accordingly granted the strike-out application categorically,[118] ordering costs on the punitive scale as between attorney and client.[119] We submit that the same result should follow.[120]

57 Related to this is an attempt to rely on a book published by Prof Jonathan Jansen.[121] The mere existence of the book is contended to constitute evidence of the factual validity of the applicants' case. There is of course no principle in the law of evidence which supports this assertion. The attempt to bolster the applicants' case in reply with non-evidence is nevertheless revealing. While the replying affidavit threatens that reliance will be placed on unidentified parts of this book, the applicants' heads of argument do not refer to this book at all. The extent to which this publication could arise for consideration is accordingly highly questionable, especially in the light of the revelation in the replying affidavit that Prof Jansen declined to be associated with this application by deposing to any

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[117] [2014] 1 All SA 671 (WCC) at para 10.
[118] Id at para 12.
[119] Id at para 122. While the applicants rely on this judgment in relation to non-joinder, they omit to account for this part of the judgment in their heads of argument in relation to strike-out. Instead, they only state that Swissborough Diamond Mines (Pty) Ltd (which is quoted in Helen Suzman Foundation) is distinguishable, because it dealt commercial interests. Even if Swissborough were distinguishable on this spurious basis, Helen Suzman Foundation (which is a Full Bench decision of this Court) is not.
[120] As the Supreme Court of Appeal held, "there comes a time when one needs to say 'enough is enough'; and when stern action, such as striking the matter from the roll, must be taken" (***Jeebhai v Minister of Home Affairs*** 2009 (4) SA 662 (SCA) at para 12, ordering costs de bonis propriis – as para 1 of the judgment reflects).
[121] Record p 2826 para 89.

affidavit. Tellingly the deponent herself did not seek to identify any part of the publication which supports the applicants.

58 Should this publication be sought to be introduced in oral argument, this will be resisted on the basis of irrelevance and inadmissibility.

The respondents' condonation application

59 We finally deal shortly with the respondents' application for condonation.

60 Condonation should be granted, we respectfully submit, for *inter alia* the following reasons:

60.1 It is unopposed.

60.2 The parties have agreed mutually-satisfactory timelines which facilitates the hearing despite the delay in filing the answering affidavit.

60.3 The court date is unaffected by the delay.

60.4 There is no prejudice to the applicants or inconvenience to the Court.

60.5 The respondents' explanation for the delay is adequate.

60.6 The interests of justice and the doctrine of separation of powers require a full ventilation of the factual and legal issues.

RESPONDENTS' CASE

61 The Respondents contend as follows:

61.1 The government of the day formulates policy on education and set the standards that must be met. This has been done. In implementing the policy as the government does, it is informed by a variety of factors including the past disparities, socio-economic conditions, demographics and fiscal constraints. Among the tools government has introduced in order to assist the learner performance and development capacity is the Annual National Assessment (*"ANA"*). The ANA has for the past three years, since its inception, served as an important yardstick in government identifying shortcomings and how to overcome them. Inadequate performance in the ANA is nothing more than a departure from the remedial goals set by government for itself. The goal was set in the 2009 State of the Nation Address. Non-compliance with this code is a matter for political sanction – not court intervention, especially not prior to the release of the 2014 ANA results (2014 being the target year for reaching government's goal).[122]

61.2 The application is self-destructive. On the one hand it accepts that policy choices are for government to make and cannot be dictated by litigants or prescribed by courts. Yet

[122] Record p 1116 paras 16-17.

the applicants heavily rely on expert opinion from commentators in order to discredit government policy and its implementation. The availability of other options only serves to demonstrate the wide range within which legitimate government policy may fall. Government adopted its policy after extensive research and public consultation, and its preferred option is supported by international experience. It is of course possible to prioritise certain objectives differently, or to take different views on desirable outcomes and means to deploy to achieve them. But Government's prioritisation and policies, and their application, clearly falls squarely within the field of legitimate choices and measures open to Government.

61.3 The research papers on which the applicant's place reliance, when analysed, clearly indicate that they all suffer from one of the following defects:

61.3.1 Failing to consider the Action Plan, the Annual National Assessments or other policies; omitting to provide any basis for suggesting the superiority of the paper's author's preferred alternative, or any shortcoming in Government's policy matrix; and ignoring the manner in which the author's point of view is often addressed in a different manner by Government's existing policy and its implementation;

61.3.2 Making proposals which the applicants repudiate in, or exclude from, the founding affidavit; and which are in any event not reflected in, or consistent with, the relief sought in the notice of motion;

61.3.3 Staleness or mootness in that the proposal has been overtaken by policy instruments and implementation measures not accounted for in the author's analysis; (for example Alexander *"Language Policy In Education 1994-2009 in a nutshell"*; Alexander *"Mother-Tongue based education is a necessary condition for the realisation of the right to basic education"*; Bloch *"looking back, looking forwards: Facilitating reading and writing opportunities for children in South Africa"*; and October *"Medium of Instruction and its Effect on Matriculation Examination Results for 2000*") – all four articles, and indeed all articles on multi-lingualism and mother-tongue education, pre-date the draft policy on the Incremental Introduction of African Languages in South African schools;

61.3.4 Otherwise failing to provide appropriate, practical and context specific proposals sufficiently aligned with Government's comprehensive vision of an all-

inclusive South African education system and society at large.[123]

61.4 Since 1994, Government formulated and implemented many policies and measures to reverse the legacy of the apartheid education system. Since 1994 Government has made significant progress in improving the quality of education especially for the previously disadvantaged and has taken steps to provide in-service training to the educators. The damage that apartheid education has inflicted on our nation cannot be reversed overnight; neither can it be reversed in 20 years. The South African education system and the quality of the education provided by Government are far better than the type of education that was offered to the majority of the population prior to 1994. Government has successfully implemented steps *inter alia* to:

61.4.1 expand the nutrition programme in schools and preschool programs (which already by 2011 fed 6 million children in 18,000 schools across the country);

61.4.2 enlarge access to no fee schools (providing free education to 77% of South Africa's children);

61.4.3 provide near-universal access to grade R (increasing from 50% in 2003 to 99% in 2013);

[123] Record pp 1117-1118 para 20.

61.4.4 achieve a 99% completion rate in grades 1 to 9;

61.4.5 improve the professionalisation of teachers (*inter-alia* by restructuring pay skills, collaborating with teacher unions and introducing bursary schemes);

61.4.6 reduce teacher's workload (*inter alia* by providing clear guidance to teachers and reducing the administrative duties);

61.4.7 streamline the curriculum (by introducing the Curriculum and Assessment Policy Statements in 2012, ("CAPS"));

61.4.8 achieve the delivery of textbooks, workbooks and other teaching materials (at a success rate of 99%, and to the satisfaction of even the most vocal advocacy group specialising in litigation on this topic, Section 27, which commended the Department of Basic Education);

61.4.9 improve numeracy and literacy *(inter alia* through diagnostic and intervention measures such as the Annual National Assessments, and by distributing (as at 2013) some 114 million full-colour workbooks to public schools since 2011);

61.4.10 promote African languages and mother tongue education;

61.4.11 establish norms and standards for school infrastructure (which a non-governmental organisation, Equal Education, lauded as *"providing a sound, legal basis for the plan to provide decent school infrastructure for all"*); and

61.4.12 integrate schools so successfully that 56% of historically white schools are now attended by black learners.

61.5 In addition to the above achievements, government has delivered on many other basic-education outcomes. All of these requires a balancing act, due to the fact that budget and resources constraint limit the pace that government would like to achieve its milestones, despite that in every budget allocation by National Treasury, education has in all successive years received the largest allocation of the budget, which is on its own testimony to Government's commitment to providing quality education to all children in its schools.

61.6 Apartheid education never invested in the education of the majority of the population, and paid scant regard to teacher training of black teachers. Black children were prepared by the apartheid education system to be labourers and to be perpetually inferior to the white children. It is not surprising that the teaching of mathematics and science was never a

priority. This government has made the teaching of maths and science the focal point of its goal. Due to the untold suffering and damage caused by the apartheid education legacy, it will take time to reach the desired result. The applicants correctly do not purport to challenge government's prioritisation. In realising Government's five prioritised outcomes, the constitutional right to basic education is not only realised; it is realised to the greatest amplitude, and establishes an education system which fulfils in the needs of the most vulnerable while simultaneously balancing a wide range of competing interests, specialist views and diverging expectations. Resetting government's priorities according to the preferences of the applicants would be counter-productive, and impermissibly interfere with the executive's core responsibility: adopting policy and identifying priorities to achieve the greatest goal for an inclusive South African society.

61.7 Government's primary vision for the South African society at large and education in particular, is to reverse the legacy of apartheid. Apartheid education was based on a system of exclusivity, through which inequalities were entrenched by design and result. It allocated resources drastically disproportionately, aiming to (and succeeding in) establishing an elitist education system. The Constitution eradicates this.

It establishes an inclusive, equal society. This requires that as the *first priority* basic education be provided for all.

61.8 South Africa has a near-100% school attendance rate for grade R to 15 year olds. It significantly outperforms all comparable developing countries. Recent senior certificate results demonstrate a substantial improvement in the quality of basic education's ultimate output: the matric pass rate. The most recent matric result achieved a pass rate of 78.2% and a 30.6% Bachelors degree pass rate. This reflects a consistent year-on-year improvement.

61.9 Improving basic education outcomes often depends on interventions targeting the entire school career; therefore not all interventions are capable of demonstrating significant results immediately. What must further be recognised is that the improved education system sponsored by government involves a complex intersection of:

61.9.1 constitutional and statutory provisions;

61.9.2 policies pursuant to enabling legislation; and

61.9.3 collaboration between organs of state at every level and with interdisciplinary bodies, entities and representative organisations (including organised labour).

61.10 In essence, the respondents' stance is that government should be permitted to continue the implementation and improvement of an all-inclusive and ambitious basic education system. Substantial success has already been achieved, and momentum should not be lost through litigation aimed at recalibrating government's priorities. Granting the relief sought would necessitate an overhaul of the complex action plan with interdependent steps – many of which have already been accomplished or are being piloted or rolled out. International experience demonstrates that intermittent interruptions are not in the interest of the basic education system or its ultimate beneficiaries. The best interests of all South Africa's children, especially the poorest, require a well-planned approach to their early childhood development of basic education. Reformulating strategies that are well on their way, as this application envisages, risks creating unintended consequences which may result in the exclusion of the most vulnerable children from an all-inclusive, carefully-considered policy.[124]

COMMON CAUSE ISSUES

62 The following issues are common cause between the parties:

[124] Record pp 1118-1124 paras 21-26.

The Apartheid Legacy In Education[125]

62.1 It is common cause that when South Africa became a democracy, it inherited a racially differentiated education system. The system was fragmented, comprising thirteen different departments organised along racial lines with vast inequalities throughout the system.

62.2 Funding was disproportionally allocated according to race. The major share was dedicated to the education of the white minority. At the height of apartheid, government was spending nine times more on White leaners compared to that of African learners in homelands. Consequently, the education of Africans was characterised by low quality and limited resources evidenced in high teacher-learner ratios, inadequate infrastructure and ill-prepared teachers. The Apartheid system's skewed funding meant that schools teaching Black leaners had limited funding to spend on school infrastructure and the maintenance of existing buildings, science laboratories, and mathematics and science equipment.

62.3 In 1994 only 54% of the black teachers were suitably qualified, compared to the 99% of white educators, 93% for Indians and 71% for coloureds. In the higher education sector 80% of professional staff was white. Only 12% was

[125] Record pp 23-26 paras 28-34; Record pp 1133-1136 paras 55-64.

black, 4% coloured and 4% Indians. Women were generally under-represented and only constituted 34% of the staff.

62.4 At school level, infrastructure backblocks were immense. Some 59% of schools were without electricity, 84% without water, 12% without toilets, 61% without telephones and 82% without a library. Compounding this, 57% of schools had classrooms with 45 learners or more.

62.5 Consequently the white minority enjoyed better education resources while the African education was under-resourced with limited access to quality education. In summary, in 1994 the democratic government inherited an unequal education and training system in terms of access, infrastructure, internal efficiency, input and output.

The National Interventions[126]

63 On 3 March 2011 the national government exercised its powers under section 100(1)(b) of the Constitution to intervene and assumed responsibility for the executive obligations for the Eastern Cape education Department in order to maintain essential national standards of education in the province. Similarly, on 5 December 2011 the national government intervened in terms of section 100(1)(b) of the Constitution and assumed responsibility for the obligations of five departments in the Limpopo province, including

[126] Record pp 30-33 paras 41-46; Record p 1213 para 276-278; Record pp 1215-1216 paras 282-283.

the Limpopo Department of Education on the grounds of a financial crisis.

Education-Related Litigation[127]

64 The applicants invoke the fact that there has been a number of court applications related to the right to basic education brought by different applicants against *inter alios* the second respondent.

65 Contrary to the applicants' suggestion, this fact undermines its application, instead of strengthening it. The founding papers acknowledge four crucial facts:

65.1 Firstly, there is an extant structural interdict by the court in whose jurisdiction the textbook issue arose (paragraph 65.2.3). In such circumstances, a second structural interdict by another court in a different province (where the problem is inapplicable) is obviously inappropriate.

65.2 The second issue is related to the first. It is that appropriately placed courts are required to, and do, provide "tailor-made remedies" (paragraph 65.4). It is clear even from the founding affidavit that different circumstances exist in the nine provinces. To the extent that they require remedial action, this must be fact-specific. A one-size-fits-all approach is not appropriate. Nevertheless, the applicants seek the very opposite of what they identify as *"tailor-made"* relief, which they acknowledge is required in the light of

[127] Record pp 40-47 paras 66-71; Record pp 1230-1231 paras 316-320.

Constitutional Court case law. They categorically seek "nation-wide" relief.

65.3 Thirdly, in paragraph 70.3 of the founding affidavit the applicants are driven to concede that some of the permanent structures to be completed pursuant to the order resulting from the so-called *Seven Schools* litigation have already been completed. The full facts are that the matter was settled, and that the settlement agreement had been complied with by the department. Thus, far from supporting the applicants' request for a supervisory remedy from this Court, the outcome demonstrates the need for bespoke interventions, and Government's preparedness to make concessions and comply with settlement agreements.

65.4 Moreover, in paragraph 70.5 the deponent further discloses that the *Amasango* litigation resulted in an extant structural interdict. As is the case with the extant structural interdict pursuant to the *Section 27* litigation, this too demonstrates that a concurrent structural interdict by a different court is inappropriate. Should there be any concern about compliance with an existing order, this is a matter for the court that issued the order. There is no jurisdictional basis on which a High Court from a different division should anticipate non-compliance and intervene on a *"nation-wide"* scale.

Improvements Since 1994

66 The first phase of the eradication of apartheid education spanned from 1994 to 1999. This phase was concerned with overarching reconstruction of the education system. The democratic government restructured organisational administrative protocols, capacities and systems. This saw government developing many policies and enacting important legislation aimed at reorganising the education system.[128]

67 These policies include *inter alia* the 1995 White Paper on Education and Training. This policy determined the national norms and standards for the education planning, provision, governance, monitoring and evaluation.[129]

68 The most important legislative instrument enacted during this period is the South African Schools Act, 84 of 1996. It provides for a uniform system for the organisation, governance and funding of schools. The Act gives effect to the constitutional right to education, ensuring that all learners have a right of access to education without discrimination. It makes schooling compulsory for all children from the year in which they turn seven to the year in which they turn 15, or at the end of Grade 9.[130]

69 The Employment of Educators Act, 76 of 1998 is another statutory measure which is instrumental in eradicating the legacy of apartheid.

[128] Record p 1136 para 66.
[129] Record p 1136 para 67.
[130] Record p 1136-1137 para 68.

It governs the State's employment of teachers, the regulation of teachers' conditions of service, their discipline, misconduct, incapacity, discharge, retirement, and educator establishments of the national and provincial education departments, and related matters.[131]

70 An equally important legislative intervention of this period is the National Education Policy Act, 27 of 1996. It provides for the determination of national education policy (including policy on the conditions of employment of teachers) and incidental matters.[132]

71 During the second phase, spanning the period 2000 to 2009, further important and statutory enactments followed. This includes the South African Council for Educators Act, 31 of 2000. This act empowers the South African Council for Educators (SACE), first established under the Employment of Educators Act, to perform important functions *inter alia* to promote and develop the education, training and professional development of teachers.[133]

72 The second phase also saw the enactment of the Further Education and Training Colleges Act, 16 of 2006. As its name suggests, it regulates further education and training.[134]

73 An important policy introduced during the same period is the No-fee School Policy. It ensures that no one is denied access to school as a

[131] Record p 1137 para 69.
[132] Record p 1137 para 70.
[133] Record p 1137 para 71.
[134] Record p 1137-1138 para 72.

result of parents' financial position. The implementation of this policy achieved meaningful results prioritising the poorest of the poor.[135]

74 Further policies on comparable instruments formulated during this phase and the third phase include the following:

74.1 The human resource and development strategy 2010 to 2030. It is aimed at dramatically improving and attaining the outcomes for all levels of the schooling system.

74.2 The Government Strategic Priorities: Education and Skills. It forms one of the ten key priorities in the 2009-2014 strategic agenda of government:

74.3 The Green Paper for Post-Schooling Education and Training. It identifies the problem of poor mathematics and science results as a barrier to post-schooling education.

74.4 To crown government's legislative achievement to accomplish children's rights, the Children's Act, 38 of 2008 was enacted. It is this act which provides for Early Childhood Development (ECD).[136]

75 It is common cause that this application has been instituted in ignorance of almost all of the policies and intervention measures formulated and implemented by the respondents and other entities tasked with basic education (but which the applicants did not even

[135] Record p 1137 para 73.
[136] Record p 1130 paras 74-75.

appreciate the need to cite as co-respondents).[137] As a result, in reply, the applicants are driven to introduce new facts and some 400 pages of annexures. This is impermissible.[138]

76 They also suddenly assert that by relying directly on section 29(1)(a) they somehow have impugned the policies. This is self-evidently untenable. Policies not identified in the notice of motion (which did not and still does not seek relief directed at any policy or measure) and in respect of which the founding papers (and even the replying affidavit) makes no case *are <u>not</u> impugned*.[139] This legal misdirection renders the application flawed, even before the factual inquiry arises.

77 Were the facts nevertheless to arise for consideration, the important concessions in the replying affidavit must be noted.[140] One of these is an unqualified abandonment of any reliance on corruption in procurement,[141] an issue invoked under that heading in the founding

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[137] Record p 1225 para 305, not denied at Record p 2896 para 288.

[138] ***Coffee, Tea & Chocolate Co Ltd v Cape Trading Co*** 1930 CPD at 82.

[139] ***MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School*** 2013 (6) SA 582 (CC) at paras 101-104, referring the numerous Constitutional Court judgments demonstrating that it is a fundamental principle that cases must be decided on the basis of the pleaded cause of action in the founding papers. Even were a court to consider a provision unconstitutional, the failure to impugn it in the notice of motion precludes relief (id at para 103, citing ***Shaik v Minister of Justice and Constitutional Development*** 2004 (3) SA 599 (CC)).

[140] See e.g. the applicants' acknowledgement that the introduction of mother-tongue education is indeed identified by the respondents as an important intervention measure (Record p 2869 para 201). See, too, the concession that the Action Plan has not been considered in preparing this application (Record p 1117 para 20, not denied at Record p 2814 para 53).

[141] Record p 2902 para 306.

affidavit.[142] As a result, there is no basis for supervision by the Auditor-General.[143]

78 The replying affidavit further clarifies that the applicants only rely on four issues: (i) mother-tongue education; (ii) teachers' professionalisation; (iii) teaching material's delivery; and (iv) early childhood development.[144] It follows that the reliance placed on numeracy and literacy (and accordingly the ANA results) is relinquished. As we shall show below, both as a matter of fact and law the abandonment of also this issue (on which such a large part of the founding affidavit was spent) was unavoidable. It follows that the relief in prayer 2.1 of the notice of motion has been abandoned by necessary implication. We nevertheless make submission on all issues initially identified.

FACTUAL BASES OF OPPOSITION

Numeracy and literacy[145]

79 The DBE is committed to laying a solid educational foundation that is based on the creation of a prosperous, truly united, democratic and internationally competitive country with numerate, literate, creative and critical citizens. It is for this reason that goals 19 and 20 in Action

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[142] Record p 47 para 72. Throughout the founding affidavit allegations of corruption were resorted to (see e.g. Record p 27 para 36.4; Record p 33 para 46.3; Record p 56 para 93).

[143] The only suggestion in the founding affidavit of any basis for supervision by the Auditor-General is a reference to a newspaper report referring, in turn, to a past report by the Auditor-General into allegations of corruption and financial mismanagement in the Limpopo province (Record p 32 para 46). It was only with reference to "corruption-free and timeous delivery of … teaching materials" (Record p 90 para 142) that the founding affidavit sought to make out a case for supervision by the Auditor-General.

[144] Record p 2884 para 252.

[145] Record pp 1168-1173 paras 147-160.

Plan 2014 “Towards the realisation of 2025” clearly articulated that every learner should have access to the minimum set of textbooks and that access amongst learners to a wide range of resources, media, including computers, should be increased. Since democracy, many interventions have been formulated and implemented to further literacy. Hereunder follows a list of some of the most important of these measures:

79.1 “Drop-all and read” campaign;

79.2 ITHUBA writing project;

79.3 National guidelines for school library and information services;

79.4 Mobile library;

79.5 Vodacom and Telkom mobile libraries;

79.6 Teacher’s reading toolkit;

79.7 Sunday Times storybook campaign;

79.8 Activities promoting reading; and

79.9 Numeracy interventions.

Textbooks and materials[146]

80 The DBE has been striving towards timeous procurement and delivery of textbooks by all provinces. Since 2011 the DBE has

[146] Record pp 1173-1178 paras 161-171.

improved on its delivery time-frames for the release of the National Catalogue. This is the first step in moving towards the timeous procurement and delivery of textbooks in the provinces. The DBE produces the national catalogue of textbooks in preparation for the grades implementing CAPS.

81 The development of the national catalogue of textbooks was, in turn, a recommendation of the Ministerial Task Team on Learner Teacher Support Material ("LTSM") in 2010. Based on this recommendation, the process began in 2011 with the catalogue for grades 1-3 and 10. In 2012 it extended to include grades 4-6 and 11. In 2013 it was further extended to include grades 7-9 and 12. In each of these cases, the catalogue is developed one year in advance of the phased-in implementation of the Curriculum and Assessment Policy Statement ("CAPS") for the relevant grades. In instances where there are no suitable books received to enable the development in certain subjects, the DBE develops addenda catalogues to fill in those gaps.

82 In terms of textbook provisioning, the DBE is mandated to develop the national catalogue of textbooks, while the responsibility of the Provincial Education Departments ("PEDs") is to procure for their schools as well as to ensure that the procured books are delivered to each school. The responsibility of monitoring lies with both the PEDs and the DBE, with the DBE providing support and oversight to all PEDs. The DBE holds quarterly meetings with representatives from PEDs, i.e. CFOs, LTSM Provincial Co-ordinators, Curriculum and Supply Chain Management to inform them of national processes, to

receive and engage in provincial progress reports and share examples of good practice. In addition, DBE holds regular meetings with publishers' associations (the African Publishers Association ("APA") and Publishers Association of South Africa ("PASA")) to consult on forthcoming screening processes and receive and discuss progress reports on the printing and delivery of textbooks to provinces. The National Catalogue is prepared by subject experts mostly sourced from outside the DBE and the material selected because of its suitability to the curriculum and a number of titles are included in the National Catalogue per grade per subject and per language.

83 The DBE established an LTSM management forum, comprising the DBE, provincial LTSM coordinators as well as a committee of publishers. The DBE further monitors and supports provinces, through visits to them in which the DBE engages with provincial and district officials and school personnel. The DBE also visits schools, district offices and provincial warehouses. The DBE receives regular written reports (quarterly or even weekly in some instances) from provinces on the progress in the provincial textbook procurement and delivery process and also engages with provinces telephonically. The DBE reports on monitoring to different high-level structures within the department, that is, HEDCOM and CEM. The purpose for this is to strengthen accountability on the part of provinces and to inform the structures of progress (or lack thereof) so that the necessary remedial steps can be taken immediately.

84 To strengthen monitoring and support by the DBE, the Director-General engages regularly with the Provincial Heads of Education, mainly through correspondence. The DBE developed the 2013 Basic Education Sector Plan for the Procurement and Delivery of Textbooks.

85 To further strengthen service delivery in the context of textbooks, a Department of Basic Education Service Delivery Improvement Plan was developed. It focuses on improving the service delivery of textbooks. The plan has been submitted to the Department of Public Service and Administration, because textbook delivery impacts on that department too.

Professional development of teachers[147]

86 Government has demonstrated its strong commitment to the professionalisation of teachers. Not only are they at the coalface of delivery of education, many of them have themselves experienced the injustices of the apartheid education system.

87 One of the significant policy measures formulated and implemented in this regard is the Integrated Strategic Planning Framework for Teacher Education and Development in South Africa (ISPFTED). The ISPFTED emerged from a teacher development summit held in 2009 initiated by the then Department of Education and continued by the restructured Departments of Higher Education and Training and Basic Education. It brought together all key representative

[147] Record pp 1149-1159 paras 102-128.

stakeholders to discuss challenges in the teacher education and development field.

88 The summit produced a national plan for teacher education and development, the *Integrated Strategic Planning Framework for Teacher Education and Development in South Africa 2011-2025 (ISPFTED, 2011*). This plan focuses on the entire teacher education and development continuum from the point of recruiting potential new teachers to career-long professional learning and development. Its primary outcome is to improve the quality of teacher education and development in order to improve the quality of teachers and teaching.

89 The ISPFTED analysed the challenges in the field as follows: “a lack of access for prospective and practising teachers to quality TED opportunities; a mismatch between the provision of and demand for teachers of particular types; the failure of the system to dramatically improve the quality of teaching and learning in schools; a fragmented and uncoordinated approach to TED; the tenuous involvement of teachers, their organisations and other role players in TED planning; and inefficient and poorly monitored funding mechanisms.”

90 The ISPFTED acknowledges that teacher development depends on co-operation and collaboration between teachers themselves, the DBE, provincial education departments (PEDs), the Department of Higher Education and Training (DHET), the teacher unions, the South African Council of Educators (SACE) and the Education Training and Development Practices Sector Education and Training

Authority (ETDP SETA). The ISPFTED addresses the career of a teacher through the following phases:

90.1 recruitment of potential teachers;

90.2 preparation of new teachers;

90.3 induction into the world of work; and

90.4 career-long (continuing) professional learning and development.

91 The ISPFTED adopts a fifteen-year timeframe and in so doing recognises the need for immediate, medium-term and long-term deliverables to ensure quality teacher education and development.

Teacher absenteeism, accountability and professionalism[148]

92 Already in 2008 the DBE, funded by UNICEF, commissioned the Human Sciences Research Council (HSRC) to undertake a study on teachers' perceived absenteeism. The aim of the study was to:

92.1 investigate the extent of teachers' leave-taking and the reasons therefor; and

92.2 examine the systems that are in place to record, monitor, measure and stem teacher truancy.

93 The outcome of the HRSC's investigation is summarised as follows:

93.1 Extent of leave taking and patterns:

[148] Record pp 1186-1191 paras 193-209.

93.1.1 The study estimates the loss of instruction time as 20 to 24 days per annum per teacher. Factoring in the estimated six days spent on official duties, this demonstrates that educators' days of absence are in fact within their permissible quota of leave (including sick leave and family responsibility leave) which is about 18 days.

93.1.2 The Department of Basic Education is nevertheless keenly concerned that teachers do not abuse their labour rights at the expense of children's education rights. However, the findings of the study suggest that there is no need to take any drastic steps (such as reviewing regulations or expensive electronic attendance monitoring systems). Drastic measures are, in fact, counter-productive. They have in the past led to serious threats of industrial action, which invariably result in legally protected strikes – which, in turn, necessarily involves the absence of teachers. Balancing teachers' and children's entitlements is thus a matter of profound practical difficulty, requiring careful assessment. It cannot be done on an over-broad and abstract basis (as the applicants appear to envisage). It must be based

on fact and the concrete circumstances concerned.

93.1.3 Based on this reality, a key focus area identified by the respondents is the improvement of the administration of leave and supporting school principals, who are statutorily responsible for teachers' attendance, to better manage the discretionary leave strategically and tighten provisions on absence for official duties. The Department of Basic Education, PEDs and district offices continue to monitor compliance and supervision by principals.

93.2 Absence due to official duties:

93.2.1 Another concern arising from and confirmed by the study is the inherent tension between two other issues: professional development and absenteeism. Both of them are simultaneously invoked by the applicants in their notice of motion and founding affidavit, but apparently without realising the obvious practical implications. Professional development of teachers *requires* their absence, because in-service training cannot always be accomplished after-hours and out of term.

93.2.2 The number of days (time) allocated for professional development must be quantified. At present educators are expected to spend 80 hours (roughly translating to 10 days) of their own time on professional development. It is suggested that educators are formally allocated an equivalent of four days per calendar year for professional development, at least one day per term, which will be taken during contact time. This time would complement the educator's own time (80 hours). The following conditions apply:

(a) This time would strictly be used for professional development (workshops and seminars). This will exclude meetings, excursions, religious observance and the like.

(b) The days (hours) must be recorded as formal leave managed accordingly.

(c) If needs be, this time could be accommodated in the school calendar either at school level or through adding more days to the general school calendar. In this way the leave would not result in lost learning time.

(d) The utilisation of this time will be based on usage rather than entitlement, that is, days (time) not used will be forfeited. This will ensure that time used for professional development is formalised and capped and is separated from other official duties such as excursions and meetings and managed accordingly. The key emphasis here is that the time used for professional development should not be regarded as contact time lost as it must be factored into the school calendar.

93.3 Strategic management of discretionary leave:

93.3.1 The report's findings show that the bulk of the days of absence are well within the days provided in the leave dispensation. Because teachers' leave-taking occurs well within their constitutional rights and statutory entitlements, leave taking requires to be managed strategically. The role of the principal and the school management team is critical in this regard both in terms of management of leave taking and managing contact time. To assist them in this regard, trends are monitored at district level so that relevant support is directed to the school principals.

93.3.2 The study indeed found that administration of leave in schools was in place. The only challenge which was identified was the capturing of leave on the PERSAL system. It was identified as critical to use only one source of leave data, requiring the development of an effective system and process of capturing leave. As the example from the Free State province demonstrates, this has indeed been accomplished.

93.3.3 In addition the DBE is currently distributing the Human Resource Management Guidelines which gives further guidance on the application of systems, processes and procedures to manage and administer attendance and leave-taking.

93.3.4 The Education Human Resource Management Information System (EHRMIS) further facilitates the capturing of educator attendance electronically. Schools with access to this system are able to yet further enhance their capacity for leave administration.

93.4 Strategic management of non-discretionary leave:

This involves the management of leave taking; time management at school level, which will include recovery of time lost; and the management of short-term substitute

teacher arrangements. As noted in the study, nothing can substitute for effective school leadership, functionality of the school, and maintaining professionalism among educators at school level. This fact indeed finds statutory recognition in the South African Schools Act itself. Section 16A provides that it is the responsibility of the principal to undertake the professional management of a school, and to manage educators and staff. The legislature adopted a statutory framework which balances school's institutional integrity (and the need to give due consideration to their individual circumstances) with the ultimate responsibility for education vested in PEDs and the DBE.

Indigenous languages and mother-tongue education[149]

94 The erstwhile Department of Education formulated a draft policy called the Language in Education Policy (LiEP). The LiEP documents have been the subject of discussions and debate with a wide range of education stakeholders and role players. They have also been the subject of public comment following the publication on 9 May 1997 in the Government Gazette. LiEP is a policy contemplated by section 50(4)(m) of the National Education Policy Act. Neither this Act nor LiEP is impugned by the applicants.

95 As the Act contemplates, the formulation of language in education is a matter of policy. It is therefore contemplated by the legislature that

[149] Record pp 1178- 1186 paras 173-192.

the inherent qualities of a policy (*inter alia* flexibility) be retained. True to its policy nature, LiEP is indeed part of a continuously evolving process by which language in education is being developed as part of the national language plan. It encompasses all sectors of society, including the deaf community.

96 Language policy must be understood and applied in its constitutional context. The Constitution recognises that cultural diversity is a valuable national asset and promotes multilingualism, the development of the official languages, and respect for all languages used in the country, including South African sign language and other languages. The Constitution eradicates the apartheid approach to language in education. That approach had been fraught with tensions, contradictions and sensitivities, and underpinned by racial and linguistic discrimination. A number of these discriminatory policies have affected either the access of learners to the education system or their success within it.

97 The DBE further published norms and standards to guide language policy pursuant to section 6(1) of the South African Schools Act. The aim of the norms and standards is to recognise that diversity is a valuable asset to be respected, promoted, fulfilled and developed.

98 The DBE finalised a draft policy in September 2013. It was published for comments on 11 November 2013. Comments were due by 2 December 2013, and are currently being considered and

incorporated. In its current form, it is known as the Incremental Introduction of African Language policy (IIAL). It aims to:

98.1 promote and strengthen the use of African languages by all learners in the school system by introducing learners incrementally to learning in African languages from grades 1 to 12 to ensure that all non-African language speakers speak an African language;

98.2 strengthen the use of African languages at home-language level;

98.3 improve proficiency in and utility of the previously-marginalised African languages at first-additional-language level;

98.4 raise the confidence of parents to choose their own languages;

98.5 increase access to languages by learners beyond English and Afrikaans; and

98.6 promote social cohesion by expanding opportunities for the development of African languages as a significant way of preserving heritage and culture.

Early childhood development[150]

99 The erstwhile Department of Education already started phasing in grade R in 2001 as part of Education White Paper 5 on Early Childhood Education (2001). The 2014 target is to have 80% of all five-year olds in grade R classes with the remaining 20% in community based centres. The number of grade R learners increased from 241 525 in Public Ordinary Schools (in 2001). The current (2013) figure is 779 370. These learners are in 16 909 public primary schools leaving only 1 566 schools without grade R classes.

100 The Integrated Strategic Planning Framework for Teacher Education Development in SA (2011-2025) aims to improve the provision of ECD by enabling certain institutions to specialise in preparing ECD practitioners and the roll-out plan has started.

101 The Minister of Social Development has similarly pronounced Early Childhood Development as a priority for the Department in 2010. The Department of Social Development's commitment to this pronouncement is demonstrated *inter alia* by linking the ECD programme to the Expanded Public Works Programme, increasing children's access to critical ECD services. In so doing, human resources in this sector were expanded by creating a number of jobs.

102 It is clear from the above interventions that Government has, as a fact, demonstrated its deep recognition of its constitutional responsibilities and has meaningfully addressed the apartheid

[150] Record pp 1167-1167 paras 132-145.

legacy. The Constitutional Court has recognised that the constitutional promise is no panacea, and the applicants concede that there is no *"magic bullet"*. In this light Government's interventions should be permitted to do their work, especially because many of these measures are inter-related. For example, measures directed at school health directly impact on children's ability to learn. In the light of the extensive interventions set out in the answering affidavit it is clear that the case made out in the founding affidavit does not sustain the relief set out in the notice of motion.

103 In short, each of the bases underlying this application is either factually unfounded, substantially moot, inconsistent with the unimpugned statutory and policy framework (to which the applicants, the respondents and the Court are bound), or outside of this Court's jurisdiction. We demonstrate this further in turning to the legal bases of opposition.

LEGAL BASES OF OPPOSITION

104 The legal bases of opposition relate to the merits and the remedy, and some relate to both the merits and the remedy. They are discussed in the order in which they arise for consideration.

Section 29 does not support the reliance on an immediately-exigible quality of numeracy and literacy

105 The founding affidavit expressly invokes section 29 of the Constitution as main strut for the relief claimed.[151] While some other constitutional provisions are also tangentially identified, the applicants only rely on them as ancillary to (or, in the deponent's words, "as read with")[152] section 29.[153] On a proper approach, this application falls to be considered on the basis of section 29.[154] In reliance on section 29, the applicants' first contention which underlies this application rests on "the quality of education [to be] delivered by the State".[155] This application is animated by an ambition to achieve under court supervision a desired qualitative standard of education.[156]

106 The Constitutional Court has consistently rejected a similar approach in the context of related rights. It repeatedly held that a minimum core content could not be read into a constitutional right.[157] In the teeth of these binding precedents, the applicants nevertheless implores this Court to supervise the respondents' performance of

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[151] Record p 18 para 24.
[152] Ibid.
[153] The only instance of invoking section 28(2) of the Constitution to augment section 29 of the Constitution is in relation to mother-tongue education (Record p 20 para 25.5).
[154] ***Nokotyana v Ekurhuleni Metropolitan Municipality*** 2010 (4) BCLR 312 (CC) at para 50.
[155] Record p 19 para 25.1.
[156] As para 9 of the applicants' heads of argument anticipate, the structural interdict will (on the applicants' approach) only be dischargeable once "the tests" have been satisfied. "Put at its lowest", the "tests" require excellence in ANAs, Grade 12 achievements which enables success "in the job market" and outright success in tertiary education.
[157] ***Government of the Republic of South Africa v Grootboom*** 2001 (1) SA 46 (CC) at paras 32-33; ***Minister of Health v Treatment Action Campaign (No 2)*** 2002 (5) SA 721 (CC) at para 34; ***Mazibuko (supra)*** at paras 53-56.

their constitutional and statutory functions until *inter alia* unemployment has been eradicated, because – on the applicants' approach – this constitutes the minimum "test" to establish that basic education has been delivered at the required qualitative standard.[158] This despite section 29 being silent on any qualitative component, and despite the legislation giving effect to section 29 expressly refers to the *"provi[sion] [of] an education of progressively high quality"*.[159]

107 No primary, secondary or comparative legal precedent is advanced by the applicants for their conception of what an adequate education is, or how a court is to gauge whether the required quality has been achieved. When commentary is considered, the provenance of the qualitative content animating this application is clear. Commentators identify the following components of the right to basic education conferred by section 29 of the Constitution: *"aspects such as free and compulsory basic education, … the duty of the State to make education generally available, and the provision of special education."*[160] These components, it is common cause, are indeed being afforded by the State. Commentators, however, further identify the following aspects in conceptualising the right to basic education:

107.1 equal access to education (which, again, is not in issue);

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[158] The standard is described in the applicants' heads of argument as "functional literacy", which it is argued is "the ability to function at the level of an eighth grader who has successfully completed eight years of education in his or her language of choice" (para 2 of the applicants' heads of argument).

[159] Preamble to the South African Schools Act 84 of 1996.

[160] Boezaart Child Law in South Africa (Juta & Co, Cape Town 2009) at 400.

107.2 freedom of choice between education institutions (which, similarly, is not in issue);

107.3 education in an official language of one's choice (which is of course subject to section 29(2) of the Constitution, but is not in issue, because the applicants seek mother-tongue education – irrespective of whether the language has section 6(1) status);

107.4 the establishment of private educational institutions (which, too, is not in issue); and

107.5 the "availability, accessibility, acceptability and adaptability" of education.[161]

108 The so-called "four As" comprising the fifth aspect is derived from the *CESCR General Comment No. 13: The right to education, article 13*.[162] Although the applicants' founding papers, the replying affidavit and the heads of argument forebears disclosing this (or is perhaps ignorant of this), it is the third component of Comment No. 13 (i.e. *"acceptability"*) which provides the foothold for the numeracy and literacy issue.[163] It is because, in this context, the concept

[161] See e.g. Boezaart op cit at 400-402.

[162] The comment is formulated by the Committee on Economic, Social and Cultural Rights, established under the International Covenant on Economic, Social and Cultural Rights (1966).

[163] The General Comment describes "acceptability" as "the form and substance of education, including curricula and teaching methods, [which] have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State (see art 13(3) and (4))".

"acceptability" refers to the *"quality of education that should be provided."*[164]

109 Thus, the first contention underlying this application requires that this Court apply General Comment No. 13 in the context of section 29 of the Constitution. As General Comment No. 13 itself spells out, it gives content to General Comment No. 3 within the context of Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966).[165] Article 13 deals specifically with the right to education. It is General Comment No. 3 which the Constitutional Court has thrice rejected. The applicants' case is accordingly built on an embellishment of a General Comment which the Constitutional Court held does not support a constitutional cause of action.

110 Some of the key considerations and *dicta* underlying the Constitutional Court's rejection of any reliance on the General Comment to sustain a constitutional cause of action are the following.

111 The first arises from the text of the Constitution. In relation to programmatic rights, the Constitutional Court held that they did not entitle a right-bearer to assert an immediate claim to a specific quantity of, say, water. In the current context, the text of section 29 itself equally clearly does not establish a claimable *"quality"*. What section 29 provides for is that everyone be afforded the right to a basic education. It is therefore unsurprising that it was indeed "*access to school"* which the Constitutional Court held in *Juma*

[164] Id at 402, emphasis added.
[165] General Comment No. 13 at para 57.

Mushid to constitute an important component of the right to basic education which is a necessary condition for achieving the right to basic education.[166] Nothing in the Constitutional Court's case law[167] or in the text of section 29 supports a claim to an immediate entitlement to a level of "literacy or numeracy" which a court must somehow measure as "sufficient".[168] Because it is common cause that the desired quality of education did not exist at the time when the interim Constitution and even final Constitution entered into force, it could not have been the drafters' intention that that quality would have been immediately exigible on the date of the Constitution's inception.

112 Second, introducing a qualitative content in reliance on a General Comment disregards courts' institutional capacity:

> *"Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact*

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[166] Supra at para 43.

[167] As Keightly "The Challenges of Litigating Socio-Economic Rights in South Africa" 2011 NZ Law Review 295 at 313 explains:
"The Constitutional Court's judgment in Mazibuko heralded no new departures in terms of its established jurisprudence. On the contrary, the judgment makes it clear that all socio-economic rights should be approached in the same way, and that there is no scope for litigating any socio-economic rights on the basis that they have an identifiable content separate from that of the reasonableness of the measures implemented by the state to give effect to them. In the context of socio-economic rights litigation this is a significant constraint, as it removes from the equation a discernable cause of action based primarily on the social and economic needs of applicants. The focus of socio-economic rights litigation must, instead, fall on a reasonableness evaluation of the measures adopted by the state to give effect to the rights in question" (emphasis added).

[168] As para 25.1 of the founding affidavit appears to contemplate. To the extent that the founding affidavit purports to piggyback on targets set in the State of the Nation Address, this is the subject of the next subsection.

> *have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance."*[169]

113 Third, targets are to be set by other arms of government:

> *"ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice."*[170]

114 Fourth, courts' role is to review policies, not to pre-empt them:

> *"In Grootboom and Treatment Action Campaign (No 2) the focus of the court's reasoning was whether the challenged government policies were reasonable. In both cases the court identified deficiencies which rendered the policies unreasonable. In determining an appropriate remedy in each case, the court took care not to draft policies of its own and impose them on government. So in Grootboom the court did not order that each applicant be provided with a house, but required government to revise its housing programme to include 'reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'."*[171]

115 Accordingly, courts' role to enforce social rights (like the right to education) in circumstances where steps have already been taken to fulfil the constitutional right in issue (as is the case here) is to establish whether the implementation measures adopted by the State

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[169] ***Minister of Health v Treatment Action Campaign (No 2)*** (supra) at para 38.
[170] ***Mazibuko (supra)*** at para 61.
[171] Id at para 63.

are unreasonable. If they are, the courts' role is to require that the measures be reviewed to meet the constitutional standard of reasonableness.[172]

116 Courts accordingly do not sit as an ultimate board of examiners to determine whether the outcome of a school career satisfies a "lowest level" "test" based on matriculants' ability to "participate in the job market".[173] What is required is that reasonable legislation and policies be formulated and implemented by the executive and legislative arms of government. It is against this standard, and not a standard set by a General Comment, which the respondents' compliance with section 29(1)(a) of the Constitution must be measured – unless, of course, there is a constitutional challenge to the enabling legislative regime itself.

117 The enabling legislative regime contemplates that the desired quality of education be realised progressively. If it is contended that a particular quality is constitutionally entrenched, and that this quality is immediately realisable, then a constitutional challenge to the South African Schools Act is required. Absent such challenge, a direct reliance on an immediately exigible (but constitutionally unarticulated) quality of basic education is legally incompetent.

118 The Constitutional Court has deliberately refrained from giving section 29 an immediately exigible content. Its approach demonstrates that what courts are required to do is to interpret and

[172] ***Mazibuko (supra)*** at para 67.
[173] As paragraph 9 of the applicants' heads of argument requires.

apply section 29 in the context in which it is invoked in a concrete case. In following this approach, what the South African courts have done is to identify textbooks,[174] furniture[175] and school buildings[176] as necessary components to enable the government to deliver "basic education".

119 It is true that the text of section 29(1)(a) is not qualified by provisos like "available resources", "progressive realisation" or "reasonable legislative measures". Nevertheless, the right to basic education must be construed and applied within the Constitutional Court's existing socio-economic rights jurisprudence.[177] This, together with the Constitutional Court's rejection of a standard of perfection and recognition of the realities wrought by apartheid, strongly militates against the drastic application of section 29(1)(a) for which the applicants contend.

120 Indeed, despite the difference in the text of sections 26 and 27, on the one hand, and section 29(1)(a), on the other, commentators caution that section 29(1)(a) of the Constitution requires a sober approach.[178] Berger,[179] for instance, identifies the source of the tension between a qualified and qualified right as follows:

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[174] ***Section 27 v Minister of Education*** 2013 (2) BCLR 237 (GNP).
[175] ***Madzodzo v Minister of Basic Education*** [2014] ZAECMHC 5.
[176] ***Centre for Child Law v Government of the Eastern Cape*** [2012]4 ALL SA 35 (ECG).
[177] See e.g. ***Minister of Health v Treatment Action Campaign*** 2002 (5) SA 721 (CC) at para 35:

> *"it is impossible to give everyone access even to a core service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis."*

[178] Woolman et al Constitutional law of SA 2nd edition vol 4 at 57-11.

> *"to announce numbers that cannot be made would ultimately cheapen the Constitution;*
>
> *the court can preach whatever message it wants, but that message and the Constitution itself will ring hollow once people begin to realise that its rulings do not improve their everyday lives. A narrow constitution, goes the argument, is better than an empty one".*

121 The manner in which the Constitutional Court has approached both qualified and unqualified rights informs the interpretation and application of section 29(1)(a). In *Grootboom* (a case in which children's unqualified section 28 right was squarely invoked),[180] the Court adopted the following contextual approach to interpreting socio-economic rights (of which basic education is one):

> *"interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their contextual setting. This will require a consideration of chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in the social and historical context."*

122 The importance of the right to basic education notwithstanding, there is no hierarchy of constitutional rights. Thus, the right to education does not trump rights to housing, food, water, health care and social security. Housing, food, water, health care and social security provide, after all, the basic conditions of existence – and without them, the right to education cannot exist *in vacuo.* The realisation of essential socio-economic components contributing to an environment enabling education is the legal and factual context in which the right to basic education must be interpreted and applied. The historical

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[179] ***Berger "The right to basic Education under the SA Constitution*** (2003) 103 Columbia Law Review 614 at 638-639.

[180] ***Government of the Republic of South Africa v Grootboom*** 2000 (11) BCLR 1169 (CC) at para 8.

context for doing so is the apartheid education system. The post-apartheid state inherited an education system that purposefully tried to ensure that the majority of the population could not be anything more than chewers of wood and drawers of water. This historical context to section 29(1)(a) emphasises the restitutional character of the right of education. Section 29(1)(a) could not have been intended by its drafters to expunge a historical fact. The size and nature of the problem besetting basic education at the inception of the Constitution do not support an interpretation and application of the right which envisage an immediate standard of education at the inception of the Constitution (pursuant to the principle of objective constitutionality) for which the applicants contend.

123 The Constitutional Court's judgment in *Grootboom* demonstrates the proper interpretation and application to be applied. Although the applicants' primary complaint was based on section 26, the right to housing, they also claimed relief under the seemingly unqualified section 28(1)(c), the right to shelter for children. In the High Court, the unqualified content of section 28(1)(c) was accepted and the children were granted the specific remedy as requested. The Constitutional Court reversed the High Court's decision. It held that section 28(1)(b) required that a child's needs be provided primarily by his or her family. The obligation to provide shelter under section 28(1)(c) rests *"primarily on the parents or family"* and, therefore, *"only alternatively on the state"*.[181] This reflects a recognition of the reality

[181] ***Grootboom (supra)*** at para 77.

that even rights whose text is unqualified require a nuanced approach by courts.

124 Indeed, Woolman and Fleisch[182] contemplate exactly such approach to section 29(1)(a). They state:

> *"the absence of an internal limitation for the right to a basic education makes sense when viewed through the lens of apartheid-era funding inequalities. The drafters wanted to reaffirm that primacy of education in a social democracy and to undermine any attempt to perpetuate unequal levels of state funding. The historical context and aspirational content of the South African Constitution requires a more nuanced reading of the absence of the internal limitation of section 29(1)(a). In short, the section should be read as a reminder that the state may never again use education as a vehicle for the reproduction of-and must make every effort possible to eliminate all vestiges of-apartheid-era patterns of inequality".*

125 As Woolman and Fleisch correctly observe, the nuanced approach to section 29 is not limited to the content of the right. It also applies to justification and remedy. First, even where an infringement is established, it is clearly capable of being justified. The extensive facts before court demonstrate that a section 36 analysis (were it to have arisen, if specific statutory instruments or administrative acts were identified and impugned) would justify any infringement of section 29. Second, were to applicants to succeed in establishing that government has failed in its constitutional duties, the Court must give an order that is just and equitable. Such an order could encompass a simple declaratory order (which is what the applicants resort to not as an end in itself, but as a peg on which to hang a

[182] Fleisch et al "On the Constitutionality of School Fees: A reply to Roithmayr" (2004) 22(1) Perspectives in Education 111.

structural interdict), a suspended order of invalidity (which does not apply, because no instrument or conduct is impugned) or a structural interdict (directed at giving government an opportunity to offer a *bona fide* plan to realise the right to basic education). In this matter the respondents have already put before court extensive plans clearly showing that government has formulated *bona fide* plans which are directed at improving the delivery of basic education to all learners in South Africa. The plans are not impugned. The purpose of a structural interdict has already been served. There is accordingly no utility in such extraordinary relief.

126 The applicants' heads of argument provide no analysis or authority which supports an argument to the contrary. They are driven to misconstrue the respondents' case as contending for a basic education system which is incapable of delivering a basic education[183] (by which is meant a system capable of *"inculcate[ing] … literacy and numeracy*").[184] This is not the respondents' case.[185] Nor is the system incapable of achieving numeracy or literacy. The system is quite clearly designed to achieve not only numeracy and literacy, but all of the outcomes which the respondents have identified – and more. Its design encompasses the following:

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[183] Para 140 of the applicants' heads of argument.
[184] Para 139 of the applicants' heads of argument.
[185] The answering affidavit demonstrates, quite contrary to suggestion in the applicants' heads of argument (e.g. paras 135ff), the respondents' clear commitment to provide quality education to all children. The respondents' case is that the system cannot be impugned simply because the standard which the respondents have set for themselves has not yet been achieved. The respondents' case is clear. They ask "[i]n essence, … that Government be permitted to continue the implementation and improvement of an all-inclusive and ambitious (but achievable) basic education system" (Record p 1123 para 26).

126.1 expanding access to basic education to include all children, focusing resources on the poorest of the poor and prioritising an all-inclusive system;[186]

126.2 ensuring early childhood development through *inter alia* the expansion of nutrition programmes and universal Grade R access;[187]

126.3 furthering mother-tongue education, *inter alia* by countering preconceived ideas (of learners, parents and teachers) about indigenous languages in education;[188] and by promoting teachers from rural areas who speak the local language;[189]

126.4 improving numeracy and literacy, *inter alia* through annual assessments which serve not only as diagnostic tools but also provide remedial measures which are implemented on a school-by-school and teacher-by-teacher level, under the supervision of the relevant school principal (who is responsible to the relevant district office, which in turn reports to the relevant provincial departments of education);[190]

126.5 developing teachers and supervise their attendance, accountability and professionalism, through extensive measures, including the CPTD management system, the policy on Minimum Requirements for Teacher Education

[186] Record p 1128 para 39.
[187] Record p 1128 para 39.
[188] Record pp 1184-1185 paras 186-187.
[189] Record pp 1152-1152 paras 110-111.
[190] Record p 1161 para 131.

Qualifications, SACE's January 2013 CPTD Management System Handbook, and SACE's CPTD System Implementation Planning;[191] and

126.6 providing infrastructure, teaching materials, workbooks and textbooks, *inter alia* through the Department of Basic Education's Service Delivery Improvement Plan (implemented in collaboration with the Department of Public Service and Administration),[192] and the textbook retrieval system.[193]

127 If it is sought to be contended that there is anything unconstitutional with this design, this had to be identified squarely in the founding papers. This was not done. Indeed, the replying affidavit contended that the problem lies in the system's *implementation*. If this is the true crux of the applicants' case, then the defects in the implementation had to be identified and reviewed.[194] This, too, was not done – not even in reply. The reason for the applicants'

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[191] Record p 1233 para 325.
[192] Record p 1178 para 171.
[193] Record p 1178 para 170. The recent litigation (in which judgment is reserved) in the North Gauteng Division of the High Court deals with a defective implementation of this system in the Limpopo province. But there is no evidence that the system itself is per se defective or incapable of successful implementation in any of the other provinces.
[194] The applicants' heads of argument suggests that the applicants have "review[ed] the whole panoply of government's steps (legislative, policy, programmes and plans) in order to show that the steps taken thus far fall substantially short of what the Constitution requires" (para 151). As is the case with the word "impugn", they do not use these words in the legal-technical sense. A measure is only reviewed or impugned (in the sense used in legal documents like heads of argument and affidavits) if it is the subject of a legal challenge in which a declaration of invalidity is sought. It is not legally competent for a litigant to "accept the [court's] task" of review by asserting that its "experts" have made a certain legal conclusion. It is moreover factually incorrect to suggest that the applicants' experts have concluded that the measures – many of which are not analysed at all – are indeed unconstitutional. But even if they had so concluded, and even if that in itself constituted a case (as if it was not for this Court to consider the legal question), the notice of motion nevertheless had to request such relief.

equivocation is that the founding affidavit was premised on the understanding that no measures were formulated or implemented. This was shown to be erroneous, hence the shift in the applicants' case in reply.

The cause of action impermissibly invokes political undertakings, and circumnavigates the governing legislative matrix

128 As the founding affidavit reflects in relation to numeracy and literacy (which, as mentioned, does not constitute a separate cause of action), the target set in the ANA reports is derived from President Zuma's 2009 State of the Nation Address.[195] The target is that "by 2014, 60% of learners in Grades 3, 6, and 9 should perform at an acceptable level in languages and mathematics."[196] This target is not one for judicial enforcement.[197] Yet it is the failure to achieve this target which the applicants invoke as proof of systemic dysfunctionality.

129 Governments around the world set targets for themselves. Many circumstances, like economic conditions or labour unrest results in targets not being met. This does not constitute a legal cause of action. A failure to achieve targets set in political addresses only constitutes a cause of action in a court of law if the political undertaking founds a substantive legitimate expectation. No such case has been made out in the founding or replying affidavits, and

[195] Record p 61 para 107.
[196] Ibid.
[197] ***Mazibuko (supra)*** at para 61: the President's targets "are subjected to democratic popular choice."

not even in the heads of argument is any such allegation advanced.[198]

130 Thus, it is not the State of the Nation Address that sets the operative standard. It is the South African Schools Act which applies. The Act provides no statutory recognition for any immediately-exigible standard. Instead, its preamble contemplates the *"provi[sion] [of] an education of progressively high quality"*.[199]

131 It follows that no factual basis exists for invoking the foreword of the 2011 ANA, which – as the applicants themselves accept – *"is a reference to the target set by President Zuma in his 2009 State of the Nation [A]ddress"*.[200] Nor is any legal basis advanced to do so either.[201]

The separation of powers doctrine

132 The Constitution does not expressly mention the principle of separation of powers. The separation of powers can be traced back to Constitutional Principle VI, which is one of the principles that governed the drafting of the Constitution.[202] The doctrine of separation of powers is therefore to be found in the provisions

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[198] For the notoriously strict cumulative requirements, see ***South African Veterinary Council v Szymanski*** 2003 (4) SA 42 (SCA) at para 19. South African courts have not yet enforced a substantive legitimate expectation, however (***KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*** 2013 (4) SA 262 (CC) at para 31 fn 7).

[199] Preamble to the South African Schools Act 84 of 1996.

[200] Ibid.

[201] Even the Freedom Charter, which the applicants' heads of argument invoke – but incorrectly quote – in para 140 does not support them. The Freedom Charter provides: "Education shall be free, compulsory, universal and equal to all children".

[202] Constitutional Principle 6 provide that: "(T)here shall be a separation of powers between the Legislator, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

outlining the functions and instructions of the various organs of state, their respective independence and also interdependence.[203]

133 The Court therefore has to be alive not to overstep on the field of the Executive.[204]

134 It is for good reason that the Court respects other arms of government in dealing with issues relating to operational or budgetary considerations affecting constitutional rights.[205]

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[203] ***Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa***, 1996 (4) SA 744 (CC) at paras 110 and 111; ***Glenister v President of the Republic of South Africa & Others*** 2009 (1) SA 287 (CC) at paras 29-36.

[204] ***Minister of Health & Others v Treatment Action Campaign & Others (No 2)*** 2002 (5) SA 721 (CC) at paras 23-25; ***National Coalition for Gay and Lesbian Equality v Minister of Home Affairs & Others*** 2000 (2) SA 1 (CC) at para 66:

> *"The other consideration a Court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislator in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate it in general terms what such deference must embrace, for this depends upon the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislator."*

O'Regan "Helen Suzman Memorial Lecture" (Johannesburg, 22 November 2011):

> *"By and large, courts in South Africa have avoided a jurisprudence of exasperation. Government action is scrutinised to ensure that it is lawful, rational and in compliance with the Bill of Rights as the Constitution requires. Beyond these parameters government must be, and is, free to act. It is important for courts to continue to be disciplined in this regard despite criticism that may come not only from government, but also from other sources. … Instead of a jurisprudence of exasperation, we should insist on a jurisprudence of accountability that ensures that the responsibility for government remains that of the legislator and executive, but insists that those two arms of government must account for their conduct, where required to do so, through the courts."*

[205] The ***Treatment Action Campaign***-matter, at 740C-H:

> *"It should be borne in mind that in dealing with such matters the Courts are not institutionally equipped to make wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in "Soobramoney":*
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> > '*The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals of society.'*

Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC) at para 37:

> *"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is*

135 A Court may not, under the guise of protection of constitutional rights encroach on the field of the Executive and make orders reserved for the domain of the Executive.[206]

The principle of subsidiarity

136 It is an established principle of constitutional litigation that claims for enforcing constitutional rights must be based on, and brought in terms of, the legislation enacted to give effect to the constitutional right concerned.[207] This is the principle of constitutional subsidiarity.[208] Its purpose is

> *"to preserve the constitutional power and obligation of the courts to control the constitutional validity of legislation [in cases involving a constitutional challenge to legislation, which does not apply here], while at the same time paying due respect to the democratic power and legitimacy of policy makers and legislatures in giving effect to their reform obligations under the Constitution."*[209]

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not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institution by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

[206] **Capricorn District Municipality & 1 Other v The South African Civic Organisation** [2014] ZASCA 39 (31 March 2014). In this matter the Supreme Court of Appeal found that a Court may not grant a mandatory interdict directing the Municipality to repair and replace water pipelines and faulty water meters and to charge consumers a fee per month for the repairs and replacements.

[207] ***PFE International v Industrial Development Corporation of South Africa Ltd 2013*** (1) SA 1 (CC) at para 4.

[208] Ibid. The same terminology is of course also used to refer to the principle of avoidance or complementarity in some academic commentary, or in other fields of law (e.g. inter-country adoptions or the use of deadly force in arrests), but it is here used in the sense applied by the Constitutional Court in the judgments discussed in this section.

[209] Van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 Constitutional Court Review 77 at 126.

137 The principle has been applied by the Constitutional Court on many occasions.[210] As was again confirmed in *Nokotyana v Ekurhuleni Metropolitan Municipality*:[211]

> *"This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation or alternatively challenge the legislation as inconsistent with the Constitution.*

138 The applicants recognised this by relying primarily on Chapters 12 and 13. They also tried to rely directly on the Constitution though. They cannot be permitted to do so. …"

139 The answering affidavit explains the statutory and policy framework giving effect to section 29(1)(a) of the Constitution, comprising *inter alia* the South African Schools Act[212] and the National Education Policy Act,[213] and many policies and measures adopted pursuant to the legislative scheme.[214] The applicants do not contend that any of the measures formulated and implemented by Parliament or the

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[210] ***Mazibuko (supra)*** at para 73, citing ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism (supra)*** at paras 22-26; ***MEC for Education, Kwa-Zulu Natal v Pillay*** 2008 (1) SA 474 (CC) at para 40; ***South African National Defence Union v Minister of Defence*** 2007 (5) SA 400 (CC) at para 52.

[211] 2010 (4) BCLR 312 (CC) at para 48-49.

[212] Record p 1136 para 68.

[213] Record p 1137 para 70.

[214] In response to the answering affidavit raising this defect (Record p 1114 para 12), the applicants' response was simply that the policies and their implementation fall short of the constitutional requirements (Record p 2810 para 41). Not even in reply was the statutory scheme to which the answering affidavit refers impugned, and there is still no relief claimed in this respect. The high-water mark is some scattered references which e.g. "question the efficacy of [a particular] policy" (Record p 2861 para 178) or other intervention measure (Record p 2867 para 193), or record "concern" (Record p 2869 para 202). This is the classic Theletsane problem for an applicant who has claimed in founding papers that no measures exists, and is then presented with an answering affidavit demonstrating considerable measures that do exist. Such applicant is then driven in reply to say that the measures are not sufficient. In Administrator, Transvaal v Theletsane 1991 (2) SA 192 (A) the Supreme Court of Appeal held that this is an impermissible approach which only serves to demonstrate that the founding papers did not make out a proper case, as is required.

Executive are inadequate, defective or under-inclusive.[215] Instead, the applicants argue that this Court should supervise compliance with section 29(1)(a) of the Constitution directly – as if no pre-existing legal framework have been established by the competent arms of government.[216]

140 It is not only Parliament's primary constitutional role to supervise the Executive.[217] Parliament is also the constitutionally-competent body to enact legislation to counteract inequalities of the past and give content to constitutional rights.[218] In the particular field of basic education, Parliament adopted *inter alia* the South African Schools Act, which commentators describe as *"a progressive development for which the government, and especially the national department of education, may justly take credit."*[219] In enacting this and other statutory instruments, Parliament fulfilled its part of the State's

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[215] The repeated assertion is simply that to the (unidentified) extent that any "policy is inconsistent with the Constitution, it is invalid" (Record p 2822 para 76). This, too, is a legal misconception underlying the applicants' case. A policy is not automatically invalid to the extent inconsistent with the Constitution; it is required to be declared invalid by a court before it can simply be disregarded by the executive, the judiciary or a litigant. The Constitutional Court has confirmed this established principle in this very context in Head of Department, Department of Education, Free State Province v Welkom High School (supra) at para 72. This is one of the many judgments of the Constitutional Court which is entirely absent from the conception of the application, and even from the applicants' heads of argument.

[216] The contention to which the applicants are driven in their replying affidavit is "that the policies are impugned to the extent that in many cases they are not implemented, incorrectly implemented or educationally unsound, since they appear to be ineffective" (Record p 2824 para 84). This is not a permissible approach. A policy must be impugned expressly, it must form the target of relief formulated in a notice of motion, and the founding papers must indicate to what extent a policy is either under-inclusive, overbroad, inflexible, or otherwise unlawful. Purporting to assert an implicit impugning in reply for the first time exposes a fatal defect in the founding papers, one which cannot be purged (as the applicants correctly recognise by not attempting to amend their notice of motion).

[217] Section 92(2) of the Constitution.

[218] ***Mazibuko (supra)*** at para 61.

[219] Visser "Some thoughts on legality and legal reform in the public school sector" (2006) 2 TSAR 359 at 360.

obligation to give content to the right to education, a task which is not primarily the task of courts.[220]

141 A direct reliance on the Constitution invites the court to usurp Parliament's primary duty, contrary to the principle of subsidiarity (and the doctrine of separation of powers). The principle of subsidiarity reserves courts' constitutional role to interpret and apply legislation, or to declare it unconstitutional (to the extent that legislation does not give full effect to the Constitution). It does not permit going behind legislation (and policies pursuant to empowering provisions)[221] in circumstances where there is no constitutional challenge to the legislative and policy matrix, as is the position here.[222] Nor does it permit the approach of the applicants, which is that anything standing between them and the relief set out in the notice of motion is somehow impugned (without identifying any legislative or administrative act or omission in the notice of motion, or even in the founding papers).[223]

142 The applicants thus correctly concede the importance of the subsidiarity principle.[224] Their heads of argument nevertheless now contrives to suggest that it has been invoked "somewhat

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[220] Froneman "Enforcing socio-economic rights under a transformative Constitution: The role of courts" vol 8 no 1 ESR Review 20 at 23.

[221] It is established that not only legislation, but also "other measures, such as policy" are "the primary instruments for the achievement of socio-economic rights" (Keightly op cit 307-308).

[222] Record p 1205 para 253.

[223] Keightly op cit at 317:

> *"It is important in this regard to bear in mind that legislative content has been given to most of the socio-economic rights in the Constitution. Therefore, socio-economic litigation will usually involve a consideration of the complex interplay between constitutional and other relevant legislative provisions. This should guide the manner in which socio-economic cases are conceptualised and pleaded."*

[224] Record p 2825 para 86.

tentatively".[225] This is not supported by the pleadings.[226] Indeed, in their replying affidavit, the applicants attempted to escape the unavoidable consequences of the principle[227] by limiting their case to "the implementation of the enabling instrument" [sic].[228] This after it was pointed out that even the annexures to the applicants' own founding papers identified the proper target of any dissatisfaction with the respondents' fulfilment of their functions pursuant to section 29(1)(a) of the Constitution: the policy and legislative framework.[229] Having instead elected to now pin their colours to the mast of "implementation" of the enabling provisions, the applicants have in effect conceded that the high-water mark for their case is one sounding in administrative law.[230] A complaint about the implementation of legislation is a basis for seeking the ordinary remedy of administrative review, not the extraordinary remedy of a structural interdict. The latter is generally appropriate in the context

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[225] Para 53 of the applicants' heads of argument.

[226] Record pp 1126-1127 paras 32-35, raising the principle prominently as a basis of opposition and emphasising its fundamental nature.

[227] The replying affidavit could identify only three paragraphs in which the applicants referred to the South African Schools Act (Record p 2839 para 115). They are paragraphs 11, 12 and 120(3)bis of the founding affidavit. Paragraphs 11 and 12 are non-substantive, dealing only with the citation of the respondents. They simply state that the Minister of Basic Education is – unsurprisingly – the responsible member of the national executive for basic education under the Constitution, the South African Schools Act and the National Education Policy Act; and that the MECs for education have the same responsibility on provincial level. Paragraph 120(3)bis states nothing other than that section 6(1) of the South African Schools Act empowers the Minister to determine norms and standards for language policy in public schools, a power exercised in adopting the LiEP. Accordingly the replying affidavit confirms the founding papers' failure to invoke what it concedes is the national legislation "giv[ing] effect to the constitutional right to education" (Record p 1136 para 69; conceded at Record p 2839 para 115). As regards the National Education Policy Act, the applicants concede that it is this Act which "is the statutory source of polices which comprises the legal matrix in which this application falls for consideration" (Record p 1137 para 70; conceded at Record p 2840 para 117).

[228] Record p 2825 para 85.

[229] Record p 1204 para 250.

[230] See e.g. ***New National Party of South Africa v Government of the Republic of South Africa*** 1999 (3) SA 191 (CC) at para 23.

where an impugned policy regime requires revision under the supervision of a court – after having been impugned successfully.

143 Now, in their heads of argument, the applicants are driven to another *volte face*. In doing so, they resort to new matter introduced in reply.[231] This is impermissible for several reasons. First, a case must be made out in the founding papers. An applicant stands or falls by the founding papers. Thus, a defective case cannot be purged once a fatal defect has been identified in the answering affidavit,[232] as happened here. Second, it is impermissible to resort to the contents of an annexure to an affidavit without having drawn particular attention to the relevant sentence or paragraph (even were it annexed to the founding papers, which is not the case here).[233]

144 The four causes of action are erroneously presented as *"discrete"*. They are simultaneously interrelated and in tension, and influence (and is influenced by) many other matters. They thus require a comprehensive approach, for which the Action Plan (as complemented by other policies and measures) already provides a coherent intervention strategy. Discrete interventions are not only

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[231] Para 55 of the applicants' heads of argument, which purports to rely on "the research of Patricia Martin" (at Record 2934-2987), introduced in reply. The article cannot be relied upon in seeking to impugn a statutory and policy framework in existence at the time of instituting this application. Thus the fact that the article was published in 2014 does not render it admissible for the purpose tendered, namely to sketch the operative legal infrastructure. All it serves to demonstrate is that the legal infrastructure was not identified or impugned in the founding papers, hence the reliance on annexures to the replying papers.

[232] ***Betlane v Shelly Court CC*** 2011 (1) SA 388 (CC) at para 29.

[233] ***Minister of Land Affairs and Agriculture v D & F Wevell Trust*** 2008 (2) SA 184 (SCA) at para 43 ("A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of the facts therein contained. Trial by ambush cannot be permitted."); ***Port Nolloth Municipality v Xhalisa*** 1991 (3) SA 98 (C) at 111H-I; ***Helen Suzman Foundation v President of the Republic of South Africa*** [2014] 1 All SA 671 (WCC) at para 10.

disruptive, but indeed destructive of the concerted effort to reverse the legacy of the apartheid education system. The founding papers are, however, silent on the Action Plan and related instruments. These measures are accordingly neither considered nor analysed; nor are they criticised or impugned in this application. This is a fatal defect in the application, because the right to basic education (like its associated rights)[234] is given effect through the South African Schools Act, the National Education Policy Act and similar legislation, and policies and other intervention measures pursuant to these statutes.[235] A litigant is required to identify a defect in an existing measure, or a lacuna in the implementation framework or a defective implementation of the framework. Short-circuiting an extant regulatory infrastructure by direct reliance on the Constitution is impermissible. It is prohibited by the principle of subsidiarity.

145 The applicants' case falls foul of this principle in numerous respects. The cause of action based on mother-tongue education and the promotion of indigenous languages provides a simple example. LiEP is a policy under the National Education Policy Act 27 of 1996. It deals with language in education.[236] Neither the policy nor its empowering Act is impugned. Similarly, the Incremental Introduction of African Languages in South African Schools has been formulated

[234] Mazibuko (supra) at para 66:

> *"The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the State to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness."*

[235] Malherbe "Centralisation of power in education: have provinces become national agents? (2006) 2 TSAR 237 at 239.

[236] Record pp 1178-1179 para 173.

in draft form.[237] It, too, is not impugned. Nor is any other statutory provision dealing with language in education impugned. Equally, the applicants do not seek to review any act or omission under any of these instruments. Instead, in their heads of argument the applicants now resort to section 6(4) of the Constitution[238] to contend that the Constitution requires *"parity of esteem"* between *"the indigenous languages."*[239] Thus they compound their direct reliance on section 29 by also directly relying, in argument, on section 6(4) of the Constitution. This is impermissible. It is also consistent with the text of the Constitution. Section 6(4) provides that legislative and other measures must regulate the Executive's use of official languages, and that all official languages *"must enjoy parity of esteem"*. Section 29(2) of the Constitution similarly refers to official languages, and limit education in the official language of choice to instances where this is "reasonably practicable." The attempt to import a right to mother-tongue education (or education in an indigenous language enjoying *"parity of esteem"*) is accordingly not only contrary to the principle of subsidiarity. It is also inconsistent with the Constitution's text. It is not every mother-tongue or indigenous language which is contemplated by sections 6 and 29. Only official languages fall within their operation.

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[237] Record p 1185 para 189ff.

[238] The applicants misconstrue section 6 as one of the "foundational values of the Constitution". It is section 1 of the Constitution which sets out the founding values of the Constitution. Section 6 forms part of Chapter 1, which comprises the founding provisions.

[239] Para 173 of the applicants' heads of argument.

Structural relief is inappropriate in the circumstances of this case

146 We deal with the declaratory and mandatory relief in section VIII below in commenting on the applicants' heads of argument. In this section we focus on structural interdicts, demonstrating why the Constitutional Court's well-known reluctance to grant structural interdicts apply with particular force in the current circumstances.[240]

Structural relief is constitutionally inappropriate in the current circumstances

> *The structural relief sought in the notice of motion necessarily requires the Court to override the existing legislative and policy matrix, despite it not being impugned. This is impermissible. No organ of State can "simply override the policy adopted or act contrary to it."*[241] *This can only be done after a policy has been successfully impugned. The Action Plan and associated policies and intervention measures are extant and are being implemented. Any prayer which requires their override invites a court to violate the separation of powers doctrine.*[242]

147 A nation-wide structural interdict also contradicts one of the purposes of the governing legislation. As the Constitutional Court held in *In re: The National Education Policy Bill No 83 of 1995*,[243] one of the purposes of the Bill which became the National Education Policy Act is to "accommodate differences between the national government

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[240] See e.g. Davis "Adjudicating Socio-Economic Rights in the South African Constitution: Towards 'deference lite'?" (2006) 22 SAJHR 301 at 311, in the context of the Constitutional Court's case law on sections 26 and 27 of the Constitution. See also Keightly op cit at 309.

[241] Rivonia (supra) at para 49(a). See, too, Ermelo (supra) at paras 73-75; Welkom (supra) at paras 74-76, 79 and 150.

[242] Moseneke "Oliver Schreiner memorial lecture: Separation of powers, democratic ethos and judicial function" (2008) 24 South African Journal on Human Rights 341 at 349: "courts must observe the limits of their own power." See also Keightly op cit at 309: the principle of separation of powers and the need to demonstrate the appropriate respect to other arms of State "extends also to the relief granted in socio-economic rights cases."

[243] 1996 (4) BCLR 518 (CC) at para 28.

and the provinces." These differences do not only exist on the ideological level, but are practical: different circumstances prevail in different provinces and require different solutions. A *"nation-wide"* supervisory regime to be conducted ex Cape Town by this Court is not consistent with the division of powers between different spheres of government. Nor is it realistic. It would involve supervision over circumstances in e.g. the Tshikondeni rural community, situated 140 km from Musina, in the Limpopo province; Lusikisiki, situated 45 km north of Port St Johns in the Eastern Cape province; and even far more remote rural areas. The Constitution recognises these realities. It is *inter alia* for this reason that it entrenches a decentralised approach to basic education.[244]

148 Furthermore, the basis on which structural relief is insisted on in the replying affidavit similarly renders it constitutionally inappropriate. The replying affidavit asserts that *"[u]ntil such time"* as the system "*ensures, without exception, that every child, in every classroom, at every stage, has a textbook in the correct language that is appropriate to the subject of the course being attended"*, *"[a] supervision order is the most efficient and effective way of dealing with this problem."*[245] This is a legally-flawed premise.[246] While the respondents are committed to the best possible system and are striving towards one, perfection *"is not the constitutional standard"*.[247]

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[244] Malherbe "Centralisation of power in education: have provinces become national agents? (2006) 2 TSAR 237 at 248, criticising the previous administration for top-down usurpation of provinces' concurrent competencies in relation to basic education.
[245] Record p 2868 para 197.
[246] It is also factually flawed, for reasons set out below.
[247] Mazibuko (supra) at para 164

It follows that a court cannot intervene because perfection has not been attained.

149 The replying affidavit further resorts to another legal misconception. It is that the right to basic education is not a socio-economic right and that therefore no duly deferential approach is required by courts.[248] Both elements of this proposition are mistaken. First, the right to basic education is a socio-economic right.[249] That is why it was first recognised in the International Covenant on Economic, Social and Cultural Rights (1966); why it is the UN Committee on Economic, Social and Cultural Rights whose *"four As"* are obliquely invoked by the applicants; and why the right is the subject-matter of the standard textbook on socio-economic rights in South Africa.[250] Second, the applicants' formalistic resort to a classification of the right (i.e. whether it is a political, civil or social right) is not what the Constitutional contemplates; instead the proper principle informing a court's exercise of its remedial discretion is the separation of powers doctrine.[251] Constitutional Court case law identifies the doctrine of separation of powers as requiring courts to exercise their remedial discretion with an appropriate degree of respect for other arms of Government's constitutional role. Accordingly, what the applicants

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[248] Record p 2870 para 205.

[249] ***Minister of Health v Treatment Action Campaign (No 2) (supra)*** at para 94; ***Juma Masjid Primary School v Essay NO*** 2011 (8) BCLR 761 (CC) at para 37.

[250] Liebenberg Socio-Economic Rights: Adjudication under a transformative constitution" (Juta & Co Ltd, Cape Town 2010) at 242-256, a source absent from the applicants' heads of argument.

[251] See e.g. Moseneke op cit at 349: "Our system of separation of powers must give due deference to the popular will as expressed legislatively, provided the laws and policies in issue are consistent with constitutional dictates."

correctly[252] identify as *"a reluctance to grant structural relief in respect of socio-economic rights"*[253] equally applies to the right to basic education.[254] To the extent that the applicants' papers invite this court to follow what is suggested to be an approach in terms of which "*courts have not been duly deferential"*,[255] this is insupportable and inconsistent with the Constitution and Constitutional Court case law.

Structural relief is legally impermissible in the current circumstances, and not supported by the bases advanced by the applicants

150 The applicants seek to support a case for a structural interdict on the basis of past litigation relating to certain circumstances which prevailed only in a small minority of provinces.[256] But this is no basis to grant a structural interdict over different respondents.[257] Nor is it a

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[252] See e.g. ***City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*** 2012 (2) SA 104 (CC) at para 101, where a structural interdict granted by the High Court (after declaring a policy unconstitutional) was set aside by the Supreme Court of Appeal, and a cross-appeal to reinstate the structural interdict was dismissed by the Constitutional Court. See, too, Rail Commuters Action Group v Transnet Ltd t/a Metrorail (supra) at paras 109 and 111, setting aside the structural interdict granted by this Court. See further ***Minister of Health v Treatment Action Campaign (No 2) (supra)*** at para 129, setting aside the High Court's structural interdict.

[253] Record p 2870 para 205.

[254] ***Minister of Health v Treatment Action Campaign (No 2) (supra)*** at para 129, setting aside an order by the High Court which included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution.

[255] Record p 2870 para 205.

[256] Record p 2872 para 213.

[257] To do so would constitute an overbroad remedy, binding entities to a court order and exposing them to contempt of court proceedings when there have been no past failures on their part. A court order can only be granted in anticipation of the violation of a right when a case for a conventional interdict is made out. No such case is advanced. There is no evidential basis for presuming any imminent threat that textbook delivery failures are bound to occur in provinces in which it has never been a problem, least of all the Western Cape. Imposing a duty to devise a "countrywide plan" in the absence of a nation-wide textbook delivery failure (as the applicants expressly seek: Record p 2910 para 302) is more than simply "bold" (as the applicants describe their own application: Record p 2901 para 303). It is legally misconceived, because it requests a remedy without seeking to establish a commensurate violation. No organ of State is authorised to exercise its

reason for this Court to become the *"nation-wide"*, pre-emptive supervisor of other courts' orders. This Court, with respect, does not have such jurisdiction – as the applicants correctly concede.[258]

151 Furthermore, in this matter, different spheres and organs of State are responsible for different aspects of the relief sought. Some of these institutions (e.g. the provincial departments of social development; SACE and the Pan South African Language Board) have a distinct constitutional and statutory role. The relief sought has a direct impact on their functions. This further militates against structural relief in the current circumstances.[259]

152 Also the reliance on the National Development Plan is legally impermissible. Yet it is repeatedly invoked in the replying affidavit in support of structural relief.[260] The applicants' heads of argument go further by identifying the NDP's *implementation* as *"an area which is particularly well suited to the granting of a structural interdict"*.[261] This is misconceived. The NDP cannot found a basis for legal relief,

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constitutional powers in a disproportionate manner (see e.g. ***Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa***, 1996 (4) SA 744 (CC) at para 284; see, too, ***Mohunram v National Director of Public Prosecutions*** 2007 (4) SA 222 (CC) passim, concerning the very question whether the court-sanctioned remedy was proportionate).

[258] Record p 2880 para 242.

[259] ***Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty)*** 2004 (6) SA 40 (SCA) at para 41.

[260] It is invoked over twenty times: Record p 2798 para 12; Record p 2799 para 13; Record p 2808 para 33; Record p 2808 para 35; Record p 2809 para 37; Record p 2842 para 123; Record p 2862 para 179; Record p 2864 para 184; Record p 2875 para 223; Record p 2875 para 224; Record p 2881 para 247; Record p 2882 para 247; Record p 2884 para 253; Record p 2885 para 254; Record p 2886 para 255; Record p 2892 para 276; Record p 2894 para 282; Record p 2895 para 285; Record p 2898 para 295; Record p 2903 para 309; Record p 2903 para 310; Record p 2909 para 326.

[261] Para 172 of the applicants' heads of argument.

because it is not law.[262] It cannot be invoked to trump the Children's Act. It is the Children's Act which is the statutory instrument allocating different constitutional responsibilities to separate organs of State within distinctive spheres of government.[263]

153 The reliance on past litigation is equally self-defeating. The facts demonstrate that competent institutional litigants are ready, able and willing to litigate at very short notice if any emergency arises. Where this has been done, courts of competent jurisdiction have intervened to grant appropriate relief, where necessary. It is not always necessary, however. As the common cause facts reflect, the litigation history demonstrates the respondents' *"preparedness to make concessions and comply with settlement agreements."*[264] The applicants' resort to their own lack of "wherewithal",[265] while they

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[262] ***Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*** 2001 (4) SA 501 (SCA) at para 7, confirmed in ***Head of Department, Department of Education, Free State Province v Welkom High School*** 2014 (2) SA 228 (CC) at para 217 (per Zondo J; Mogoeng CJ, Jafta J and Nkabinde J conc).

[263] In reply, the applicants indeed appear to contemplate a role for local government too, in addition to the provincial sphere tasked with early childhood development by the Children's Act (Record p 2885 para 254).

[264] Record p 1231 para 319, not denied at Record p 2901 para 304. Adopting an armchair approach is not permissible (especially absent a full factual ventilation and administrative review of the action or inaction) and cannot be a proper basis for criticising the relevant respondent for not having acted more promptly. Even were it otherwise, this is still no proper basis for categorical structural relief against the incumbent respondents. Nor is it an issue within this Court's jurisdiction. The answering affidavit explained that complex executive choices must be made by the Minister and her department to avoid unions' obstruction (Record p 1249 para 373, not denied at Record p 2913 para 336). Culpable remissness or wilful disregard of section 29(1)(a) or court orders can therefore not be inferred.

[265] Record p 2901 para 303. Understandably the applicants are unable to litigate beyond the area of their members' activities. Its own constitution does not contemplate an extraterritorial litigious life for the second respondent, and therefore does not endow it with financial or other resources to do so. Litigation (and the supervision of litigation) on a nation-wide basis is an extensive exercise which consumes time and resource. The respondents themselves are constantly under siege. Because a structural interdict is not a class action, it does not preclude other litigants from pursuing concurrent litigation against any of the respondents. A structural interdict as proposed by the applicants therefore threatens exhausting both the applicants and the respondents (and the Court), while simultaneously exposing the respondents to concurrent court proceedings and orders.

demonstrate how institutional litigants have been able to institute proceedings at very short notice when considered necessary (and without identifying the need for structural relief), is not a basis to argue that *"the justice system [should] make a single wider-ranging … intervention"*.[266]

Structural relief is impractical in the current circumstances

154 The relief requires concurrent supervision by different supervisory bodies (including Chapter 9 institutions and courts). The applicants do not suggest how this Court should *"delegate"* the unidentified *"separate aspects of the relief claimed, in whole or in part, to any one or more of them."*[267] Indeed, the applicants can do no more than to place themselves *"in the hands of this Honourable Court"*.[268] They are thus unable to suggest any practical division of functions between this Court, other divisions of the High Court, or any of the three Chapter 9 institutions which the applicant contemplate could perform supervisory functions.[269] The applicants do, however, envisage that disputes may arise throughout the indefinite supervisory period, and says that it is obvious[270] that this Court will have to settle any dispute which arises. Disputes in the execution of a structural interdict simultaneously supervised by, say, the Human Rights Commission and the Public Protector are indeed readily

[266] Record p 2901 para 304. Qualifying such extraordinary intervention as "effective", as the applicants do in the elided text, begs the question.
[267] Record p 2809 para 39.
[268] Record p 2804 para 23.
[269] See also Record p 2811 para 43, resorting to speculation (what "may well be") and to the sixteenth respondent "sniffing out" something for which no case has been made out in the founding (or, for that matter, replying) papers.
[270] Record p 2810 para 40.

foreseeable. Crafting a remedy liable to lead to disputes and court intervention is not appropriate relief.

155 The relief is also unworkable for a yet more fundamental reason. On the applicants' approach, that which the relief is intended to achieve (*"effective delivery of basic education"*)[271] can only be established on a certain minimum test. The applicants formulated the test thus:

> *"learners shining in the ANA assessments [sic] and graduating from Grade 12, functionally literate and numerate, to a sufficient extent that they are able to successfully participate in the job market, or are able to progress to tertiary education and to complete the educational requirements within the tertiary institutions' stipulated time periods successfully."*[272]

156 This test renders structural relief unworkable. The test which the applicants insist on (and characterise as one *"[p]ut at the lowest"*)[273] requires this Court to continue to supervise the provision of basic education until learners excel in the ANAs (but without suggesting the required level for excellence), and until Grade 12 achievements are at a level which ensures employment or a tertiary degree. How it is to be determined whether learners are *"able"* to progress to tertiary education and to complete tertiary education at a 100% first-time pass rate (which, of course, requires a court to presume the congenital suitability of all children for tertiary education) is not suggested. What is necessarily implicit is that the period of supervision extend over the course of a full education career spanning from even before Grade R to Grade 12. The applicants'

[271] Para 9 of the applicants' heads of argument.
[272] Ibid.
[273] Ibid.

structural interdict accordingly envisages that this Court would continue to supervise basic education on a "nation-wide" basis for a period of over twelve years.

157 More importantly, nothing in section 29 suggests that the constitutional right to basic education cognises this ambitious outcome. Section 3 of the South African Schools Act, which gives effect to section 29 (and which is not impugned), contemplates that the obligation to provide basic education be limited to *"the age of fifteen or the ninth grade, whichever occurs first"*.[274] Thus, setting a test for establishing compliance with basic education which extends until Grade 12 by far exceeds the period Parliament legislated for the provision of basic education (which is only until Grade 9). Requesting a structural interdict to enforce compliance with such a test is accordingly inconsistent with the statutory scheme.[275]

Structural relief is counterproductive in the current circumstances

158 It is common cause that this application was instituted in ignorance of many of the policy instruments and other intervention measures deployed by the respondents and uncited stakeholders.[276] To seek a categorical overhaul of these measures, as the applicants do, precipitates retrogression. This is because the relief sought requires that:

[274] Section 3(1), read with section 3(3).
[275] While the applicants' heads of argument concede that a school career towards Grade 12 is not what the South African Schools Act provides for (para 148), their argument does not surmount its own internal inconsistency.
[276] Record p 1225 para 305, not denied at Record p 2896 para 288.

158.1 the implementation of extant plans and policies be suspended;

158.2 new plans and policies be formulated, and costed;

158.3 once formulated and costed, plans be ventilated in indeterminable court proceedings (each of which resulting in months' delay);

158.4 once approved by court, a public consultation process might well be required; and

158.5 once finalised, officials be trained in the implementation of these measures.

It will accordingly take many years to accomplish a new coherent plan capable of implementation. And it is only in its implementation that that plan's strengths and weaknesses will be discovered.

159 There is, with respect, no guarantee that even a Full Bench of this Court (or, for that matter, any of the Chapter 9 institutions) would be capable of ushering in an education system living up to the applicants' expectations: a plan which guarantees fault-free delivery; no drop-outs from school or university; and career-readiness (implying a ready career) for each South African. In none of the cases in which the Constitutional Court identified the many problems besetting South African society has it suggested that the quick-fix is a structural interdict. Instead, the Constitutional Court's considerable reluctance to grant a structural interdict suggests the very converse.

160 To direct the respondents to embark on an undefined overhaul of a system which, particularly pursuant to the Action Plan, is being implemented accordingly to a meticulously planned timeline over decades is especially inappropriate in circumstances where the applicants could identify no defect in any of the policies. Their failure to impugn the policies apart, the applicants have not suggested which policies require revision and to what extent. They have not suggested that any policy is discriminatory, overbroad, under-inclusive, inflexible or in any other way unconstitutional. They simply ask that the respondents be sent back to a *tabula rasa*, and they do not ask for this Court to provide any legal guidance in the reformulation process.[277] This is because the respondents could identify no material defect in the policy. Their inability to do so further confirms that, at most, the concerns underlying this application relate to the *implementation* of the array of interrelated policies and measures spanning the complex field of basic education. Formulating, ventilating, and floating new policies and measures will unavoidably introduce new difficulties in complying with them. The applicants' back-to-square-one approach is accordingly counterproductive.

Structural relief is disruptive in the current circumstances

161 The founding affidavit expressly contemplates *"discrete"* judicial intervention into a coherent education system presenting an

[277] See e.g. Kiliko v Minister of Home Affairs 2006 (4) SA 114 (C) para 32 for an example of courts' approach to a structural interdict: specifying the defects in a successfully impugned practice and policy, and identifying the aspects required for reporting back to court.

integrated and holistic remedial approach to a minefield of tenacious legacy issues.[278] The applicants' symptomatic tinkering precipitates unknown consequences, risking the exclusion of the most vulnerable children from an all-inclusive, carefully-considered education rehabilitation policy.[279]

162 The applicants' approach is also internally-inconsistent. They caution against *"policy fatigue and phobia"*, draw attention to the *"need for policy restraint and discretion in the formulation of policy"*, and the need to "work from the premise: if it ain't broken, don't fix it."[280]

163 Throughout the answering affidavit the respondents have demonstrated that their policies and interventions are in particular directed at pro-poor outcomes.[281] They have also shown that these policies and their implementation take time to mature and inure to the benefit of beneficiaries. Should these plans be required to be revised at this stage, the success which they are starting to show will be undermined.

164 Finally, even the concurrent court orders and litigation to which the applicants refer in an attempt to justify requesting this Court to grant nation-wide structural relief do not assist the applicants. The

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[278] Record p 1168 para 146. As the answering affidavit demonstrates, numerous intervention measures formulated and implemented by the respondents have a multi-dimensional approach, addressing simultaneously e.g. teacher development, learners' numeracy and literacy, and mother-tongue education (Record p 1170 para 151).

[279] Ibid.

[280] Record p 2836 para 111.8. This paragraph forms the proper subject of a strike-out application. It nevertheless demonstrates the inconsistencies and conceptual anarchy underlying the application.

[281] See e.g. Record p 1141 para 81; Record p 1143 para 85; Record p 1147 para 98.

remedial regime devised and to be devised by those courts, in the particular circumstances of each case, with due regard to the concrete facts as ventilated in court papers, should not be pre-empted by a court without any concrete connection to the issue for remedial action.

The cited Chapter 9 institutions are not appropriate supervisory bodies in the current circumstances

165 The applicants appear to concede that this Court (especially not a Full Bench) is not appropriately to be tasked with a structural interdict which involves supervision of all nine provinces over a period of many years. It is for this reason that the three Chapter 9 institutions are sought to be *"harnessed"*.

166 While the founding affidavit prioritised the Public Protector, the heads of argument now prefers the South African Human Rights Commission as supervisory body. However, when the SAHRC's constitutional mandate is read, the lack of utility in such relief is apparent. Section 184(4) provides that the Commission must annually obtain and reports from *"relevant organs of State"* setting out *"measures that they have taken"* to comply with *inter alia* the right to basic education. There is nothing in the applicants' affidavits or heads of argument which suggests that the *"radical"* remedy they contend is required will be accomplished by a court order which merely increases the frequency of the reporting duty contained in section 184(4) of the Constitution.

167 The Public Protector's most recent involvement in a textbook investigation, and the contemplated review application to set aside her report,[282] with respect, renders her office *prima facie* inappropriate to supervise the same issue. It appears that the applicants have for this reason relegated the Public Protector to second position in their heads of argument. The applicants nevertheless argue that maladministration is a basis for involving the Public Protector.[283] The argument proceeds that section 100 interventions in the Eastern Cape and Limpopo *per se* establish *"sufficient"* maladministration.[284] The applicants' logic is that because the national Executive has resorted to the section 100 remedy, therefore the Public Protector's "province"[285] is established. This is a *non sequitur*. A prior or extant remedial measure (i.e. the section 100 intervention) does not provide proof of the propriety of another remedial measure (i.e. structural relief). Instead, it demonstrates that the maladministration is being attended to, and strongly suggests that a concurrent remedial measure is inappropriate.

168 As regards the Auditor-General, we have already referred to the unqualified abandonment of any reliance on corruption in procurement.[286] As mentioned, it is this issue which formed the basis for purporting to involve the Auditor-General as potential supervisory

[282] Record p 1199 para 237.
[283] Para 163 of the applicants' heads of argument.
[284] Para 164 of the applicants' heads of argument.
[285] Para 163 of the applicants' heads of argument.
[286] Record p 2902 para 306.

body.[287] Now the applicants raise in their heads of argument the spectre of ghost provinces caused by a great *"trek"* from the Eastern Cape to the Western Cape.[288] This misplaced political mantra is not supported by any evidence. The further resort to *"teachers not being paid" and "appointments not being made"*[289] equally forms no part of the applicants' cause of action.

RESPONSE TO APPLICANTS' HEADS OF ARGUMENT

169 In this penultimate section we deal briefly with the more relevant contents of the applicants' heads of argument, to the extent required. However, most of the applicants' argument has already been addressed in our submissions above. Accordingly only the following six issues require a brief response.

The applicants' test for compliance with section 29(1)(a)

170 We have already dealt with the test set out in paragraph 9 of the applicants' heads of argument, which reinforces the legal premise on which this application rests.[290] It is that ANA results, matric results, joblessness and university performance establish a failure by the respondents to comply with section 29(1)(a) of the Constitution, and that the respondents have failed to implement reasonable remedial

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[287] As mentioned, the only suggestion in the founding affidavit of any basis for supervision by the Auditor-General is a reference to a newspaper report referring, in turn, to a past report by the Auditor-General into allegations of corruption and financial mismanagement in the Limpopo province (Record p 32 para 46). It is only with reference to "corruption-free and timeous delivery of … teaching materials" (Record p 90 para 142) that the founding affidavit attempted to make out a case for supervision by the Auditor-General.

[288] Para 167 of the applicants' heads of argument.

[289] Para 168 of the applicants' heads of argument.

[290] It is for this reason that a quarter of the founding affidavit is attributed to ANAs results (Record pp 56-77 paras 99-112bis).

measures. Because the respondents demonstrably have formulated and implemented (and are continuously evaluating and continuing the implementation of) remedial measures, the basis on which this application has been brought is fallacious.

Factual disputes

171 The applicants argue that the respondents' answering affidavit is of a nature which may be rejected on the very exceptional bases set out in *Rail Commuters Action Group*.[291] In that case, however, the Constitutional Court held that a *"welter of factual disputes"* existed which could not be determined on the papers.[292] The only factual issue which could be determined on the papers was one which was not in dispute.[293] Thus *Rail Commuters Action Group* does not support the applicants.

172 The applicants further rely on *National Director of Public Prosecutions v Zuma*.[294] In *Zuma* Harms DP held that the High Court erred because it decided the case on probabilities without rejecting the NDPP's version.[295] It is exactly this repudiated approach which the applicants contend for: the drawing of an adverse inference, despite the Minister's version that policies, plans and implementation measures exist and are being applied.[296]

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[291] ***Rail Commuters Action Group v Transnet Ltd t/a Metrorail (supra)*** at para 53.
[292] Id at para 54.
[293] Id at para 56.
[294] 2009 (2) SA 277 (SCA) at para 26.
[295] Ibid.
[296] Had the applicants' heads of argument's quotation from the very beginning of para 26 of the Zuma judgment not abruptly ended just before the last sentence (in which Harms DP

173 As mentioned, the Minister was required to deal with allegations in the founding affidavit which averred that the respondents have misconceived their legal duty and failed to act upon any of the NDP's proposals,[297] failed to roll out solutions *"across the land"*,[298] and have done "[n]othing concrete … to address the recommendations in the [2012 ANA] Report".[299] The Minister responded by identify concrete policies, interventions and other activities to the contrary.[300] It is now common cause that the application was launched in ignorance of *"most of the relevant policy instruments and interventions."*[301] Accordingly it is the factual version put up by the applicants which are untenable.

174 The applicants are accordingly not supported by principle or precedent, least of all the authorities they cite.

Declaratory relief

175 The applicants rely on *Allpay* and *Rail Commuters Action Group* in support of their request for declaratory relief. Neither supports the applicants' approach.[302]

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rejected the High Court's resort to inferences), this would already have been apparent from the quotation in para 12 of the applicants' heads of argument.

[297] Record p 50 para 79.

[298] Record p 58 para 98.

[299] Record p 74 para 101bis.

[300] See e.g. Record pp 1118-1120 para 21; Record p 1122 para 23. She also explained that interventions cannot be expected to yield the intended results immediately (Record p 1122 para 24); and acknowledged that certain problems have been identifies (Record p 1127 para 37).

[301] Record p 1225 para 305, not denied at Record p 2896 para 288.

[302] The further reference in parenthesis to ***Glenister v President of the Republic of South Africa*** 2011 (3) SA 347 (CC) at para 191 fn 48 and 49 is misdirected. Glenister deals with a situation where legislation was impugned (which the applicants in casu failed to do), and reiterates courts' restrained and focused constitutional role. It does so by

176 Firstly, *Allpay* concerned review proceedings impugning certain conduct. In this application, the applicants have resorted to an approach in which they have not impugned any statutory or policy instrument, or any conduct pursuant to the governing legal regime. Thus the reliance on the *dictum* which refers to courts' responsibility to ensure that unconstitutional conduct is declared invalid does not assist the applicants. They have identified no commission or omission which is contrary to the governing statutory scheme, which must – absent a challenge – be presumed to be valid.

177 Secondly, in Rail Commuters Action Group the Constitutional Court confirmed that the reasonableness standard governs,[303] because it "strikes an appropriate balance between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances." The Court accordingly confirmed Minister of Health v Treatment Action Campaign (No 2), in which it was held that:

> *"Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the*

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referring in fn 48 and 49 to Rail Commuters Action Group at para 86, which in turn quotes Bato Star at para 48:

> *"[a] decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker."*

[303] Supra at para 87.

> *Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation."*[304]

178 The current applicants have not sought to subject the reasonableness of the many measures adopted by the respondents and other entities (of which the founding affidavit demonstrates ignorance) to court scrutiny, nor has the implementation of any measure been impugned. Accordingly the application seeks relief which is inconsistent with the *"restrained and focused role"* which the Constitution contemplates for courts.[305]

179 In Rail Commuters Action Group declaratory relief was warranted because "Metrorail and the Commuter Corporation den[ied] that they bear obligations to rail commuters to protect their safety and security."[306] The Constitutional Court held that they have "clearly misconstrue[d] the nature of the obligations imposed upon them by the SATS Act."[307] In the current matter, there is no need to declare the law: the Constitutional Court already did (in Juma Mushid). Moreover, because in "a constitutional democracy … courts … declare the law, on the one hand, but leave to the other arms of

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[304] Supra at para 38.

[305] See further Keightly op cit at 307-308, summarising the position as follows:

> "*Legislation and other measures, such as policy, are therefore the primary instruments for the achievement of socio-economic rights. The role of courts in this process is an important but limited one. … In essence, the Constitutional Court sees the function of the courts in the adjudication of socio-economic rights as being premised on ensuring democratic accountability on the part of the legislative and executive branches of government in respect of the manner in which they seek to fulfil their obligations. In particular, the Court has indicated that the Constitution does not require courts 'to take over the tasks that in a democracy should properly be reserved for the democratic arms of government'. … provided the policy in question is reasonable, and the process followed is not flawed, the courts will not interfere"* (references omitted).

[306] Id at paras 89 and 92.

[307] Id at para 89.

government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed",[308] mandatory and supervisory relief was inappropriate.[309]

Mandatory relief

180 The applicants appear to contend that the *"broadly framed"*[310] mandatory relief is a reason for granting it. The correct legal position is, of course, the contrary. Mandatory relief must be narrowly (not broadly) framed. As the Constitutional Court itself confirmed in the very context of mandatory relief

> *"a claimant, who seeks to vindicate a constitutional right by impugning the conduct of a State functionary, must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making orders, have to formulate orders with appropriate precision.*[311]

181 Thus, an order which is *"broadly framed"* merely to *"require the respondents to take reasonable and accountable steps to put basic education in place"*[312] is not what the Constitutional Court requires. *A fortiori* in circumstances where an expansive regulatory and remedial framework already exists. In such circumstances mandatory relief (read with declaratory relief, if necessary) must identify the respect in which a measure, or any functionary's implementation thereof, requires correction.

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[308] Id at para 108.
[309] Id at para 109.
[310] Para 17 of the applicants' heads of argument.
[311] ***Von Abo v President of the Republic of South Africa*** 2009 (5) SA 345 (CC) at para 50.
[312] Para 19 of the applicants' heads of argument.

Structural relief

182 We have already dealt with this aspect above, demonstrating that the Constitutional Court is reluctant to uphold structural interdicts. The *Allpay* litigation is in no way comparable to this matter, and the structural interdict granted in that matter was very simple.[313] In this case, the applicants ask for *"an innovative and complex regime for supervision"*.[314] This will – on their own approach – require supervision extending beyond the statutorily prescribed duration of basic education.[315] The applicants further concede that the relief presents *"problems of supervision"*, for which they can only tenuously suggest *"a possible solution"*.[316] But this solution involves further litigation, which they say they do not have the wherewithal to pursue.[317]

183 We have also already shown, firstly, that the applicants' case based on early childhood development is flawed, because it erroneously elevates the National Development Plan to a status above the Children's Act. Secondly, considerable measures exist to further mother-tongue education and indigenous languages. Thirdly, the professionalisation of teachers receives extensive attention by the

[313] As para 4 of the order reflects, it required the lodging of a report with the Registrar informing the court of any decision not to award a tender, and providing the relevant information regarding the assumption of the duty to pay welfare grants; and the filing of an audited statement of expenses, income and profit (which statement had to be independently audited for verification).
[314] Para 22 of the applicants' heads of argument.
[315] Para 9 of the applicants' heads of argument.
[316] Para 157 of applicants' heads of argument.
[317] The respondents do not criticise the applicants' for what they describe as their own lack of "wherewithal". What is in issue is whether a remedy which requires extensive further litigation is in the interests of justice and the administration of justice, and whether it is appropriate and even practically possible, regard being had to the competing demands on the parties' financial and human resources.

respondents (and other entities, which are not even cited). Fourthly, in the vast majority of provinces the delivery of textbooks is not an issue at all. It follows that the applicants have not met the standard which they accept applies. They have to establish *incompetence, inattentiveness and intransigence*. They say that this is either common cause or apparent from the answering affidavit.[318] Unsurprisingly no record references are provided to support this extraordinary hypothesis.

***In limine* issues**

184 We have already dealt with the *in limine* issues. It remains only to address the unwarranted criticism in the applicants' heads of argument that these issues are "technical points" intended to obstruct. This is factually and legally misconceived.

185 First, as a matter of fact, it is common cause that the *in limine* issues are raised on a principled basis,[319] not as expedient.[320] The respondents have fully demonstrated their preparedness to answer the application on its *"merits"*.[321]

186 Secondly, as matter of law, the Constitutional Court has itself emphasised the need for courts to scrutinise whether the appropriate relief is sought by the appropriate party in appropriate

[318] Para 154 of the applicants' heads of argument.
[319] Record p 1128 para 40, not denied at Record pp 2827-2828 para 92.
[320] As the applicants' heads of argument now seeks to suggest, however obliquely (and off the papers).
[321] Record p 1128 para 40, not denied at Record pp 2827-2828 para 92; Record p 1130 para 45, "noted" at Record p 2828 para 96.

proceedings.[322] This requires a court to consider its own jurisdiction,[323] litigants' standing,[324] and absentees' interests in the proceedings (and, especially, in the orders sought).[325] Thus jurisdiction, standing and non-joinder are issues which are incumbent on a court to consider. It is, quite contrary to the suggestion by the applicants, indeed a State litigant's responsibility to draw such issues to a court's attention. To do so is in the interests of justice and gives effect to the doctrine of separation of powers.

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[322] See e.g. ***Tulip Diamonds FZE v Minister for Justice and Constitutional Development*** 2013 (10) BCLR 1180 (CC) at para 1:

> *"Standing is an important element in determining whether a matter is properly before a court. Our law accords generous rules for standing that permit applicants to bring lawsuits either on their own behalf or on behalf of others. But these are not limitless. A methodical and thorough application of the rules of standing is necessary to ensure, amongst other things, that relief is being sought by the appropriate party."*

See also ***Van Wyk v Unitas Hospita***l 2008 (2) SA 472 (CC) at para 32:

> "It is true the case raises an important question concerning the constitutional right of *access to information. This in itself is no reason to come to the assistance of a litigant who has been dilatory in the conduct of litigation. This court has previously refused to come to the assistance of litigants where there was a delay of some nine months regardless of the issue raised."*

See, too, ***Swartbooi v Brink*** 2006 (1) SA 203 (CC) at paras 4 and 5:

> *"… During argument this Court raised the important procedural consideration that the council, which had been the respondent in the High Court, was no longer a party to the proceedings. It has a material interest in the appeal, for any finding that the High Court was wrong in ordering the applicants to pay the costs would almost inevitably result in that liability being placed on the council. The council ought therefore to be joined as a party to the proceedings.*
>
> *Quite apart from the procedural question, important issues were raised concerning the separation of powers and the scope of the privileges and immunities conferred upon members of a municipal council by section 28 of the Local Government: Municipal Structures Act 117 of 1998. These are issues that affect all municipal councils and could have a significant bearing on the way in which they function. It is desirable that these issues be determined by this Court. For this reason alone leave to appeal should be granted. It is also desirable that notice of these proceedings be given to the South African Local Government Association, the members of provincial executive committees responsible for local government in each of the provinces as well as the national minister responsible for local government, and that they be given an opportunity to address argument to this Court if they choose to do so. It would be helpful to the Court for the views of those involved in local government to be made available to it."*

[323] See e.g. ***S v Zuma*** 1995 (2) SA 642 (CC) at para 2.

[324] See again ***Tulip Diamonds FZE v Minister for Justice and Constitutional Development (supra)*** at para 1. See also ***Oudekraal Estates (Pty) Ltd v City of Cape Town*** 2004 (6) SA 222 (SCA) at para 35.

[325] See again ***Swartbooi v Brink (supra)*** at paras 4 and 5.

187 Moreover, the respondents' identification of these issues in their answering affidavit not only assists this Court, it also facilitated the full ventilation of these issues and enabled the applicants to contest or purge the identified defects. The applicants have indeed availed themselves of this opportunity in relation to standing, conceding the defect and now seeking condonation. This the respondents do not oppose.

188 The applicants' accusations are accordingly unfortunate.

Residual issues

189 The remainder of the applicants' heads of argument have been dealt with in the preceding sections. For the reasons there advanced, we submit that the applicants' argument is factually unfounded and legally misconceived.

CONCLUSION AND APPROPRIATE RELIEF

190 It is a poor reflection on the applicants' case that they are driven to resort in reply to new (some serious,[326] but all inadmissible and untenable) allegations in order to prop up a case for extraordinary relief. The express purpose of introducing the new material is to demonstrate that "a structural interdict will wonderfully focus the minds" of the respondents *"to a point where the criticism that basic education is not being delivered becomes history"*.[327] Herein lies a yet further problem with the applicants' case. It is premised on

[326] See e.g. the unsubstantiated claim of harassment and intimidation (Record p 2849 para 146).
[327] Record p 2853 para 155.

criticisms. Criticisms of service delivery are a far-ranging phenomenon in a democracy where freedom of expression is encouraged, especially during an election year. Contrary to the case made out in reply, *"current complaints"*[328] do not sustain a case for structural relief. This is especially the position in circumstances where it is common cause that the respondents' policy choices are based on comparative studies, and are continuously re-evaluated in the light of changing South African circumstances and national and international developments in the specialist field of basic education.[329] There is on the one hand no utility in an order directing the respondents to do that which they are already doing. On the other hand, court-imposed strictures pursuant to a structural interdict are not conducive to a flexible and organic process which is expert-driven and fact-based.

191 Even in their attempt to criticise the Minister, her department, the other respondents, and indeed Government in its entirety, the applicants must admit that the programmes introduced by the respondents are *"helpful"*,[330] *"importan[t]"*[331] and *"welcome"*.[332] The applicants have been unable to identify any provisions in any legislation, policy or intervention measure which is constitutionally offensive or even merely inappropriate. Nor have they identified any failure to comply with any provision of the statutory scheme giving effect to section 29(1)(a) of the Constitution.

[328] Record p 2853 para 155.
[329] Record p 1242 para 352, not denied at Record p 2909 para 327.
[330] Record p 2857 para 165.
[331] Record p 2867 para 193.
[332] Record p 2869 para 201.

192 It follows that the substantive relief must be refused, and with it the ancillary relief. For the convenience of the Court, we summarise the essential bases for disposing of the substantive relief as follows.

Disposal of substantive relief

193 First, the applicants' reliance on the results of national intervention measures (like the ANAs) to make out a case in relation to numeracy and literacy is self-defeating. This is because these intervention measures demonstrate the respondents' commitment to fulfil their constitutional functions. It also demonstrates the radical nature of this application. Were it to be held that adverse statistics founds a case for structural relief, a structural interdict should equally issue as a result of, say, the high incidence of road deaths in South Africa, rape, and child abuse; or the state of the public health system. In circumstances where a full statutory and policy regime addresses these issues, and absent any declaration being sought that the measures are invalid, it is not open to a court to supervise other arms of Government's fulfilment of their functions as conceived by Parliament. This disposes of numeracy and literacy (prayer 2.1 of the notice of motion) – to the extent that this is a live issue.[333]

194 Second, no factual case is presented for the extraordinary assertion that isolated, historic failures in certain provinces is somehow imminently expected in the large majority of provinces which have

[333] Record p 2884 para 252.

never experienced any similar problem. Because the province in respect of which this Court has jurisdiction is not affected by the problem, this Court has no jurisdiction to entertain the issue.[334] Nor is there any utility in doing so, because courts in whose area of jurisdiction these failures have occurred are already addressing the issue. This disposes of substantive relief in relation to the cause of action relating to textbook delivery (prayer 2.2 of the notice of motion).

195 The third and fourth issue both relate to teachers. They involve teachers' equipment, absenteeism, accountability and professionalism. These issues are subject to the supervision and control of a statutory body (SACE) under its empowering Act. It is impermissible for the applicants simply to state that that body is *"dysfunctional"*, without providing any basis for this bland allegation. If it were true that SACE were dysfunctional, such a case had to be made out in the founding affidavit and appropriate relief had to be sought in the notice of motion. This has not been done. Apart from compelling facts demonstrating that this complaint is not factually supportable, the failure to cite SACE or impugn its activities *per se* disposes of substantive relief in relation to all issues relating to teachers (prayers 2.3 and 2.4 of the notice of motion).

196 Fifthly, the cause of action based on mother-tongue education and indigenous languages is not supported by either section 29 or section 6 of the Constitution, it violates the principle of subsidiarity, is

[334] Section 21(1) of the Superior Courts Act 10 of 2013.

incapable of being granted in the absence of necessary parties, and is factually unfounded. This disposes of prayer 2.5 of the notice of motion.

197 Finally, because the relief in relation to early childhood development is contradicted by binding legislation which is not impugned, this cause of action is constitutionally misconceived. The applicants' case is that the National Development Plan requires the centralisation of ECD functions in the national Department of Basic Education. Not only is this, as mentioned, contrary to constitutionally mandated legislation in the form of the Children's Act. The Children's Act devolution of functions gives effect to the constitutional division of concurrent competencies between national and provincial government. The contended centralisation of responsibility for ECD is accordingly contrary to the Constitution's fundamental conception of South Africa as a quasi-federal democracy. This disposes of the relief in relation to early childhood development (prayer 2.6 of the notice of motion).

198 In the absence of a well-founded case for the declaratory relief, there is no basis for any ancillary relief either. We therefore submit that this application falls to be dismissed *in toto*.

Persisting in the application warrants a costs order

199 Finally, as regards costs, the Constitutional Court reiterated the constitutional and statutory obligation to engage in good faith before turning to the courts to litigate issues within the sensitive, contested

and specialist field of basic education.[335] The answering affidavit demonstrates that this was not the approach adopted by the applicants.[336] In reply the answer was that other entities have written an open letter to the Minister in 2012.[337] The current applicants did not participate in this open letter, nor did any of the signatories of the open letter seek to support the applicants in this application. Despite every opportunity to intervene, whether as *amici* or otherwise (which they have no doubt been beseeched to do by the applicants), none of the institutional litigants in the field of basic education did so. Instead, they have effectively dissociated themselves from this application. Accordingly their open letter does not excuse the applicants' blind lunge into this litigation. It was an irresponsible approach, persisting in relief which is contrary to the Constitution and the enabling legislation. It asks this Court to give legal effect to political undertakings, not only disregarding but also contradicting extant policies and other intervention measures.

200 Accordingly a costs order is warranted.[338] We ask for the costs of three counsel[339], although the voluminous nature of this application

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[335] Welkom (supra) at 135; confirmed in Rivonia (supra) at para 73, referring at para 78 to the need to prevent litigation.

[336] Record p 1209 para 264.

[337] Record p 2882 para 248.

[338] ***Biowatch Trust v Registrar, Genetic Resources*** 2009 (6) SA 232 (CC) at para 24. The replying affidavit misconstrues the law. It states that a costs order should not be made ("especially" in public interest litigation), provided only that the application is not vexatious (Record p 2907 para 321; to this the applicants' heads of argument adds "not frivolous": para 181). The law is that "[i]f an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award" (Biowatch Trust (supra) at para 24, emphases added). Having instituted proceedings in ignorance of the factual and legal position, and having persisted in them despite the applicants' conceded ignorance having been exposed by the answering affidavit, the applicants acted manifestly inappropriately. The relief they seek is contrary to the unimpugned and binding legal regime, and thus legally misconceived. The factual premise advanced in the founding affidavit that nothing

and its complexity and importance justified the engagement of four counsel.

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has been done by the respondents has been shown to be irresponsible. The wanton criticism of the Minister and Government compounds the applicants' inappropriate conduct in this litigation. It resembles the approach adopted on behalf of Mr Glenister in Helen Suzman Foundation v President of the Republic of South Africa (supra), in which a Full Bench of this Court would clearly have ordered costs against him were he not "lucky to piggy-back" (id at para 122) on the Helen Suzman Foundation's argument.

[339] By reason of the difficulty, complexity, voluminous documentation and multiplicity of issues it is fair for the purpose of doing justice between the parties that cost of three counsel be allowed: ***Fisheries Development Corporation of SA Ltd v Jorgensen & Another, Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*** 1980 (4) SA 156 (W) at 172H.