**In re National Education Policy Bill 1995**

**Case CCT 46/95**

Explanatory Note

*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

The Speaker of the National Assembly, acting in terms of s 98 of the Constitution, referred a dispute concerning the constitutionality of the National Education Policy Bill 83 of 1995 to the Constitutional Court for adjudication. The Court found that the Bill was not unconstitutional.

The Bill provides for the determination of national education policy by the Minister, requiring this to be done in terms of the Constitution, taking into account the competence of the provincial legislatures and the relevant provisions of provincial legislation relating to education. The Bill requires the Minister to consult with the Council of Education Ministers (which includes the Members of provincial Executive Councils responsible for education) and other bodies before formulating national education policy. The minister is also required to consult the Council before introducing legislation on education to Parliament. In terms of the Bill, national education policy must be published in a policy instrument, and provision is made for monitoring and evaluating education throughout the Republic.

The main challenge to the Bill was based on the argument that it required the provinces to amend their legislation to conform to national education policy, and thereby empowered the Minister to impose national education policy on the provinces. The Court rejected this contention and held that the Bill neither imposed an obligation on the provinces to follow national education policy nor empowered the Minister to require the provinces to adopt national policy nor to amend their own legislation to conform with national policy.

The Court held that provinces must comply with national standards which have been formulated in accordance with the Constitution and lawfully made applicable to them. The effect of the Bill was to give the provinces an opportunity of addressing situations where the standards of education provision, delivery and performance did not comply with national standards or the Constitution. The Bill further suggests remedial action that should be taken, even when the national standards have been formulated but have not yet been made the subject of legislation. The Bill thereby prevented the national government from acting unilaterally, without allowing the provinces this opportunity.

A further challenge to the Bill was that it required Members of Executive Councils and their administrations to participate in structures, provide information and promote a national policy. This challenge was rejected. The Court held that the only reasonable way in which concurrent powers could be exercised was through consultation with and co-operation between the national executive and the provincial executives. It could not be said to be contrary to the Constitution for Parliament to enact legislation which was based on the assumption that the provinces would offer the necessary co-operation. Consultation was

necessary to enable the national government to obtain the information it needed to take decisions falling within its power, to avoid conflicting legislative provisions and to rationalise legislation which fell within concurrent lawmaking powers, and to enable provincial and national governments to formulate their plans for the future.

The Court analysed the relationship between the powers of the provincial legislatures and the powers of Parliament. Provincial legislatures have the power to make laws for their provinces in respect of any matter set out in Schedule 6 to the Constitution, which includes education. This power has to be exercised concurrently with the Parliament, which has the power to make laws for the whole of the Republic. If there is a conflict between a provincial law and an Act of Parliament, the Constitution provides for the resolution of that conflict by giving priority either to Acts of Parliament or to provincial laws, depending on the circumstances. If there is such a conflict, the provisions of the law which are given priority must be enforced in all respects. The other law is not invalidated and, for as long as that inconsistency endures, it is inoperative and ineffective only to the extent of the inconsistency but must be implemented in all other respects. The Court held that provincial legislatures do not have any exclusive powers under the Constitution. The Court therefore rejected the contention advanced by the MEC for Education of KwaZulu-Natal that as long as a province is capable of regulating a Schedule 6 matter effectively it has the right to do so.

The judgment of the Court was delivered by Chaskalson P and was concurred in by the other members of the Court.