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

NATIONAL PARTY PETITIONERS' HEADS OF ARGUMENT

A. INTRODUCTION

1.

The speaker of the National Assembly has referred the above matter to the above Honourable Court in terms of section 98(9) as read with section 98(2) of the Constitution of the Republic of South Africa, Act No. 200 of 1993 (*"the Constitution"*).

2.

The **casus belli** is the National Education Policy Bill, Bill 83 of 1995 (*"the Bill"*)

which appears in the document ***"Petitioner's factual information in terms of Rule 13 pursuant to directions given by the Honourable President of the Court".***

Record p.2.

3.

Petitioners from various political parties are seeking to assail the constitutionality of the Bill and will address separate argument thereon. The touchstone of the reference is a petition dated the 13th September 1995, the first page of which appears as annexure "B".

Record p.11.

4.

Annexure "C" to the affidavit of Mr. MARAIS is a document entitled ***"Memorandum accompanying the petition to the speaker ...."*** filed on behalf of the Democratic Party of South Africa.

Record p.10.

Annexure "D" to the affidavit of Mr. MARAIS is a document entitled ***"Petition"*** and

sets out the grounds raised by the Petitioners of the National Party which was filed with the speaker on the 13th September 1995 in support of the original ***"Petition"*** (Annexure "B").

Annexure "D" is to be found at

Record pp.13-16.

5.

The Petitioners wish to address argument to the above Honourable Court on the following sections of the Bill:

Sections 3(3), 3(4), 4 and 8.

6.

The touchstone of the Petitioners' argument is that the Bill (and more particularly the sections enumerated above) constitute a didactic mechanism for interfering with the enshrined rights of the provinces in regard to matters appertaining to education. A synopsis of the Petitioners' argument follows:

6.1 Section 144 of the Constitution provides the following:

> *"(1) The executive authority of a province shall vest in the Premier of the province, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution.*
>
> *(2) 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."*

6.2 In terms of section 126(1) of the Constitution 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. Clearly, therefore, the province has executive competence in respect of all of the functional areas specified in Schedule 6 in respect of which it has legislative competence.

6.3 Included within the legislative competences of provinces in Schedule 6 is *"education at all levels, excluding university and technikon education."*

6.4 The Constitution itself makes provision for the establishment of a Constitutional State with a decentralised form of government in place of

what had previously been authoritarian rule enforced by a strong central government.

See: ***The Executive Council of the Western Cape Legislature and Others v The President of the Republic of South Africa and Others 1995(4) SA 877 (CC) at 885G-886D.***

6.5 Clearly, the Constitution seeks to ensure that there is a substantial measure of decentralization in respect of the functions defined in Schedule 6 to the Constitution.

6.6 The provisions of the Bill, **a priori,** create mechanisms whereby provincial executive functions are subjugated to a policy to be determined by the Minister and other functionaries.

7.

From the aforegoing it is clear that the matter is essentially a question of interpretation of the Bill when viewed against the aims and objectives of the Constitution. We respectfully point out that, central to our argument, is the contention that the Bill permits the Minister to usurp executive functions of the provinces. If we are incorrect in this view, however, then we would seek, in the alternative, a declarator by the Court to the effect that the Bill does not empower

the Minister in any way to compel the provincial executive authorities to implement any particular education policy. Although there is no express provision in either section 98 of the Constitution or the Rules of the above Honourable Court relating to a declarator, we respectfully submit that the power to make such a declarator is clearly within the province of the Court. Annexed to these heads of argument is a draft order seeking such a declarator.

B. THE BILL

1.

At the outset we wish to emphasis that it is not our contention that the formulation or the publication of a policy **per se** can ever be unconstitutional; we do, however, contend that the present Bill goes much further and employs language, in terms, which will allow for the imposition of such a policy upon provincial authorities in a manner which is unconstitutional. Ordinarily it would not be necessary for a Minister of State to be empowered in legislation to determine policy; the inclusion of such powers within a statute leads to the ineluctable conclusion that the statute is intended to render such ***"policy"*** compellable. We submit that the legislature is attempting to enact so-called ***"framework legislation"*** recognized, for instance expressly in the German Constitution. Policy enshrined in framework legislation is compellable in Germany.

See generally: ***Blair: "Federalism and judicial review in West Germany" 1981, pages 85*** **et. seq.**

But our Constitution does not provide for framework legislation and indeed, in respect of certain functions forbids the fettering of provincial authority unless the specific defined criteria in section 126(3) of the Constitution are met.

We refer now to certain provisions of the Bill which appear to render the policy and the implementation thereof compellable:

1.1 Section 2(c) provides, in terms, that:

> ***"The objectives of the Act are to provide for:***
>
> ***(a)*** .....
>
> ***(b)*** .....
>
> ***(c)*** ***the publication and implementation of national education policy;"***

[our emphasis.]

1.2 In addition, the provisions of section 2(d) refer to ***"monitoring and evaluation of education"***. This should be read together with section 8 (with which we will deal hereunder) which makes it clear that the ***"monitoring and evaluation"*** entails, in fact, enforcement of a policy rather than merely information gathering and evaluation.

1.3 Section 3(3) of the Bill is replete with didactic and coercive language. Thus, the Minister, if he wishes a particular national policy to ***"prevail over the whole or a part of any provincial law on education"*** is enjoined to inform the provincial political heads of education and to make a specific declaration in the policy instrument to that effect.

Once again this sub-section should be read with certain of the provisions of section 8 and in particular section 8(3) and 8(6). The effect of the implementation of section 3(3) would be to supplant the clear provisions of section 126(3) of the Constitution.

We point out that the ***"monitoring and evaluation"*** of education, (presumably consequent upon a specific declaration as set out in section 3(3) of the Bill,) ultimately lead to the coercion set out in section 8(6) which requires the provincial political head to submit ***"within 90 days a plan to remedy the situation."*** The moot point is what would occur should the provincial political head decline to do so or decline to ***"remedy"*** a particular

situation?

1.4 Section 3(4) allows the Minister to ***"determine"*** a wide ranging panoply of education functions. Although it is stated to be under the umbrella of ***"national policy"*** it is clear that section 3(4)(r) is directed to implementation and enforcement of the policy rather than the mere statement thereof. Indeed, unless section 3(4)(r) is directed towards implementation and enforcement of the policy it would be entirely otiose.

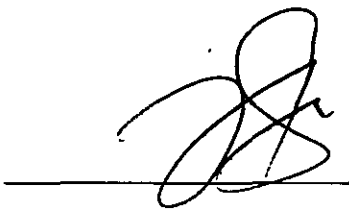
C. CONCLUSION

In the premises the Petitioners respectfully pray that it may please the above Honourable Court to declare that the Bill, alternatively the sections enumerated above are unconstitutional and that the Petitioners be granted their costs, including the costs consequent upon the employment of two counsel; alternatively that the above Honourable Court grant a declarator in the terms set out in the draft order annexed to these heads.

DATED at PRETORIA this 24th day of JANUARY 1996.

C.E. PUCKRIN SC

J.P. VORSTER
COUNSEL FOR THE NATIONAL PARTY PETITIONERS



H.S.J. KRUGER
ATTORNEY FOR NATIONAL PARTY PETITIONERS
DYASON
Leopont Building
451 Church Street East
PRETORIA