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

Matter on Roll **19 May 2014** before a Full Bench

CASE NO: 18904/13

In the matter between:

EVELYN WILHELMINA PEASE	First Applicant
PROGRESSIVE PRINCIPALS ASSOCIATION	Second Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF BASIC EDUCATION	Second Respondent
MEC FOR EDUCATION: EASTERN CAPE	Third Respondent
MEC FOR EDUCATION: FREE STATE	Fourth Respondent
MEC FOR EDUCATION: GAUTENG	Fifth Respondent
MEC FOR EDUCATION: KWAZULU-NATAL	Sixth Respondent
MEC FOR EDUCATION: LIMPOPO	Seventh Respondent
MEC FOR EDUCATION: MPUMALANGA	Eighth Respondent
MEC FOR EDUCATION: NORTHERN CAPE	Ninth Respondent
MEC FOR EDUCATION: NORTH WEST	Tenth Respondent
MEC FOR EDUCATION: WESTERN CAPE	Eleventh Respondent
NATIONAL MINISTER OF FINANCE	Twelfth Respondent
NATIONAL MINISTER OF SOCIAL DEVELOPMENT	Thirteenth Respondent
PUBLIC PROTECTOR	Fourteenth Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Fifteenth Respondent
AUDITOR-GENERAL	Sixteenth Respondent

APPLICANTS' HEADS OF ARGUMENT

INTRODUCTION

1. The Applicants seek redress in respect of the failure on the part of the Government of South Africa to respect, protect, promote and fulfil each and every child's constitutional right to basic education due to the dysfunction in arguably about 80% of public schools as exacerbated by deficient implementation of laws, policies, practices and plans aimed at delivery of that right.

2. Constitutional Court authority in the case of *Governing Body of the Juma Musjid Primary and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) [at par. 37], the court held that *"[i]t is important ... to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures".* The Applicants contend that the right to basic education is unqualified and not subject to progressive realisation, as is the case with other socio-economic rights in the Constitution. While the Second Respondent concedes that this unqualified right is the law, there are functionaries in the education system who persist in the notion that "progressive realisation" is the applicable formula. The right to basic education has a substantive content that obliges the state to educate children (and indeed adults) at least to the level of functional literacy and numeracy within the nine years of compulsory school attendance.

"Functional literacy" is the ability to function at the level of an eight grader who has successfully completed eight years of education in his or her language of choice. The provisions of section 3, 5A, 6 and 6A of the South African Schools Act ("SASA") are relevant. All of these provisions are either expressly, or by implication, subject to the Constitution.

3. The court in the *Juma Musjid* case furthermore recognised the right to basic education as an empowering right, by stating that [at par. 43] *"basic education is an important social, economic right directed, amongst other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."* (See also the recent matter of *Madzodzo and Others v The Minister of Basic Education and Others* (2144/2012) [2014] ZAECMHC 5 (20 February 2014)).

4. The Applicants contend that the state is failing to meet its obligations in terms of C29(1)(a), as read together with C1, 2, 6(2) and (4), 7(2), 8(1), 9, 10, 12(2), 28, 30, 195(1) and 237 of the Constitution. This failure is particularly so in the case of children from impoverished and historically disadvantaged communities who find themselves in schools that are categorised by the authorities as being in the lower three quintiles (being quintiles 1 to 3) of public schools.

5. The Constitutional Court has developed a jurisprudence that is particularly child-friendly and accords substantive content to the concept of "the best interest of the child". In the matter of *C and Others v the Department of Health and Social Development Gauteng and Others* 2012 (2) SA 208 (CC), the aforementioned department had decided to stop children begging in the streets with their parents and rounded up the applicants' children summarily and without a court order. Reliance was placed on provisions of the Children's Act of 2005. The court was having none of this. In the majority judgments the child-focused jurisprudence of the Constitutional Court was taken further than before and the "best interests of the child" test developed a substantive as well as procedural content with reference to the applicable international treaties and the previous findings of the courts in this field. The "child friendly" approach of the majority is directly relevant to this matter. In an article entitled "The Constitutional Court consolidates its child-focused jurisprudence: The case of C v Department of Health and Social Development, Gauteng" [2013 *SALJ* (4) 672, M Couzens concludes [at p. 687] that: *"[the case] consolidated [the Constitutional Court's] child-centred jurisprudence, built primarily on the application of C28(2). The essence of this child-centred approach seems to be the view of the court that the state ought to play an active role in protecting and fulfilling the rights of children. This approach is reflected in an increasing number of positive obligations developed by the court and placed on the state. Some of these positive obligations have been derived by the court from C28(2) applied as a substantive right. ...*

The court consolidated its use of C28(2) as an independent right, advancing the development of its emerging substantive content."

6. Further legislative obligations on both national and provincial education authorities to deliver basic education exist, including the South African Schools Act 84 of 1996, and in particular, sections 5A, 6, 6A, 6B, 34, 35, 58B, 58C; the National Education Policy Act 27 of 1996, the various provincial school education acts, the Language in Education Policy, the Pan South African Language Board Act 59 of 1995 and the National Language Policy Framework 2003. Draft policies, existing policies and the provisions of the National Development Plan also inform the process in and practices of the delivery of basic education by the state.

7. The Applicants seek declaratory and mandatory relief against the First Respondent, as well as structural interdicts (supervision orders) involving the Respondents (other than the Chapter Nine Institutions) that address the systemic failure to deliver the right to basic education, either adequately, or at all, to children in South Africa in the implementation of laws, policy, practices and plans in the public school system and in the field of early childhood development.

8. The Applicants contend that the granting of the above relief is an effective and efficient manner in which to secure consistency with the Constitution in the delivery of basic education on the part of the Respondents. Proper interventions and systems need to be put in place and compliance

therewith needs to be monitored in order to counter the on-going systemic failures in the delivery of basic education.

9. Put at the lowest level, the tests for the determination of effective delivery of basic education, include evidence of learners shining in the ANA assessments 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.

10. In light of the above criteria, the SAIRR surveys, the Child Gauge analysis and ANA results clearly show that basic education is not being delivered effectively and efficiently to a large proportion of the children of South Africa in the manner required by C 195(1) (b).

11. The Applicants contend that effective planning, implementation and monitoring of the following four topics are essential in order to ensure the delivery of basic education:

    11.1. The provision of ECD for every child, by suitably qualified teachers, using appropriate teaching materials and an adequately reasonable standard curriculum, in order to properly prepare <u>all</u> children, especially the poor children, to start Grade 1 on the 'front foot';

11.2. Teaching children in their mother tongue, at least in the foundation phase, as well as ensuring competence in the relevant language of learning both among educators, as well as learners, in order to ensure effective learning;

11.3. The professionalisation of teachers by ensuring that all teachers are properly qualified and appropriately supported with teaching materials and methods, and that their current time on task, low morale and unduly high absenteeism rates are effectively addressed.

11.4. Timeous supply and delivery of adequate quantities of textbooks and teaching materials (officially called "LTSM") in the appropriate languages on time every year, so that it is possible to start teaching and learning at the beginning of the year; and

Grounds for declaratory relief:

12. The breach by the state of its constitutional duty to provide basic education is apparent from the statistics and facts set out by the Applicants in their founding, supplementary and replying affidavits. There are no material disputes of fact arising from the Second Respondent's answering affidavit. Many of her denials are demonstrably false, her defences misdirected and her obfuscation of the issues unnecessary. This court is at large to regard such disputes of fact as may have been raised as immaterial to the

determination of the issues by following the well-trodden path taken by the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) [at par. 53] and explained by the SCA in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) [at par. 26] as follows: *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

13. In this regard the Applicants contend that the state is failing reasonably to meet the obligations imposed on it by C29(1)(a), as read together with C2, 6(2) and (4), 7(2), 28(2) 9 and 10 of the Constitution, to provide all children in South Africa with a basic education, more particularly in that:

    13.1. It has failed to make available comprehensive early childhood development services, including age appropriate education, school readiness programmes, and suitably qualified pre-school teachers, to all children under the age of five years.

13.2. It has failed to take reasonable steps to prevent the marginalisation and neglect of the indigenous languages in schools and to ensure that all learners are given an adequate grounding in their mother tongue language as a necessary precondition for maximal cognitive development;

13.3. It has consistently failed to equip the majority of children in South African public schools with sufficient literacy and numeracy skills;

13.4. It has failed to take reasonable steps to equip all teachers in public schools with adequate skills to perform their task at an acceptable level;

13.5. It has failed to take reasonable steps to curb the high incidence of teacher absenteeism in schools; and

13.6. It has failed to ensure that delivery of textbooks and teaching materials takes place on time in all public schools.

14. In light of the above, the Applicants are seeking a declaratory order in terms of C172(1)(a) of the Constitution, declaring the state's failure to deliver basic education to be inconsistent with its obligations in terms of the Constitution.

15. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12 (17 April 2014) [at par. 42], the court held that *"[t]here can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution."*

16. In *Rail Commuters (supra)* [at par. 108] the court regarded declaratory relief of particular value, in that it allows the courts to declare the law, while leaving the decision as to how best to observe the law, in the hands of the executive and the legislature. The decision is also useful for its description of the criteria to be applied in the process of reasonable decision-making that is constitutionally compliant [at par. 88]. [See also *Glenister II v The President of RSA and Others* 2011 (3) SA 347 (CC), at p. 408, par. 191, and footnotes 48 and 49].

<u>Grounds for mandatory relief</u>:

17. The mandatory relief is broadly framed so as not to interfere with the functioning of the executive.

18. Historically, education authorities have a poor track record when it comes to complying with orders granted to successful litigants, such as *Equal*

Education, *Section 27* and the *Centre for Child Law* at the University of Pretoria.

19. In *Rail Commuters (supra)* [at paras 83 and 84] it was held that the Constitution affirms 'accountability' as a value governing public administration and requires reasonable steps to be taken by the relevant organs of state to comply with their legislative and constitutional obligations; *in casu*, this compliance would require the Respondents to take reasonable and accountable steps to put basic education in place for the poor, the marginalised, the rural and township dwellers and in the medium of a suitable indigenous mother tongue for those who do not speak English or Afrikaans as their mother tongue.

Grounds for supervisory interdicts:

20. The Applicants contend that a declaratory order is insufficient to vindicate the infringement of learners' rights to basic education, and that more effective remedies are required to compel the state to indicate how and when the violation of the learners' right are to be addressed.

21. This contention is particularly important in the light of the experiences of Equal Education and Section 27. These organisations have been obliged to return to court on several occasions in order to enforce the relevant respondents' compliance with the respective orders of court that had been granted, whether by consent or otherwise.

22. Structural interdicts can be highly effective in addressing the systemic failures, as well as in ensuring the future implementation of effective interventions, plans and policies in the delivery of basic education. This Honourable Court is well positioned to grant an innovative and complex regime of supervision involving the Chapter 9 Institutions cited as Respondents in this matter.

23. Structural interdicts or supervision orders are not uncommon in South African law (See *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC)). In the recent case *Allpay v SASSA (No 2) (supra)* the court imposed a structural interdict to ensure effective monitoring, accountability and impartiality in a new tender process.

POINTS *IN LIMINE*

24. The Second Respondent has taken a variety of points *in limine* of dubious provenance and quality in the answering affidavit to which she has deposed.

25. It is useful to introduce the response to these points *in limine* by making reference to the special duty which rests on government litigants in constitutional litigation, as discussed by Du Plessis et al, in “Constitutional Litigation” in par. 1.2 at pages 3 to 7 (“Du Plessis et al”).

26. Constitutional litigation ought not to be an arena for technical point-taking, or what Murphy J described as "the bureaucratic prevarication intrinsic to the department's litigation strategy" by defending litigation unnecessarily (footnote 2 on page 4 of Du Plessis et al, where the MEC for Education in Gauteng was the 'strategist' under discussion).

27. The oft quoted words of Cameron J in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA), are set out on pages 6 and 7 of Du Plessis et al. In that matter the SCA was critical of an approach to litigation by a department of state "as though it were at war with its own people", in circumstances where it assailed a claim *"by recourse to every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand."* The SCA concluded that the approach of the state in that case was *"contradictory, cynical, expedient and obstructionist".*

28. A proper appreciation of the underlying constitutional values that inform the new South African approach to the rights of children, the paramount nature of their interests, their human dignity and the promotion of the achievement of equality as foundational values set out in Chapter One of the Constitution, as well as the various sections of the Bill of Rights that are germane to the issues on the merits, all militate against the taking of technical points *in limine*. Instead an open, accountable and responsive answer to the areas of concern raised by the Applicants ought to have informed the approach of the Second Respondent to this application. C165(4) and C7(2), read with C28(2) and C29(1), all point in that direction:

in the words of Sachs J in *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC), quoted at page 4 of Du Plessis et al, candour and courtesy are what is required: *"The notion that 'government knows best, end of enquiry" might have satisfied Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution…"* Sachs J clearly had C1 and C2 in mind in making this statement.

Lack of Urgency

29. The Second Respondent has taken the point that the matter is not one of urgency.

30. It is mystifying that she should have done so. The Applicants contend for no more than a semi-urgent hearing in their founding papers and in the notice of motion at paragraph 1, page 2 of the record.

31. This Honourable Court has, by consent between the Applicants and First to Thirteenth Respondents, so directed that the matter be enrolled for hearing on 19 May 2014. Such order was made on 10 December 2013.

32. It is a well-established practice in this Honourable Court that matters of a semi-urgent nature can be so enrolled following the decision of Fagan J in *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C).

33. There is accordingly no factual or legal basis for contending that the matter is not properly before the court by consent and is enrolled as one which is manifestly a semi-urgent matter.

Locus standi of the Second Applicant challenged

34. An attack on the *locus standi in judicio* of the Second Applicant is contained in the Second Respondent's Answering Affidavit, despite the clear exposition of the grounds relied upon for standing in paragraph 21 of the Founding Affidavit.

[Record pages 16 and 17]

35. This attack is completely misguided and unnecessary. C38(d) makes it pellucid that anyone may sue in the public interest in relation to the infringement or threatening of a right in the Bill of Rights.

36. The issue was considered by this Honourable Court in *Rail Commuters Action Group and Others v Transnet t/a Metrorail and Others (No 1)* 2003 (5) SA 518 (C) [at p. 555E to 556C] in which the locus standi of a mere lobby group, without a constitution, was accepted in a matter concerning the right to freedom from violence. The point taken was quietly dropped in the ensuing appeals to the SCA and CC, neither of which had any difficulty with considering the matter as one properly brought by an applicant with the necessary locus standi.

37. It is plain that this matter is in the nature of public interest litigation.

The authority of the Second Applicant's deponent and the appointment of its attorneys of record are impugned

38. These two points are as unmeritorious as those dealt with above.

39. Not only has the Second Applicant formally resolved to launch this application using its chairperson as its duly authorised representative, all of the steps taken by the Second Applicant in the matter have been ratified to the extent that it may have been necessary to do so.

40. The First and Second Applicants are seeking identical relief in the matter. No prejudice has been occasioned to the Respondents by the manner in which authority to represent the Second Applicant has been shown and its attorneys chosen to act on its behalf.

Non joinder

41. The Second Respondent does not always seem to appreciate that the state has the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. The First Respondent is the appropriate party to sue when those rights are infringed or threatened. This is a matter that primarily concerns the infringement of the rights of all to basic education as set out in C29(1) read with C7(2). Other rights guaranteed to all in the Bill of Rights are also implicated in the matter.

42. In the circumstances, it would have sufficed to sue the First Respondent alone.

43. However, SASA contemplates a role for the Council of Education Ministers established by the National Education Policy Act. For example, under s 5A of SASA, the Second Respondent may, after consultation with the said Council, by regulation prescribe norms and standards for the provision of learning and teaching support materials (as defined in s 5A(2)(c)). Neither consultation, nor the setting of norms and standards has been done, nor is it envisaged that it will be done on any fair conspectus of the answering papers.

44. Mere omissions impact directly on the relief claimed concerning non-delivery of books and materials for learning and teaching.

45. So too, with the provision of ECD, the Thirteenth Respondent (up to the time of preparation of these heads over Easter 2014, a passive by-stander in this application) is at present seized of obligations under the Children's Act which are destined to end when First Respondent gets around to implementing the National Development Plan of 11 November 2011 and, in particular, the plan to remove ECD from Thirteenth Respondent and to relocate it under the supervision of Second Respondent. On the papers neither minister seems to be aware of this fact.

46. The most recent authority on what it means to sue "The Government of the Republic" is a full bench decision of this Honourable Court dated 13

December 2013 in the *Glenister III* and *Helen Suzman Foundation* matters (heard together) [*Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of the Republic of South Africa and Others* [2014] 1 All SA 671 (WCC)] to impugn the latest version of the legislation regarding the Directorate of Priority Crime Investigation or Hawks. From that decision it is apparent that the Applicants do not need to join parliament or anyone else from government in these proceedings.

Threatened application to strike out

47. Whilst no formal application to strike out certain material introduced in the founding and supplementary papers filed of record by the Applicants has been made, there are indications in the answering affidavit that the Second Respondent may be so ill-advised as to actually seek to strike out the passages and documents of which she complains.

48. There is no merit in any striking out application either. The Applicants have, wherever possible, obtained confirmatory affidavits in respect of the material they have placed on record. Where this has proved impossible, as in the case of the late Professor Alexander for example, there is an explanation for the absence of a supporting affidavit that is lucid, logical and perfectly acceptable, given that this is public interest litigation over the

rights of children. The approach is time-honoured both in *Ngxuza* and *Rail Commuters*. The case of *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) [at 324D-G], upon which the Second Respondents seeks to rely, is distinguishable, not only because that was a commercial dispute that had nothing to do with the rights of children, but also because the Applicants have carefully explained that for the purpose of showing that the right to basic education is infringed by the way in which the public school system functions, they rely upon the whole of the surveys, gauges, reports and ANA results which they have placed on record. This they need to do in order to demonstrate the depths to which the crisis in basic education extends.

49. It is fervently to be hoped that the Second Respondent will reconsider her position and that she will not proceed with any striking out application. If she does, it will be opposed *seriatim*.

<u>Jurisdiction</u>

50. The Western Cape is the legislative seat of government at national level and the home of the executive for at least half of the year while parliament is in session.

51. It is perfectly permissible to seek relief having nationwide effect in this Honourable Court. It has been done in the past in the Pharmaceuticals cases, in *Rail Commuters*, in *Glenister II* and *III* and numerous other

cases. As the Applicants are domiciled here too, it is the forum *conveniens*.

52. The Applicants have expressly invoked s 19(1)(b) of the Supreme Court Act in justification of the jurisdiction of this Honourable Court.

[Record page 22 to 23]

Subsidiarity

53. The Second Respondent suggests, somewhat tentatively, that the doctrine of subsidiarity is a basis for dismissing the application.

54. This too is wrong. The individual parties sued have been sued because they have roles to play in the current application of laws, policies, plans and practices in so far as these relate to the implementation of the scheme for delivery of the right to basic education, which is a constitutional imperative. Such delivery in terms of the applicable laws and policies, ought to be effected reasonably and in a manner which is consistent with the Constitution. It manifestly is not, given the facts and figures, surveys and gauges, assessments and outcomes which are laid out in great detail in the founding papers and are barely controverted.

55. The laws and policies identified in the research of Patricia Martin are not working, or being implemented, in a manner that efficiently, effectively and economically delivers the right to basic education to all learners in the public education system. Manifestly there is no compliance with C237.

According to the research 80% of public schools are dysfunctional. The crisis in education deepens by the year and the authorities seized with the duty to deliver education via the scheme of the laws and policies, remain paralysed to act in a constitutionally compliant way. This is a breach by conduct of the provisions of C2 and it justifies the intervention of the courts in the manner claimed in the notice of motion.

Alleged breach of the doctrine of the separation of powers

56. The doctrine of the separation of powers presupposes that there are checks and balances on the exercise of power in a constitutional democracy under the rule of law.

57. The function of the judiciary in a case like this is not to prescribe laws, policies, practices or plans for the proper delivery of the rights in the Bill of Rights that the Applicants are able to prove are infringed or threatened. Nor do the Applicants seek any relief of this kind.

58. The role of the courts in matters of this nature is to consider the manner in which the laws, policies, practices and plans in place are being implemented against the standards of the Constitution. Is there open, accountable and responsive governance concerning delivery of the right to basic education? Are the values and principles that inform the public administration as it relates to basic education as contained in C195(1) being implemented properly and consistently by the First Respondent? Does the state respect, protect promote and fulfil the rights infringed and

threatened according to what is common cause on the papers? Is supervision of the shortfalls indicated? Should the declaratory and mandatory relief claimed be granted? These are the questions posed by the Applicants. They are entitled to access to this Honourable Court for the purpose of seeking answers.

59. None of these questions infringe the separation of powers doctrine in any way. They are the manifestations of the testing that needs to be carried out when laws or conduct (which includes policy and its implementation) are assailed for their lack of consistency with the Constitution. The Applicants submit that the service delivery situation in basic education is not consistent with the values and principles of the Constitution. There is widespread and systemic failure to deliver adequate basic education in the public schools of the land. The way to address such failure in litigation of this kind, is to fashion remedies that afford redress to the children or learners who are prejudiced by the failure of the state (via the First Respondent and the Second to Thirteenth Respondents on behalf of the First Respondent – in short "government" as the Second Respondent puts it) so that suitably constitutionally compliant plans are put in place diligently and without delay, as is required by C237.

60. The creation of such remedies does not infringe upon the separation of powers. It is rather the checking and balancing of the exercise of power by the legislative and executive spheres of government. It is the task of the judiciary, pursuant to its oath of office, to uphold the Constitution. The supervision order sought is directed at bringing consistency with the

Constitution into being. After 20 years the First Respondent has failed to do so despite "bespoke" litigation aimed at improving the lot of learners in the basic education supply chain in public schools. This application seeks to address causes of the malaise in basic education rather than to reactively address symptoms as they arise.

61. There is no relief claimed that seeks to prescribe laws, policies or any solutions; the Applicants' only requirement is that whatever plan is put in place to improve the situation is consistent with the Constitution. Anything less would be invalid and could lead to further litigation over the reports that are submitted in terms of the structural interdict claimed.

Ripeness and Mootness

62. These two points *in limine* are mutually contradictory.

63. They were tried in *Ngxuza* and failed in that case.

64. They do not apply to any relevant factual matrix in this matter and fall to be dismissed out of hand.

EARLY CHILDHOOD DEVELOPMENT

65. The Applicants have identified the lack of proper ECD facilities and appropriately qualified ECD personnel as critical to addressing the non-delivery of the right to basic education.

66. Children who do not receive the benefit of adequate ECD struggle at school, lag behind their ECD “graduate” classmates and drop-out of the basic education system. As a consequence children in privileged schools continue to enjoy an enormous head start over children from the poorer communities, thereby perpetuating the inequalities of the past.

67. The 2013 SAIRR survey statistics show that in 2012 only 35.7% of children in the 0-4 year old age group were attending ECD centres; 3.2 million children were not.

[Record “EP10” p. 301 *Early childhood development centres*]

68. In a paper, entitled *Early Childhood Development as a Strategy to Eradicate Poverty and Reduce Inequality*, presented at the Carnegie III conference in September 2012, co-authors Michaela Ashley-Cooper and Eric Atmore discuss the devastating effect of poverty and inequality on children. Such circumstances do not only serve to turn childhood into a time of adversity, but also undermine the healthy development of children. This effect has led former United Nations Secretary-General Kofi Annan to say, *“poverty is the major obstacle to the realisation of children’s rights.”*

[Record “EP17” p. 405]

69. Both local and international research has identified the early years of a child's life as the critical period for development. Good quality ECD programmes can have a significant impact in overcoming the effects of poverty and lead to higher levels of social, emotional, cognitive and physical well-being in young children. These outcomes in turn lead to significant social and economic benefits to the country.

70. The provision of appropriate ECD for all children at an early age, but especially for those children suffering from the effects of poverty and inequality, can assist these children to grow and develop to their full potential, thereby reducing the need for costly remedial interventions to address developmental lag and social problems later in life. Ashley-Cooper and Atmore argue that in order to overcome the effects of deprivation in the most effective way, *"South Africa needs a much greater investment at the level that produces the greatest social and economic return: early childhood development."* The 'investment' referred to in order to reduce inequality, empower communities, and move young children and their families out of poverty, includes community-driven ECD programmes, including teacher training programmes, governing body training, infrastructure upgrades, equipment provision, family outreach programmes and management training.

[Record "EP17" p. 406]

71. The authors further indicate that whilst South Africa has one of the highest rates of public investment in education in the world, public spending in the critical early years is the lowest. Nationally, less than 2% of government

spending is spent on children aged five years and younger. Yet, the authors argue, investment in effective ECD, including proper ECD teacher training and development, the provision of age-appropriate educational equipment and teaching materials, breeds economic success both for the beneficiaries of this ECD input and for the overall economy. Economic success, in turn, reverses the effects of deprivation suffered by those trapped in the cycle of poverty.

[Record "EP17" p. 407]

72. In a media statement released on 13 March 2014, entitled *Challenges Facing Early Childhood Development Centres Emerging,* the Thirteenth Respondent comments on key issues in relation to its national audit of ECD services undertaken in August 2013. The relevant report was due to be published at the end of March 2014. Interim findings contained in the report reveal that ECD teachers held extremely low levels of qualifications and that 91% of ECD centres followed an unrecognised curriculum. The findings also reveal that the ECD centres are plagued by poor infrastructure, inadequate equipment and supplies, as well as inadequate health and safety measures. Research has in fact revealed that even though three quarters of Grade 1 learners have attended Grade R, the impact of this pre-school education has had a limited effect on reducing Grade 1 and Grade 2 repetition rates. It would appear that ECD is more about child-minding than preparing the learners for formal schooling.

[Record "EWP14" p. 3304-3305; and "EWP12" p. 3282]

73. The NDP is now the official policy of the land and has been adopted by all major political parties as well. In its NDP 2030, the NPC acknowledges and identifies the benefits of early intervention in the lives of young children resulting in *better school enrolment rates, retention and academic performance; higher rates of high school completion; lower levels of antisocial behaviour; higher earnings; and better adult health and longevity*.

[Record p. 48]

74. The NDP furthermore identifies ECD as a priority and proposes at page 302 of the report that there should be a "policy and programme shift to ensure that the DBE take the core responsibility for the provision and monitoring of ECD. Other departments should continue to provide services in a supportive capacity. Resource allocation should gradually reflect the changes in institutional responsibility for ECD".

[Record "EP16" p. 391]

75. Although the Applicants welcome the contemplated shift in respect of ECD, there is little or nothing to suggest that anything has been, or is being done, to give effect thereto, or, in fact, that the Second Respondent is even aware of the intended shift of ECD to her department as per the NDP. In fact, in the DBE Annual Report 2012/2013, in paragraph 3.4 entitled *Strategic outcome-orientated goals*, at page 6, under the sub-heading "Output 3: Improve early childhood development", two goals are identified, namely (i) to universalise access to Grade R; and (ii) to improve the quality of early childhood development. Following on page 8, under the

second bullet point, reference is made to the 2000 Education White Paper on ECD, which requires the provision of Grade R to all five-year-olds, as well as the expansion and improvement of the quality of programmes, curricula and teacher development in ECD for the 0 – 4 year cohorts. No reference is made in this report to the provisions of the NDP, dated 11 November 2011. This inattentiveness to the high level policy development adopted by First Respondent is lamentable.

76. The Thirteenth Respondent, in her June 2013 Parliamentary presentation (annexures **"EWP 8"** and **"EWP 9"** to the replying affidavit), persists in her department's involvement in ECD, contrary to NDP policy.

[Record p. 1112, par. 9; p 2808-2809, paras 33 to 37;

"EWP 8" and "EWP 9"]

77. The policy envisaged in the NDP is sound. Good ECD provision enhances results and outcomes in relation to adequate delivery of basic education. The NDP has been available to the Second and Thirteenth Respondents since November 2011. The lack of implementation or even awareness thereof, is also lamentable.

MOTHER TONGUE EDUCATION

78. Although our Constitution entrenches equality for all South Africans as a basic human right, which includes education and language equity, our

education system perpetuates the legacy of inequality, in that it continues to benefit Afrikaans and English speakers and effectively denies African language speakers the opportunity of receiving education in their primary language of communication, or, what the Applicants refer to as a learner's mother tongue or home language.

79. Considering that teaching in the classroom is mainly done through the medium of language, the success of this interaction is determined by the effectiveness of the communication. The ANA 2013 results, which assessments included learners being tested in both their home language (i.e. mother tongue) and their first additional language, reveal a 20% higher achievement in the home language results for both Grade 6 and 9 learners. Such results bear testimony to the advantages of receiving mother tongue education. These language versions of the ANA tests, however, do not constitute confirmation that learners are being taught in their mother tongue in the foundation phase. The tests only provide evidence that a mother tongue is on record.

[Record p. 880, Table 1.3. *Comparative average percentages achieved for literacy in 2012 and 2013*]

80. In a paper entitled *"Medium of Instruction and its Effect on Matriculation Examination Results for 2000, in Western Cape Secondary Schools: A study of examination results in relation to home language and language medium"* by Michellé October, the effects of mother tongue education on Grade 12 results were analysed. The analysis revealed that learners achieved high performance results in subjects which had been taught in

their mother tongue, and that markedly lower marks were achieved in subjects that had been taught in a second language.

[Record "EP27" p. 708, section 6.5 *Conclusion*]

81. Professor Neville Alexander, in two reports entitled *"Language policy in education 1994-2009 in a nutshell"*, and *"Mother tongue based education is a necessary condition for the realisation of the right to basic education"* considers the relevant legislative provisions dealing with language policy in our education and identifies certain important implications of these provisions, which include provision for mother tongue based schooling for as long as possible during a child's schooling; teacher education and professional development, in line with the requirements of offering mother tongue based education; and provisions of appropriate learning support materials in all of the official languages.

[Record p. 80 to 81, paras 120.1bis to 120.4bis;

"EP28" p. 728, *Promises*]

82. Professor Alexander also contends that C29 of the Constitution effectively requires the state to provide mother tongue based education, arguing that basic education presupposes <u>meaningful learning</u> as opposed to merely nominal 'access to education'. He is of the opinion that the language medium issue is probably one of the main reasons for the high drop-out and failure rates amongst learners in the schooling system, despite the sustained investment in education.

[Record "EP29" p. 731, par. 3; and "EP28" p.728, *Delivery*]

83. The problem is exacerbated in that bilingual teacher education and professional development is virtually non-existent for most educators, so that teachers are, in many instances, teaching children in a medium that is neither their, nor the learners', mother tongue. As a result, the children emerge from their schooling with a very low level of competency in their mother tongue, as well as their language of learning, which is most likely to be English or Afrikaans. Practices that require teachers to teach in a language in which they may not be proficient or adequately fluent, and which require children to learn in a language in which they are even less proficient or fluent, constitute violations of children's rights to a basic education.

[Record "EP28" p. 728-729, paras 1 and 4]

84. In terms of the provisions of C29(2) the Applicants submit that is not reasonably practicable, nor a reasonable educational alternative to expect learners to grasp English when their first exposure to English is in the classroom and they are ill-equipped for that exposure due to the neglect of mother tongue education and the failure of the state to accord parity of esteem to the indigenous languages of the majority of black learners.

85. Professor Alexander states that the vast majority of educationists agree that learners should be taught only in their mother tongue, until such time as they have acquired 'second language instructional competence'. Such a system is referred to as mother tongue based bi- or multilingual education. When such a system is not adhered to, the children from the poorer communities are *"in effect robbed of the one element of cultural*

capital .... that [they own] and which represents an element of continuity between the home and the school".

[Record "EP29" p. 732-733, paras 8 and 10]

86. This criticism is supported by Ms October who contends that our education system benefits an Afrikaans and English speaking elite. African language speakers remain at a disadvantage because, in practice, they are denied access to education in their primary language of communication and conceptual development.

[Record "EP27" p. 684, par 1.1 *Statement of the problem*]

87. Approximately 89% of schools in South Africa (that is approximately 20,254 schools) fall within the poorest categories, being quintiles 1 to 3. In 2007 schools falling in quintiles 1 and 2 were identified as no-fee schools, which is approximately 67% of schools. Children from these areas suffer greatly from poor living conditions, as well as a lack of access to books, computers and learning materials, and are more likely to have illiterate parents. Their ability to learn successfully and effectively is materially compromised from the outset in instances where they do not receive instruction in their mother tongue.

[Record "EP10" p. 306 *Public schools by quintile*;

"EP3a" p. 98 *How are school quintiles determined?*;

"EP29" p. 733-734, paras 10 and 11]

88. The aforegoing important concept is also recognised in the LEAP policy document where it is stated, with reference to multilingual education, that,

"the underlying principle is to maintain home language(s) while providing access to and the effective acquisition of additional language(s). Hence, the Department's position that an additive approach to bilingualism is to be seen as the normal orientation of our language-in-education policy". The document further provides that *"[t]he right to choose the language of learning and teaching is vested in the individual. This right has, however, to be exercised within the overall framework of the obligation on the education system to promote multilingualism"* [emphasis added].

[Record "EP30" p. 783, paras 5 and 6]

89. In an article, entitled *"Overcoming inequality in South Africa through multi-bilingual education",* Margie Owen-Smith Loffell explains that one of the reasons for the inequality of status of the indigenous languages in our education system, is that apart from mother tongue Afrikaans speakers, most parents are set on having their children educated through the medium of English and the South African public thinks this is the obvious way to go. Meanwhile, the resources inherent in the home language are poorly utilised, or left outside the classroom door, or even banned by some teachers.

[Record "EP31" p. 791, par. 1 *Multi-bilingualism and the need for it*]

90. Professor Alexander states that the choice of parents to have their children educated in English, as opposed to their mother tongue, "is based on ignorance of the impact of wrong choices with regard to language medium at school." He states that such situation is a result of the DBE not "providing the essential information, advocacy and advice to parents and

guardians or to the relevant children" with regard to the choice of language medium. Professor Alexander contends that the state therefore effectively fails to realise the right to basic education, by failing to provide a mother tongue bi- or multilingual education system. Ms October concludes that, "in a bilingual educational system, mother-tongue education is essential if we want to provide all learners with similar choices and opportunities".

[Record "EP29" p. 731, par. 3; and 734, par. 12;

"EP27" p. 721]

91. The Second Respondent's introduction of the "third language" policy and plans, does not constitute a responsive and accountable manner in which to answer, or to deal with, the material and fully substantiated issues in relation to the provision of foundation phase education in the learners' mother tongue.

92. The lack of mother tongue education for all children is at the heart of many of the problems in the foundational phase of basic education.

PROFESSIONALISATION OF TEACHERS

93. The abysmal neglect of teachers, mostly in the public school system, is well documented in the founding papers, is not addressed adequately, or at all, in the answering affidavit, and remains at the heart of many of the dysfunctional aspects of the delivery system that are in place in public schools.

94. Currently, half of the learners entering Grade 1 never complete a Grade 12 certificate, and even some of those attaining the National Senior Certificate are not functionally literate and numerate, both groups contributing to the 74% of unemployment amongst the youth. Such a shockingly high drop-out rate and level of under-achievement ought not to be allowed to continue. It will, however, be perpetuated, unless adequate and appropriate steps are devised and put in place to improve the professionalisation of teachers in order to achieve effective, reasonable and constitutionally compliant delivery of the right to basic education.

[Record p. 87, par. 135.4, read with par. 339 at p. 1238]

95. Some of the crucial weaknesses that have been identified in the basic education system relate to the problem of unqualified and under-qualified teachers, teacher absenteeism and the slow pace of classes.

96. The SAIRR survey of 2013 indicates that the large jump in the proportion of purportedly qualified teachers, from 37% in 1990 to 97.6% in 2013, was a result of the fact that during the 1990's qualifications were awarded to previously unqualified teachers on a large scale on the basis of recognition of prior learning; notionally years in the classroom but of unknown quality. Many teachers who did not have formal qualifications were accordingly subsequently deemed to be qualified and were categorised accordingly.

[Record p. 316 *Teacher qualifications*]

97. Moreover, being 'qualified' does not necessarily equate to having an adequate understanding of the subject material. In a study requested for

the NDP, testing of the content knowledge of Grade 6 mathematics teachers undertaken in 2008, revealed that 12% of the teachers could answer all five test questions, whereas two-thirds of teachers could only answer three out of five questions. The tests furthermore revealed that the learners who were taught by teachers who could answer all five of the questions performed noticeably better in their own scores for mathematics (scoring an average of 47%), than the remaining learners (scoring an overall average of 35%).

[Record p. 3271-3272]

98. In a paper entitled *Quality teacher education, development and professionalization are necessary conditions for the realisation of the right to basic education* by Joseph and Ramani, in analysing the crisis in South African schooling found that teachers, many of whom had received inadequate training themselves, are prone, especially in the poorer schools, to make use of “rote-learning” and lower-order thinking techniques that do not engage students to understand their studies or to participate in a meaningful way. Teachers are further hampered by problems such as lack of learning support materials, overcrowded classrooms, unsafe working environments, uncertainties caused by retrenchments, and poor administration. These problems contribute to teachers becoming demotivated and ineffective. The situation is exacerbated in the poorer and previously disadvantaged communities where the schools and teachers are essentially dysfunctional. The cumulative effect of such unprofessionalism has led to the standard of primary school literacy and numeracy in South African being of the lowest

in the world, which, in turn, severely compromise children's schooling during the future years.

[Record p. 425-426; paras 38 and 39, p. 28 to 29; and "EP4" at p. 111]

99. The on-going failure of the DBE to deliver textbooks in sufficient quantities to all schools timeously, the failure on the part of the DBE to distribute existing teachers equitably, together with a lack of school monitoring and teacher training for the new CAPS curriculum, are all factors which contribute to the dysfunctionality of the schooling system. Furthermore, the government's failure to put time-specific goals in place, by allowing itself to respond to vital issues in the 'medium to long term', as evidenced in its *Annual Performance Plan 2014/2015,* coupled with its failure to address numerous other problems, such as, for example, insufficient teacher remuneration and the failure to appoint and retain good teachers, impacts negatively on the working environment of the teachers.

[Record p 426 to 427; and p. 3111 to 3120]

100. Joseph and Ramani are critical of the system of top-down teacher training that limits teachers to rigid teaching policies. So, for example, the CAPS directives instruct teachers what to do in the classroom minute-by-minute. Research has, however, shown that the model of 'teacher-development' is preferable, because it allows teachers to integrate their own unique styles of teaching, thereby allowing for more innovation and quality of teaching. A reasonable and constitutionally compliant outcome is not being produced by the top-down method and it accordingly behoves

the First and Second Respondents to devise a method of training that is consistent with the Constitution.

[Record p. 427 to 429]

101. In the chapter, entitled *Origins of the Eastern Cape Education Crisis,* in the book *South Africa's Education Crisis: views from the Eastern Cape,* Wright similarly determines that the main problem is that the needs of teachers have been ignored, as the focus of the South African education system is not on teacher development/education, but rather on ineffective top-down policies. The historical degradation of education quality in South Africa through the Apartheid regime and Bantu education, particularly in rural areas, has accordingly not been rectified, despite 20 years of freedom and corresponding budget increases.

[Record p. 452 to 455]

102. The current process of in-service education and training ("Inset") used by the DBE to provide teacher assistance is ineffective for the reasons identified by Dr Michael Rice. For example, the courses are offered at centralised venues, far from the teachers' own classrooms (thereby taking them out of their comfort zones), and involve great costs in respect of travelling, accommodation and catering cost during weekends and holidays. Furthermore, the Inset programme causes the teachers to become passive recipients of information, rather than active co-participants in adding meaning to the training. In addition, there appears to be no follow-up after such attendance to establish whether Inset has contributed any value to the teaching environment.

[Record p. 2991 to 2992]

103. Insufficient attention has been paid to other alternatives to Inset which have the potential for reasonably complying with the values and principles of the Constitution. For example, and without being prescriptive, the "tablet solution" which is in place in the German, Canadian, USA and some other African countries' education systems. One such system is the programme for educational tablets in schools ("Pets"), which has successfully been piloted in 20 schools. The system uses information communications technology, which has the advantages of bringing the training to the participants in their familiar surroundings, substantial savings in costs, as well as the elimination of time wasted travelling. Notwithstanding the denials, the "tablet system" at the very least provides proper systems that work accountably, that are responsive to the needs of learners and that have monitoring and double-checking in place. This innovation and alternatives ought properly to be the subject matter of a suitably framed structural interdict.

[Record p. 2991 to 2993]

104. Education is a powerful tool for social transformation. In a paper entitled, *Toward social transformation: addressing poverty and inequality in the Southern African educational context,* Long describes the current education system as being based on learners reaching targets in systematic testing, rather than achieving actual understanding and further knowledge in subjects. As a result, the current system provides a limited education that does not adequately equip learners for the world, and

despite teachers' repeated efforts, this system fails, because learners are not meeting targets. Teachers and schools are visited with full accountability for this failure, whereas it is in fact the system that is at fault. Teachers should be incorporated in the process of curriculum development and student-assessment. There should be holistic innovations to improve learner subject proficiency. These are all reasonable means of securing consistency with the provisions of the Constitution in the delivery of basic education.

[Record p 617 to 618]

105. Teachers with poor education and pedagogical skills from the apartheid legacy need teacher development to bring them up to standard. If teachers are trained and educated adequately, they can become agents for social change and will be in a position to inform and improve curricula with their own knowledge and professional interpretation. By focussing on teacher professionalism and development, the Respondents can ensure learners receive the basic education to which they are entitled to under the Constitution.

[Record p. 626]

106. Expert evidence adduced by the Applicants, and not meaningfully contradicted by the Second Respondent, is to the effect that the neglect of teachers is central to the dysfunction in the system. Despite the overwhelming evidence on record, the Second Respondent does not appear to be willing to make this concession. The hard facts and figures, as well as the opinions gleaned, show that there is a desperate need to be

systematically responsive to development, curriculum support and training needs which have been expressed by teachers themselves and to treat teachers as professionals, from whom a high standard of professional ethics is expected, rather than as disengaged workers given to absenteeism. The need for intervention is manifest and urgent.

107. While the Second Respondent's concession that she is "vilified" by SADTU is frank and appropriate, there is a material lack of accountable management by the Respondents in the basic education system, with the union "tails" wagging the management "dogs" throughout the system, both in the classrooms of public schools and in their management by the Respondents. This inversion of accountability is a central part of the malaise in the basic education environment, the management of which is squarely the responsibility of the Respondents. This malaise and its impacts are evident in the debacle of the maladministration in the Eastern Cape Education Department, where the governmental section 100 intervention was resisted, to the detriment of the delivery of basic education to the children in that province.

[Record p. 115 to 116; and par. 372 at p. 1248 to 1249]

TIMEOUS DELIVERY OF TEXTBOOKS

108. A well-designed textbook is essentially a manual of instruction in a particular branch of study. It is a resource for both teachers and learners in that it sets out the design of lessons and work to be covered; it provides clear units of work, organised in a balanced, chronological presentation of

information. Textbooks form an essential component of teaching and learning in the classroom environment. Children who have access to textbooks will have a definite advantage over their peers who lack such resources.

109. The First Respondent's Action Plan in fact stipulates that every learner should have access to the minimum set of textbooks that may be prescribed. In *Section 27 and Others v Minister of Education and Another 2013 (2) SA 40 (GNP)*, [at par. 23], the court found that the First Respondent has stipulated that textbooks are an *"essential and vital component in delivering quality learning and teaching."* The court furthermore held, that textbooks are an *"essential component of the right to basic education, inextricably linked to the fulfilment of that right",* and that failure on the part of the respondents to timeously deliver textbooks to the learners, constituted a violation of the right to basic education [at paras 25, 32].

110. The First to Eleventh Respondents' failure to take the necessary steps to ensure the timeous delivery of textbooks to all learners in each Grade across the country, in the correct quantities and in the correct languages, remains a major problem that recurs every year. This problem was highlighted in the Limpopo textbook fiasco in 2012, necessitating litigation, together with several return visits to court, in order to enforce compliance with the respective court orders.

[Record p. 2802, par. 19]

111. The Second Respondent denies that there is a problem in this regard despite the detailed reports (both provisional and final) of the Fourteenth Respondent, the interim report by the Fifteenth Respondent, antecedent litigation in relation to the disaster in Limpopo and current reports of textbook shortages being reported in 2014 in the Free State, Eastern Cape and Limpopo.

[Record p. 1018 to 1075; par. 144 at p. 2808 to 2809; par. 337 at p. 2913 to 2914]

112. In Limpopo there is pending litigation regarding non-supply of books in at least 39 schools. The matter will be heard in the Gauteng High Court on 22 April 2014. These learners have been severely prejudiced in their learning and preparation of schoolwork, as they still had not received their textbooks by the end of the first term of this school year. As these heads of argument are being prepared before the outcome of the current Limpopo litigation is known, the judgment or order in the matter will be made available to the court at the hearing hereof. [**Legalbrief** of 23 April 2014 contains coverage under the Heading *"Litigation: intimidation of principals raised in textbook matter"].*

113. The recurring failure to provide text books in the appropriate languages on time, every time, highlights the failure on the part of the Second Respondent to put proper systems in place to ensure effective procurement and delivery of textbooks. The proper administration of the delivery of textbooks needs to be addressed on a systemic basis. Until such time as a system is devised and implemented that ensures, without

exception, that every child, in every classroom, at every grade, in every subject, from day one of the school year, has the appropriate textbooks in the correct language for the subject being presented, it is clear that the textbook problem remains unresolved.

114. The Applicants contend that a supervision order is the most efficient and effective way of concentrating the minds of officialdom in order to prevent future systemic failure of this vital aspect of the education supply chain.

115. In the *Section 27* case above, the court, in addition to setting a date for the delivery of textbooks, ordered the respondents to develop a catch-up plan for Grade 10 learners. Such approach shows that the courts are prepared to grant tailor-made remedies to ensure the effective protection and enforcement of fundamental rights where existing traditional remedies do not provide sufficient redress. This approach accords with the findings of the Constitutional Court in *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC).

116. It is legally preferable to adopt a pro-active approach to the provisions of LTSM that requires the First Respondent to devise and implement a system that works properly so that the need for repeated re-active (or bespoke) litigation on each occasion that damage is done in a manner that is at least dislocatory, if not irreparable, is obviated.

117. The Applicants accordingly request that a suitable supervision order be granted in relation to the timeous provision and delivery of LTSM.

THE CRISIS IN BASIC EDUCATION IS SUFFICIENTLY PROVEN TO JUSTIFY THE GRANT OF RELIEF

118. The term “crisis in education” has become an oft used expression in the description of the state of the public school system in South Africa.

119. The governing alliance has identified education as one of its top five priority areas of concern since 2007.

120. The National Development Plan devotes its Chapter Nine to the strategies and plans for improving, inter alia, education. The Commissioners call for focus, for the next 18 years, on improving literacy, numeracy/mathematics and science outcomes; on increasing the number of learners eligible to study maths and science at tertiary level, improving performance in international comparative studies and retaining more learners. The Commission envisages competency levels of 50% and above, with 90% of learners scoring 50% or more in the ANA for these subjects.

[Record p. 394]

121. The system has a long way to go before such levels can be achieved if regard is had to the contents of the SAIRR surveys and Child Gauges of the University of Cape Town that are filed of record.

[Record p. 120 to 366]

122. The latest ANA results underscore the concerns that the Applicants raise in their founding and supplementary papers.

[Record p. 61 to 74 of the founding affidavit; and p. 875 to 887 of the supplementary affidavits and reports]

123. On any proper conspectus of the facts that are common cause on the papers, there is indeed a crisis in basic education that is attributable to the failure of the state to respect, protect, promote and fulfil the right to basic education which has been entrenched in the Bill of Rights.

124. To the extent that there are purported, or even real, disputes of fact in the matter, it is submitted that the proper approach is that adopted by the Constitutional Court in the *Rail Commuters* matter [*supra,* at par. 53]. In that case, the minutiae of disputed facts were ignored on the basis that on any version of the facts there was a problem with proper compliance with the law and the constitution. Similarly, in the instant case, it is submitted that it is clear that there is a problem when it comes to the provision of basic education in a manner that can properly be characterised as being in compliance with the law and the Constitution. A lack of accountability, responsiveness to the needs of poor children, parity of esteem for all official languages, compliance with the principles and values of C195(1)

and the failure of the state to live up to the standards of the Bill of Rights are all evident on any fair conspectus of the papers filed of record on behalf of all of the parties to this application. A fair conspectus involves approaching the affidavits filed of record in the manner prescribed by the SCA in *NDPP v Zuma* [*supra,* at par. 26].

125. The crisis has been long in the making. As long ago as 21 June 2012, several key stakeholders in public education addressed an open letter to the Second Respondent.

126. The said letter sets out a long litany of difficulties *"which represent a catastrophic failure... to adequately deal with long-standing systemic issues"* many of which are *"a direct result of poor administration by district offices, which are either unresponsive to the needs of the schools or lack the administrative capacity to attend to those needs".*

127. The letter further stresses that delivery of *"the right to education is fundamental to resolving the structural legacy of apartheid*" and urges the Second Respondent to *"address the massive inequalities in the provision of education and to prevent the complete collapse of the public education system."*

[Record pages 3306 to 3308]

128. By comparison, the demands made on behalf of the Applicants on 30 August 2013 are relatively meek and mild. They asked only for engagement on the matters of ECD, mother tongue education in the

foundational phase, the professionalization of teachers, as well as materials development and LTSM provision.

[Record 367 to 369]

129. It is the Applicants' case that appropriate attention to these areas of concern is an essential, long overdue and necessary start on the road to turning from failure and beginning the provision of access to basic education in a manner consistent with the law and the Constitution.

130. There has been no substantive engagement between the parties, other than through the papers now filed of record in the matter. Most recipients of the Applicants' demand ignored it, others in essence did no more than respond that the matter is receiving attention.

131. In these circumstances, the issues are manifestly ripe for the type of interventions by the courts that the Applicants seek in the relief that they claim in the notice of motion.

[Record p. 2 *et seq*]

132. The Grade 12 results, properly analysed with due regard for context of the entire entering cohort, as contended by First Applicant, bear testimony to a systemic failure to get to grips with what is required in order to deliver adequate basic education. Absent such education, there is little, if any, meaningful way in which to address the poverty trap, the exacerbation of inequality and the joblessness of three quarters of the youth, which are all traceable, at least in part, to the failure of the education system to prepare

the young properly for social and economic adulthood that is more equal, more dignified and more ethical than is at present the case. In order to do so, one has to reverse the rising trends in the Gini co-efficient and the rate of joblessness which leaves 7,5 million job-seekers unemployed, as well as the current value system of the young.

[Record page 2830 to 2831]

133. The Applicants' analysis of the latest ANA scores in their supplementary founding papers (filed by consent), prepared shortly after the publication of the ANA results for 2013, underscores the point that grave problems that permeate the system from at least Grade 3 all the way through to Grade 12. The ECD system, on the First Respondent's own showing, is in disarray with no functional direction in policy formulation that accords with the NDP.

[Record page 877 *et seq*]

134. The question is how to best address the issues in this case, through meaningful deployment of the legal remedies available in public interest litigation under the current constitutional dispensation.

REMEDIES FOR INFRINGEMENTS OF CONSTITUTIONAL RIGHTS

135. It is submitted that it is appropriate to grant the type of declaratory, mandatory and supervisory relief claimed in the notice of motion.

[Record page 2 et seq]

136. The Second Respondent seems to suggest that the right to basic education has no qualitative content and is accordingly not justiciable for its quality or the lack thereof.

137. The Applicants submit that the constitutional duty to respect, protect, promote and fulfil the right to basic education goes way beyond the mere provision of access to educational facilities. What is in place ought to comply with, or be consistent with, the Constitution in a manner which is reasonable. It is not.

138. The creation of a DBE with responsibilities in respect of primary and secondary education to the level of Grade 12 suggests that the executive recognises that basic education ends at the Grade 12 level with learners progressing either into the world of work or to a tertiary educational institution for which they are adequately prepared.

139. “Basic education”, put at its lowest, means the inculcation of literacy and numeracy into the learners who are in the system, so that even those who emerge or leave the system after compulsory nine years without a Grade 12 certificate are not functionally illiterate and innumerate.

140. This minimal expectation accords with the ethos of the Freedom Charter which envisages that the “doors of learning shall be open to all”. The idea that basic education involves learning, as well as the attendance at a public school, accords with a purposive approach to the meaning of

the term 'basic education' as it is used in the Bill of Rights. Taken together with the notion that the bests interests of children must be served in all matters concerning them, as set out in C 28(2), it is specious to suggest that the notion of "basic education" does not include at least the capacity of the system to deliver a basic education to the learners who attend public schools in South Africa in a manner which is effective, efficient and economical [C195(1)(b)].

141. The existing judicial precedents in the Constitutional Court and the High Court (Kollapen and Goosen JJ) are against the narrow and hollow meaning of "basic education" suggested by the Second Respondent. The views of the Fifteenth Respondent accord with those of the courts (indeed Kollapen J was Chair of Fifteenth Respondent when its seminal 2006 report was prepared).

142. In their important analysis called "Concretising the right to a basic education", the McConnachies interpret the *Juma Masjid* case to mean that a *"substantive standard of education"* is required by the law, if there is to be compliance with the Bill of Rights. The Applicants embrace this approach. Anything less makes nonsense of the foundational project of the new order to promote the achievement of equality [C1(a)] Such a standard can surely never be achieved while the well-off, the privileged and the previously advantaged, enjoy a substantively high standard of education in 20% of public schools and in the private schools of the land, while in 80% of public schools, mostly attended by previously disadvantaged learners,

learners are treated to a system which is devoid of substance in their quest for basic education.

[Annexure G1 to the Guide to Reading the Record]

143. The current system is so dysfunctional that it routinely produces only a small cohort of Grade 12 Certificate holders who are truly ready for tertiary education, and simultaneously, a large a cohort of school leavers (to its shame, including some who pass on Grade 12 exit criteria) who remain functionally illiterate and innumerate. On these grounds, the Applicants assert that the current system is not one that can properly be described as a system that respects and protects, promotes and fulfils the right to basic education in the sense that the term is used in the Bill of Rights. It also does not accord with sentiments expressed by the education authorities, including previous Minister of Education Kader Asmal who said on 20 November 2000: *"A measure of our humanity is inextricably related to how we treat our children. Apartheid tried to rob us of our humanity. By condemning every black child to a life of deprivation, they sought to deprive us of our dignity… Everyone involved in education has a responsibility to restore the humanity and dignity in the way we treat our children."*

144. Such redress can hardly be achieved if the right to basic education does not include sufficient substance to produce school-leavers who can read and write and do arithmetic in a fashion that prepares them adequately for adult life in the modern world of the twenty-first century.

145. The McConnachies suggest that *“the responsible use of litigation over school facilities can help to spur on systemic change, can secure improvements for those in greatest need and can contribute to the creation of school environments that are conducive to effective teaching and learning”* [*supra,* at 557].

146. Education that lacks substantive content or quality is not capable of achieving the transformative goal of the Constitution which is a society in which everyone is equal before the law and in which the achievement of equality is foundational to the constitutional project [C1(a) read with C9].

147. The discussion of the nature of ‘a basic education’ in which the McConnachies engage [*supra* page 565 et seq] is instructive and ought to inform the decision of this Honourable Court in determining the issues in this matter.

148. It should be noted that, mindful of the limitations set in s 3(1) of SASA which makes school attendance compulsory from the age of seven years until the age of 15 years or reaching ninth grade, whichever occurs first, the Applicants have not sought any relief in this matter which relates to the outcomes in the Grade 12 examinations. Instead, the poor Grade 12 National Senior Certificate outcomes are used to illustrate that the system is not producing anything near the number of certificated candidates that could be expected of a public school system in which literacy and numeracy are given their proper place and are successfully imparted.

Further, those who do leave school in Grade 9 should do so in at least a functionally literate and numerate state. This criterion, on any analysis of the ANA scores, including the analysis of the Second Respondent, is simply not happening at present, to the detriment of the poor learners in quintile one, two and three schools.

149. Nkabinde J adopts a purposive approach in *Juma Musjid* at para 42 where she refers to the significance of basic education for individual and societal development. Neither of these forms of development can occur in a basic education system that has no substantive content. Nor can education serve the cause of transformation if it does not have individual and societal development in view.

150. The international law distinction between "primary" and "basic" education discussed at p. 566 *et seq* of the same article points to the interpretation for which the Applicants contend and away from that suggested by the Second Respondent. [See also p. 572 and the discussion of foreign law at p. 573].

151. The Applicants in this matter have accepted the task of reviewing 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. This review they have conducted with the help of the various experts who have deposed to affidavits in support of the Applicants' cause and by placing on record the ANA results, as well as the surveys and Child Gauges relating to the last three years. These

sources of evidence have established that the education system is not reasonably delivering basic education to the vast majority of learners in the system, that it is inconsistent with what the provisions of the Constitution require and that it is ripe for the type of declaratory, mandatory and supervisory relief which the Applicants have claimed.

152. As regards the use of the supervision order mechanism, which the Second Respondent resists, the Applicants refer to the learning and authorities analysed in the article authored by Kent Roach and Geoff Budlender SC, entitled “Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?”

[Annexure G2 to the Guide to Reading the Record]

153. From the exposition of the law set out by Roach and Budlender in South Africa, Canada and in the USA, it is apparent that supervision orders are indicated in circumstances in which the authorities are incompetent, inattentive and intransigent.

154. It arguable that all three of these unfortunate conditions apply variously to the facts that are common cause:

154.1. On ECD inattentiveness to the NDP is demonstrated;

154.2. On language of instruction a combination of incompetence and intransigence appears from the answering affidavit of the Second Respondent;

154.3. On the professionalisation of teachers all three conditions apply; and

154.4. On the provision of LTSM incompetence and inattention (especially as regards Limpopo) are apparent.

THE ROLE OF THE CHAPTER 9 INSTITUTIONS

155. It is contemplated that the order made in this matter will apply at national level, as well as to all provincial education departments as well.

156. Insofar as the structural interdict is concerned, it would be invidious for this Honourable Court to assume supervisory jurisdiction in all provinces to which the order that may be granted, will apply. There is the further complication that the provincial departments of Limpopo and the Eastern Cape are under the administration of the DBE in terms of C100 of the Constitution.

157. In these circumstances independent and objective supervision by institutions other than the Courts, with the opportunity of recourse to the courts not excluded, is a possible solution to the problems of supervision.

158. The SAHRC has produced a “Report of the Public Hearing on the Right to Basic Education” a copy of which is annexed hereto, marked **“Y1”**. In the foreword to the report the then Chairperson, Jody Kallopen, of the

SAHRC observes that it was (in 2006) *"an opportune time to take stock of the achievements and identify the obstacles that block the realisation of the right to basic education"* [at p. 1].

159. The said report concludes with the sage observation that: *"Each passing day we continue to fail many of our country's children. There is no rewind button that can be pushed and for the opportunity to provide a quality education to be played again. Education is necessary to develop and free the potential of each child in this amazing and wonderful country of ours. It cannot be accepted that in the constitutional democracy for which we fought, we live in a country where the potential of some children is met whilst the potential of others is neglected and destroyed. The right to dignity will be difficult to affirm when the hopes and dreams for a better future cannot be realised because our children have not been equipped with the necessary education and skills to embrace that future. There is indeed a continued dire sense of urgency that even though much has been achieved since 1994, we need to recommit with renewed energy and vigour matched with the necessary resources to address the challenges. Children are our future!"* [at p. 45].

160. It follows from the report and the conclusion it reaches that the human rights issues relating to the supervision order could be correctly construed as falling within the constitutional mandate of the SAHRC. That mandate requires it to promote human rights and their protection, development and attainment [C184(1)]. It is given the power to investigate the observance of human rights, as it has done, critically, in the report annexed to these

heads [C184(2)(a)]. The SAHRC also has the power to take steps to secure appropriate redress where human rights have been violated [C184(2)(b)].

161. A request by the applicants and an order by the court that the SAHRC act as supervisory body in respect of any structural interdict falls within the mandate of the SAHRC to the extent that the supervision relates to infringement of human rights. It is submitted that the wholesale infringement of the right to basic education, one guaranteed to all in the Bill of Rights, has been proved on a proper conspectus of the papers filed of record in this matter.

162. It follows that there is a possible role for the SAHRC in the supervision of "securing appropriate redress" [C184(2)(b)] in respect of all of the human rights infringements that the court finds proved from dignity and equality, through language and culture to basic education, the right to a trade or profession and to the extent that the paramount nature of the interests of children has not been respected, protected, promoted and fulfilled in the basic education system of laws, policies, programmes and practices.

163. As regards the Public Protector, her mandate is to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in impropriety or prejudice [C182(1)(a)]. In essence maladministration is the province of the Public Protector.

164. The deficiencies identified in the founding papers speak to instances of maladministration. The mere fact that two provinces have their education departments under national administration is indicative of sufficient maladministration of those departments in Limpopo and the Eastern Cape, to justify a C100 intervention. It may be that the Public Protector is well placed to supervise the remediation of maladministration in education departments and that this could be construed as falling within her mandate to so investigate.

165. The fact that the Public Protector also has the power to take appropriate remedial action [C182(1)(c)] is useful in the context of the supervision of any structural interdict that the court may be minded to granted.

166. As far as the Auditor General is concerned, his mandate extends to reporting on the financial management of all national and provincial state departments and administrations [C188 1)].

167. The long standing inability of the respondent education departments to so manage their affairs and to successfully complete the elementary task of getting the right materials, in the right languages into classrooms both timeously and in sufficient quantities for each and every learner to be on a level playing field at the commencement of the academic year, every year, is a matter of financial management. Often, the reason for non-delivery of the necessary textbooks, workbooks, library books, teaching aids and

even desks and chairs is due to financial mismanagement couched in language such as, ‘we have no funds for materials’. This requires systemic correction. The retiring Auditor General has spoken publicly of the need for better co-ordination in local government. The same criticism applies in the education system. More co-ordination is needed to prevent the collapse of the basic education system in weaker provinces and the resultant strain on the systems of stronger provinces as people move away from failing provinces toward those in which the poor perceive education opportunities to be better for their children. The population of Cape Town has grown by 30% in the last 10 years due to this phenomenon and Gauteng has been similarly affected. People with comfortable houses in the Eastern Cape trek to Cape Town to live in wretched informal settlements near to schools in which their children are able to receive a better education than that on offer in the Eastern Cape. Unless proper co-ordination of the kind to which the retired Auditor General refers is put in place we will end up with ghost provinces that are overpopulated and under unprecedented social and economic stress.

168. The Auditor General could, if the court deems it appropriate, play a vital role in correcting the types of financial mismanagement that lead to teachers not being paid, appointments not being made and most importantly, the non-delivery or late delivery of teaching materials.

COSTS AND CONCLUSION

169. This application is in the nature of public interest litigation. The entire public interest is served by the constitutionally compliant delivery of the right to basic education enshrined in the Bill of Rights [C29(1)] and by the public administration doing so in a manner that accords with the values and principles set out in the provisions of C195(1).

170. Of equal, if not greater, importance is serving the best interests of the children in the public education system. The Applicants have in mind those who are the victims of unreasonably inadequate delivery of their right to receive a basic education from a state that "must" respect, protect, promote and fulfil that right. Many other rights, also guaranteed under the Bill of Rights, are involved in the proper delivery of basic education. Human dignity, the promotion of the achievement of equality, rights to a profession or occupation of choice, cultural and psychological rights, and more, are all served by a functioning education system that is well able to deliver a basic education to all.

171. The forms of short-delivery of the right to basic education that have been identified by the Applicants relate to four areas of particular weakness in the current system, areas which the Applicants consider can be successfully addressed via the relief they claim.

172. The provision of early childhood development facilities to all children is a Cinderella area. The Thirteenth Respondent, in her press release of 13 March 2014, by implication, if not explicitly, acknowledges this wholly inadequate provision of early childhood development. This inadequacy is

also admitted and addressed in the National Development Plan of November 2011. Although the NDP is the official policy of the First Respondent and of the Eleventh Respondent (who is in a province not controlled by the same political party as that in control of governance nationally and in all other provinces at least until 7 May, if not beyond) it appears that the plans that the NDP has for ECD have escaped the attention of the Second and Thirteenth Respondents. There is no evidence from the Respondents that the Council of Education Ministers has paid any attention whatsoever to the sweeping changes envisaged for ECD by the NDP. Instead, bland confirmatory affidavits have been served. This set of changes envisaged in the NDP is accordingly an area that is particularly well suited to the granting of a structural interdict. The weaknesses in the delivery of ECD need urgent attention. Every year of continued dysfunction condemns another cohort of children entering the system to adversity which infringes their constitutionally protected psychological integrity and, all too often, to failure at school. These setbacks are likely to limit their opportunities in life and in the economy, and they are doomed to a future in which bodily and psychological integrity are constantly imperilled by the spectres of poverty, inequality and joblessness.

173. In the field of mother tongue education there has been serious neglect of the indigenous languages that ought to enjoy "parity of esteem" [C6(4)] by the state (and in the education system), according to the foundational values of the Constitution. C6(2) obliges the state to take "practical and positive measures to elevate the status and advance the use of these languages". This elevation has not happened on any fair conspectus of the

evidence on record. Professor Alexander has given this area of learning deep and sustained attention; his concern about the absence of mother tongue education in the foundational phase of public schooling in large measure instigated the launching of this application. The need for improvement in this field is obvious and the granting of supervisory as well as declaratory and mandatory relief is well justified. The Second Respondent's reliance upon the draft policy for the incremental introduction of African languages in South African Schools is misplaced. It is not the introduction of a third language that is needed, even though this intervention is welcome. It is the enhancement of the provision of mother tongue education that is lacking.

174. The appalling neglect of teachers in the public education system has been singled out by Professor Wright, as the single most devastating aspect of the dysfunction in the system. Low morale, high rates of absenteeism, rampantly inappropriate intrusion on management prerogatives by recalcitrant unions, the admitted vilification of the Second Respondent by SADTU, un- and under- qualified teachers still in the system 20 years into liberation, the weaknesses of Inset and more, all need urgent attention which will not be forthcoming if no legal redress is granted. The Second Respondent is in denial of the problems with teachers. This denial is untenable in the face of the results that the system is producing, both in ANA scores and in the Grade 12 pass rates. The political will to do what is necessary to address the parlous lot of teachers will not be generated in the absence of a structural interdict. Such an interdict can be used to address the dysfunctional relationship between

managers and unions in the public education system. It can certainly assist the learners to get a better deal than is at present the case for far too many black and impoverished learners. If learners' needs are not prioritized, the national constitutional project to promote the achievement of equality, which is foundational to the new order, will fail. Such failure is likely to have catastrophic results for all concerned, not only the learners who, on average, receive instruction for only 40% of the time that they are in classrooms around the country, from which half of those learners emerge without any useful qualification, effectively functionally illiterate and innumerate. A structural interdict is sorely needed.

175. As regards the inadequate provision and delivery of learning and teaching support materials (LTSM), there is on-going litigation elsewhere concerning the failure to get all textbooks into the classrooms of the public schools on time every time in the right quantities and in the right languages. The Fourteenth Respondent has reported adversely regarding the situation in the Eastern Cape, complaints are heard in the Free State and in Limpopo the Section 27 litigation comes to a head as these heads of argument are under preparation.

176. As has been observed by human rights lawyer Faranaaz Veriava (writing on page 36 of the Mail and Guardian newspaper on 17 April 2014): *"Even if Section 27's current action in the courts is successful, the larger question will remain: Have the lessons learnt from the 2012 textbook crisis led to reforms that are capable of addressing the systemic weaknesses with textbook procurement and delivery? Unless and until this (reform)*

occurs, the government will continue to struggle to meet its obligations concerning LTSM provisioning, and the problem of the non-delivery of textbooks is likely to recur time and again, not only in Limpopo but also in other provinces such as the Eastern Cape, where similar problems have been reported in the past."

177. The need to address these "similar problems" is self-evident. Tackling them on a systemic basis that is reported to the court and held up for critical appraisal by the Applicants, interested parties such as Section 27 and by the Chapter Nine Institutions that find themselves already reporting adversely and retrospectively on what has already gone wrong with the vital matter of LTSM provisioning, is urgently required. A stitch in time saves nine.

178. The Applicants accordingly persist in claiming the relief set out in the Notice of Motion filed of record.

179. As regards costs of suit, it is submitted that the experts who have deposed to affidavits in support of the relief sought have contributed positively to the determination of the issues in the case and ought to be awarded their qualifying expenses. The Respondents have engaged four counsel to oppose the matter, so it is well within the bounds of reasonableness to request the costs of two counsel for the Applicants.

180. The best interests of children are paramount and are directly implicated in the determination of the issues. The complexity of the issues, the

amount of information relevant to their consideration and the need to marshal the facts and the law in a manner that is conducive to the independent and impartial adjudication of the issues, justifies the engagement of two counsel.

181. There is no justification for any adverse costs award against the Applicants, irrespective of the outcome of the matter. Public interest litigants who are not frivolous or vexatious (and there is no suggestion of either in this matter) are not ordinarily mulcted with adverse costs awards in their quest to enforce the human rights they consider to be infringed or threatened. As Ngcobo CJ put it in the main judgment in *Glenister II*: [158]: *"I am not persuaded that we should depart from the general rule that, where a private litigant is unsuccessful in vindicating his or her constitutional rights, he or she should not be mulcted with costs."*

182. The general rule to which the learned Chief Justice so refers is that laid down in *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC) at [paras 56-57].

183. It is submitted that a proper case has been made out for all of the relief claimed in this matter.

184. It follows that an order should be made as set out in the notice of motion with such provisions as to the supervision of the structural interdict claimed as this Honourable Court deems meet.

Adv. Paul Hoffman

Adv. Natalie Lawrenson

Counsel for the Applicants

Chambers

23 April 2014

APPLICANTS' LIST OF AUTHORITIES

Case Law

1. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12 (17 April 2014) *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)

2. *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC)

3. *C and Others v the Department of Health and Social Development Gauteng and Others* 2012 (2) SA 208 CC

4. *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC)

5. *Glenister II v The President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

6. *Governing Body of the Juma Musjid Primary and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC)

7. *Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of the Republic of South Africa and Others* [2014] 1 All SA 671 (WCC)

8. *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C)

9. *Madzodzo and Others v The Minister of Basic Education and Others* (2144/2012) [2014] ZAECMHC 5

10. *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC)

11. *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC)

12. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)

13. *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA)

14. *Rail Commuters Action Group and Others v Transnet t/a Metrorail and Others (No 1)* 2003 (5) SA 518 (C)

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16. *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T)

17. *Section 27 and Others v Minister of Education and Another 2013 (2) SA 40 (GNP)*

Articles and Books

18. Couzens, M "The Constitutional Court consolidates its child-focused jurisprudence: The case of C v Department of Health and Social Development, Gauteng" 2013 *SALJ* (4) 672

19. Du Plessis et al, *Constitutional Litigation.* Juta (2013)

20. McConnachie, C & McConnachie, C "Concretising the right to a basic education." (2012) 129 *SALJ* 554

21. Roach, K & Budlender, G "Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?" (2005) 122 *SALJ* 325