

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

**WRITTEN ARGUMENT OF THE INKATHA FREEDOM PARTY'S
PETITIONERS AND OF THE AMICUS CURIAE**

1.

The following written argument is submitted on behalf of the
Petitioners belonging to the Inkatha Freedom Party in the
National Assembly of the Parliament of the Republic of South
Africa, pursuant to the directions given by the President of
this Honourable Court in the Registrar's letter dated 2

November, 1995.

2.

This argument is also submitted provisionally on behalf of the Minister of Education and Culture of the Province of KwaZulu-Natal, upon his due admission as an *amicus curiae* in these proceedings.

3.

For the sake of brevity, both the Inkatha Freedom Party Petitioners and the *amicus curiae* will hereinafter be referred to collectively merely as "the Petitioners" as they make common cause that the National Education Policy Bill ("the Bill") ought to be declared unconstitutional.

4.

This matter comes before this Honourable Court pursuant to the provisions of section 98(2)(d) read with (9) of the Constitution of the Republic of South Africa, 1993 ("the Constitution"). A Memorandum accompanying the Petition to the Speaker setting forth the provisions of the Bill which are disputed and specifying the grounds thereof has been submitted, in accordance with the provisions of Rule 13(1) and (2).

5.

In addition to what is stated by the Petitioners generally

in the said Memorandum, the Petitioners herein dispute the constitutionality of the Bill on two main grounds, which will be elaborated upon hereunder:

- (a) section 3(3) read with section 8(6) and (7) entitles the National Minister of Education to establish a unitary education system in South Africa against the wishes of the provinces, thus nullifying the fact that education is provincial legislative and executive competence in terms of the Constitution;
- (b) even should the provisions of the Bill which are disputed be found to be constitutional, certain of the provisions of section 3(4) are constitutionally objectionable and the Court will be requested to require the National Assembly to correct the defects therein, pursuant to section 98(5) of the Constitution.

6.

Section 126(1) of the Constitution provides as follows:

"A provincial legislature shall be competent, subject to subsection (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6."

In terms of Schedule 6 the legislative competences of

provinces includes "Education at all levels, excluding university and technikon education".

7.

Section 144(2) of the Constitution provides as follows:

"A province shall have executive authority over all matters in respect of which such province has exercised its legislative competence, matters assigned to it by or under section 235 or any law, and matters delegated to it by or under any law".

8.

It is submitted that the combination of legislative and executive powers and authority enables and entitles a province to develop comprehensive education policies of its own:

Prince Zulu Affidavit, para 14.

9.

"Policy" here may be defined as:

"A course of action or principle adopted or proposed by a government."

See: New Shorter Oxford English Dictionary (1993), Vol. II, page 2274.

10.

Whilst no judicial definition of the term "policy" or "government policy" can be found in reported cases in South Africa or in England, it is submitted that its meaning is as given above. The course of action may be laid down in an agreement, a circular, a resolution, guidelines or the like;

see: Halsbury's Laws of England (4th Edition), Vol. 1(1) *sub nom* "administrative law", para 54 n 1 and the cases cited therein.

11.

In the United Kingdom at any rate declarations of "policy" by a government would appear to have legal effect and as such be subject to judicial review;

see: Attorney-General ex rel Tilley v. London Borough of Wandsworth (1981) 1 All E.R. 1162 at 1167 h (Ch.D) 1171 j (CA).

12.

It is submitted that the sum of the policy decisions in the field of education amount to an education system, which in turn comprises a plethora of individual items;

see: Prince Zulu Affidavit, para 15.

13.

It is submitted that in terms of the Constitution the

provisions of section 126(1) and 144(2) as read with Schedule 6 as expressed in the education system of a province, must prevail over national legislation on the topic of education, unless the latter deals with one of the matters listed in section 126(3)(a) to (e) - which are colloquially referred to as "overrides". These overrides are:

- "(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;
- (c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
- (d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
- (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies".

This in effect means that each province is entitled under

the Constitution to develop its own education system. In other words, there may be a plurality of education systems, subject only to the so-called "overrides" which may be used to co-ordinate the various systems:

Prince Zulu Affidavit, para 17.

15.

The Bill seeks in effect to nullify what has been conceded to the provinces by the Constitution and to establish a single unitary education system.

16.

It will be observed that the Bill is carefully worded so as to appear to preserve the competence of the provinces over education, as bestowed by Schedule 6 and does not legislate directly on the topic - save for the provisions of section 3(4)(n) which deal with the use of corporal punishment in schools. Instead, the Bill empowers the National Minister to "determine national education policy" (see section 3(1)) on a very wide variety of topics (see section 3(4)) "... without derogating from the generality of this section...".

17.

It is submitted that if the "policy" referred to in the Bill was used in the sense of a mere wish or expectation on the part of the National Minister it would be unobjectionable,

but the term as used appears to go beyond this as it is given a sanction in the form of enforcement mechanisms.

18.

In the case of the Bill, what gives the Minister's "policy" the force of law is the enforcement mechanisms contained therein, which in effect permit the National Minister to legislate for the provinces on the subject of education. Here reference may be made to the following provisions:

- Section 3(3) - This permits the Minister to make "a particular national policy to prevail over the whole or a party of any provincial law on education".
- Section 8(1) - This permits the Minister to issue directives that the standards of education provision, delivery and performance throughout the Republic be monitored and evaluated by the Department with the object of *inter alia* assessing progress in complying with the National Education policy as determined in terms of section 3(3).
- Section 8(6) - Entitles the Minister, should a province not comply with the policy determined in terms of section 3(3) to require the submission from the political head of education concerned, of a plan to remedy the situation.

- Section 8(7) - A plan required by the Minister in terms of subsection (6) must be prepared by the Provincial Education Department concerned in consultation with the (National) Department of Education, which plan must be tabled in Parliament.

19.

The provisions of section 8 of the Bill quoted above impose a legal obligation upon an errant province to comply with the Minister's policy directive. Although not referred to in the Bill, it is of course always open to the National Government to penalise such a province by, for example, withholding funds until compliance occurs.

20.

It is submitted that this power bestowed upon the National Minister by the Bill offends against the Constitution on a number of grounds.

21.

In the first place, it permits the National Minister in effect to prescribe to the provinces on a topic which is within their competence. This it is submitted amounts to an impermissible delegation by Parliament of legislative functions to a Minister;

see: Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others, 1995 (10) BCLR 1289 (CC) at 1317E - F.

22.

It is submitted that the provisions of section 3(2) of the Bill do not amount to a restriction on the Minister's powers as it simply reiterates what the Constitution already states, namely, that when legislating regard must be had to the provisions of section 126 of the Constitution as read with Schedule 6.

23.

Secondly, if the Bill were to become law in its present form, it could lead to a multiplicity of Court applications each time a policy determination upon a particular topic is made by the National Minister. In the case of outright legislation on the other hand this Court would be entitled to strike it down once and for all if it is unconstitutional or, alternatively, to require Parliament to correct the defect pursuant to the provisions of section 98(5) of the Constitution.

24.

Thirdly, none of the so-called "overrides" set out in section 126(3) of the Constitution [quoted in paragraph 13 *supra*] can be held to apply to the Province of KwaZulu-Natal.

25.

It is submitted that the "override" provided for in section 126(3)(a) of the Constitution cannot be invoked, as KwaZulu-Natal has a well-established administration in the field of education and is accordingly capable of regulating any matter relating to education within the Province:

Prince Zulu Affidavit, para 20;

Prince Zulu Affidavit, para 67 to 79.

26.

It is submitted that the same reasoning is applicable to the "overrides" contained in section 126(3)(d) and (e) of the Constitution. Education has, it is submitted, nothing to do with the topics dealt with in these two paragraphs which cover economic, environmental and commercial matters for the most part. It is submitted that the words "impedes the implementation of national economic policies" in paragraph (e) serves as an indication that a "policy" and a "law" may be two separate concepts; the former may be nothing more than an aspiration or a wish whereas the latter carries with it a means of enforcement.

27.

Insofar as the "override" contained in section 126(3)(b) of the Constitution is concerned, this refers to a matter that to be performed effectively requires to be regulated or co-

ordinated by "uniform norms or standards" applying generally throughout the Republic.

28.

It is unclear what is meant by the phrase "uniform norms or standards" as it has not been defined in the Constitution, nor has the phrase been the subject of judicial interpretation. It is also unclear whether pre-existing norms or standards are intended to be referred to or whether the legislation by Parliament may bring about the norms or standards in question. However, it is submitted that such norms or standards may not be ordained when the "matter" which is the subject of the Act of Parliament can in fact be performed effectively without such norms or standards.

29.

The Bill appears to attempt to lay down uniform norms or standards in educational matters indirectly. This appears, it is submitted from use of the following phrases "the determination of national education policy by the Minister" (section 2(a)) and "the monitoring and evaluation of education" (section 2(d)). Here the Province of KwaZulu-Natal is capable of effectively determining policy and performing executive functions in the field of education and - co-ordination apart - denies that a unitary system of education throughout the Republic is necessary:

Prince Zulu Affidavit, paras 20, 23 and 24.

30.

As regards the "override" referred to in section 126(3)(c) of the Constitution, it appears that the Bill does not attempt to set minimum standards for the rendering of a public service:

Prince Zulu Affidavit, para 21.

31.

In any event, it is submitted that such an "override" is only permissible when the Act of Parliament in question is "necessary" for the rendering of public services. Whilst it is conceded that the phrase "public services" probably embraces a matter such as education, the word "necessary" means reasonably required, or legally ancillary, to the accomplishment of the object in question;

see: Stroud's Judicial Dictionary (4th Edition, 1973), Vol. 3, page 1737;

R. v. Magana, 1961 (2) SA 654 (T) at 658.

32.

It would in any event be strange if the Constitution, having given legislative and administrative competence to the provinces on the topic of education, would simultaneously

envisage that minimum standards might be necessary "across the nation".

33.

It is further submitted that the "overrides" should be restrictively interpreted, so as to permit as large a measure as is possible of provincial autonomy. Here regard should be had to Constitutional Principle XXII, which provides:

"The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces".

It is submitted that the constitutional principles contained in Schedule 4 of the Constitution may be taken into account in interpreting other provisions of the Constitution;

see: Executive Council of the Western Cape Legislature and Other v. President of the Republic of South Africa and Others (*supra*) at 1307E.

34.

In the alternative the *amicus curiae* submits that should the Court find the powers bestowed upon the National Minister by section 3(3) of the Bill as read with section 8(6) and (7) to be constitutional, it should nevertheless exercise its power in terms of section 98(5) of the Constitution and correct the defects in the Bill as referred to hereunder.

35.

Section 3(4):

Section 3(4) (a): This should be a concurrent competence:

Affidavit Dr. Jarvis, para 6.

Section 3(4) (c): "Facilities" should not be a national competence:

Affidavit Dr. Jarvis, para 7.

Section 3(4) (d): This should be a shared responsibility:

Affidavit Dr. Jarvis, para 8.

Section 3(4) (f): This should be deleted in whole:

Affidavit Dr. Jarvis, para 10.

Section 3(4) (g): This should be deleted in whole:

Affidavit Dr. Jarvis, paras 11 to 16.

Section 3(4) (i): This should be a concurrent competence:

Affidavit, Dr. Jarvis, para 18.

Section 3(4) (k): The word "dates" ought to be deleted:

Affidavit Dr. Jarvis, para 20.

Section 3(4) (l): "Core syllabuses and education programmes" should be deleted:

Affidavit Dr. Jarvis, paras 21 and 22.

Section 3(4)(m): This should be deleted in whole:

Affidavit Dr. Jarvis, para 23.

Section 3(4)(n): This should be deleted in whole:

Affidavit Dr. Jarvis, para 24.

Section 3(4)(o): This should be deleted in whole:

Affidavit Dr. Jarvis, para 25.

Section 3(4)(p): (iii) Local Government should be deleted:

Affidavit Dr. Jarvis, para 27.

Section 3(4)(r): This should be deleted in whole:

Affidavit Dr. Jarvis, para 30.

DATED at DURBAN this 23rd day of JANUARY, 1996.



F.G. RICHINGS, S.C.

COUNSEL FOR THE INKATHA
FREEDOM PARTY PETITIONERS
AND AMICUS CURIAE

LIST OF AUTHORITIES

1. R. v. Magana, 1961 (2) SA 654 (T) at 658.
2. Stroud's Judicial Dictionary (4th Edition, 1973), Vol. 3, page 1737;
3. Attorney-General ex rel Tilley v. London Borough of Wandsworth (1981) 1 All E.R. 1162 at 1167 h (Ch.D) 1171 j (CA).
4. New Shorter Oxford English Dictionary (1993), Vol. II, page 2274.
5. Executive Council of the Western Cape Legislature and Others v. President of the Republic of South Africa and Others, 1995 (10) BCLR 1289 (CC) at 1317E - F.
6. Halsbury's Laws of England (4th Edition), Vol. 1(1) *sub nom* "administrative law", para 54 n 1 and the cases cited therein.