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 83 OF 1995

HEADS OF ARGUMENT ON BEHALF OF THE MINISTER OF EDUCATION

---

1 *INTRODUCTION*

1.1 This case comes before the Constitutional Court by way of a petition in terms of section 98(2)(d) of the Constitution of the Republic of South Africa (Act 200 of 1993) ("the Constitution").

1.2 These heads of argument address the following issues:

1.2.1 The National Education Policy Bill (B83-95) ("the Bill") facilitates the making of national departmental policy on educational matters. In principle a Department of State does not require statutory authorisation in order to make policy; the law only requires that any departmental policy be *intra vires* any regulatory legislation, and that in its execution it does not improperly fetter the exercise of specific statutory discretions.

Cf. **Padfield v Minister of Agriculture, Fisheries and Food**
[1968] AC 997; [1968] 1 All ER 694 (HL);

Hood Phillips and Jackson *Constitutional and Administrative Law* (7th Ed 1987) 666-8

The Bill, however, imposes significant constraints upon the Minister's policy-making function.

1.2.2 Since the Bill has not yet become law, no question arises concerning the manner in which such policy may ultimately be formulated.

1.2.3 Similarly, the petition raises no issues concerning a potential conflict between national legislative measures and provincial legislative measures. It is not suggested that the Bill in any way conflicts with existing provincial legislation on the same

subject matter in a single respect.

1.2.4 No case of a *prima facie* violation of any of the provisions of the Constitution has been made out by the Petitioners.

1.3 It will be submitted that the core of the argument advanced by the Democratic Party (DP), the Inkatha Freedom Party (IFP) and the National Party (NP) misconceives the nature of the Minister's powers under the Bill, and indeed its general statutory scheme. The essence of the argument advanced, although couched in different terms, is that provincial legislative and executive autonomy is impermissibly violated by the Bill because the Minister can impose national educational policy on the provinces. This argument ignores the fact that:

1.3.1 The Bill specifically requires any national policy to be determined subject to the Constitution generally (section 3(1)), and (explicitly) subject to section 126 (section 3(3)).

1.3.2 Ultimate decisions relating to educational policy issues vest in Parliament and not the Minister (sections 6, 7(b), 8(7));

1.3.3 The Bill envisages special procedures for legislation embodying educational policy (ibid);

1.3.4 Enforcement of educational policy on unwilling provinces is neither dictated by the Bill nor an inevitable consequence of the Minister's policy-making powers.

We shall expand upon these and other aspects below.

2 *THE AMICUS APPLICATION*

The Minister of Education abides the court's ruling.

3 *THE REFERRAL*

3.1 In terms of section 98(2)(d) of the Constitution, the Constitutional Court **"shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to sub-section (9)."**

3.2 Section 98(9) provides:

> **"The Constitutional Court shall exercise jurisdiction in any dispute referred to in sub-section (2)(d) only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who shall make such a request to the Court upon receipt of a petition by at least one-third of all the members of the Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so."**

3.3 The general rule is that the Constitutional Court will not pronounce upon purely abstract or hypothetical matters.

cf. **Zantsi v Council of State, Ciskei & Others**
1995 (4) SA 615 (CC) at 617-619 paras 1-7

And see too:

S v Mhlungu & Others
1995 (3) SA 867 (CC) at 894-5 para 59
per Kentridge AJ

3.4 As it has previously done in other contexts, it is submitted that it is desirable for this Court to lay down guidelines for the proper referrals in terms of section 98(9).

3.5 From the debates of the National Assembly and the Senate annexed to the documents filed by the National Party it is clear 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 became sub judice and that the contents of the Bill could not be debated. In the National Assembly, certain parties refused to participate in any debate on the Bill.

3.6 It is submitted 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 Bill. Further debate is appropriate for four main reasons:

3.6.1 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. In the present case, for instance, if we are correct in submitting that the petitioners misconstrue the statutory scheme (and in particular, the import of section 8 of the Bill), this could well have become apparent in the course of a proper debate.

3.6.2 The debate itself may give rise to alternative formulations or approaches which resolve the dispute in question.

3.6.3 The ending of all debate purely by reason of a reference to the Constitutional Court can have the effect of delaying the

legislative process.

3.6.4 The absence of a record of the entire debate makes it more difficult for this Court to adjudicate the issue placed before it.

3.7 There is a further issue of procedure arising out of the reference in the present case. There is a material difference between the attack upon the Bill contained in the petition itself and the attack in the accompanying memorandum. The petition identifies clause 3(3) and 3(4) of the Bill as being offensive to the Constitution. The memorandum accompanying the petition, however, identifies clauses 3, 4, 5, 6, 8, 9 and 10 of the Bill as being offensive to the Constitution. It is submitted that the nature of an attack upon a Bill justifying a petition to the Constitutional Court ought to be formulated with precision. If it is not, there is the risk that the procedure may be abused simply by projecting a Bill into the Constitutional Court without any adequate consideration of the substance of the complaint.

3.8 The problem is highlighted by the facts of the present case. Only the DP, IFP and NP have chosen to file written argument. Moreover, the arguments advanced are narrowly confined. Other parties such as the Pan Africanist Congress and the Freedom Front have apparently elected not to present argument. It is not clear, therefore, whether this Court

is required to deal with complaints raised in the petition but not pursued by those parties who have elected to present argument to the Court.

4 *EVIDENCE*

4.1 It is submitted that the adjudication of the present issue is capable of being decided as an abstract question of law. The National Party, however, has seen fit to file a considerable amount of documentation without any attempt being made in the affidavit to identify those portions of the documentation upon which reliance will be placed and for what purpose. It is submitted that this procedure is irregular. There is an obligation upon a party to spell out to his or her adversary any legal inferences or conclusions sought to be drawn from documentation relied upon, so that any qualificatory or contrary material can be placed before the Court.

Port Nolloth Municipality v Xhalisa & Others
1991 (3) SA 98 (C) at 111 B - C

It is submitted that this is particularly so in proceedings in this Court, given the difficulties which it faces in determining factual issues.

4.2 In their heads of argument, the NP has chosen only to refer to the

formal documents comprising the Bill itself, the signatures required for the petition, the petition itself and the memorandum accompanying the petition. These documents take up only some sixteen pages out of the 357 filed by the NP. Even at this stage, therefore, the NP has given no indication as to the purpose of the voluminous documentation relied upon. Nor, however, has reliance on this material been disavowed. The other parties have had to prepare in the light of this state of affairs.

4.3 It is submitted that the procedure adopted by the NP has been ill-considered and wasteful, and should be met by an adverse order of costs.

5 *ANALYSIS OF THE BILL*

Object

5.1 According to its long title (and as is manifest from its contents) the object of the Bill is "**to provide for the determination of national policy for education**". The context in which the Bill was introduced appears from the preamble which provides:

> **"Whereas it is necessary to adopt legislation to facilitate the democratic transformation of the national system of**

education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights".

5.2 According to the memorandum accompanying the Bill, the Bill was prepared with reference to the Constitution and the Ministry of Education's White Paper, "**Education and Training in a Democratic South Africa: First Steps to Develop a New System.**"

5.3 The essential components of the Bill are succinctly reflected in section 2 which provides:

> **"The objectives of the Act are to provide for:**
>
> **(a) The determination of national education policy by the Minister in accordance with certain principles;**
>
> **(b) The consultations to be undertaken prior to the determination of policy, and the establishment of certain bodies for the purpose of consultation;**
>
> **(c) The publication and implementation of national education policy;**
>
> **(d) The monitoring and evaluation of education."**

The policy-making power

5.4 Given the political transformation of South Africa and its heritage of racially discriminatory and unequal education, the need for new

educational policies is hardly surprising. The central principle is articulated in section 3(1) of the Act which confers the power to determine national education policy "**in accordance with the provisions of the Constitution and this Act**".

5.5 The subject matter of the policy-making power is broadly defined and confers a discretion on the Minister to determine national policy in respect of some 18 matters specified in section 3(4). The matters so specified include "**innovation, research and development in education**", "**the ratio between educators and student**", "**the professional education and accreditation of educators**", "**compulsory school education**", "**coordination of the dates of school terms among provinces**" and "**language in education**".

5.6 The policy-making power is required to be directed towards a variety of goals set out in section 4. These goals include "**the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 3 of the Constitution**". Policy must also be directed towards -

5.6.1 Enabling the education system to contribute to the full personal development of each student, and to the moral, social, cultural, political and economic development of the nation at large,

including the advancement of democracy and the peaceful resolution of disputes (section 4(b)).

5.6.2 Achieving equitable education opportunities and the redress of past inequality in education provision (section 4(c));

5.6.3 Endeavouring to ensure that no citizen or permanent resident is denied the opportunity to receive an education to the maximum of his or her ability as a result of physical disability (section 4(d));

5.6.4 Providing opportunities for and encouraging lifelong learning (section 4(e));

5.6.5 Achieving an integrated approach to education and training within a national qualifications framework (section 4(f));

5.6.6 Cultivating skills, disciplines and capacities necessary for re-construction and development (section 4(g));

5.6.7 Recognising the aptitudes, abilities, interests, prior knowledge and experience of students (section 4(h));

5.6.8 Encouraging independent and critical thought (section 4(i));

5.6.9 Promoting a culture of respect for teaching and learning in education institutions (section 4(j));

4.6.10 Promoting enquiry, research and the advancement of knowledge (section 4(k));

4.6.11 Enhancing the quality of education and educational innovation through systematic research and development on education, monitoring and evaluating education provision and performance and training educators and education managers (section 4(l));

4.6.12 Ensuring broad public participation in the development of education policy and the representation of stakeholders in the governance of all aspects of the education system (section 4(m));

4.6.13 Achieving the cost effective use of education resources and sustainable implementation of education services (section 4(n)).

5.7 The goals towards which the policy to be formulated must be directed all reflect the history of South Africa's unequal education system.

Constraints on the policy-making power: Consultation

5.8 The Bill envisages substantial constraints upon the ministerial power to make policy. In this respect, it is submitted, the Bill recognises the importance of broad participation by all those with an interest in educational matters. Hence, significant obligations are imposed upon the Minister to consult in the process of formulating educational policy.

5.9 In terms of section 5 of the Bill, policy may only be determined by the Minister "**after consultation with such appropriate consultative bodies as have been established for that purpose in terms of section 11 or any applicable law**" and with the six specified bodies in the sub-section. Those bodies include organisations representative of teachers, parents and students.

5.10 Where it is proposed to translate any matters of policy into legislation, section 6 of the Bill imposes an obligation of consultation between the Minister and various other bodies.

5.11 The Act also envisages the creation of advisory and consultative bodies:

5.11.1 In terms of section 9, a Council called the Council of Education Ministers is established comprising, *inter alia*,

every provincial political head of education. The functions of the Council are, *inter alia*, to promote a national education policy "**which takes full account of the policies of the government, the principles contained in section 4, the education interests and needs of the provinces, and the respective competence of Parliament and the provincial legislatures in terms of section 126 of the Constitution.**"

5.11.2 In terms of section 10, it is envisaged that there be established a committee called the Heads of Education Departments Committee whose functions include the facilitation and development of a national education system and the provision of advice to the department on various matters including the Minister's policy-making functions.

5.11.3 Section 11(1)(a) requires the establishment of a body to be known as the National Education and Training Council in order "**to advise on broad policy and strategy for the development of the national education system and the advancement of an integrated approach to education and training**".

5.12 In addition to the obligation to consult, there are substantive constraints upon the Minister's policy-making power. In terms of section 3(2), the Minister is obliged to **"take into account the competence of the provincial legislatures in terms of section 126 of the Constitution and the relevant provisions of any provincial law relating to education."**

Publication of National Education Policy

5.13 The Bill imposes significant obligations upon the Minister to publish proposed policy and to table it before parliament. Section 7 of the Bill provides:

> **"The Minister shall within 21 days after determining policy in terms of section 3 -**
>
> **(a) Give notice of such determination in the Gazette and indicate in such notice where the policy instrument issued with regard thereto may be obtained;**
>
> **(b) Table the policy instrument referred to in paragraph (a) in Parliament within 21 days after the notice has appeared in the Gazette, if Parliament is then in ordinary session, or if Parliament is not in ordinary session, within 21 days after the commencement of the first ensuing ordinary session of Parliament."**

5.14 Ordinarily, there would be no obligation upon a department of State to table a policy proposal in Parliament. This requirement in the present

Bill therefore constitutes not only a significant constraint upon the Minister's policy-making power but also an important element in subjecting proposed policy to democratic scrutiny.

Monitoring and Evaluation

5.15 The Bill makes provision for the monitoring and evaluation of the implementation of proposed policy. Absit such a provision, the making of policy would be relegated to an academic exercise of little practical value.

5.16 The Bill envisages both a monitoring and a remedial function. The remedial function is itself subject to parliamentary scrutiny;

5.16.1 In terms of section 8(6) of the Bill, the remedial function is triggered by the publication of a report following an analysis of data gathered by means of education management information systems or by other suitable means "**in cooperation with provincial departments of education**".

5.16.2 The report in question must, in terms of section 8(5) be published "**after providing an opportunity for the**

competent authority concerned to comment, which comment shall be published with the report" (section 8(5)).

5.16.3 If the report "**indicates that the standards of education provision, delivery and performance in a province do not comply with the Constitution or with the policy determined in terms of section 3(3), the Minister shall inform the provincial political head of education concerned and require the submission within ninety days of a plan to remedy the situation**" (section 8(6)).

5.16.4 In terms of section 8(7), the plan required by the Minister shall be prepared by the provincial education department concerned in consultation with the department. The Minister is then obliged to table the plan in parliament with his or her comments within 21 days of receipt, if parliament is then in ordinary session, or, if parliament is not in ordinary session within 21 days after the commencement of the first ensuing ordinary session of parliament.

Overview

5.17 The Bill seeks to create a framework for the making of national education policy. The process envisaged requires extensive consultation with all those who have an interest in the subject, particularly the provincial education authorities. While the Bill envisages the power to make policy on a wide range of issues, whether or not policy is in fact determined in respect of those issues remains within the discretion of the Minister. There is little to be gained from speculating as to what such policy may ultimately contain. It may be entirely benign, reflecting internationally accepted educational norms. Any evaluation of the Bill, therefore, cannot be predicated upon the fears of what might never transpire.

5.18 It is not inevitable that the Minister will seek to impose any particular policy over the provinces. This is made clear by section 3(3) which provides:

> **"Whenever the Minister wishes a particular national policy to prevail over the whole or a part of any provincial law on education, the Minister shall inform the provincial political heads of education accordingly, and make a specific declaration in the policy instrument to that effect."**

Moreover, where the monitoring and evaluation function reveals that the

standards of education provision, delivery and performance in a province do not comply with the Constitution or with the policy determined in terms of section 3(3), the Minister has no power to impose his will. It is Parliament, before whom a remedial plan is tabled, which is vested with ultimate authority.

5.19 Accordingly, insofar as it is suggested that the Bill *per se* constitutes an infringement of the legislative competence in respect of educational matters, this is not so.

6 *THE PETITION*

Alleged violation of section 37 of the Constitution

6.1 Of the parties who have filed written argument, only the IFP contends (in paragraphs 21 and 22 of their heads of argument) that the ministerial powers amount "**to an impermissible delegation by Parliament of legislative functions to a minister.**" This attack is misconceived. It is based upon a confusion between a legislative function and a policy-making function. That there is no such delegation is underscored by the provisions of section 8(7) in particular.

6.2 The primary purpose of the Bill is to enable the Minister, after the necessary consultation, to formulate a national education policy. There is an important distinction to be made between vesting a Minister with the power to make a policy and giving such Minister legislative competence. These were issues which recently engaged the Constitutional Court in the dispute between the Western Cape Legislature and the Government concerning the validity of Section 16A of the Local Government Transition Act, 209 of 1993. The decision of the Constitutional Court (**The Executive Council of the Western Cape Legislature and Others v The President of the Republic of South Africa & Others 1995 (4) SA 877 (CC)** yielded divergent opinions. The Court was unanimous in holding Section 16A of the Local Government Transition Act to be unconstitutional. Certain observations by Chaskalson P are pertinent to the present issue:

> "51 **The legislative authority vested in Parliament under Section 37 of the Constitution is expressed in wide terms - 'to make laws for the Republic in accordance with this Constitution'. In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate**

legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. ....

52 In the past our Courts have given effect to acts of Parliament which vested wide plenary power in the executive. ..... These decisions were, however, given at a time when the Constitution was not entrenched and the doctrine of Parliamentary sovereignty prevailed. What has to be decided in the present case is whether such legislation is competent under the new constitutional order in which the Constitution is both entrenched and supreme. .....

53 In the United States of America, delegation of legislative power to the executive is dealt with under the doctrine of separation of powers. .... Delegation of legislative power within prescribed limits is permissible because, as the Supreme Court has said, 'without capacity to give authorisations of that sort we would have the anomaly of legislative power which in many circumstances calling for its exertion would be but a futility'. Per Hughes C J in Panama Refining Co v Ryan 293 US 288, 421 (1935). The delegation must not, however, be so broad or vague that the authority to whom the power is delegated makes law rather than acting within the framework of law made by congress. The distinction was explained by Taft CJ in Hampton and Co v United States, 276 US 394, 407 (1928) (quoting Ramney J in Wilmington & Zanesville Railroad Co v Commissioners, 1 Ohio St 77(1852)) as follows:

> **'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'"** (emphasis added).

After considering other authorities, Chaskalson P made it clear that the

issue had to be decided **"in the light of the terms of our own Constitution"** (para 59).

6.3 Mahomed D P after referring to the Panama Refining Co case observed at para 131:

> **"131 The rationale for the American jurisprudence in respect of this problem is based not only on the wording of the relevant provisions of the United States Constitution but also upon two very important concerns: the first concern is that since the Constitution reposes confidence in the political judgment of those elected to Congress and in their capacity to make policies pursuant to that judgment, it would be constitutionally subversive to allow such political judgments and such policies effectively to be made by those not identified for that purpose in the Constitution; the second concern is that if the law-making function vested in Congress is delegated to members of the executive or the administration in a manner which allows the delegatee to make political assessments and assessments of policy, the exercise of the delegated power would not be subject to adequate judicial checks; discretions and functions exercised on political grounds cannot easily be the subject of judicial review.**
>
> **132 Although both these concerns have been specially articulated in American jurisprudence they are of manifest relevance in all countries where the Courts have to grapple with the permissible parameters of delegation by a supreme law-making body to any part of the executive."**

6.4 The Bill itself draws a clear distinction between the Minister's policy-making function and the translation of policy into legislation. In the

latter case, section 6 specifically envisages that legislation on a matter referred to in section 3 must proceed through parliament.

6.5 No modern democracy can function effectively without the capacity for government to formulate and act upon policy considerations. Baxter *Administrative Law (1984)* observes at 80:

> **"Policy and discretion are historically and analytically related concepts. 'Policy' is a notoriously difficult word to define. For the context of this discussion, the Oxford English Dictionary defines it as 'political sagacity; prudence, skill or consideration of expediency in the conduct of public affairs'. It usually signifies a general plan of action designed to advance or protect 'some collective goal of the community as a whole', as distinguished from individual or group rights. Policies, in this sense, are forms of <u>expediency</u> and <u>strategy</u>, dictated by what is believed to be in the overall public interest"** (emphasis in the original).

At 82 - 84, Baxter discusses the necessity for government to act according to policy:

> **"... discretionary power - including discretionary power involving significant policy elements - is an indispensable necessity for any government. ...**
>
> **In the first place not all policies are capable of being crystallised into legislation. Moreover, the belief that policy should be enshrined in legislation is based on a simplistic view of the process of policy <u>formulation and application.</u> ... As Carl Friedrich has observed: "Public policy, to put it flatly, is a continuous process, the formation of which is inseparable from its execution. Public policy is being formed as it is being executed, and it is likewise being**

> **executed as it is being formed.' This is one of the reasons why the word 'policy' is so ambiguous: When looked at from the point of view of the Administrator 'policy' is synonymous, not with general plans of action but with 'administration' or 'discretion' (as distinct from 'adjudication').**
>
> **Discretion, whether composite or not, is also necessary or at least desirable for a number of reasons. It is almost impossible to conceive of a legislator sufficiently prescient to be able to enact legislation that would be detailed enough to provide a rule for every situation; likewise it is impossible for the legislator to foresee every eventuality. Rules are inflexible, and every legal system retains some elements of equitable discretion in order to meet the justice required in 'special cases'."** (emphasis in the original)

See also: **De Smith, Wolff and Jowell *Judicial Review of Administrative Action* (5th ed 1995) 1-032, 13-056 to 13-058, 6-099 to 6-100**

6.6 It is submitted that ordinarily, a Department of State would not require statutory authorisation to formulate and implement policy. The Bill in fact places significant constraints upon the Minister's policy-making function by requiring a process of consultation and publication. In this regard, the observations of Justice O'Connor in **Minnesota State Board for Community Colleges v Knight 465 US 271; 70 L Ed 2d 299** are apposite. The case concerned an application by 20 State community college faculty instructors who were not members of a community college faculty association, challenging the constitutionality of the association's exclusive representation of community college faculty in collective bargaining. Provisions in the Minnesota Public Employment

Labour Relations Act required public employers to engage in official exchanges of views with their professional employees on policy questions relating to employment that are outside the scope of mandatory bargaining but restricted participation in these "**meet and confer**" sessions to the employees exclusive representative. In holding that the provisions in question did not violate the constitutional rights of the college faculty instructors within the bargaining unit who were not members of the exclusive representative, Justice O'Connor observed:

> **"Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted. Legislatures throughout the Nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received from only a select group. Executive agencies likewise make policy decisions of widespread application without permitting unrestricted public testimony. Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognise a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.**
>
> **Not least among the reasons for refusing to recognise such a right is the impossibility of its judicial definition and enforcement. Both federalism and separation - of - powers concerns would be implicated in the massive intrusion into State and federal policymaking that recognition of the claimed right would entail. ... Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard. ...**

> **However, wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation."** (L Ed at 312)

6.7 This does not mean that the adoption and implementation of a particular policy would be beyond constitutional scrutiny. This was made explicit by Chaskalson P, on behalf of the majority in **Ferreira v Levin (Constitutional Court, Case No. CCT 5/95, 6 December 1995, unreported) at para 180**:

> **"Implicit in the social welfare state is the acceptance of regulation and re-distribution in the public interest. If in the context of our Constitution freedom is given the wide meaning that Ackermann J suggests it should have, the result might be to impede such policies. Whether or not there should be regulation and re-distribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution."**

6.8 The obligation to table the proposed policy in Parliament is also no mere formality. It enables members of parliament, as public representatives to consider the issue in the nation's highest democratic forum.

Cf. **Metal & Allied Workers' Union & Ano v State President**

**of the Republic of South Africa & Others
1986 (4) SA 358 (D) at 364 B - F**

**Bloem & Ano v State President of the Republic of South Africa & Others
1986 (4) SA 1064 (O) at 1080 J**

Provincial Competence

6.9 A further attack raised by the Petitioners concerns the provisions of provincial legislative competence in terms of section 126 of the Constitution. Section 126 (as amended) provides:

"126(1) A provincial legislature shall be competent, subject to sub-sections (3) and (4) to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6

(2) The legislative competence referred to in sub-section (1) shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.

2A Parliament shall be competent subject to sub-sections (3) and (4), to make laws with regard to matters referred to in sub-sections (1) and (2).

(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in sub-section (1) or (2) except in so far as -

(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 inter provincial 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.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in sub-section (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are expressly or by necessary implication, inconsistent with each other.

(6) A provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of sub-section (3)."

6.10 In terms of Schedule 6 to the Constitution, one of the matters in respect of which the provinces enjoy legislative competence is "**education at all levels excluding university and technikon education**". It is clear, therefore, that both the provincial legislatures and the National Parliament enjoy concurrent competence in respect of educational matters. There is in other words no sole and exclusive competence to legislate for educational matters vesting in the provinces. This much is apparently conceded by the petitioners who have filed written argument.

6.11 The Constitutional Court has emphasised the fact that the National Assembly and Provincial Legislatures enjoy concurrent competence. In the **Premier of KwaZulu-Natal & Others v The President of the Republic of South Africa & Others (Constitutional Court, Case No. 36/95, 29 November 1995, unreported)** Mahomed DP, speaking on behalf of a unanimous court rejected an argument that a constitutional amendment offended the division of powers identified in section 126 as read with Schedule 6 of the Constitution. He stated:

> **"This submission was also, wisely, not pressed in argument. It appears to assume that section 126, read with Schedule 6 of the Constitution, gives to a province the exclusive legislative competence to deal with matters which fall within the functional areas specified in Schedule 6. This is a plainly incorrect assumption. Section 126(1) (read with**

Schedule 6) does give to a provincial legislature the jurisdiction to make laws dealing, *inter alia*, with indigenous law, customary law and local government. But it is made expressly clear by section 126(2A) that Parliament also has that power."

In **Executive Council of the Western Cape Legislature & Others v The President of the Republic of South Africa & Others 1995 (4) SA 877 (CC)** Chaskalson P put the matter thus at 911 para 74:

"The new Constitution allocates legislative power to Parliament and to the provincial legislatures. In terms of section 37 Parliament is given legislative competence over the whole of the national territory and in respect of all matters. The legislative competence of the provincial legislatures, dealt with in section 126 of the Constitution, is restricted. They have concurrent competence with Parliament in respect of the matters referred to in Schedule 6 to the Constitution and their territorial competence is limited to the provincial territory. Section 126(3) makes provision for the way in which any conflict that might arise between national laws and provincial laws in this field of concurrent powers is to be resolved. If there should be such conflict, national laws are given precedence insofar as they meet criteria specified in section 126(3)(a) - (e) and provincial laws are given precedence in respect of other matters."

6.12 A constant refrain in the argument advanced by the DP, and echoed by the NP and IFP, is that the Bill enables the Minister to impose his policy on the provinces:

6.12.1 In paragraph 6.3 of the DP's argument it is contended that certain clauses in the Bill "**create a mechanism by**

which the Minister can enforce provincial legislative and executive compliance with his national education policy". (Similarly for the NP, the Bill constitutes "**a didactic mechanism (sic) for interfering with the enshrined rights of the provinces in regard to matters appertaining to education**" para 6 of the heads).

6.12.2 In paragraph 6.6 of the DP's argument it is contended that "**provincial governments may be compelled ... to implement and assist in the implementation of the Minister's national education policy.**"

6.12.3 It is contended in paragraph 9.3 that the Bill contains the notion "**that mere executive policy could prevail over conflicting provincial legislation.**"

6.12.4 In paragraph 16 it is argued that the mechanism created by the Bill "**violates provincial legislative and executive autonomy by permitting the Minister to force them to exercise their legislative and executive functions in compliance with his policy**" (emphasis supplied).

6.13 The argument is misconceived because it ignores the scheme created by

the Bill. More particularly, the argument fails to take account of the following:

6.13.1 National education policy is not self-executing. To the extent that there is to be any enforcement of national education policy, that cannot be achieved by the Minister simply through the provisions of the Bill.

6.13.2 Powers of monitoring and evaluation are conferred on the Department, in co-operation with provincial departments.

6.13.3 If this process reveals standards not in compliance with the Constitution, or the national policy, the Minister is obliged to require the province to submit "**a plan to remedy the situation**".

6.13.4 An obligation on a province to report to a national department could only offend section 126 read with Schedule 6 if the petitioners could point to a contradictory provincial law, and if the overrides of section 126(3) did not have application. The petitioners are unable to do so.

6.13.5 The petitioners however strive to contend that this obligation to submit a plan implicitly obliges the provinces to take legislative or executive action.

This is patently not so. Such a report might explain the prevailing situation in terms of conditions peculiar to that province (thus poor infrastructure, a large proportion of rural schools, a particular demographic mix) and call for greater funding by the Department, or other actions by it, such as the secondment of teachers.

6.13.6 The petitioners overlook the significant provisions of section 8(7). Even this does not require action by Parliament itself. Parliament may be satisfied with other steps proposed.

6.13.7 Even were Parliament to consider remedial legislation, this itself would have to comply with the Constitution, including the provisions of section 126 read with Schedule 6. Otherwise stated, there is nothing in the Bill which requires or permits Parliament to act in an unconstitutional way in response to the tabling of a provincial plan in terms of section 8(6).

6.14 The DP further contend that provincial participation in the Council of Education Ministers (created by section 9) and the Heads of Education Department's Committee (created by section 10) "**violates the executive autonomy of the provinces**".

DP Argument: paras 6.4, 6.5, 17 and 18

6.15 The argument is a curious one. It pre-supposes that the inclusion of representatives from the province at the highest level for consultative purposes in respect of a matter which is covered by both national and provincial legislative competence, somehow violates the Constitution. The logic of the argument advanced would dictate that the exclusion of provincial participation concerning matters in respect of which they have a vital interest would be constitutionally unassailable. The argument is recidivist: it resorts to the suggestion of exclusive division and non-concurrence "**wisely not pressed**" in the KwaZulu-Natal case.

6.16 With regard to the attack on section 9 of the Bill, the DP argues that sections 9(1) and (4) "**in effect requires every provincial political head of education to participate in the promotion of 'a national education policy which takes full account of the policies of the government', whether or not it accords with provincial policy.**"

DP Argument: para 17

The contention ignores the plain words of the section which provide:

> "9 (3) (a) **The functions of the Council shall be to promote a national education policy which takes full account of the policies of the government, the principles contained in section 4, the education interests and needs of the provinces, and the respective competence of Parliament and the provincial legislatures in terms of section 126 of the Constitution."**

6.17 The DP also contends that section 10(1) and (2)(a) "**in effect compels the Heads of Provincial Education Departments to participate in facilitating 'the development of a national education system in accordance with the objectives and principles provided for in this Act', whether or not it is the policy of the provincial government concerned to do so.**" Again, it is submitted that the argument is misconceived. The "**objectives and principles provided for**" in the Act give constant and explicit recognition to provincial competence in this sphere of education. The very purpose of including the Heads of the Provincial Education Departments in the Heads of Education Department's Committee is to obtain their views on matters of vital interest to the provinces.

6.18 The issue of enforcement of educational policy would only arise in circumstances where the policy in question overrides the provincial competence. As indicated above, it is by no means inevitable that policy determined by the Minister, in accordance with the Bill, will have that effect. Where, however, the Minister envisages the application of a policy on a national level, it is axiomatic that the requirements of section 126(3) would have to be complied with. Any argument advanced, therefore, must be premised upon the assumption that the requirements of the Constitution, and in particular section 126, have been met. Unless a mechanism was created to facilitate enforcement, the override power would be meaningless. In the present case, however, given the absence of the formulation of any policy at this stage, the petitioners are driven to contend that <u>any</u> attempt at the enforcement of national policy constitutes a violation of the Constitution. It is respectfully submitted that this proposition is untenable.

The rights, powers and functions of governing bodies

6.19 None of the written arguments suggest that the Bill conflicts with section 247(1) of the Constitution.

6.20 The petition however contends that the powers under the Bill which

enable the Minister to determine national policy for the planning, provision, financing, staffing, coordination, management, governance, programmes, monitoring, evaluation and well being of the education system conflict with section 247(1) of the Constitution. Section 247(1) of the Constitution provides:

> **"The national government and the provincial governments as provided for in this Constitution shall not alter the rights, powers and functions of the governing bodies, management councils or similar authorities of departmental, community based or State-aided primary or secondary schools under laws existing immediately before the commencement of this Constitution unless an agreement resulting from bona fide negotiation has been reached with such bodies and reasonable notice of any proposed alteration has been given."**

6.21 This attack is also misconceived. It pre-supposes that the Minister will exercise his powers under clause 3(4) of the Bill in a way which conflicts with section 247(1) of the Constitution. There is no warrant at all for this supposition. Moreover, any attack based upon this ground is premature. Should the Minister act in the way feared, the petitioners would have their remedy.

7 *CONCLUSION*

It is submitted that the attacks on the Bill misconceive its scheme. There was

no need for such a Bill to empower the Minister to make national educational policy. In fact, the Bill serves to impose important constraints on that inherent capacity, in the light of the new constitutional dispensation precisely with a view *inter alia* to a consultative process with the provinces. The required involvement of the provincial authorities in that consultative process has not been shown to be unconstitutional, by virtue of the operation of Schedule 6 and section 126. Nor is the investigative and planning mechanism created by the Bill unconstitutional. In short, the national education policy is misrepresented as some sort of self-executing ukase, elevated above legislative or executive process. The converse is correct: only Parliament may (and this is not required by section 8(7)) act in the light of a provincial report. Even then it need not necessarily address the revealed circumstances in the provinces(s) by legislation: it may vote more funds, or call for a commission of inquiry or other action. And even if Parliament were to adopt legislative measures aimed directly at addressing the situation in the particular provinces(s), the principle of concurrence would permit it to do so, within the constitutional confines created by section 126 and Schedule 6.

8 It is accordingly submitted that the challenges to the Bill should be dismissed, and that the NP should be directed to bear the costs occasioned by the evidential material lodged by it, including the costs of two counsel.

9 It is submitted that, given the setting of a section 98(9) referral, any further

costs order would be inappropriate, save in exceptional circumstances (such as vexatiousness or *male fides*). It is submitted that in any event, even applying ordinary criteria applicable to commercial litigation (cf. **Fisheries Development Corporation v Jorgenson 1980 (4) SA 156 (W) at 172**, approved and applied in **Compagnie Interafricaine de Travaux v SATS 1991 (4) SA 217 (A) at 242A**), the DP's claim for the costs of three counsel is misplaced.

J J GAUNTLETT SC

G J MARCUS
Counsel for the Minister of National Education

Chambers
Johannesburg and
Cape Town
2 February 1996

C:\WP51\GM\NATASSEM.HDS

LIST OF AUTHORITIES

Padfield v Minister of Agriculture, Fisheries and Food
[1986] AC 997; [1968] 1 All ER 694 (HL)

Zantsi v Council of State, Ciskei & Others
1995 (4) SA 615 (CC)

S v Mhlungu & Others
1995 (3) SA 867 (CC)

Port Nolloth Municipality v Xhalisa & Others
1991 (3) SA 98 (C)

The Executive Concil of the Western Cape Legislature & Others v The President of the Republic of South Africa & Others
1995 (4) SA 877 (CC)

Panama Refining Co. v Ryan
293 US 288, 421 (1935)

Hampton and Co. v United States
276 US 394, 407 (1928)

Wilmington & Zanesville Railrod Co. v Commissioners
1 Ohio St 77 (1852)

Minnesota State Board for Community Colleges v Knight
465 US 271; 70 L Ed 2d 299

Ferreira v Levin (Constitutional Court, Case No. CCT 5/95, 6 December 1995, unreported)

Metal & Allied Workers' Union & Ano v State President of the Republic of South Africa & Others
1986 (4) SA 358 (D)

Bloem & Ano v State President of the Republic of South Africa & Others
1986 (4) SA 1064 (D)

Premier of KwaZulu-Natal & Others v The President of the Republic of South Africa & Others
(Constitutional Court, Case No. 36/95, 29 November 1995, unreported)

Fisheries Development Corporation v
Jorgenson
1980 (4) SA 156 (W)

Compagnie Interafricaine de Travaux v SATS
1991 (4) SA 217 (A)

LITERATURE

Hood Phillips and Jackson *Constitutional and Administrative Law* (7th Ed (1987) 666-8

Ministry of Education's White Paper, *Education and Training in a Democratic South Africa. First Steps to Develop a New System*

De Smith, Wolff and Jowell *Judicial Review of Administrative Action* (5th ed 1995) 1-032, 13-056 to 13-058, 6-099 to 6-100