IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION

REPORTABLE

Case No.: 332/2005

In the matter between:

THE GOVERNING BODY OF MIKRO PRIMARY SCHOOL	First Applicant
MIKRO PRIMARY SCHOOL	Second Applicant

and

THE WESTERN CAPE MINISTER OF EDUCATION	First Respondent
THE HEAD: EDUCATION, WESTERN CAPE EDUCATION DEPARTMENT	Second Respondent
PARENTS OF CERTAIN LEARNERS CURRENTLY RECEIVING INSTRUCTION AT MIKRO PRIMARY SCHOOL	Third Respondents

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JUDGMENT DELIVERED THIS 18TH DAY OF FEBRUARY, 2005

THRING, J.:

I would like to have had more time to prepare this judgment; however, because of the urgency of the matter, and because I have formed a firm view as to the order which I ought to make, I shall endeavour to state the reasons for my conclusions with as much clarity and fullness as the constraints of time will allow.

The second applicant is a public school at Kuils River as defined in section 1 of the South African Schools Act, No. 84 of 1996 (to which I shall refer as "the Schools Act"). It is a primary school. I shall refer to it as "the school". It has been in existence since 1972. Since 1973 it has always been a single-medium school in which Afrikaans has been the language of instruction. The first applicant is its governing body, duly elected and constituted under sections 16 and 23 of the Schools Act. It is represented in these proceedings by its chairman, Mr. E.E.H. Wolf. The first respondent is the Western Cape Minister of Education; he is, in terms of section 1 of the Schools Act the member of the Executive Council of the Western Cape Province who is responsible for education in this province. The second respondent is the Head of Education of the Western Cape Administration; in terms of section 1 of the Schools Act he is the Head of the Department of Education in this province. The third respondents are the parents of certain 21 Grade 1 pupils who are presently attending the school against the wishes of the first applicant.

On the 2nd December, 2004 the second respondent addressed a letter to the principal of the school, Mr. N.S. Walters, in which he said, inter alia:

> "You are consequently instructed under my authority to admit and accommodate the learners listed in the document attached to this letter at Mikro Primary School. I will provide the relevant number of educators to ensure that effective learning and teaching takes place."

This directive came with the threat of a sanction for non-compliance, viz:

> "I must advise you that failure to implement this directive may constitute grounds for disciplinary action."

The "document attached to this letter" is a list containing the names and addresses of 40 children. They were required, in terms of the letter, to be admitted to Grade 1 at the school in

January, 2005. It is common cause that, in addition, they were required by the second respondent to be taught in English, as the medium of instruction chosen by their respective parents. The letter came to be written after the first applicant had been requested several times by or on behalf of the first and second respondents to sanction the admission of pupils to the school to be taught in English, and the first applicant had on each occasion refused to accede to this request.

On the 17th December 2004 the attorneys acting for the first applicant lodged an appeal to the first respondent against the directive contained in the second respondent's letter to which I have referred. On or about the 19th January, 2005, the day on which public schools opened in the Western Cape, the first respondent dismissed the appeal. Later on the same day two senior officials in his department attended at the school and participated in the process by which 21 of the 40 children named in the list to which I have referred came to attend the school. They are still attending the school, and a teacher has been provided by the Western Cape Education Department to teach them in English.

On the following day, the 20th January, 2005, the present application was launched by the first applicant. Later the second applicant and the third respondents were joined. The notice of motion was also later amended. What the applicants seek against the first and second respondents, on the papers as they presently stand, is an order:

> "1. Dat hierdie aansoek as 'n saak van dringendheid aangehoor word ooreenkomstig Reël 6(12) van die Eenvormige Hofreëls en dat afgesien word van die normale vereistes ten opsigte van vorm en betekening.
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> 2. Dat die tweede respondent se besluit soos uiteengesit in sy skrywe van 2 Desember 2004 (aanhangsel "EEHW1" tot die vestigende beëdigde verklaring) rakende die toelating van Graad 1 Engels-sprekende leerders tot die Laerskool

Mikro ("die skool") vir 2005 en die onderrig van daardie leerders in Engels, hersien en tersyde gestel word.

3. Dat die tweede respondent se besluit van 19 Januarie 2005 om uitvoering te gee aan die besluit waarna in paragraaf 2 verwys word, hersien en tersyde gestel word.

4. Dat die eerste respondent se besluit om die besluit waarna verwys word in paragraaf 2 te ondersteun en die applikant se appèl daarteen van die hand te wys, hersien en tersyde gestel word.

5. Dat die tweede respondent verbied word om voort te gaan met die plasing van die betrokke leerders ooreenkomstig sy besluite en die eerste respondent se versoek.

6. Dat die tweede respondent gelas word om die amptenare van sy Departement wat die administrasie van die skool oorgeneem het, aan die skool te onttrek en te gelas om nie die leerders waarna verwys word in paragraaf 2 as leerders van die skool te probeer registreer nie.

7. Dat enige poging deur enige beampte of beamptes van die Wes-Kaapse Onderwysdepartement om die leerders waaroor hierdie aansoek gaan amptelik by die skool toe te laat, nietig verklaar en tersyde gestel word.

8. 'n Bevel wat verklaar dat die betrokke leerders nie regtens as leerders van die skool toegelaat is nie.

9. Dat die regshulp soos versoek in paragrawe 5 en 6 geld as 'n tussentydse interdik hangende die finale beregting van hierdie aansoek.

10. In die geval dat die Agbare Hof sou bevind dat die applikant nie geregtig is op die regshulp soos uiteengesit in paragrawe 2 tot 6 alvorens die aangeleentheid na arbitrasie of the Pan-Suid-Afrikaanse Taalraad verwys is nie, die Hof die applikant vrystel van die verpligting om die aangeleentheid aldus na arbitrasie of die Pan-Suid-Afrikaanse Taalraad te verwys; alternatiewelik die applikant te gelas om die aangeleentheid na arbitrasie te verwys en 'n bevel te maak dat, hangende die afhandeling van sodanige arbitrasie, die implementering van die besluite waarna verwys word in paragrawe 2 tot 4 opgeskort word en dat tussentydse regshulp ooreenkomstig paragrawe 5 en 6 verleen word hangende die finalisering van die arbitrasie.

11. Verdere en/of alternatiewe regshulp.

12. Dat die respondente gelas word om die applikant se koste te betaal op die skaal soos tussen prokureur en kliënt, insluitende die koste verbonde aan die dienste van twee advokate, gesamentlik en afsonderlik, die een te betaal die ander onthef te word."

The prayer for interim relief sought in paragraph 9 of the amended notice of motion has now fallen away, it being common cause that all interested parties are now before the Court. The applicants seek no relief or costs against the third respondents, who have been joined merely because of their interest in the matter. At the conclusion of his reply, counsel for the applicants handed in a draft order which contains provisions which differ slightly from the prayers in the notice of motion.

The matter first came before this Court on the 21st January, 2005. On that day, by agreement between the parties, it was postponed to be heard as a matter of urgency on the 7th February, 2005. The parties were put to terms as to the filing of affidavits and heads of argument.

Provision was made in the order, inter alia, for the amendment of the notice of motion and for the joinder of the second applicant and of the third respondents. The matter could not commence on the 7th February, 2005, but I heard argument on the 8th, 9th, 10th and 11th February, 2005.

Now, the first applicant consists of nine members, of whom five are parents of pupils at the school, two are teachers, one is a non-teacher and the ninth is the school principal. Its members serve for three years. It has a written constitution dated the 14th October 2003, a copy of which was required, in terms of section 18(3) of the Schools Act, to be submitted to the second respondent by the first applicant within 90 days of the latter's election. There is no suggestion on the papers before me that this was not done. Nor is there any suggestion that either the second or the first respondent raised any objection at the time to any of the provisions contained in this document. Clause 12 of the first applicant's constitution reads:

> "MEDIUM VAN ONDERRIG
>
> Die medium van onderrig by die skool (behalwe in die leerareas Engels en Xhosa) is Afrikaans."

This provision is consonant with section 6(2) of the Schools Act, which reads:

> "The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law."

It is not contended on behalf of the first or second respondents that the language policy of the second applicant, as thus determined in the first applicant's constitution, is in conflict with any provision of the Constitution of the Republic of South Africa, Act No. 108 of 1996, or of the Schools Act, or of any applicable provincial law. In terms of that policy the second applicant is, as I have said, a single-medium school, the medium of instruction being Afrikaans.

The dispute between the applicants, on the one hand, and the first and second respondents, on the other, is, in essence, about the school's language policy. Hitherto, as I have said, the accepted policy has been that it should be a single-medium, Afrikaans-language school. The effect of the action taken in December, 2004 and January, 2005 by the first and second respondents, if allowed to stand, is, in effect, to alter the school's language policy and convert the school, de facto, into a parallel-medium school, that is to say, in the first respondent's words, a school which "teaches more than one class in the same grade in more than one language".

Mr. Arendse who, with Mr. de Villiers-Jansen, appears for the first and second respondents, contends (although this is not clearly advanced in the affidavits) that this matter ought not to be before this Court. He submits, if I understand his argument correctly, that both the first and second respondents and their department, on the one hand, and the first applicant on the other, are "organs of state" as defined in section 239 of the Constitution, the relevant portions of which read:

> "In the Constitution, unless the context indicates otherwise –
> .....
> 'organ of state' means –
> (a) .....
> (b) any other functionary or institution –
> (i) .....
> (ii) exercising a public power or performing a public function in terms of any legislation ....."

The argument proceeds to rely on section 41(1) of the Constitution, which provides that:

> "All spheres of government and all organs of state within each sphere must –
> .....

(h) co-operate with one another in mutual trust and good faith by –

.....

(vi) avoiding legal proceedings against one another."

Section 41(3) reads:

> "An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

(In this subsection the word "intergovernmental" should perhaps more correctly read "intragovernmental"; but nothing turns on this, as the sense is clear enough.)
Mr. Arendse went on to point out that in terms of section 6(1) of the Schools Act certain "norms and standards" for language policy in public schools (to which I shall refer as "the Norms and Standards") have been determined by the National Minister of Education and have been published in the Government Gazette. Paragraph V E2 of the Norms and Standards reads:

> "Any interested learner, or governing body that is dissatisfied with any decision by the MEC, may approach the Pan South African Language Board to give advice on the constitutionality and/or legality of the decision taken, or may dispute the MEC'S decision by referring the matter to the Arbitration Foundation of South Africa."

Rather than being entertained by this Court, submits Mr. Arendse, the dispute in this matter, being, in his contention, a dispute between two "organs of state", ought to have been referred to the Pan South African Language Board and/or to arbitration. Indeed, he says, in a letter to the second respondent dated the 14th December, 2004 the first applicant's attorneys indicated that, in the event of the first applicant's appeal to the first respondent being unsuccessful they

intended to refer the dispute to arbitration in terms of the Norms and Standards, and this stance was reiterated to the first respondent in their letter of appeal to him dated the 17th December 2004. Thus, he argues, the first applicant has made an election to go to mediation or arbitration, and it must be held thereto. But even had it not made such an election, it would still be bound to submit to the dispute being referred to the Pan South African Language Board and/or to arbitration, so the argument runs.

In the first place, I am unable to agree that the first applicant is an "organ of state". In the context of the (interim) Constitution, Act No. 200 of 1993, the term was considered in Directory Advertising Cost Cutters v. Minister for Posts, Telecommunications and Broadcasting and Others, 1996(3) SA 800 (T). At 809G van Dÿkhorst, J. said:

> "An 'organ of State" ('Staatsorgaan') is an institutional body by means of which the State governs. (The Afrikaans definition of 'Staatsorgaan' in HAT is: 'Enigeen van die instellinge of liggame .... waardeur die Staat sy regerende funksie uitoefen.')"

At 810 F-H the learned Judge continued:

> "The concept as used in s 7(1) of the Constitution must be limited to institutions which are an intrinsic part of government – i.e. part of the public service or consisting of government appointees at all levels of government – national, provincial, regional, and local – and those institutions outside the public service which are controlled by the State – i.e. where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such extent that it is effectively in control. In short, the test is whether the State is in control."

In Lebowa Mineral Trust v. Lebowa Granite (Pty.) Ltd, 2002(3) SA 30(T) a Full Bench of the Transvaal Provincial Division, presided over by the same learned Judge, held at 35 F-I:

> "In Directory Advertising Cost Cutters v. Minister for Posts, Telecommunications and Broadcasting and Others, 1996 (3) SA 800 (T) and Korf v. Health Professions Council of South Africa, 2000 (1) SA 1171 (T) at 1176H – 1177A it was held that the test to determine whether a statutory body is an organ of State is whether the body is directly or indirectly controlled by the State. The test of control has been consistently followed by our Courts. Mistry v. Interim National Medical and Dental Council of South Africa and Others, 1997 (7) BCLR 933 (D) at 947B – 948C; Wittmann v. Deutscher Schulverein, Pretoria, and Others, 1998(4) SA 423 (T) at 454B, ABBM Printing & Publishing (Pty.) Ltd. v. Transnet Ltd., 1998(2) SA 109 (W) at 113A-G; Goodman Bros. (Pty.) Ltd. v. Transnet Ltd., 1998(4) SA 989 (W) at 993G – 994H, Claase v. Transnet Bpk. en 'n Ander, 1999(3) SA 1012(T) at 1018-19. The first two cases deal with the interim Constitution and the other three with the 1996 Constitution (the Constitution of the Republic of South Africa Act 108 of 1996).

It must therefore be concluded that the control test to determine whether a body is an organ of State is now generally accepted."

In my view the first applicant fails the "control test" as to whether it is an "organ of state". Whilst it is a statutory body established in terms of section 16 of the Schools Act, it is clear that a public school's governing body is intended by the legislature to be independent of state or government control in the performance of its functions, which are set out in section 20 of the Schools Act. That section requires a school's governing body to perform those functions only "subject to this Act." In terms of section 6(2) the governing body of a public school may determine the language policy of the school "subject to the Constitution, this Act and any applicable provincial law". No machinery is to be found in the Schools Act for the control of a governing body by the state. Nor have I been referred to any provision in other legislation, national or provincial, to such an effect. In terms of sections 23(1) and (2) of the Schools Act all the members of a school's governing body are elected, save for the principal of the school, who

is a member ex officio, and for co-opted members. The latter are presumably co-opted by the governing body itself. In the present case five of the nine members of the first applicant are parents who have been elected or, perhaps, co-opted, to the body. They have not been appointed by the state and they are not amenable to control by the state. Nor, for that matter, have the two teachers and one non-teacher who are also members of the first applicant been appointed by the state. I would be surprised it they allowed themselves to be controlled or dictated to by the state like lackeys in performing their functions as members of the first applicant. The same applies to Mr. Walters, the school principal. Indeed, he has demonstrated as much resistance to the actions of the first and second respondents in this matter as could reasonably be expected of him, bearing in mind that he is an employee of the Department of Education. It must follow that the first applicant is not an instance in which "the majority of the members of the controlling body are appointed by the state or where the functions of that body and their exercise is prescribed by the state to such extent that it is effectively in control" (the Directory Advertising case, supra, at 810 G-H).

In any event, and even if it could be said that the first applicant is an "organ of state", it is not, in my view, an "organ of state" within a "sphere of government" for the purposes of sections 41(1) and (3) of the Constitution. In Independent Electoral Commission v. Langeberg Municipality, 2001(3) SA 925 (CC) it was held at 936 D-E that the Independent Electoral Commission was an "organ of state" as defined in section 239 of the Constitution. The Constitutional Court then addressed the question "whether it is part of government in that, as an organ of state, it falls within a sphere of government contemplated by chap 3 of the Constitution" (into which chapter section 41 falls). It was contended that the Commission fell within the sphere of national government. However, this contention was rejected by the Court in the following terms at 940 C-E:

> "The Commission is clearly a State structure. The fact that a State structure has to perform its functions in accordance with national legislation does not mean that it falls within the national sphere of government.

[31] Our Constitution has created institutions such as the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission – and the other chap 9 bodies – was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of State within the national sphere of government. The dispute between Stilbaai and the Commission cannot therefore be classified as an intergovernmental dispute. There might be good reasons for organs of State not to litigate against the Commission except as a last resort. An organ of State suing the Commission, however, does not have to comply with s 41(3)."

As I have said, the governing body of a public school is intended by the legislature to carry out its functions independently, without being subject to control by the state or the executive, and that includes control by provincial "organs of state" such as the first and second respondents, their department and its functionaries. It follows that a governing body does not perform such functions within a "sphere of government" for the purposes of section 41(1) of the Constitution, and that a dispute between such a governing body and an "organ of state" cannot be categorised as "an intergovernmental dispute" as contemplated in section 41(3) of the Constitution.

As for Mr. Arendse's argument that the first applicant, through its attorneys of record, has elected to submit this dispute to arbitration, in my view it does not stand scrutiny when properly considered against the factual background. The statements in the two letters dated the 14th and 20th December, 2004 on which he relies were both made conditionally. In the first letter the first applicant's attorneys wrote:

> "We request that you notify us by 10h00 on 17 December 2004 whether or not you are prepared to suspend the effect of your directive pending the outcome of our appeal and any subsequent reference to arbitration."

In the second letter they said:

> "We appreciate your assurance that the appeal, which was lodged early on the afternoon of December 17, will automatically suspend the Head of Department's decision pending the MEC's decision on the appeal. We assume that, should the MEC dismiss the appeal, the decision will likewise be suspended pending arbitration and/or our approach to the Pan South African Language Board, in terms of the Norms and Standards document."

The response to this request came in a letter dated the 21st December, 2004 from a Mr. C.J. Fourie, the acting head of education. It was non-committal. On the 23rd December, 2004 the first applicant's attorneys wrote back to him and said:

> "We note the contents of your letter but can really see no reason why you should not confirm that your decision would be further suspended pending the arbitration and/or approach to the Pan South African Language Board. Be that however as it may we assume that you will give us adequate notice of your intended course of action so as to enable us to adequately protect our client's rights."

This request was repeated in a further letter dated the 18th January, 2005. However, it was not complied with. Instead, on or about the 19th January, 2005 the first applicant's appeal was dismissed by the first respondent and the second respondent's directive of the 2nd December, 2004 was summarily put into effect without further notice to the first applicant.

In the circumstances the first applicant cannot, in my view, be faulted for approaching this Court for urgent relief, and cannot be held bound by its election to seek redress elsewhere, which was

clearly conditional on the suspension of the putting into operation of the second respondent's directive.

Then it is contended by Mr. Arendse that the applicants are precluded from approaching this Court by the provisions of section 7(2)(a) of the Promotion of Administrative Justice Act, No. 3 of 2000, which reads:

> "Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

Paragraph (c) of the same subsection provides that:

> "A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

This contention, also, is not clearly raised in the affidavits delivered by or on behalf of the first and second respondents. However, it is, to my mind, easily disposed of. This matter, to my mind, is unquestionably one of urgency. At stake are the interests of 21 small children whose educational future is in question, inasmuch as it is uncertain what primary school they will attend. That this question should be resolved with as little delay as possible is self-evident. Unfortunately, and due to nobody's fault, almost a month has already elapsed since these proceedings were launched. A fresh reference of this dispute to a body such as the Pan South African Language Board, or to arbitration, would inevitably result in further delay, and would undoubtedly exacerbate the problem, especially as the board referred to lacks the power to make decisions which are binding on the parties who appear before it (see section 11 of the Pan South African Language Board Act, No. 59 of 1995) and an arbitrator, as Mr. Arendse submitted in another context, would probably require to hear evidence viva voce. Such delay can be avoided if the matter is finalised here and now, after having been fully ventilated in this Court,

as it has been. Moreover, this case has generated considerable public interest. It can safely be assumed, I think, that there are many people to whom the principal issues raised in this matter, and especially the central questions of language policy in public schools and the rights and powers of their governing bodies, are of great moment. It would be regrettable if issues of such magnitude and importance were to be decided behind closed doors by a statutory board or by an arbitrator: see Earthlife Africa (Cape Town) v. Director-General: Department of Environmental Affairs & Tourism and Another, C.P.D., 26th January, 2005, Case No. 7653/03 (as yet unreported), at paragraph [32].

To my mind the cumulative effect of these factors constitutes "exceptional circumstances" for the purposes of section 7(2)(c) of the Promotion of Administrative Justice Act justifying the exemption of the applicants from any obligation which they might otherwise have been under to exhaust their internal remedies, and I deem such exemption, which is sought by the applicants, to be in the interests of justice.

I turn, now, to the merits of the application.

As I have said, in terms of section 6(2) of the Schools Act the first applicant was entitled to determine the second applicant's language policy, and did so in its constitution as long ago as October, 2003, if not before then. The second respondent's directive to the school principal of the 2nd December, 2004 flew in the face of that policy, inasmuch as it compelled the latter, against the will of the first applicant, and on pain of disciplinary action, to admit certain pupils to the school and to have them taught in English. The effect of the directive was factually to convert the school, at least for the year 2005, from a single-medium school into a parallel-medium one. That was overriding the second applicant's language policy in what I consider to be a fundamental and far-reaching manner. The second respondent acted as if the school's language policy did not exist, or that it counted for nothing. It is contended by the first and second respondents that the applicants will suffer no prejudice because pupils at the school who have chosen to be taught in Afrikaans may continue to receive their tuition in that language. I

disagree. Where the governing body of a school has elected to have a single language as its medium of instruction, the introduction of a second language of tuition must inevitably have a profound influence on the modus vivendi, the customs, traditions and almost every aspect of the atmosphere which pervades the school. It is not difficult to think of examples to illustrate this. To name just a few: at school assemblies at a parallel-medium school, staff and pupils must presumably be addressed in both languages, and proceedings must be conducted in both; the same applies to meetings at the school which are attended by parents; notices on the school notice board or boards will likewise have to be in both languages; correspondence between the school and parents will have to be conducted either in both languages or selectively, depending on the particular parent's language of choice; the same applies to school reports; in the present case the school motto, which presently reads "Werk en Skep", may have to be scrapped and replaced with one which caters for both languages, or, perhaps, even with one in a third language, such as Latin; the first applicant's constitution will have to be in both languages, and the same will presumably apply to such things as the school song, if it has one. The list is almost endless. I am not suggesting that any of these things are undesirable in themselves; I have no doubt that many parallel and dual-medium schools function perfectly satisfactorily in such a bilingual milieu: however, I do say that these aspects will, of necessity, be very different in a dual or parallel-medium school from what they are in a single-medium school.

As to the reasons which appear to underlie the second respondent's directive, I have been referred to an article by Prof. R. Malherbe which was apparently published in 2004 Perspectives in Education (Pretoria University) entitled "The Constitutional Framework for Pursuing Equal Opportunities in Education". In it he says at 14-15:

> "The indiscriminate targeting of Afrikaans-medium schools and educational institutions to become dual or parallel medium institutions presently undertaken by the state, as well as the neglect of indigenous languages in education, deny the multilingual reality of South Africa and violate the language rights guaranteed by the Constitution. This is an example of the values of human dignity and freedom being sacrificed for the sake of a view which

equals equality to uniformity, instead of the three values being applied in harmony to enhance the equal worth of people.

.....

The fact that subsection 29(2) (of the Constitution) expressly refers to single-medium institutions means that within a range of possibilities that may also include dual and parallel medium instruction, at least this alternative must always be considered. Whenever they are found to provide the most effective way to fulfil the right to education in one's preferred language, single-medium institutions should be the first option.

Any perception that single-medium institutions obstruct the redress of past discrimination is unfounded. As suggested above, mother-tongue education is, as a matter of fact, a powerful tool to extend educational opportunities to all South Africans. Research has established the correlation between mother-tongue instruction and optimal educational progress. Furthermore, equal access to educational facilities is in any case guaranteed by the equality principle and any abuse of single-medium institutions to deny anyone equal access to education would be inconsistent with section 9.

Although, in principle, dual and parallel medium institutions or instruction may under suitable circumstances be the appropriate option to fulfil the right to education in one's preferred language, it has the shortcoming that diminishing numbers of a particular language group puts tremendous pressure on that language and may in practice lead to an institution eventually becoming single-medium. Should that happen, the right of those learners to education in their preferred language is threatened."

I find myself in agreement with these views. However, in the view which I take of this matter it is not necessary for me to express any opinion as to the constitutional soundness or the acceptability or otherwise of the reasons for the second respondent's conduct, whatever they may have been, and I refrain from doing so.

Much has been made of the fact that a school's language policy goes hand-in-hand with its admission policy, and this is clearly so, inasmuch as the language policy will, to a large extent, determine what pupils are to be admitted to the school. Section 5(5) of the Schools Act provides that:

> "Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school."

The first applicant has, indeed, determined the second applicant's admission policy. Clause 1.2 thereof has come under attack by the first respondent on the papers. It reads:

> "Leerders moet hulle vereenselwig met die kultuur, tradisies, gebruike, konvensies en etiese waardes van hierdie Afrikaansmediumskool en dit eerbiedig."

The first respondent avers, in a supplementary answering affidavit jurat the 1st February, 2005, that this provision in the school's admission policy is unconstitutional and unlawful. Mr. Arendse argues to the same effect. However, whether or not there is substance in this contention is not something which I need consider, and I accordingly express no view on it. It is, in fact, irrelevant to the issues before me. I say this because in the same supplementary answering affidavit the first respondent says that he first had sight of the second applicant's admission policy only after the 28th January, 2005, and that the same applies to the second respondent (who has delivered an affidavit confirming this) and to the relevant officials of his department. He also says that the document has never formally been submitted to the second respondent or to the Western Cape Education Department for approval. This means, of course, that the school's admission policy could not have played any role in the decisions taken by the first or second respondents before the 28th January, 2005, nor could it have influenced them in their conduct before that date: they were oblivious of the document, and of clause 1.2 of the policy in particular. If the parents of the 21 pupils here concerned, or any of them, were unwilling to

subscribe to this clause (and there is no evidence that they were), that was not a factor which could have weighed with either the first or the second respondent before the 28th January, 2005. They could not have been under the impression that the first applicant was refusing to admit the 40 children to the school because their parents had declined to subscribe to clause 1.2 of the school's admission policy. All that the first and second respondents knew until at least the 28th January, 2005, was that the second respondent's directive to admit the pupils and to have them taught in English, as opposed to Afrikaans, was inconsistent with the second applicant's language policy and its admission policy only insofar as the chosen language of instruction would obviously have been a criterion for admission to the school.

In passing, it should perhaps be pointed out that amongst the "doelstellings van die skool" the first applicant's constitution lists the following:

> "10.2 Om sonder om op enige wyse onregverdig te diskrimineer leerders volgens die toelatingsbeleid van die skool tot die skool toe te laat.
>
> 10.3 Om sonder enige vorm van rassediskriminasie die leerders in Afrikaans te onderrig."

No allegation is made on the papers that the school or its governing body, the first applicant, has at any time been guilty of any form of racial, religious or otherwise unfair discrimination. Indeed, as regards the 21 pupils concerned in this case Mr. Budlender, who appears for their parents, the third respondents, and to whom the Court is particularly indebted for the exceptionally able, balanced and helpful way in which he has represented them, has on their behalf expressed their grateful appreciation for the manner in which the school principal has handled this difficult situation and for the fact that the children have been made to feel welcome at the school, notwithstanding this pending litigation. The Court also applauds the school's magnanimous conduct in this regard.

Mr. Heunis, who appears with Mr. Osborne for the applicants, submits that the second respondent's directive to the first applicant's principal of the 2nd December, 2004 to admit the 40 pupils and to have them taught in English was unlawful in the circumstances. The second respondent had no right, he argues, in effect summarily to thrust a language policy on the school which flies in the face of its established language policy, which has legitimately been determined by the first applicant in terms of section 6(2) of the Schools Act. If the second respondent found the school's language policy unpalatable, or considered that it was essential to alter it, Mr. Heunis submits that machinery to bring about such a change is to be found in sections 22(1) and (2) of the Schools Act, which read:

> "(1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body.
>
> (2) The Head of Department may not take action under subsection (1) unless he or she has –
>
> (a) informed the governing body of his or her intention so to act and the reasons therefor;
>
> (b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and
>
> (c) given due consideration to any such representations received."

(In subsection (3) provision is made for cases of urgency). The second respondent has at no time purported to use this machinery. On the contrary, in his answering affidavit the first respondent says:

> "I respectfully point out that it was never my intention nor that of the Department to forcibly change the applicant's language policy."

This averment is confirmed by the second respondent in his affidavit. Instead of following the procedure set out in section 22 and withdrawing from the first applicant the function of determining the school's language policy, the second respondent summarily ordered the school principal to act in conflict with the existing policy. This, submits Mr. Heunis, was unlawful.

Mr. Arendse seeks to justify the second respondent's decision to issue the directive and the first respondent's subsequent support thereof on appeal mainly on demographic grounds, as did the first and second respondents in their opposing affidavits. They point to a substantial increase in the number of school- going children in the Western Cape over the last decade. This increase has manifested itself in the Kuils River area as elsewhere, and there has been an increased demand in that area for tuition in English, they say. They point to a series of meetings with the first applicant, commencing in 2002, at which it was repeatedly requested to admit pupils for instruction in English. The last of these meetings was held late in November, 2004. However, the first applicant has consistently refused to accede to this request. The next thing was the directive from the second respondent on the 2nd December, 2004. Mr. Arendse points out, correctly, that in terms of section 29(2) of the Constitution there is a right to receive education in the official language of one's choice. The subsection reads:

> "Everyone has the right to receive education in the official language or languages of their choice in public education institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
>
> (a) equity;
> (b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices."

He emphasises, correctly that the parents of each of the 21 children here concerned have chosen to have their child educated in English. He also relies on paragraph V D3 of the Norms and Standards, which reads:

> "It is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it in a particular school." (sic)

He also relies on section 3(1)(a) of the Western Cape Provincial School Education Act, No. 12 of 1997(C) in which mention is made, as part of a framework of principles on which the first respondent may, "where necessary", determine a policy, of education at a pupil's nearest ordinary public school, insofar as it is reasonably practicable. Whether or not the first respondent has ever determined such a policy is not clear. These provisions and considerations, Mr. Arendse contends, justify the decision of the second respondent to issue the directive of the 2nd December, 2004.

In this dispute about the school's language policy Mr. Budlender, for the third respondents, adopts a neutral attitude.

I am unable to agree with Mr. Arendse in the conclusion which he seeks. It is undoubtedly true that the parents of each of the 21 children here concerned have the right, under section 29(2) of the Constitution, to choose the official language or languages in which they wish their children to be educated. It is also no doubt desirable and convenient for a child to be educated at the school nearest to his or her home, if that is practicable. It is also correct, it seems, that where 40 or more children in a particular grade between Grades 1 and 6 at a particular school request tuition in a particular official language, the provincial Education Department is placed

under an obligation by the Norms and Standards to provide it. It may also be that demographic changes sometimes render that obligation a difficult one for the Department to perform, for various practical reasons. However, in my view none of these things can justify the first and second respondents summarily riding roughshod over the school's language policy and treating it as if it did not exist, or did not matter. Their remedy, if they really needed one, was to call in aid the provisions of section 22 of the Schools Act, and to withdraw from the first applicant its function of determining the school's language policy. That, to my mind, is what the legislature envisaged should happen in an appropriate case. The fact that a number of meetings took place and that the first applicant adopted a consistent attitude throughout does not assist the first and second respondents, in my view.

In any event there is authority that, even using the machinery of section 22 of the Schools Act, it is not open to a provincial education department to override the properly established language policy of a single-medium public school by proclaiming it a parallel-medium school unless it has first been established that all the other public schools in the school district concerned, in which tuition is given in the other language, are full: see Laerskool Middelburg en 'n Ander v. Departementshoof, Mpumalanga Departement van Onderwys en Andere, 2003(4) SA 160(T) at 170 I – 171A, 171G and 173G. That is not so in this case. In terms of the Western Cape Education Department's own criteria, a school is regarded as full only when the ratio of pupils to classrooms is in excess of 35 or 38 to one, depending on the circumstances. Some 1,200 metres from the school, and in the same school district, is another school, the de Kuilen Primary School, which is a parallel-medium school using Afrikaans and English as the languages of tuition. According to calculations done for the applicants by Mr. D.E.H. de Clerk, a senior business analyst, using data supplied by the Western Cape Education Department, the average number of pupils per classroom at de Kuilen in 2004 was only 30.7, as opposed to the overall provincial average of 34.1. Moreover, there are three prefabricated classrooms at de Kuilen, about which I shall have more to say later. If these buildings are included in the calculation, de Kuilen's average pupil to classroom ratio diminishes to 28. That of the second applicant is 28.7. These figures all relate to 2004, but are apparently the most recent obtainable. On these figures Mr.

Arendse was constrained to concede that both schools appeared to be somewhat "under-utilized", and that he could not argue that de Kuilen was full.

I find myself in agreement with Mr. Heunis' submissions on this aspect of the matter, which I have attempted to summarise above. For these reasons I find that the second respondent's directive of the 2nd December, 2004 was unlawful. It follows that both his decision to issue the directive and his subsequent decision to put it into operation when the school opened on the 19th January, 2005 were likewise unlawful.

Next I shall deal with the first applicant's appeal to the first respondent. The first respondent's decision to dismiss it is attacked by the applicants on a number of grounds. I need mention only two of them.

The first is that the first respondent's decision "was materially influenced by an error of law" (section 6(2)(d) of the Promotion of Administrative Justice Act). I consider that it was. The error of law was that the first respondent thought that the second respondent was entitled to issue his directive of 2 December, 2004. For the reasons which I have mentioned, that view was erroneous.

Secondly, the first respondent refused or failed to allow the first applicant's attorneys to place further matter before him which would probably have been relevant to his decision of the appeal. Having noted their appeal on the 17th December 2004 the attorneys wrote to the second respondent on the 20th December, 2004 inter alia requesting certain information from the department in written form. They said:

> "In the interim, and pending the furnishing of the abovementioned information, we submit that the MEC cannot make a decision with regard to the appeal until such time as we are furnished with the said information and, if necessary, have had the opportunity to

respond thereto and to amplify the bases of our client's appeal. Kindly supply the information sought as soon as practicably possible."

On the 13th January, 2005 the second respondent's senior law adviser wrote a letter to the applicant's attorneys in which some of the required information was furnished. However, it was furnished subject to a caveat as to its correctness. Between the 13th and the 17th January, 2005 a large volume of further documentation, apparently running to some 1,500 pages, was transmitted to the attorneys electronically. On the 18th January, 2005 the first applicant's attorneys wrote to the first respondent, saying, inter alia:

"...(W)e must however stress that we need to consider the documentation forwarded, take instructions and thereafter amplify our client's appeal. Our client must be given a reasonable time to do the necessary in this respect, particularly given the voluminous nature of the documentation. We must further point out that we are unable to commence that process until such time as there has been a proper response to paragraph 3 of our letter."

In paragraph 3 of their letter referred to them had complained to the second respondent's senior law adviser earlier on the same day that:

"You will appreciate that it would be pointless for us to review the documentation merely to be informed, in due course, that same is not correct. It is also impossible for us, in view of the reservation with regard to the correctness of the information, to amplify our client's appeal. In the circumstances this matter cannot be taken forward until you have confirmed the correctness of the information, thereby placing us in a position to proceed herein. In view of the urgency of this matter, and particularly in the light of what will hereinafter be set out, we look forward to hearing from you as a matter of urgency."

However, notwithstanding these requests, without further notice to the first applicant or its attorneys, and without affording them an opportunity to amplify their appeal as they had requested, the first respondent proceeded to dismiss the appeal on or about the 19th January, 2005.

The information contained in the requested documentation formed the basis, subsequently, for the figures extracted by Mr. de Clerk, to which I have referred, relating, inter alia, to the availability of alternative accommodation for the children concerned at de Kuilen. Had this information been allowed to be placed before the first respondent before he had decided the appeal, he might have decided it differently. He says, and it was argued that he could not wait for this material because the schools were due to open on the 19th January, 2005, and finality was urgently required. The answer to this contention is that the urgency was of the Education Department's own making. The second respondent left it until the 2nd December, 2004, the day before schools closed for the year, to drop the bombshell which his directive must have been for the school and its governing body. The school was about to break up and its teachers to disperse for the summer holidays. No good reason has been advanced why it was necessary for the department to wait until then to bring this vexed question to a head. According to the first respondent it had been simmering for many months. Had the directive been issued at an earlier stage the appeal against it could have been disposed of less summarily and with less haste. I find that the first respondent's action in dismissing the appeal as he did was procedurally unfair (section 6(2)(c) of the Promotion of Administrative Justice Act).

For these reasons, in my judgment his decision falls to be set aside on review.

Next there is the matter of the events at the school of the 19th January, 2005. According to Mr. Wolf's founding affidavit, amplified by that of the principal, Mr. Walters, two senior officials from the Western Cape Education Department, Messrs. Caroline and Saunders, arrived at the school that morning and insisted that the children here concerned and their parents attend the school assembly in the school hall, at which the school was about to be opened for the year.

They brushed aside Mr. Wolf's protests that these children had not yet been admitted to the school: certain of the relevant application forms had apparently been filled in, under the supervision of Mr. Caroline, but they had not yet been processed by Mr. Walters, nor had he yet applied his mind to such matters as whether each of the children fell within the required age-group to qualify for admission. Mr. Wolf says that Mr. Caroline informed him that he, Mr. Caroline, had taken over the management of the school in full, and that the children had been enrolled at the school.

In their reply the first and second respondents deny that the children were not enrolled at the school, and they deny that Mr. Caroline "had taken over the school". They aver that Mr. Caroline "was merely seeing to it that the instruction given by the Head" (the second respondent) "was being executed." Save for that, the applicants' above allegations are not really denied by the first and second respondents.

It seems to be clear on the papers that on the morning of the 19th January, 2005 the process of admitting these children to the school and enrolling them was, as yet, incomplete. The insistence by the Western Cape Education Department's officials that the children and their parents attend the school assembly against the wishes of its principal and governing body amounted, in my view, to interference by them in the government and professional management of the school. This they were not at liberty to do. Section 16(1) of the Schools Act reads:

> "Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act."

Section 20(1) provides that:

"Subject to this Act, the governing body of a public school must –

.....

(e) support the principal, educators and other staff of the school in the performance of their professional functions; "

Section 16(3) reads:

"Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department."

It seems to me to be part of the professional management of a school, and thus a function of the principal, to determine who may attend school assemblies. In terms of section 20(1)(e) of the Schools Act the first applicant is bound to support him when he makes such a determination. Mr Walters was clearly not willing to permit the children here concerned or their parents to attend the school assembly on the 19th January, 2005, for the process of admitting and enrolling the children was as yet incomplete. He was supported in his unwillingness by the first applicant, whose chairman, Mr. Wolf, protested to Mr. Caroline. Nevertheless the latter insisted that the children and their parents attend the assembly as if the children had been duly admitted and enrolled at the school. In effect, he usurped the function of the school principal. The fact that a school principal, in terms of section 16(3) of the Schools Act, must undertake the professional management of his school "under the authority of the Head of Department" does not, to my mind, render him subservient to the department in everything he does. He does not, thereby, become the second respondent's lackey.

In the circumstances, in my judgment the conduct of Messrs. Caroline and Saunders entitles the applicants to the declaratory relief sought by them in the draft order submitted by them.

Unfortunately it seems to me, in the light of the history of this matter, that a future repetition of similar conduct on the part of the first and second respondents is not unlikely. Accordingly the applicants, in my view, are also entitled to the interdictory protection which they seek.

Next must be considered the position adopted by Mr. Budlender on behalf of the children's parents, the third respondents, and his submissions. Regardless of the rights or wrongs of the conduct of the first or second respondents, he submits, the best interests of the 21 children here concerned must weigh heavily. According to their parents they have all settled in happily at the school, where they have been made to feel welcome, despite this litigation. They mix easily and comfortably with both the English-speaking and the Afrikaans-speaking children at the school, and they have made friends. They would be reluctant to have to leave the school. However, all of the parents concerned, according to their spokeswoman, Mrs. J. du Preez, would find both Mikro and de Kuilen acceptable, provided that their children are taught in English. She says, however, that they are extremely unhappy at the prospect that they might be shifted from pillar to post at this highly formative moment in their school careers, and, in her view, it would be in the best interests of the children for them to remain at the school where they have settled happily. She goes on to say in her affidavit that the prospect that their children might be moved, first, to a temporary "holding" school, as has been suggested by the first and second respondents, and, eventually, from there to a third school, is utterly unacceptable to the parents.

Mr. Budlender points out, first, that the parents of these children enjoy a right, enshrined in section 29(2) of the Constitution, to insist that their children receive education in the official language of their choice, which is English, and that they cannot be compelled or expected to abandon that right, at least insofar as such education is reasonably practicable, which it is, in the Kuils River area. I agree. He also points out that section 28(2) of the Constitution provides that:

"A child's best interests are of paramount importance in every matter concerning the child".

He concedes that the first applicant also enjoys a constitutional right, viz. to administrative justice, and that the best interests of children do not always override such a right. It depends upon the circumstances. He submits that there is what he calls a "tension" in this case between these two elements. I agree. The one does not necessarily override or "trump" the other. It is a matter of striking a proper balance between the two. He argues that, even if I find that the conduct of the first and second respondents was unlawful and violated the first applicant's right to administrative justice, which I do, I still have a discretion, to be exercised with appropriate judicial care, to make an order which, in the best interests of the children, will leave them where they are, at the Mikro School. As I understand it, that was the thinking which underlay the substantive order which was granted in the Laerskool Middelburg case, supra: in that case the children concerned had already been at the school for some eight or nine months when judgment was delivered.

As I have said, I have found Mr. Budlender's argument most constructive and helpful, and I am indebted to him for it, and for the responsible and reasonable attitude which he and his clients have adopted in this matter. Regrettably, the same cannot be said of the first and second respondents, whose attitude differs markedly from that of the applicants and of the third respondents in a number of respects.

Without question, the best interests of these 21 small children are of paramount importance, and are of very great concern. But there is another principle at stake here, and it is of equal, if not greater, concern. It is about what Mr. Osborne, in replying for the applicants, calls "the value of legality": it is the simple principle that the state must obey the law. That is a principle which is so fundamental and so important in any civilised country that it must be only extremely rarely, if ever, that the rule of law can be "held hostage", as Mr. Osborne puts it, to the best interests of children. Indeed, it is difficult to imagine how it could ever be in the best interests of

children, in the long term, to grow up in a country where the state and its organs and functionaries have been elevated to a position where they can regard themselves as being above the law, because the rule of law has been abrogated as far as they are concerned. It could be cogently argued, I think, that a Court which, by its orders, exposed children to the risk of growing up in such a place would be doing them a greater disservice than a Court which merely ordered that they be removed from one school and placed in another, equally acceptable to their parents, and only a short distance away.

Fortunately, in this matter I think that the "tension" between the best interests of these children, on the one hand, and the constitutional right of the first applicant to administrative justice, on the other, is more apparent than real, and that the order which I propose to make will succeed in suitably protecting the latter and in upholding the rule of law, without causing any real harm to the children.

First, although the children are happy where they presently are, there is no evidence that they, or any of them, will be less happy at another school such as de Kuilen, where they can, in all probability, be accommodated without too much inconvenience, either to themselves or to the school. De Kuilen is only approximately 1,200 metres from Mikro. Their dedicated English-speaking teacher, Ms. Loubser, can and will no doubt accompany them there. Whilst there must always be some risk that a change of school will not be altogether successful, from a child's point of view, that does not appear to me to be a very great risk in this instance: the parents of these children all seem to know de Kuilen, and none of them have any objection to it; indeed, it was the first school to which they applied to have their children admitted, and they were only turned away because they were told, (probably wrongly) that it was full. They say, in effect, that they would be equally content with either school, as long as their children are taught in English. Nor is a change of schools an extraordinary phenomenon: the children of such persons as diplomats experience it frequently, without dire consequences.

Secondly, these children are not being uprooted from a school which they have been attending for years or even months: today is only their 23rd school day since they first went to school on the 19th January, 2005. It seems unlikely to me that a single move to another school now will cause them undue distress or trauma.

Thirdly, the academic curriculum for Grade 1 pupils is almost certainly not such that they are likely to suffer any real disadvantage as a result of a change of school at this stage, especially if their present teacher accompanies them to their new school, wherever it may be.

Finally, in the order which I propose to make there will be no question of a double move for these children, or of their being accommodated temporarily in a so-called "holding school".

To conclude, there is the matter of costs. The applicants seek a special order in this regard against the first and second respondents. They point to a number of features of the case which they contend justify such an order. I shall deal with only one.

It has been the attitude of the first and second respondents throughout that the 21 children here concerned (initially 40) cannot be accommodated at the de Kuilen Primary School because that school is full. The first applicant has from the outset contended that there are some pre-fabricated classrooms at de Kuilen which can be used to accommodate them. As recently as the 28th January, 2005 the first respondent, in his main opposing affidavit, said:

> "Although there are pre-fabricated classrooms at De Kuilen which the applicant contends could be used to accommodate the 40 English learners, I am advised by Mr. Caroline that these classrooms were erected prior to 1971, are in a dilapidated state and pose a serious safety hazard."

He went on to say, in the same affidavit:

"In the event that this Honourable Court should grant the interim relief sought, the learners, who are residents of Kuilsriver, will have to be placed in a holding school and thereafter alternative arrangements will have to be made to place these learners in different schools. The closest holding school in Kuilsriver is Alta Du Toit, a school used for severely mentally handicapped learners."

As it turned out eventually on the papers, the information provided to the first respondent about the prefabricated classrooms by Mr. Caroline, who is the Director: Education Management and Development Centre, Metropole East, was wrong. Three days later, on the 31st January, 2005 de Kuilen was visited by an engineer, Mr. W.F.R. Liebenberg, and he inspected these buildings. This is what he says in an affidavit delivered by the applicants in reply:

"5. The Prefabs are all approximately the same size: approximately 8 by 8 metres. They are each about 2,6 metres in height.

6. I spent about 15 minutes inspecting the exterior of the Prefabs. I approached to within a metre or so. Although I did not have an opportunity to conduct structural tests, check the foundations, or inspect, for example, the space above the ceilings, I did observe, with respect to three of the Prefabs, that:

(a) The framework appeared to be in good condition.

(b) The walls, which consist of prefabricated panels appeared to have been freshly painted.

(c) The structures appeared to be resting squarely on the ground; I saw no evidence of subsidence.

(d) The roof appeared to be sound.

(e) One of the prefabs, the one marked 2 on the map annexed as WL1, had an air-conditioner installed on the Eastern wall. I was not able to determine whether it was in operation at the time.

7. The fourth Prefab, marked 4 is in the process of being renovated. Paint pots, brushes and other building material are in close proximity to this classroom. It appeared to me that heavy duty shelves are being installed therein.

8. Children were present in three of the four Prefabs under the supervision of adult females. I estimate that between 20 and 30 children were distributed between the three classrooms.

9. Because, as mentioned, children were in the classrooms, I did not have the opportunity to inspect the interiors of the Prefabs. From the outside, however, I was able to observe that:

(a) The interior walls appeared to be in good condition.

(b) There was no sign of sagging in the ceilings, nor was water damage visible."

He also took some colour photographs of the buildings and these are attached to his affidavit. They appear to bear out much of what he says. Although they may not be equipped with such luxuries as air conditioning and inter-leading toilets, it is abundantly clear that these buildings are adequate for use as classrooms.

All this information was as easily available to the first and second respondents as it was to Mr. Liebenberg – indeed, more so. Before going on oath and, albeit perhaps unwittingly, potentially

misleading the Court on a fundamentally important aspect of this case, they ought to have verified the information. The first and second respondents ought to have known, if they did not know, that de Kuilen was, in fact, not full, and that the contention advanced by them to the contrary was unfounded. Moreover from the statistical data available to them they could have calculated, as Mr. de Clerk subsequently did, that the ratio of pupils to classrooms at de Kuilen was only 30.7 to one, as against the provincial average of 34.1 to one and the department's own guideline for full capacity of 35 or 38 to one. Moreover, had they taken the trouble to ascertain the truth about the prefabricated classrooms they would have realised that these were, in fact, available for use at de Kuilen as the first applicant contended, that they were in fact being used, and that their use would reduce de Kuilen's pupil to classroom ratio to only 28 to one.

It goes further than this. On the false premise that the children could not be accommodated at de Kuilen the first and second respondents have, in effect, threatened that the alternative to leaving them at Mikro would be to accommodate them temporarily at a "holding school" called Alta du Toit, which is a school for "severely mentally handicapped learners". In the circumstances, I regard this unfounded threat to the well-being of six-year old children as highly reprehensible. It seems to me that the first and second respondents, having imposed their will on the unwilling school, and having achieved a fait accompli by engineering the children's attendance there, were prepared to use this dreadful threat as a lever to ensure that their wishes were not thereafter thwarted. In my view the first and second respondents must bear a heavy burden of public opprobrium for their conduct, and that opprobrium will be reflected in the costs order which I propose to make.

In the result I make the following order:

1. The decision of the second respondent, set out in his letter to the principal of the second applicant dated the 2nd December, 2004, to direct the latter to admit

certain pupils to the second applicant, and to have them taught in the medium of English, is set aside.

2. The decision of the second respondent of the 19th January, 2005 to put the said directive into effect is also set aside.

3. The decision of the first respondent, made on or about the 19th January, 2005, to uphold the aforesaid decision of the second respondent and to dismiss the first applicant's appeal against it, is set aside.

4. The first and second respondents are prohibited and restrained from compelling or attempting to compel the second applicant or its principal to admit pupils for instruction in the medium of English otherwise than in compliance with the second applicant's language policy, and with the applicable provisions of the South African Schools Act, No. 84 of 1996, of the Norms and Standards determined in terms of section 6(1) of that Act, and of any other legislation which may be applicable.

5. It is declared that the conduct of certain officials of the Western Cape Education Department on the 19th January, 2005 at the second applicant's premises constituted unlawful interference by them in the government and professional management of the second applicant, in contravention of sections 16(1) and 16(2) of the said Act.

6. The first and second respondents are prohibited and restrained from instructing or permitting officials of the said department to interfere unlawfully in the government or the professional management of the second applicant.

7. The first and second respondents are ordered to place the 21 minor children presently attending the second applicant, whose parents are the third respondents, at another suitable school or schools on a permanent basis as soon as may be reasonably practicable.

8. Until the said children shall have been so permanently placed at another suitable school or schools, they may continue to attend the second applicant and to receive instruction there in the medium of English; provided that this situation shall not continue after 2005.

9. In the event of the first and second respondents being unable to place the said children permanently at another suitable school or schools by the 18th March, 2005 the second respondent shall report in writing to the first applicant not later than the 22nd March, 2005 as to what steps have been taken to bring about such placing; thereafter, the second respondent shall report in writing to the first applicant on or before the last day of each succeeding month as to what progress has been made in this connection; leave is granted to the applicants and to the third respondents, or any one or more of them, to approach this Court on the same papers, amplified as may be necessary, for further relief in this regard.

10. The first and second respondents are ordered to bear the costs of these proceedings on the scale as between attorney and client, including the costs of the third respondents, such costs to include, in the case of the applicants, the costs occasioned by the employment of two counsel.