

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 46/95

In the matter of:

THE NATIONAL ASSEMBLY OF THE REPUBLIC OF SOUTH AFRICA

In re:

DISPUTE CONCERNING THE CONSTITUTIONALITY OF THE
NATIONAL EDUCATION POLICY BILL NO. 83 OF 1995

AFFIDAVIT OF THE MINISTER OF EDUCATION

I, the undersigned,

SIBUSISO MANDLENKOSI EMMANUEL BENGU

do hereby make oath and state:

1 INTRODUCTION

1.1 I am the Minister of Education. I am the Minister responsible for the National Education Policy Bill No. 83 of 1995 ("the Bill").

1.2 I have read the affidavits filed by Mr P MARAIS on behalf of the National Party, Mr A LEON on behalf of the Democratic Party, Ms B M NZIMANDE on behalf of the Inkatha Freedom Party and Mr L J VAN OOSTRUM apparently on behalf of the African Christian Democratic Party. There are certain matters which I respectfully wish to draw to the attention of this Honourable Court that may be relevant to the determination of the constitutionality of the Bill.

1.3 I have been advised and I respectfully submit that the issue of the constitutionality of the Bill is essentially a question of law. Accordingly, my failure to deal with any of the factual averments contained in the above affidavits, should not be construed as an admission of such facts.

2 THE FACTUAL INFORMATION

2.1 Mr Marais, on behalf of the National Party, has filed some 357 pages of documentation which, according to his affidavit, contains "factual evidence and information relevant to the arguments which the petitioners will address this Honourable Court on in regard to

the constitutionality of certain provisions of the National Education Policy Bill no. 83 of 1995".

2.2 I accept that the Bill itself is self-evidently relevant to the determination of the issues before the Court. The Bill was accompanied by memorandum on the objects which has not been filed by Mr Marais. I annex a copy of that memorandum hereto marked "SB1". I also accept that the White Paper on Education and Training published in Government Gazette 16312 of 15 March 1995 may be relevant to the issues before this Court in so far as it contains relevant matter concerning education policy in South Africa.

2.3 Apart from the Bill itself and the White Paper, it is not clear for what purpose Mr Marais wishes to rely upon the rest of the documentation filed by him. No attempt has been made by Mr Marais to indicate which portions of the documents he intends to rely upon or for what purpose. I have been advised and I respectfully submit that this procedure is irregular and it should not be left either to the Court or to me to speculate as to the purpose of the documentation relied upon. In

the circumstances, it is not possible to respond meaningfully to the documentation filed by Mr Marais. I respectfully submit that the procedure thus adopted should be met by an adverse order of costs.

2.4 The Inkatha Freedom Party has adopted the same approach as the National Party and for the reasons set out in paragraph 2.3 above, it is not possible to respond meaningfully to the contentions advanced in the affidavit of Ms Nzimande.

2.5 I do not dispute the authenticity of any of the documents filed by Mr Marais. In particular, I confirm that the documents attributed to me, including the speeches made by me in Parliament are accurate. With regard to the "Report of the Committee to Review the Organisation, Governance and Funding of Schools" ("the Hunter report") annexed to Mr Marais' affidavit as annexure "E", it is reflected in my remarks on the occasion of the handing over of the report and published with the report, that "neither I nor the Government have pre-judged the findings of the committee. This report must have a full and fair public airing before policy decisions are taken". In

the circumstances, it is not clear for what purpose the Hunter report is considered relevant to the issues before this Court. By the same token, it is not clear what relevance is sought to be placed upon the "Draft Education White Paper 2" which was published on 24 November 1995, substantially after the Bill.

2.6 I have similar difficulties in dealing with the affidavit by Mr Van Oostrum apparently filed on behalf of the African Christian Democratic Party (ACDP). The topic of this affidavit and the annexure concern the issue of home schooling. No attempt whatsoever has been made to relate the contents of the affidavit to the Bill nor has any indication been given of the purpose and relevance of the documentation. I have been advised and respectfully submit that this procedure is irregular and should be met by an adverse order of costs.

2.7 As indicated above, I accept that the White Paper on Education and Training may well be relevant to the adjudication of the issues before this Court. This White Paper is annexed to Mr Marais' affidavit as annexure "J". I

draw particular attention to Chapter 3 of the White Paper which sets out the legacy of discrimination and inequality which has characterised the education system in the past. I also draw particular attention to Chapter 4 which sets out the guiding values and principles of education and training policy, and Chapter 8, which sets out the national and provincial powers in education and training.

2.8 Apart from the Bill and the White Paper, I have been advised that there are no further factual issues relevant to the determination of the issues before this Court.

3 THE REFERENCE

3.1 I fully accept the entitlement of the petitioners to invoke the procedures created by the Constitution for purposes of determining the constitutionality of a bill. Since this is the first occasion upon which a Parliamentary bill has been referred to the Constitutional Court for consideration, it may be appropriate for the Court to deal with the correct procedure in such cases.

3.2 It will be observed from the debates of the National Assembly and the Senate annexed to Mr Marais' affidavit that the attitude was adopted by certain parties that once the requisite number of petitioners had been obtained for purposes of a reference to the Constitutional Court, the matter effectively became *sub judice* and that the contents of the Bill could not be debated. Indeed, in the National Assembly, certain parties refused altogether to participate in any debate or voting on the Bill.

3.3 I have been advised and I respectfully submit that the mere reference of a matter to the Constitutional Court by the Speaker upon receipt of the requisite number of petitioners does not preclude further debate upon the relevant Bill. Indeed, I respectfully submit that further debate is appropriate for four main reasons. Firstly, by debate and discussion the fears of some or all of the petitioners may be allayed and the need for a reference might fall away altogether. Secondly, the debate itself may even give rise to alternative formulations or approaches which resolve the dispute in question. Thirdly, I respectfully submit that the ending

of all debate purely by reason of a reference to this Court can have the effect of delaying the legislative process. Fourthly, I have been advised and respectfully submit that this Court (as its own rules make clear) would wish to see the record of the entire debate before being required to adjudicate the issue placed before it.

The guidance of this Honourable Court would be particularly apposite for purposes of future references.

4 URGENCY

4.1 From the debates in the National Assembly it will be apparent that I regard the question of educational reform to be a matter of extreme urgency and a matter of national priority. While respecting the rights of the petitioners to have this Bill tested before this Court, the urgency for transforming the legacy of a discriminatory and unequal education system remains. From the Government's point of view, therefore, the determination of the constitutionality of the Bill is a matter of urgency.

J.M. Bengu

DEPONENT

THUS SIGNED AND SWORN TO BEFORE ME at *Cape Town*
this *20th* day of DECEMBER 1995, the deponent having
acknowledged that he knows and understands the contents
of this affidavit, that he has got no objection in taking
the prescribed oath and that he regards the oath as
binding upon his conscience.

[Signature]
412670-1 SACRIST
CARL ERNST ICHGER.

COMMISSIONER OF OATHS.