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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: CCT 46/95

In the matter of:

**THE NATIONAL ASSEMBLY OF THE PARLIAMENT  
OF THE REPUBLIC OF SOUTH AFRICA**

In re :

**DISPUTE CONCERNING THE CONSTITUTIONALITY OF CERTAIN  
PROVISIONS OF THE NATIONAL EDUCATIONAL POLICY BILL, 1995**

**As Amicus Curiae: The Minister of Education and Culture,  
Province of KwaZulu-Natal**

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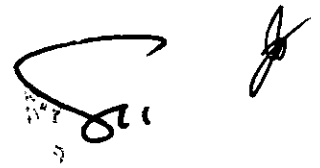
**A F F I D A V I T**

---

I, the undersigned, **MICHAEL ANTHONY MITCHELL JARVIS**, do hereby make oath and say that:

1.

I am an adult male, employed by the Province of KwaZulu-Natal as the Acting Executive Director of the ex-Natal



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Education Department.

2.

I am a qualified teacher, holding the Degrees of Bachelor of Arts (Honours) in English, a Master of Education Degree and a Doctor of Philosophy in Educational Philosophy, all from the University of Natal. I have been involved in the teaching profession since 1962 and entered the employ of the then Natal Education Department in October, 1966.

3.

By virtue of my aforesaid qualifications and experience, I am qualified to speak on education matters in general and in particular upon educational policy within the Province of KwaZulu-Natal.



4.

I have been asked to comment, from a departmental point of view, upon certain provisions of the National Education Policy Bill, 1995. I shall do so hereunder section by section and for the sake of brevity will refer to the said Bill as "the Education Bill".

Section 3(4):

5.

As regards the preamble to this subsection I consider the phrase "National Policy" to be a very broad term indeed,

which is undefined and would appear to invest the National Minister with extremely wide powers to over-ride the wishes of particular provinces. Section 3(4)(b) of the Education Bill indicates clearly that its overall intention is to establish a single national education system, rather than to allow for a plurality of education systems diversified on a provincial basis. In order to permit a plurality of education systems it is necessary that a province be allowed, to a greater or lesser extent, to develop policies in respect of each aspect of policy formulation listed in subsection (4). For instance, with regard to curricula, an educational programme in English at second level may be quite different in the rural areas of KwaZulu-Natal from, say, the Western Cape. Therefore, in order to enable this differentiation to take place, the power to develop curricula should, to a substantial extent, be left with the provinces.

6.

With regard to section 3(4)(a), I consider that this should be a concurrent competence. In shaping, constructing and managing an education system at provincial level, the Province will need to rely upon financial transfers from the Central Government, the size of which is determined on the basis of statistical data collected by the Central Department of Education. However, the education management information function is also essential to the development

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and management of an educational policy at provincial level.

7.

Section 3(4)(c) is unclear, with respect, as to what is meant by the words "facilities, finance and development plans". If by "facilities" is meant the type of schools to be built I consider that this should be a provincial as opposed to a national matter, in order to cater for the needs of specific areas and communities such as those, for example, in rural areas which may lack certain infrastructural requirements. This function is closely connected to other provincial functions such as regional planning and development, rural and urban development, welfare and housing.

8.

Section 3(4)(d) refers to matters which are essential to policy development, and there is no reason why innovation, research and development in education should be the sole preserve of the National Department of Education. In my view this should be a responsibility shared between the Central Government and the provinces as this would give scope to varying regional developmental needs. The latter are capable of producing innovative ideas in education. This has to my knowledge been so for many years within the Province of KwaZulu-Natal.

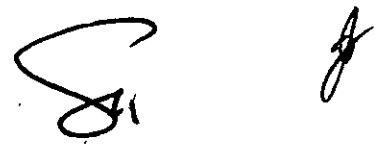


9.

Section 3(4)(e) also relates to a fundamental policy matter. The ratio between educators and students is connected to the distribution of schools in the territory, available classrooms and to the allocation of available resources within the educational budget made available to any given province. This matter really resolves itself into a question of finance and here I wish to point out that as regards certain other provinces, particularly Gauteng and Western Cape, KwaZulu-Natal is disadvantaged at present as there are more ex-House of Assembly and ex-House of Representative schools in these two provinces than in KwaZulu-Natal and there is presently a disparity in funding due to this.

10.

With respect to section 3(4)(f), it should be noted that according to Schedule 6 of the Interim Constitution, the professional training of teachers as a segment of the functional area "education", is presently the competence of the provinces. Besides professional training of teachers being a provincial educational function, a province can best determine courses and subjects which should be offered to meet its educational needs. This would also be cost-effective, as it would reduce training in over-supplied subject areas. It should also be noted that a system of accreditation of educators at provincial level is not



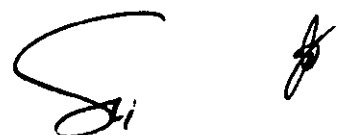
uncommon in many federal systems, even though this may be tied to national "minimum standards", as opposed to "uniform norms and standards". I would here respectfully refer this Honourable Court to the affidavit of PRINCE V.T. ZULU for the differentiation between these two concepts.

11.

With respect to section 3(4)(g), it should be noted that the organisation of education institutions is closely connected to the establishment, management and administration of schools, which is an essential part of an education system at provincial level, and may also relate to matters such as the participation of parents in the administration of schools. A basic element of the "organisation" of institutions could be their organisation into primary/secondary schools and so forth, which might call for national minimum standards, but should, however, leave sufficient room for a province to develop other organisational structures to accommodate its needs.

12.

Also with respect to section 3(4)(g), it is not entirely clear to me what the Education Bill means by the term "management". In any event, educational institutions were traditionally managed by the provinces and in my view this is an essential function in any significant aspect of policy formulation in educational matters and should be a



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provincial prerogative, as the closer management is to the institution being managed, it is generally found the more effective that management will be.

13.

Further with respect to section 3(4)(g), my view is the same regarding the term "governance". This term would appear to embrace matters such as the extent of authority to be given to school councils, parent institutions and the like. The extent to which such bodies should have a say over the governance of a particular education institution should, in my view, be a provincial competence, as a province and its education department is best suited to determine it, in consultation with school councils and communities. Without this power there cannot be any autonomy in policy formulation. Here I would point out that according to clause 4.23 of the Draft Education White Paper 2, negotiable powers may be acquired by a governing body in negotiation with the provincial education authority.

14.

As regards funding, whilst the funding of education in each of the provinces is made subject to sections 155 to 159 of the Constitution, the autonomy of each province to make the necessary policy decisions on how to allocate, prioritise and distribute its educational budget should be recognised. If all funding is determined in detail by the Central

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Government, there cannot be any significant degree of autonomous decision-making at provincial level.

15.

Insofar as the establishment of education institutions is concerned, I submit that this is a matter which should be left to the individual provinces, rather than be determined on a national level. For example, if by "establishment of schools" is meant, that there has to be a presence of say, 500 pupils, before a school may be established this would be inadvisable as it would fail to take account of prevailing conditions in each province.

16.

Finally, as regards registration of education institutions, the provincial member of the Executive Committee should have the right to effect registration, depending once again upon local conditions. To take an example, if a school building does not measure up to national standards, would that mean that it could not be registered as a school? This would be unfair especially if the building was situated in a rural area where conditions were very different from those in an urban environment. Moreover, this issue also relates to the relation between the private and public school systems and the vexed question of criteria for the registration of private schools, and is an essential instrument of policy in the shaping of an education system.



17.

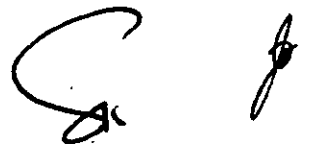
With respect to section 3(4)(h), whilst it may be conceded that in this respect the National Government may set out minimum standards, this should not lead to the necessary conclusion that it should be a national competence in its entirety.

18.

With regard to section 3(4)(i), I believe that this should be a concurrent competence, and that, whilst the age of admission to schools should not differ from province to province, provinces must have the right to control access to education institutions if they are to be able to manage their budgets and their particular needs.

19.

As regards section 3(4)(j), it should be noted that this competence goes to the core of policy formulation and the shaping of an education system. Simply put, this competence relates to the manner in which the objectives of an education system are to be achieved. Minimum standards might be deemed to apply, but it will always be open to a particular province, say, KwaZulu-Natal, to exceed the number of hours per day and days per year, having regard to local conditions, if it so wishes.



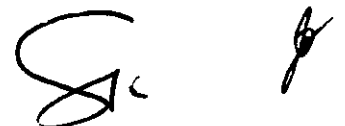
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20.

As regards section 3(4)(k), co-ordination amongst the various provinces as to school holidays is essential so that all schools do not go into recess on the same day and would take into account factors such as safety on the roads, over-crowding of resorts and the like. I am, however, of the view that each individual province ought to determine such dates according to provincial needs and matters related to specific cultures and traditions as found in each province. The power of the Central Government should not be that of deciding, but rather of "co-ordinating". However, the fact that this matter is listed as a policy formulation item suggests otherwise.

21.

As regards section 3(4)(l), it should be noted that whilst the need could be identified for national minimum standards (as opposed to uniform norms and standards) with respect to curriculum frameworks arrived at after consultation with the provinces, core syllabus construction should be a provincial competence. A bottom-up process from teacher input to provincial policy should take place. Legally, each core syllabus needs to be referred only to the South African Qualifications Authority for accreditation and does not need national departmental support. National syllabus outcomes could be too narrow and would place the provinces in a straight jacket.




22.

In the case of education programmes, I feel that these should be a matter for the provinces, as each province knows its own needs. Examinations, as the end-product of curriculum delivery, should be a provincial competence. Even examination certificates should be issued by the provinces and not by SAFCERT. These elements of policy formulation are essential to the development of an autonomous education system, which can still operate under minimum national standards.

23.

As regards section 3(4)(m), it should be noted how languages in use in education differ from province to province, which makes it seem desirable that each individual province should determine the language or languages to be used in education institutions. "Language in education" mainly refers to the choice of the medium of instruction, mother tongue education and the teaching of languages other than that used as the medium of instruction. In the 9 provinces not all 11 official languages, which are to be regarded as having equal importance and status, are commonly spoken or utilised as the mother tongue. Therefore, by necessity, any aspect of language in education will be sharply differentiated depending upon the cultural make-up and historical background of each province. For instance, KwaZulu-Natal has a specific responsibility for providing for Indian

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languages within the development of its educational curricula and syllabi, this being consistent with section 3(4) of the Constitution.

24.

As regards section 3(4)(n), I can find no reasons to justify the involvement of the Central Government in this matter. It should, as it is at present, be largely institutional, whilst the major aspects of control and discipline such as expulsion and suspension are and should be a provincial competence. Moreover, topics such as psychological or physical abuse of students are adequately covered by the common law and departmental regulations presently in force. The same applies to the use of corporal punishment. Therefore, these matters should not be the object of policy formulation.

25.

As regards section 3(4)(o), I am of the view that these topics are properly provincial matters. The Natal Education Department has, for example, always had a planning section and a counselling unit which was able to offer competent local advice. As health is a Schedule 6 function, there is also a Department of Health within the Provincial Government, with which education authorities liaise. It is also not clear to me how the National Minister of Education could notionally be able to make policy "within the



functional responsibility of a department of education". This would appear to be a contradiction in terms: if it is a functional responsibility, this should then include determination of policy.

26.

As regards section 3(4)(p), I agree that the role of the Central Government should be that of co-ordinating and promoting co-operation between the provincial and national levels of government and amongst the provinces themselves. However, this effort of co-ordination and promotion of co-operation should be based on the advancement of limited national policies and fundamental common goals, as well as on the formulation through consultation of the minimum standards imposed by the Central Government. I regard this to be the essential competence of the Central Government if in our country we are to permit the development of a plurality of education systems co-ordinated by national minimum standards when necessary.

27.

However, I believe that when co-ordination and promotion of co-operation relates to local government functions, this should be a provincial prerogative as local government is a provincial competence in terms of the Constitution and is separate and distinct from the Central Government. In many respects the Constitution suggests the idea that any co-



ordination of local government should be made through the provinces, and here reference may be made to the provisions of section 158(b) of the Constitution.

28.

I am concerned about the concept of developing a policy function to promote (or impose) co-operation with non-government organisations, for this is inevitably an encroachment upon the autonomy of civil society. However, if such a policy function is to be envisaged, it should be a provincial matter, as non-government organisations often operate either at a delivery level or at a policy level corresponding to the type of policy formulation which a province should be entitled to exercise.

29.

As regards section 3(4)(q), I agree that this topic should be a national competence. If, for example, persons are undertaking research in a particular field, they should be enabled to visit countries overseas in order that the results of the research be disseminated interprovincially. However, provinces should not be barred from developing their own programmes to foster research and acquire or disseminate educational information and resources.

30.

It appears to me that section 3(4)(r) is an intrusion into

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the rights of the provinces. The Education Bill not only seeks to determine all significant aspects of policy formulation in the field of education, but also intends to control the implementation of such policies. The petitioners before this Honourable Court have advanced the contention that the Education Bill turns the provinces into "mere implementers of policies established at national level". In terms of this provision not even such limited power would be left to the provinces. It is not clear to me how the Central Government is able to determine the executive functions required to implement "national education policy". It is also not clear what is meant by "measures to address past discriminatory practices". This appears to be idealistic and I would have thought that education departments should be concerned more to rectify such present practices which still prevail.

31.

In conclusion, if the areas of policy formulation items listed in section 3(4) of the Education Bill are examined, it becomes clear that the legislative power of a province in educational matters could only be exercised in conflict with national policies, unless such power is a mere verbatim reiteration of national policies. There is no residual area of policy formulation left.



32.

Section 3(4) read with section 8(6):

I have also been advised that section 3(3) of the Education Bill read with section 8(6) turns on its head the rules for the resolution of conflicts between the national and the provincial levels of government as set out in section 126(3) of the Constitution. I say this because, firstly, the Education Bill indicates that policy formulation at the national level of government shall prevail over that of the provinces, whilst section 126 of the Constitution provides for the opposite. Secondly, whilst section 126 of the Constitution limits the circumstances in which policy formulation by the Central Government will prevail over that of a province, to those circumstances as set out in subsection (3)(a) to (e), the sections of the Education Bill referred to above enable the policies of the Central Government to override provincial policy-making in all circumstances and without qualification or restriction.

33.

Thirdly, whilst section 126 of the Constitution sets out rules for the resolution of conflicts between legislated normative sources, the above section of the Education Bill determines the hegemony of the Central Government with respect also to a secondary source of such norms, namely, policy formulation arising from the implementation of the



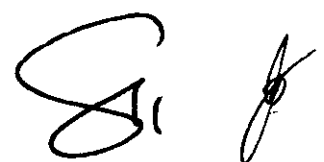


Education Bill itself. In this regard I have been advised that the Education Bill would effectively remove legislative competencies in educational matters from the National Parliament and transfer them to a secondary level of legislation under the control of the Executive and of the structures established by the Education Bill itself. By doing so, several guarantees entrenched in the Constitution to protect provincial autonomy, including those set out in section 61, would be effectively nullified, thereby empowering the Central Government to encroach on provincial autonomy as it saw fit. In this regard the Education Bill is *per se* a threat to provincial autonomy and I am advised that this is an additional ground of its unconstitutionality.

Section 4:

34.

Firstly, a good deal of what is stated in this section is idealistic as being aims to be aspired to and a repetition of what is already written in the Interim Constitution. Secondly, insofar as what is stated comprises statements of principle, much if not most is already in operation within the Province of KwaZulu-Natal. Finally, much of what is here given legislative force seems to be more properly the subject-matter for departmental guidelines and regulations rather than a statement of definite policy.



Section 5:


35.

Whilst, as I have already stated, I disagree that all the topics referred to in section 3 of the Education Bill should be a matter of national competence, I agree that the Minister of Education should have the right to consult whomsoever he or she wishes in the determination of a national education policy. I question, however, whether it is necessary to lay this down in statutory form, as a majority decision of the Council, for example, might be used as an attempt to bind a province against its will. Furthermore, insofar as subsection (2) is concerned, as I understand the position, the National Minister of Finance must always be consulted where expenditure from the State Revenue Fund is concerned.

Section 6:

36.

I have no comment to make on the provisions of section 6 save that I am of the view that before any education policy is determined at national level there should be as wide-ranging a consultation as possible between the Central Government and the provinces.

Two handwritten signatures in black ink, one larger and more stylized than the other, located at the bottom right of the page.

Section 8:

37.


This section appears to unduly restrict the power of the provinces over education. If education is to be a provincial competence, then the provinces themselves should be entitled to monitor and evaluate the effectiveness of their performance. If the newly-created provinces in terms of the Interim Constitution require assistance in the monitoring and evaluating of their performance, this could be obtained from established provinces, such as KwaZulu-Natal which has a well-established education infra-structure and institutions reaching back for more than a century.

38.

Particularly insofar as subsections (6) and (7) are concerned, I also question whether the Central Government should be entitled to enter a province with a plan of correction. This is unduly draconian as it appears to remove completely a provincial minister's accountability and responsibility to his or her respective provincial legislature.

39.

A further and undesirable result of the contents of section 8 of the Education Bill will be the creation of a massive central education department to monitor "standards of



education provision, delivery and performance throughout the Republic". This will not only be unnecessarily expensive, but in my submission represents an intrusion into the work of the various provinces, and the competence of the provincial Ministers of Education, to an extent far beyond that attempted in the history of education in South Africa to date.

Section 10:

40.

The establishment of a statutory body called the Head of Education Departments Committee appears to be unconstitutional. I say this because in my submission the Central Government cannot create a body in which organs of the province become organs of the Central Government. I concede, however, that it would appear to be necessary for a voluntary body to be established with a consultative and co-ordinating function, in terms of subsection (2)(b) and (c). Having said this, I should not be understood as agreeing that all the objectives and principles provided for in the Education Bill are matters of a national, as opposed to a provincial, competence, and I have set out above my views thereon.

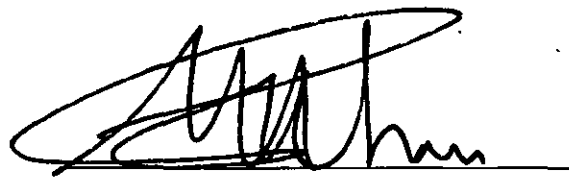


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D E P O N E N T



The deponent has acknowledged that he knows and understands the contents of this affidavit which was SIGNED and SWORN TO at *Durban* BEFORE ME this *6<sup>th</sup>* day of *January*, 1996, the regulations contained in Government Notices R1258 of the 21st July, 1972 and R1648 of the 16th August, 1977 having been complied with.



COMMISSIONER OF OATHS  
EX - OFFICIO

FULL NAMES: *MAHOMED SALGEM KHAN*  
 BUSINESS ADDRESS: *Suite 603, 6th Floor*  
*Salmon Grove*  
*Chambers 407*  
 CAPACITY: *Smith St.*  
 AREA: *Durban*  
*Adv. of the S.C. of*  
*S.A.*



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: CCT 46/95

In the matter of:

**THE NATIONAL ASSEMBLY OF THE PARLIAMENT  
OF THE REPUBLIC OF SOUTH AFRICA**

In re :

**DISPUTE CONCERNING THE CONSTITUTIONALITY OF CERTAIN  
PROVISIONS OF THE NATIONAL EDUCATIONAL POLICY BILL, 1995**

**As Amicus Curiae: The Minister of Education and Culture,  
Province of Kwazulu-Natal**

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**A F F I D A V I T**

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I, the undersigned, **DULCIE KRIGE**, do hereby make oath and say that:

1.

I am an adult female, the Director of the Geographic Information Systems Department of the Education Foundation,

DJK  
/

11 Hampden Road, Morningside, Durban.

2.

I hold a Master of Social Science Degree from the University of Natal, and have been involved in research into education and education-related matters for 10 years, both whilst employed on the staff of Natal University and by the Human Science Research Council at its Durban office.

3.

I am the co-compiler of the two works referred to in paragraphs 35 and 36 of the affidavit of PRINCE VINCENT ZULU.

4.

The statistical and other information contained in the aforesaid two works was compiled by me from the 1991 Census of the Department of Central Statistical Services in Pretoria and from the Education Data Base of the Human Sciences Research Council, as well as from the sources referred to in the Bibliographies.

5.

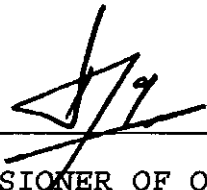
To the best of my knowledge and belief, the information contained in the said two works is accurate and reliable.

DJK

Dulcie Jean King

D E P O N E N T

The deponent has acknowledged that she knows and understands the contents of this affidavit which was SIGNED and SWORN TO at DURBAN BEFORE ME this 17<sup>th</sup> day of January, 1995, the regulations contained in Government Notices R1258 of the 21st July, 1972 and R1648 of the 16th August, 1977 having been complied with.



COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

CAPACITY:        JAVID LAURENCE MATHODORE YOUNG  
POSTMASTER/PO    GREYVILLE  
AREA:              69 STANFORD HILL ROAD/JEG  
                         3006 DURBAN



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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO.: CCT 46/95

In the matter of:

**THE NATIONAL ASSEMBLY OF THE PARLIAMENT  
OF THE REPUBLIC OF SOUTH AFRICA**

In re :

DISPUTE CONCERNING THE CONSTITUTIONALITY OF CERTAIN  
PROVISIONS OF THE NATIONAL EDUCATIONAL POLICY BILL, 1995

As *Amicus Curiae*: The Minister of Education and Culture,  
Province of KwaZulu-Natal

---

**A F F I D A V I T**

---

I, the undersigned, **LIONEL PERCIVAL HERCULES MBEKI MTSHALI**,  
do hereby make oath and say that:

1.

I am an adult male, a member of the National Assembly of the  
Parliament of the Republic of South Africa, representing the

 N.V

Inkatha Freedom Party. I am Deputy Chairperson of Committees and am also Chairman of the Inkatha Freedom Party Education Study Group.

2.

I hold the Degree of Bachelor of Arts and an Education Diploma from Rhodes University, a Bachelor of Arts (Honours) in History from the University of South Africa, a Bachelor of Education Degree from the University of Zululand and a Master of Education Degree from the University of the Orange Free State. I have had considerable experience in the field of education, having been Headmaster of a school for 10 years, Inspector in the former KwaZulu Education Department for 12 years and Chief Inspector for 7 years. From 1990 until 1994 I was Minister of Education and Culture for KwaZulu and a Member of its Legislative Assembly.

3.

By virtue of my aforesaid qualifications and experience I submit that I am qualified to speak on educational matters generally within the Republic of South Africa, and in particular, upon those as relating to the Province of KwaZulu-Natal.

4.

I dispute the constitutionality of the National Education Policy Bill, 1995, and am one of the Members of the National

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Assembly of Parliament who signed the Petition lodged with the Speaker of the National Assembly on 13 September, 1995, a copy of which has already been filed with this Honourable Court.

5.

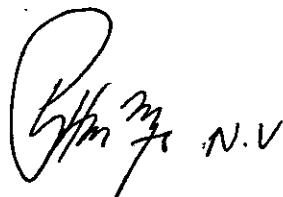
I have read the affidavit deposed to by Dr. M.A.M. JARVIS and I wish to associate myself with the criticisms of the said Bill as made by him.

6.

I further wish to draw to the attention of this Honourable Court that the National Education Policy Bill was passed through Parliament in considerable haste, having been introduced into and passed by the National Assembly in one day only, namely, 13 September, 1995, and in the Senate during the following 2 days, that is, 14 and 15 September, 1995. That this is so appears from the written transcription of the debate therein, copies of which have been filed with this Honourable Court.

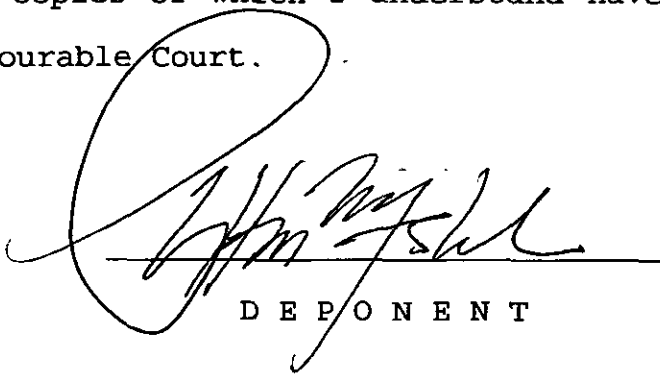
7.

The consequence of this was that parties interested in the Bill, such as teachers' organisations were to the best of my knowledge, given no opportunity to comment upon the Bill's provisions.


 N.V

8.

Furthermore, I discerned a considerable degree of unwillingness on the part of the Chairman of the Portfolio Committee on Education, Dr. B. NZIMANDE, who permitted debate on the various issues raised by the Bill. That this is so appears from the copies of the minutes of the meetings of the Portfolio Committee on Education held on 5, 6, 7, 11 and 12 September, 1995, copies of which I understand have been filed with this Honourable Court.

  
D E P O N E N T

The deponent has acknowledged that he knows and understands the contents of this affidavit which was SIGNED and SWORN TO at PINETOWN BEFORE ME this 5 day of JANUARY, 1995, the regulations contained in Government Notices R1258 of the 21st July, 1972 and R1648 of the 16th August, 1977 having been complied with.

  
COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIE
DIST. 76
AANKLAGRANTOOR
1996 -01- 04
CHARGE OFFICE PINETOWN
SOUTH AFRICAN POLICE

FULL NAMES: NICHOLAS MCHIZI  
BUSINESS ADDRESS: 133 OLD MAIN ROAD  
CAPACITY: CONSTABLE  
AREA: PINETOWN