Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case Nr: 1177/2004
Case Heard: 11-13/05/2005
Supplementary Heads: 07/07/2005
Date delivered: 24/10/2005

In the matter:

Seodin Primary School	**1st Applicant**
Governing Body of Seodin Primary	**2nd Applicant**
Kalahari High School	**3rd Applicant**
Governing Body of Kalahari High School	**4th Applicant**
Northern Cape Agricultural High School	**5th Applicant**
Governing Body of Northern Cape Agricultural High School	**6th Applicant**

versus

MEC of Education of the Northern Cape	**1st Respondent**
Head of Department: Department of Education (NC)	**2nd Respondent**
Johannes Walters Louw	**3rd Respondent**
Adolf Johannes Jonker	**4th Respondent**
Gabriël Petrus Vermeulen	**5th Respondent**
Kruman Primary School	**6th Respondent**
Governing Body of of Kuruman Primary School	**7th Respondent**
Wrenchville Primary School	**8th Respondent**
Governing Body of Wrenchville Primary School	**9th Respondent**
Wrenchville High School	**10th Respondent**
Governing Body of Wrenchville High School	**11th Respondent**
Bankara-Bodulong Combinated School	**12th Respondent**
MEC of Education of the North West	**13th Respondent**

Coram: Kgomo JP *et* Williams J et Goliath AJ

JUDGMENT

KGOMO JP:

1. The parties, as will be noted in the course of this judgment, share the blame essentially equally for causing this matter to spiral out of proportion and the consequent delay in having the matter finalized as expeditiously as the exigency of the circumstances required. The belated intervention (when the argument by the existing parties had been concluded) by the Pan South African Language Board (PANSALB) on the 13th May 2005 as *amicus curiae* did not help matters because their intervention was initially opposed and the last set of Heads of Argument only reached us in July 2005 when we were already in recess and the *coram* had dispersed.

2. On the 22nd October 2004 the five applicants filed this Rule 53 Review application against the MEC of Education, Northern Cape (First Respondent), the Northern Cape Departmental Head (HOD) (Second Respondent), five affected schools and their school governing bodies (SGB's) (Sixth to Twelfth respondents), the principals of these schools (3rd to 5th respondents) and the MEC of Education of the North West Province (the Thirteenth Respondent). Only the Northern Cape MEC and his HOD opposed this application. They will henceforthy be referred to interchangeably as the respondents or the Department.

3. The applicants are Seodin Primary School (First Applicant) and its SGB (Second Applicant), Kalahari High School (Third Applicant) and its SGB (Fourth Applicant) and Northern Cape Agricultural High School (Fifth Applicant) and its SGB (Sixth applicant). In their initial application (of 22/10/2004) the relief sought by the applicants was to have the following decisions reviewed and/or set aside:

   3.1. The decision of the MEC for Education taken on the 31st August 2004 to the effect that all single-medium Afrikaans Schools in the Kuruman District as well as the Northern Cape Agricultural High School should from January 2005 convert to and function as double-medium Afrikaans-and-English schools;

   3.2. The decision of the HOD taken on the 1st September 2004 pertaining to the implementation of the MEC's decision mentioned in paragraph 3.1 (above).

4. It would be an exercise in futility to deal with the second amended Notice of Motion because it has since been completely overhauled by the current amendment (reflected in para 5 below) which applicants only ushered in during the course of argument on the merits in May 2005. It suffices to state that the relief claimed in the second amendment was such a radical departure from the original Notice of

Motion that was sought that we were constrained to allow the postponement sought by the respondents because it was necessary for them to deal in their Answering Affidavit with the then fresh points of departure. The setting aside of the challenged decisions were still persisted in. I allude to this aspect primarily because the postponement had costs implications, which costs were reserved.

5. The relief finally sought by the applicants which we are asked to adjudicate upon and which have been incorporated in a draft order ("konsepbevel") is the following (translated and somewhat paraphrased): It is declared that:

5.1. The decision of the First Respondent (MEC for Education) of 31 August 2004 to the effect that all single-medium Afrikaans Schools at Kuruman, as well as the Agricultural High School Northern Cape shall from January 2005 function as double-medium Afrikaans-and-English schools is susceptible or amenable ("vatbaar") to being set aside;

5.2. The decision of the Second Respondent (the HOD) of 1st September 2004 concerning the implementation of the First Respondent's decision is susceptible or amenable to being set aside;

5.3. The First Respondent has through his decision of 31st August 2004 ("the decision") acted contrary to what section 29 (2) of the Constitution, Act 108 of 1996 regulates:

5.3.1. by basing his decision on, alternatively allowing himself to be influenced by, an ulterior motive to alter the racial composition of the applicant schools and/or to transform the governing bodies, and/or to change the cultural ethos, milieu and traditions of the applicant schools;

5.3.2. by failing, when he took the decision, to consider alternatively to give proper consideration to the alternative possibility of placing the learners at the different applicant school's and other schools at Kuruman so as to retain, as far as reasonably possible and practicable the status of applicant schools as single-medium Afrikaans schools;

5.3.3. by taking a decision in respect of learners who are resident in the North West Province as if he is under an obligation to provide them with education, and has thus curtailed his discretion to consider alternative possibilities as stipulated in section 29 (2) of the Constitution including the possibility of retaining the status of the applicant-schools as Afrikaans single-medium schools.

5.4. The First Respondent has failed to comply with the requirements of fair administrative action in that he defaulted in giving sufficient prior notification to the applicant as regards:

5.4.1. the nature of the decision he intended to take namely, to declare all Afrikaans-mediums schools in Kuruman including the applicant-schools, double-medium schools;

5.4.2. the facts and statistics at his disposal on the basis of which he came to his decision;

5.4.3. what factors at his disposal were considered by him which influenced the alternative options he had regard to as contemplated in section 29 (2) of the Constitution including:

5.4.3.1. the availability of funds;

5.4.3.2. the costs implication attendant to providing the necessary facilities at schools which are overcrowded;

5.4.3.3. the direct or perceptible costs and hidden costs attached to the different solutions which respondents are contemplating including the solution that they currently have or will invoke in future to recruit educators, to acquire the necessary study material, and take all the necessary steps to prevent the adverse consequences inherent in double-medium instruction from occurring;

5.4.3.4. any further information which the applicant schools may reasonably request;

5.4.3.5. to enable the applicant schools to make meaningful representations to the respondent, before any decision is made by him;

5.5. That the First and Second Respondents acted *ultra vires* their powers and contrary to the provisions of section 6 (2) of Act 84 of 1996 (Northern Cape) by unilaterally laying down a language policy for the applicant-schools pursuant to their decisions dated the 31 August 2004 and the 1st September 2004, respectively.

5.6. That First and Second Respondents are ordered to review or revise their own decisions:

5.6.1. free from or uninhibited by their objective now being challenged by the applicants;

5.6.2. by taking into consideration only learners residing in the Northern Cape;

5.6.3. with the objective insofar as is reasonably possibly practicable to restore the status of the Applicant schools to single-medium Afrikaans schools;

5.6.4. that would oblige them to give full and timeous prior notice to the applicant schools, disclosing the nature of the decisions that they are likely to take

or will take in this regard and to furnish all relevant facts and statistics at their disposal relating to (but not limited to):

5.6.4.1. all relevant statistics concerning school occupation figures and available facilities;

5.6.4.2. the possibility of extending the existing facilities at schools which were heavily overcrowded with learners during 2004 by supplementing or augmenting the existing facilities and accommodation and augmenting the number of current educators and to make provision for additional budgetary requirements pertaining thereto;

5.6.4.3. the furnishing of comprehensive estimates and budgets for purposes of the alternative solutions incorporating the following:

5.6.4.4. what the additional costs will entail;

5.6.4.5. the attendant costs pertaining to the provisions of double-medium instruction at all schools at Kuruman and at the Fifth Applicant (Northern Cape Agricultural High School) having regard to (but not limited to) the provisions of additional teachers, study material suitable for the effective use for double-medium instruction and all other direct and unforeseen costs to eliminate the disadvantages inherent in double-medium instructions; and

5.6.4.6. Sundry information reasonably required by the applicants;

5.6.5. The proposed schedules relating to any decisions which the respondents will be implementing;

5.7. Respondents are ordered to:

5.7.1. Give full effect to paragraph (non-existent paragraph referred but can only be our re-numbered paragraphs 5.6 (inclusive of 5.6.1 to 5.6.5) above)) and take the necessary decisions not later than the end of the first school term in 2005; and

5.7.2. To implement all the decisions which the respondents have thus far taken not later than the beginning of the school year 2006.

6. The terms of the relief that the applicant-schools seek are clear and unambiguous. They no longer seek the setting aside of the MEC and HOD"s decisions dated the 31st August 2004 and the 1st September 2004, as initially intended. The reason for this shift in attitude will become apparent in due course. What is immediately poignant is that substantial segments of the relief claimed have been irreversibly overtaken by events. It is also incomprehensible why in the aforequoted draft order or amended Notice of Motion, which was most likely drafted in May 2005 and made

available to the Court and the opposition on the day of argument (11/05/2005), the applicants still sought an order that should have been made before the first school term commenced in January 2005 – an obvious impossibility.

7. Before dealing with the facts of this case and Adv A Danzfuss's argument that the applicants are in essence seeking a brutum fulmen relating to the declaratory order that they seek in subparagraphs 5.1 to 5.5 (supra), it would facilitate the crystallization of issues by adverting to the leading case respecting to the interpretation of Section 29 (2) of the Constitution of the Republic of South Africa, Act 108 of 1996, as regards the right of a learner to receive education in an official language of choice at a public educational institution regard being had to practicability.

8. In **Western Cape Minister of Education & Others v Governing Body of Micro Primary School & Another** 2005 (10) BCLR 973 (SCA) the Supreme Court of Appeal made the following (unanimous) enunciation in paragraph 3-8 thereof (pp977B-979C):

"[3] Section 29(2) of the Constitution provides as follows:

'Everyone has the right to receive education in the official language or languages of their choice in public educational 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.'

[4] The South African Schools Act 84 of 1996 ('the Act') was passed shortly after the adoption of the Constitution. According to the long title it was passed in order '[t]o provide for a uniform system for the organization, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith'. In the preamble to the Act it is stated, inter alia, that the Act is passed because 'this country requires a new national system for schools which will redress past injustices in educational provision, . . . , advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, . . . , protect and advance our diverse

cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organization, governance and funding of schools in partnership with the State'.

[5] In terms of s 12 of the Act the Member of the Executive Council of the province which is responsible for education in that province must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. Every public school so provided is a juristic person, with legal capacity to perform its functions in terms of the Act (s 15). The governance of every such public school is vested, subject to the Act, in its governing body which may perform only such functions and obligations and exercise only such rights as are prescribed by the Act (s 16(1)). The professional management of such a public school, on the other hand, must be undertaken, subject to the provisions of the Act, by the principal of the school under the authority of the head of the education department concerned. It is therefore clear that, subject to the limitations contained in the Act, the governance of a public school, as opposed to the professional management of such a school, is the responsibility of the governing body of the school.

[6] The statutorily prescribed composition of the governing body of ordinary public schools reflects the aim of the Act, namely to advance the democratic transformation of society. It includes, subject to the provisions of the Act, elected members, the principal in his or her official capacity and co-opted members. Elected members comprise a member or members of each of the following categories: parents of learners at the school, educators at the school, members of staff at the school who are not educators and learners in the eighth grade or higher at the school (s 23(1)). The number of parent members must comprise one more than the combined total of other members of the governing body who have voting rights. Certain co-opted members do not have voting rights (s 23(8) and (12)).

[7] Section 20(1) of the Act provides that the governing body must perform a number of functions. It must, inter alia, adopt a constitution (subsec (b)), develop the mission statement of the school (subsec (c)), adopt a code of conduct for learners at the school (subsec (d)) and 'discharge all other functions imposed upon the governing body by or under the Act' (subsec l). One of the other functions imposed on the governing body is to be found in s 5(5) which provides:

> *'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.'*

Another one of the functions imposed on the governing body is to be found in s 6(2) which provides:

> *'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.'*

[8] In terms of s 6(1) of the Act the Minister of Education may, subject to the Constitution and the Act, by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine norms and standards for language policy in public schools. Such norms and standards were determined and published by the Minister of Education ('the Norms and Standards'). Sections V.D and E thereof read as follows:

'D. THE RIGHTS AND DUTIES OF THE PROVINCIAL EDUCATION DEPARTMENTS

1. The provincial education department must keep a register of requests by learners for teaching in a language medium which cannot be accommodated by schools.

2. In the case of a new school, the governing body of the school in consultation with the relevant provincial authority determines the language policy of the new school in accordance with the regulations promulgated in terms of section 6(1) of the South African Schools Act, 1996.

3. 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.

4. The provincial department must explore ways and means of sharing scarce human resources. It must also explore ways and means of providing alternative language maintenance programmes in schools and or school districts which cannot be provided with and or offer additional languages of teaching in the home language(s) of learners.

E. FURTHER STEPS

1 Any interested learner, or governing body that is dissatisfied with any decision by the head of the provincial department of education, may appeal to the MEC within a period of 60 days.

2 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.

3 *A dispute to the Arbitration Foundation of South Africa must be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an arbitrator or arbitrators appointed by the Foundation.'"*

9. The decision of the MEC of Education (Annexure JCT 11) which the applicants seek to impugn is contained in similar letters addressed to the affected school governing bodies and are dated the 31st August 2004. As the pronouncements of the MEC made therein are the pivot around which this application revolves it is not only excusable but also necessary to reproduce its entire contents. It reads:

"PROVISION OF SCHOOL PLACES: KURUMAN

1. *Earlier this month I informed you of my concern about the school accommodation of the learners of Kuruman, in particular, the enrolment figures at the six schools supporting the town. I invited you to express your opinion on the possible answers to what I perceive as a serious attack on the fundamental rights of some of the learners, with a focus on the weight of those rights, the efficacy of the use of our resources and my duty to provide sufficient school places for the learners of this province.*
2. *Three schools, Kalahari High School, Wrenchville Secondary School and Seodin Primary School, have commented substantively on the matter. Kuruman Primary School has chosen not to comment, while Bankhara-Bodulong Combined School and Wrenchville Primary School did not submit any response to the request.*
3. *You were asked to advise me on how you see the situation of the learners in the town in the context of the three Constitutional imperatives mentioned in my earlier letter and in my opening paragraph. The reason for this is simple. We have to constantly assess how the best interests of our children find recognition in the education system, while constantly reviewing our resourcing in line with the demands of these interests. I have to ensure that the resources are adequately responsive to the demands. My decision and actions on this matter will, after due consideration of the comments received, at all times, be guided by these considerations and a desire to improve the education environment in our province.*
4. *The comments received have served to enrich my view of the situation in Kuruman. I have a deep respect for the views expressed, although some of them are not immediately relevant to the resolution of the problem at hand. The reality of the situation is that hundreds of learners in Kuruman are*

accommodated in school circumstances that suggests a virtual denial of their right to quality education. While the transformation plan submitted by Kalahari merits a future discussion, it does not offer any solution to the urgency of the problem. Of course, there is every intention to engage with the school on some of the ideas contained in the document. The immediate problem, however, is the provision of adequate school places for our children.

5. *Kalahari High School has also suggested the existence of a "Onderwys Forum" that appears to have been established in Kuruman recently. The Head of Department has informed me that he does not know of this development, neither has he given any official of the department or principal of any public school in the town any authority to represent the department on any such structure. For now, I will assume that the forum is a body that does not represent any officially sanctioned position.*

6. *I am satisfied that Kuruman has adequate State resources to respond to the needs of the learners in the town. The most obvious problem is that these resources are not equitably distributed among the learners, and their accessibility is unreasonably restricted. At present, scores of Grade 7 learners with an English medium of instruction will have no accommodation in Kuruman to continue with their studies in the next grade in their preferred language. They have to seek admission elsewhere, at great expense to their families. This is an added problem to the already intolerable wretchedness in which many of our learners find themselves. I have come to the conclusion that certain practices in some of our schools are unconscionably contributing directly to this condition. The maintenance of the Afrikaans single-medium in these schools in the face of an educational reality that does not justify it is the bane of our system. The importance of Afrikaans as a language in our system, like any other language, has to yield to the best interests of our children where such interests are threatened or under actual attack. Afrikaans must accept that it has to share scarce public resources with other languages and cultures. They have an equal claim to the enjoyment of State resources. In fact, I hold the view that it is in the interests of Afrikaans to learn to co-exist with the other cultures, especially in public spaces. After all, it is the intention of (our) policy to strengthen and encourage the multi-cultural and multi-lingual character of our society. The insular positioning of the Afrikaans-speaking learners in public spaces at the expense of the rights of others is Constitutionally unsound.*

7. The insistence on maintaining Afrikaans as a single-medium at Kalahari, Seodin and Wrenchville Secondary School implies the (continued) overcrowding at Bankhara-Bodulong and Wrenchville Primary School. It also supports the forced and costly migration of some of our learners from Kuruman to distant towns and other provinces. I will have failed in my duty if I do not ensure an adequate schooling environment and accommodation in Kuruman for the learners involved.

8. It is for these reasons that in honouring my Constitutional duty generally, and in particular, the (imperatives) in Section 3 of the South African Schools Act, (that) I make the following decision:

(a) With effect from January 2005 none of the six schools I have addressed in my previous letter will maintain Afrikaans as a single medium of instruction;

(b) Effective from January 2005 Kalahari High School, Wrenchville Secondary School, Seodin Primary School, Kuruman Primary School and Wrenchville Primary School, will be dual medium English/Afrikaans schools, it being understood that schools will use home language or language of choice in the foundation phase of (the) curriculum;

(c) The Head of Department will ensure that learners' enrolments in these schools is consistent with the provision of quality education; and

(d) He will admit learners in the public schools that serve the town of Kuruman accordingly.

9. <u>When the school governing bodies of the affected schools prepare their language policies for my approval they will ensure that such policies respect what is in the best interests of the children who may be affected by their impact, and also the need to ensure that the public resources entrusted to them are not unduly inaccessible to our children</u>.

10. I have no doubt that those who have at heart the interests of our children and of education in Kuruman will support this decision." (My underlining)

10. What is immediately apparent from the contents of the letter is that the MEC is acutely aware of the dictates of the Constitution which fosters unity in the South African citizenry's diversity and that he also familiarized himself with the provisions of the South African Schools Act, the Northern Cape School Act, the Norms and Standards described by the Supreme Court of Appeal and was apprised of the school occupancy rates or levels in the affected schools before taking his decisions.

11. Pursuant to Annexure JCT 11 by the MEC the HOD (Mr G T Pharasi) expounded thereon in a letter (Annexure JCT 14) dated the 1st September 2004 in correspondence to basically the same interested parties. This is the second decision which the applicants are taking issue with. In this letter the HOD informs the schools that:

"ADMISSION OF LEARNERS FOR 2005

The MEC has now made his decision on how he intends to accommodate the learners of the town of Kuruman. In a letter I wrote to the principal of your school a couple of weeks ago, I signaled my intention to determine the process of the admission of the learners following the MEC's decision. I now determine that process.

1. *The decision on the applications for admission to your school will be made by my office or by the officials of this department designated by me;*
2. *Applications for admission at any school will be completed and submitted to the principal of the school where the applicant currently attends.*
3. *The application will clearly indicate the school to which the applicant seeks admission;*
4. *The application will also specify the language in which the learner wishes to be instructed; and*
5. *The principal will hand the application to the Circuit Manager responsible for the school concerned.*

I propose to admit the learners as follows:

(a) The learners presently in Grade 7 at Kuruman Primary School will be admitted to Grade 8 at Kalahari High School;

(b) The Grade 7 learners at Wrechville Primary School will proceed to Wrenchville Secondary School;

(c) 200 learners will be transferred from Wrenchville Primary School to Seodin Primary School;

(d) 150 learners will be transferred from Wrenchville Primary School to Kuruman Primary School; and

(e) The Grade 10 to 12 at Bankhara-Bodulong will be transferred to Kalahari High School and Bankhara-Bodulong will no longer offer grades in the FET (Further Education and Training) phase of the curriculum; and

(f) All new Grade 1 applicants will be distributed equitably among the primary schools.

You are called upon to comment on these proposals by 8 September 2004.
The public will be informed immediately of the MEC's decision and the procedure outlined above. They will also be encouraged to start applying now to ensure that no time is lost in finalizing the admissions for next year.
I am looking forward to receiving your advices."

12. The correct position is that the HOD in fact made his final decision in Annexure JCT 18, a letter to the affected schools dated the 17th September 2004. The contents of this letter are demonstrable of the fact that the affected schools were afforded an opportunity to make representations, what feedback was received pursuant to the MEC's invitation and what the HOD thought of the responses:

12.1. The Seodin SGB was informed:

"ADMISSION OF LEARNERS TO YOUR SCHOOL FOR 2005
I refer to my letter of 1 September 2004 in which I made specific proposals regarding the admission of learners to your school for the coming year. I also called for your comments, which I requested you to submit by 8 September 2004. On 10 September 2004 I received a letter from you in which you make some observations concerning your responses to the MEC, which have absolutely nothing to do with the contents of my letter to you. These matters may be taken directly with the MEC.
I am astonished by your insistence that we have ignored the "werkswyse" you have suggested to the MEC. My reading of your letter to the MEC is that it does not offer any suggestions or "werkswyse" for the resolution of the problem confronting education in Kuruman. Instead, you concern yourself with the exposition of the legal position that is well known to us, and which does not offer any suggestion as to how the MEC should be responding to the difficulties he had raised. … You have had more than two weeks to respond to my proposals and to date I have not received any substantive input from you, I cannot continue to delay my decision on the matter as the public has an urgent right to know how the children of Kuruman will be accommodated next year.
I now make the decision to admit 200 learners from Wrenchville Primary School to your school with effect from next year as proposed in my previous letter. Also, the admission procedure set out in my letter will be strictly adhered to.

To the extent that you have not expressed any opposition to the substance of my proposal, I will proceed from the premise that you will support this decision in the interest of the learners in Kuruman.

I remain open to any further discussion you may wish to open on the circumstances of this decision." (My underlining)

12.2. To the Kalahari High School SGB the following was conveyed by the HOD:

"ADMISSION OF LEARNERS TO YOUR SCHOOL FOR 2005

I refer to my letter of 1 September 2004 in which I made specific proposals regarding the admission of learners to your school for the coming year. I also called for your comments, which I requested you to submit by 8 September 2004. On 9 September 2004 I received a letter from you … informing me of a parents' meeting arranged to discuss the contents of my letter. I have since not heard from you as to what was decided at this meeting.

As the time for registrations is upon us, I do not believe it is reasonable or in the interest of the public to prolong the process of decision-making on a matter so crucial. I have accordingly decided to proceed in the manner I have proposed in my previous letter. Bankhara-Bodulong Combined School will cease to offer grades in the FET phase of the curriculum. All affected learners will be admitted to your school.

I will also admit all learners who will be proceeding from Grade 7 at Kuruman Primary School to your school. These will include learners who receive their education in the medium of English.

As I have not received any substantive objection from you concerning these moves, I am confident that you will support the department in its endeavour to ensure a smooth admission process."

13. The applicants commence their case by accusing the MEC and the HOD of being *mala fide*. They postulate that the three (main) letters quoted above (Annexures JCT 11, 14 and 18) and aspects of the Department's conduct connected therewith are a mere subterfuge or camouflage for the real reason behind their decision, being the forced racial integration of the applicant schools which the MEC perceive to be a relic of apartheid and "lily-white". In accordance with this contention the applicants maintain that they would be entitled to the relief sought if the Court is persuaded that the Department was prompted by ulterior motives.

14. The applicants use strong and emotive language in its portrayal of the respondents' alleged ulterior motives. A few extracts will suffice:

14.1. *"Dit dui op die veelvuldige, dog vanselfsprekende, probleme wat in die praktyk geskep word deur Respondente se onoorwoë, oorhaastige en ontydige besluite. Maar die belangrikste in my respekvolle submissie is die volgende: Die ontydigheid, onredelikheid en ontwrigtende aard van Respondente se handelinge kan nouliks beter geïllustreer word deur die feit dat die versoek van hierdie aard, nou eers op hierdie laat stadium deur die Departement uitgestuur word. Ek doen met eerbied aan die hand dat dit nogmaals aantoon dat Respondente gemotiveer is deur klipharde ideologiese dogmatiek* (motivated by immutable ideological dogmatics)*, en 'n onverdraagsaamheid teenoor enige skool wat moontlik te wit na hulle smaak mag voorkom, eerder as 'n werklike besorgdheid oor kwaliteit-onderwys vir die leerders in die provinsie."*

14.2. *"Respondente se basiese dryfveer is rassisties van aard. Die grondmotief is dat hulle die bestaan van 'n skool wat hoofsaaklik uit wit leerders bestaan per se onverduurlik vind. Soseerso dat die feit dat die betrokke skool oop is vir alle rasse [wat bereid is om in Afrikaans onderrig te word] net eenvoudig nie goed genoeg is vir Respondente nie. <u>Dieselfde houding word egter nie teenoor enige swart skool openbaar nie</u>."*

14.3. *"As die uiteinde dan mettertyd sal wees dat Afrikaans uit die skole wat nou omskep is sal verdwyn, sal Respondente sekerlik ewe min probleme daarmee hê as wat hulle tans het met die handhawing van Bankhara-Bodulong as 'n enkel-medium Engelse skool."*

14.4. "So intens is Respondente se dogmatiese sentimente in dié verband dat hulle bereid is om die drastiese en ingrypende besluite te neem op 'n stadium dat dit net nie meer moontlik is om alles daarvoor in plek te kry voor die aanvang van die volgende skooljaar nie. In hierdie verband verwys ek na paragrawe 50 tot 57 van Eerste en Tweede Applikante se aanvullende funderende verklarings. Respondente is klarblyklik heeltemal bereid om die belange van leerders op die altar van hulle politieke agenda te plaas."

14.5. "Ek doen met eerbied aan die hand dat hierdie dokument (dealt with in para 15 *ff* (below)*) baie duidelik daarop dui dat Respondente se hoofoogmerk is om 'n aanval te loods op Afrikaans-medium skole, en meer spesifiek die kulturele karakter daarvan. Die aanval tref die regte van al die samestellende komponente van die skole (leerders, ouers en opvoeders).*

15. Adv R J Raath, SC, urged upon us to find a nexus between the aforequoted challenged Annexures JCT 11, 14 and 18 and the MEC's Budget Speech in the Legislature shortly after he took office on the 1st May 2004 in which he made the following pronouncement at the tail-end of a wide-ranging speech:

"DERACIALISATION OF SCHOOLS

One of our strategic objectives, Madam Speaker, is to fully deracialise our schools and eradicate all forms of racial discrimination and prejudice in education in our province.

The successful racial integration and the recent renaming of Laerskool H F Verwoerd to Kevin Nkoane Primary School is a major victory for our fight against racial discrimination!

But the fight is not over yet!!!

We still have a number of previously advantaged schools that use various ways and means such as the school's language policy, sporting codes, staff selections and SGB policies and preferences to maintain and perpetuate the old order.

Schools like Warrenton High School, where Black learners were duped into using separate toilets to their White counterparts!

Schools like Seodin Laerskool and Kalahari Hoërskool, where the learner enrolment is still largely and deliberately kept as lily-white as shown by their enrolment figures.

This is clearly unacceptable and cannot be allowed to continue!!!" (My underlining)

16. If what Seodin and Kalahari are alleged to have done is expunged from the aforegoing quotation, what can be wrong with what the MEC has said? Adv A Danzfuss, SC, has correctly pointed out several passages which preceed the one abstracted by Adv Raath, SC, to portray a more balanced perspective. A few illustrations follow:

16.1. *"Our passion and commitment to provide quality public education, coupled with our performance in the Senior Certificate Examinations and indeed, Madam Speaker, all our work in education, is centred on the well being of our children! This is because the steps we take today, will determine the future prosperity of our Province, which ultimately belongs to our young people and future generations that will follow. We cannot and dare not let them down!"*

16.2. *"In our quest to heal the wounds and repair the damages inflicted upon our people by our painful past, the NCED (Northern Cape Education Department) then set about its transformation task with a clear view to completely undo and redress the inequities, racism, repression and disparities that permeated our Education*

System. Among the major achievements we can proudly boast of in our struggle for equity and redress is the fact that our Education Department presently spends nearly six times more on previously disadvantaged and poor learners as a result of the implementation of the Norms and Standards for the funding of Public Schools."

16.3. *"(T)he quality of the access to education is as important as the access itself. -- The vast and rural nature of the province poses the serious challenge (against) assisting learners to access quality education."*

16.4. *"We commit ourselves, Madam Speaker, to work together in conditions of entrenched democracy, respect for human rights, peace and stability to ensure that we succeed in our mandate of opening the doors of learning and culture to all."* (My underlining)

17. In order to make a pronouncement on the averment that the respondents had nothing but the forced racial-integration and the obliteration of Afrikaans and the cultural ethos of the applicant-school as their objective, it is necessary for an examination of what the respondents did pursuant to the MEC's budget speech and what information was ostensibly available to him and his Department. The MEC, as we have noted, did not start on a clean canvass. He says he had regard to what his predecessor has done. This exercise will also go some way in answering the question whether or not the respondent's observed the *audi alteram partem* rule in making their decisions or whether they went gung-ho to ride roughshod over the rights of the applicant-schools.

18. Before the decisions by the respondents dated the 31st August 2004, 1st September 2004 and the 17th September 2004 Mr P Motingoe, a senior functionary in the legal section of the Provincial Department of Education, wrote to the MEC on the 3rd June 2004 to inform him:

18.1. That some schools (in Kuruman) remain racial enclaves that, by cunning manipulation, thwart the department's efforts that are aimed at developing a schooling culture that supports the tenets of freedom and democracy as envisaged in the Constitution. He then urged some measure of intervention by the Department';

18.2. That the possibility must be considered whether the Department should not assume direct responsibility for the admission of learners to certain schools, and that leaving the admission of learners to schools and school governing bodies has

not worked and that no intervention would amount to abdication of responsibility by the Department;

18.3. That the legal position in the Northern Cape Province is that none of the schools has an admission policy that has been duly determined. He goes on to state that:

"The MEC has not approved any of our schools' admission policies, neither has approval been sought. This broadens the possibilities for the exercise of the Head of Department's power. It is this space that has aroused our curiosity. We suggest that with a guided, cohesive and well-managed intervention strategy admissions could be used to respond to the transformation calls of many communities."

18.4. That there was a need for intervention in the language arrangement of the affected schools as there was after all no "legally sustainable language policies" in those schools;

18.5. That the racial-integration of the schools will in the medium term impact (positively) on the profile of governance in the targeted schools and at the same time offer a "social context and rational (basis) for the overhaul of the (prevailing) stereotypes in governance terms"; and

18.6. That there was no High School in Kuruman to cater for additional learners who graduate from primary school with an English medium background and the learners have to seek schools in far away places.

19. Several functionaries based at Head Office and in the Kuruman region have deposed to the fact that there had been on-going discussions and consultations with all schools involved in an attempt to persuade them to convert to dual-medium (English-Afrikaans) mode of instruction to cater for learners from disadvantaged backgrounds to ease the pressure on the over-crowded schools and alleviate the over-stretched situation at English-medium schools. The endeavours were without success.

20. In what has gone before I can discern no evidence of *mala fides* or an ulterior motive in what the MEC and the functionaries of his Department have done, regard being had to the facts of this case and applying them to the principles enunciated in **Phamaceutical Manufacturers of SA: in re Ex Parte President of the RSA** 2000 (2) SA 674 (CC) at 707D-708F (paras 82-86) at which point the Constitutional Court stated:

"[82] That raises the question whether a Court can interfere with a decision made in good faith by the President in the exercise of such a power. A discussion of this question in South Africa prior to the enactment of the interim Constitution usually began with a reference to the much quoted statement from the judgment of ***Innes ACJ*** *in* ***Shidiack v Union Government*** *(Minister of the Interior), (1912 AD 642) where it was said:*

'Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own.'

The judgment goes on to hold that there are circumstances in which 'interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'

[83] To the extent that Shidiack requires public officials to exercise their powers in good faith and in accordance with the other requirements mentioned by ***Innes ACJ****, it is consistent with the foundational principle of the rule of law enshrined in our Constitution. The Constitution, however, requires more; it places further significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law.*

[84] In ***S v Makwanyane*** *(1995 (3) SA 391 (CC) at para 156)* ***Ackermann J*** *characterised the new constitutional order in the following terms: 'We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.'*

*Similarly, in **Prinsloo v Van der Linde and Another** (1997 (3) SA 1012 at para 25) this Court held that when Parliament enacts legislation that differentiates between groups or individuals it is required to act in a rational manner:*

'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State.'

[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

Mr Raath's submission that the Department acted *mala fide* or with ulterior motives or did not observe the *audi alteram partem* rule is without merit and is rejected.

21. Mr Raath sought to persuade us further that the Department of Education has expressly or by implication approved Afrikaans as a single medium of instruction for Seodin Primary School (First Applicant) and Kalahari High School (Third Applicant). He proferred the following factors in support of his argument in respect of Seodin:

21.1. That Seodin has been in existence from the beginning of the 20th century and is regarded by the Afrikaans-speaking community as an important cultural asset. Mr Theron, the chairman of the SGB of Seodin, deposed to the effect that should Seodin lose its status as an Afrikaans single-medium school the school would run a real risk of the financial support provided by the Afrikaans-speaking community being withheld by them with devastating consequencies;

21.2. That the Afrikaans language has always been the exclusive or sole medium of instruction employed by Seodin until August 2004 and that at no stage has the Department of Education or any of the MEC ever objected to this state of affairs;

21.3. That a meeting was convened on the 1st June 2001 between the SGB of Seodin and a delegation from the Department of Education represented by one Mr G Berends (Regional Director) and Mr G J Buys (Circuit Manager). It was contended that the outcome of that meeting is captured in a letter (Annexure "JCT 2") written by Mr Buys on the 11th June 2001 and addressed to the then chairman of Seodin Primary School, Mr H J Booysen. This letter, in its entirety, reads as follows:

"Verslag na aanleiding van vergadering gehou op 01 Junie 2001 tussen 'n Departementele afvaardiging en die volle Beheerliggaam van Laerskool Seodin. Die Departementele afvaardiging het bestaan uit mnre G Berends (Streekdirekteur) en G J Buys (Kringbestuurder).

1. *Die status quo van die skool moet behou en gehandhaaf word, naamlik dat Afrikaans as medium van onderrig gebruik word.*
2. *Die Skoolbeheerliggam is verantwoordelik vir die vasstelling van die taalbeleid en dit moet as sodanig gerespekteer word. Die taalbeleid is vasgestel in ooreenstemming met die breë gemeenskap wat die skool bedien.*
3. *Die skool funksioneer binne die raamwerk van die taalbeleid en is dus oop en toeganklik vir alle rasse wat in Afrikaans onderrig wil ontvang.*
4. *Voorts kan die skool nie gedwing word om Engelsmediumklasse te huisves nie, aangesien dit lynreg bots met die taalbeleid en op die bestaande skoolperseel geen sodanige akkommodasie bestaan nie. Dit dien vermeld te word dat die skool slegs 350 leerders kan huisves.*
5. *Laerskool Seodin is 'n goed gefunksioneerde skool en 'n baie hoë onderrigstandaard word gehandhaaf; ook op sport-en kultuurgebied word puik prestasies gelewer.*
6. *Geen klagtes van diskriminasie of wegwysing vir toelating tot die skool, is al, hetsy mondeling of skriftelik, deur die Onderwysdepartement ontvang nie.*
7. *Die skool word aangemoedig om sy kundigheid op verskeie terreine te deel met buurskole.*
8. *Die Voorsitter en Beheerliggaam word bedank vir hul bydrae tot opvoedende onderwys by Laerskool Seodin."*

22. As regards Kalahari High School Mr Raath relies on the deposition by Mr Louis Hamman, chairman of the school governing body, for his contention that a tacit approval has been granted to the school to retain Afrikaans as the sole medium of instruction for that school. Mr Hamman stated that:

22.1. Seodin (dealt with in the previous paragraph) and Kalahari were established during the same period (early 20th century) and shared the same name. That during the 1950's each school developed its own character and adopted its distinctive name;

22.2. He has an apprehension that an Afrikaans-English dual-medium method of tuition would contaminate the current learners' Afrikaans culture and language. He states that the education (opvoeding) that Kalahari High School dispenses is merely an extension or continuation of the "opvoeding" that is inculcated in their children at home. He proceeds to say:

"9. Die voedingsbron van die skool is groot. Talle leerders kom van verafgeleë gebiede. My eie woonplek is meer as 100 km vanaf Kuruman. My kinders is op kosskool. Veral teen hierdie agtergrond is die verwagting van ouers dat hulle kinders geborge sal voel in die skoolomgewing en dat hulle taal en kultuur in skooltyd en daarna uitgeleef kan word.

10. Kalahari speel 'n kardinale rol in die gemeenskapslewe van Kuruman. Dit gebruik Afrikaans as voertaal, synde die voertaal wat die oorweldigende meerderheid inwoners van die Noord-Kaap en Kuruman - ongeag ras - gebruik."

(The Department refutes their statistic with the aid of the most recent census which shows that African language-speakers outnumber Afrikaans-speakers by far).

22.3. Mr Hamman further declares that Kalahari has submitted its language policy to the Department of Education espousing Afrikaans as its exclusive medium of instruction and that the school was not at any stage, until the current events unfolded, favoured with a response. The letter alluded to above, Annexure "LH2", is undated, bears no forwarding address and is titled: *"Hoërskool Kalahari-Toelatingsbeleid"*. This admission policy is purported to be promulgated in terms of section 9 of the Northern Cape Schools Act, No 6 of 1996 read with the South African Schools Act, No 84 of 1996.

22.3.1. Annexure "LH2" states in clause 1.4 thereof that its admission policy is issued subject to the approval of the MEC for Education;

22.3.2. Clause 2.4 thereof stipulates that: *"Die Hoërskool Kalahari se onderrigmedium sal Afrikaans wees: derhalwe sal die skool se kultuurwaardes*

ooreenkomstig die kultuurwaardes van die ouergemeenskap ooreenstem met die kultuurwaardes en opvoeding van die Afrikaanssprekendes";

22.3.3. Clause 2.11 proclaims that:

"Die Beheerliggaam bepaal ook dat onderrig in die Afrikaanse taal sal geskied (Artikel 16 Wet 6/1996)";

23. In respect of the Northern Cape Agricultural High School it was contended that the school has, in terms of sec 6 (2) of the South African Schools Act 84/1996, adopted Afrikaans as the single-medium of instruction. Mr Zandberg, the Chairman of the school governing body, has referred to an undated document (Annexure "ANEZ 2") not directed at or addressed to any particular reader. It bears the title: *"Taalbeleid van die Hoër Landbouskool Noord-Kaapland";*

23.1. Clause 2 thereof states that the document has as its point of departure and the basis for its language policy/s that full efficacy be accorded to the fundamental rights of learners respecting to their language as enshrined in the Bill of Rights (Chapter 2) of the Constitution, but most importantly sec 29 (2) thereof;

23.2. That the language policy has as its primary aim that the best interests of the children be served and proceeds:

"4. <u>Taalgebruik by skool</u>

4.1 Die skool is 'n enkelmediuminstelling soos bedoel in artikel 29 (2) van die Grondwet.

4.2 Behoudens die bepalings van die taalbeleid, is die onderrigtaal by die skool Afrikaans (soos na verwys in artikel 6 (1) van die Grondwet).

4.3 Die taal waarin die skool bedryf of bestuur word, is Afrikaans:

Met dien verstande dat kommunikasie met buitestanders in enige ander taal kan plaasvind soos deur die omstandighede vereis en wat redelikerwys doenlik is.

5. <u>Bevordering van veeltaligheid</u>

5.1 Die skool bevorder veeltaligheid deur die aanbieding van Engels as volwaardige vak.

5.2 Die aanbieding van die vak in artikel 5.1 na verwys, geskied sover moontlik in die betrokke taal self.

5.3 In die algemeen neem die beheerliggaam en elke opvoeder by die skool redelike stappe om leerders in te lig oor die belangrikheid van veeltaligheid en om die aanleer van respek vir ander tale as die huistaal te bevorder.

5.4 Die skoolhoof lewer jaarliks aan die beheerliggaam verslag oor taalgebruik by die skool en tendense waarvan die beheerliggaam kennis behoort te dra.

6. <u>Tale as vakke</u>

Die beleid in die Regulasies oor tale as vakke (art D) (word) in die skool toegepas."

24. To the aforegoing submissions by the applicants the respondents countered that none of the affected applicant-schools have submitted a language policy in accordance with section 16 (1) of the Northern Cape School Education Act read with 6 (2) of the South African Schools Act. Mr Danzfuss has argued that none of the documents that I have dealt with hereinbefore and relied upon by the applicants as constituting their language policy complies with the requirements set out in section 16 (2) of the Northern Cape School Education Act, or the norms and standards regarding language policy or the Language-in-Education policy or the relevant provisions of the Constitution.

25. Premised on the averments of the MEC, the HOD and some functionaries of the Department of Education Mr Danzfuss further urged upon us to find that none of the aforementioned documents alluded to by the applicants had been determined as required "after consultation" with the Department nor has any of the documents been approved by the MEC, as it is a prerequisite, as constituting a language policy.

26. Mr Raath sought to meet the respondents' case by submitting that the MEC and the Department acquiesced in the retention of Afrikaans as the sole medium of instruction on the grounds of the longstanding exclusive usage of Afrikaans, the fact that in respect of Seodin the Regional Director and Circuit Manager (Berends and Buys mentioned above) gave their blessing to the proposed language policy and that the MEC in particular never reacted to the said proposed language policy. He contended resultantly or in the alternative that the respondents were estopped from holding that no language policy was in place.

27. Mr Berends has repudiated in strong and emphatic terms the correctness of the contents of Annexure "JCT2" on the basis that *"die standpunte daarin gestel druis direk in teen die beleid van tranformasie van die Departement wat op daardie stadium reeds gegeld het."* Mr Berends denies, and Mr Buys accepts, that Mr Berends made any input in the controversial document. He says he had sight of the document for the first time as an annexure to Mr Theron's affidavit when this application was launched. Mr Berends state that, in any event, Mr Buys (as a junior

official) was not competent to take up the stand point evinced in "JCT2". Mr Buys agrees and states that the document has been inelegantly phrased by him and given a distorted interpretation by the applicants. He says the document does not represent the government's views. In my view there is no doubt that Mr Buys had embarked on "a frolic of his own."

28. It is convenient at this stage to reproduce the entire provisions of section 16 of the Northern Cape School Education Act the sub-title of which is: *"Language policy of public schools"*:

"(1) The governing body of a public school may determine the language policy of the school after consultation with the Department, subject to the Constitution, the South African Schools Act and the approval of the Member of the Executive Council.

(2) The language policy of a public school shall be developed within the framework of the following principles:-

(a) The education process should aim at the development of a national democratic culture of respect for the country's diverse language communities.

(b) Within practical limits, a learner shall have the right to language choice in education.

(c) School language policy should be designed to facilitate the maximum participation of learners in the learning process.

(d) Special measures should be taken to enable a learner to become competent in the languages of learning of his or her school, and where practicable, to enable a learner to use his or her language of choice where it differs from the language of learning of his or her school.

(e) School language policies should be co-ordinated at a regional level and should take into account the availability of human and material resources.

(f) On completion of the ninth level of education a learner should have acquired satisfactory standards of competence in at least two of the official languages of the Province.

(g) Special measures should be taken to promote the status and use of official languages which have previously been neglected or discriminated against by education authorities in the Province.

(h) There shall be a duty on all public schools and on the Department to ensure that educators acquire the special skills necessary for teaching in a multilingual educational environment.

(i) No form of racial discrimination shall be practised by the governing body of a public school in exercising its language policy."

29. **Having regard to the exposition given hereinbefore I am satisfied that none of the affected applicant-schools had any approved language policy.** Both the National and Provincial Education Acts are clear as regards at what level and how the education policies of a school ought to be approved. See **Mikro Primary School** (*supra)* at para 7. *In casu* (the Seodin-case) there is no evidence that the MEC was placed in possession of any of the proposed and purported language policy of any of the schools. It was common cause, though, that the MEC was not consulted nor did he, or before him she, approve any language policy in respect of any of the schools.

30. No case for estoppel relative to the approval of Afrikaans as the language policy of the applicant-schools, contended for by Mr Raath, has been made out. There was no representation made by the respondents to the applicants to which the latter acted to their prejudice. See **LAWSA**, First Reissue, Vol 9 p 283 (Para 449) whereat the requirements for and the definition of Estoppel by Representation is described in these terms:

*"Briefly stated, the doctrine of estoppel by representation consists in this, that a person is precluded, that is estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice. (**Ex parte Welsh: in re Estate Keegan** 1943 WLD 147 149; **Koster Ko-op Landboumpy Bpk v Wadee** 1960 (3) SA 197 (T) 199D-F; **Tshabalala v Johannesburg City Council** 1962 (4) SA 367 (T) 368H-370A.) Stated more fully, the doctrine as applied in the courts of South Africa may be said to amount to the following, namely, that where a person (the representor) has by his words or conduct made a representation to another person (the representee) and the latter, believing the representation to be true, acted thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him, the representator may be estopped, that is precluded, from denying the truth of his representation. (**Ex parte Welsh: in re Estage Keegan** supra 149; **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A) 651) This statement is subject to the qualification that in certain cases an estoppel will arise only if there was fault, that is, dolus or culpa, on the part of the representor when he made the representation*

*on which the plea of estoppel is based. (**Ex Parte Oxton** 1948 (1) SA 1011 (C) 1015). The doctrine of estoppel by representation is based on considerations of fairness and justice, and is aimed at preventing prejudice and injustice. (**Ex parte Welsh: in re Estate Keegan** supra 149) it is a rule of substantive law, … and its function is to provide a defence to a claim, or to counter a defence to a claim. It has to be pleaded and proved by the party who raises it. (**Koster Ko-op Landboumpy Bpk v Wadee** supra 199D-F. in **Tshabalala v Johannesburg City Council** supra; **Peri-Urban Areas Health Board v Breet** 1958 (3) SA 783 (T) 785A; **R v Mziza** 1946 TPD 654; **R v Kriel** 1939 CPD 221, **Registrar General, Zimbabwe v Chirwa** 1993 (4) SA 272 (ZS))"*

The applicant-schools' case falls woefully short of meeting or satisfying these requirements.

31. The respondents have pointed out that to reverse or discontinue the process set in motion by them by setting aside the decisions of the respondents quoted above or stop its implimentation by other means will cause grave disruption and chaos to the schools and prejudice the affected learners. They refer to Annexure JCT 14 (bracketed paragraphs (a) to (f) quoted in paragraph 11 of this judgment which they maintain have already been implemented. See: **Laerskool Middelburg v Departementshoof Mphumalanga Departement van Onderwys** 2003 (4) SA 160 (T) at 178 C whereat the Court declared that notwithstanding the unsatisfactory outcome of the case, seen from the school's perspective, the best interests of the children are paramount and trump those of the school in respect of language. I agree.

31.1. It will be noted therein, inter alia, that 200 learners were transferred from Wrenchville Primary School to Seodin Primary School;

31.2. That the Grades 10 to 12 learners at Bankhara-Bodulang (12th Respondent) would have been transferred to Kalahari High School and that Bankhara-Bodulang ceased to "offer grades in the FET (Further Education and Training) phase of the curriculum."

31.3. The learners at Kuruman Primary School who were in Grade 7 in 2004 were admitted to Grade 8 in 2005 at Kalahari High School;

31.4. From the data furnished by the Department the bleak picture is that the so-called traditionally Black and Coloured schools have an oversubscription of learners whilst the traditionally White schools are underutilized or still have considerable

allowances to accommodate more learners. For present purposes it is unnecessary for me to deal with the statistics involved because the affected children won't be evicted.

32. According to the applicants:

32.1. Only 109 of the 200 learners who preferred to be tutored in English were actually admitted to Seodin;

32.2. That 60 learners whose choice was to be taught in English were registered at Kalahari High School;

32.3. That only 73 of the anticipated 146 learners were registered at the Northern Cape Agricultural High School (Fifth Applicant).

33. It is immaterial on the facts before us whose version is more accurate. The gravamen of the matter remains that a great number of learners will be prejudicially affected one way or another by the adverse outcome of this case. Large movement and shunting of learners has taken place which cannot be undone by the stroke of a pen.

34. It is fitting at this stage to examine Mr Danzfuss's argument (see supra para 7) that even if the applicants succeeded in obtaining the relief sought in paragraph 5.1 to 5.5 (above) our order will have no practical effect because the status quo will be maintained; the *status quo* in the sense that the placement of the learners at the various applicant-schools will remain undisturbed because only a declarator is asked for as distinct from the nullification of the Department's decisions in JCT 11, 14 and 18. In my view the relief sought by applicants can be divided into three categories:

34.1. Firstly, paragraphs 5.1 and 5.2 seek a declarator to the effect that the decisions taken by the respondent as reproduced in paragraphs 9, 10 and 11 (the latter decision being our addition) of the judgment are amenable or susceptible to being set aside;

34.2. The second category (paragraphs 5.3, 5.4 and 5.5), that the *audi alteram partem* rule (para 5.3 (above)) was not observed and that the respondents breached the provisions of section 3 of the Promotion of Administrative Justice Act (PAJA) by having denied the applicant-schools the required procedurally fair administrative action (see para 5.4 (above)); further that the MEC and the HOD acted *ultra vires* their powers and contrary to the provisions of section 6 (2) of the South African Schools Act 84/1996 (paragraph 5.5 above); and

34.3. The third category, that the Court should compel the respondents to comply with the terms and conditions set out in paragraphs 5.6 and 5.7 of the draft order sought. Basically, in this respect the Court is being asked by the applicants to regulate the future conduct of the Department of Education in the instances circumscribed in the relevant relief sought.

35. We enquired from Mr Raath if granted the condensed relief adverted to in paras 34.1 and 34.2 (above) what the efficacy thereof would be. Put differently, what would the applicants, armed with these orders, do therewith or to what use the orders would be put. Understandably counsel could not advance any cogent reasons why the value of our order to the applicant would then not simply amount to tokenism or a Pyrrhic but hollow victory or an academic exercise.

36. It is an exercise in futility for the applicants to approach the Court for legal advice in order for the Court to determine whether the decisions of the applicants are capable of being set aside in future in the following circumstances:
36.1. If the *audi alteram partem* rule has not been observed;
36.2. If the provisions of section 3 of PAJA have not been adhered to;
36.3. If the respondents acted *ultra vires* their powers relative to section 6 (2) of the South African Schools Act;
36.4. If the respondents were motivated by ulterior motives or bad faith; etc.

37. The applicants know the answers to the points raised in para 36 (above), besides there is in existence a surfeit of authority on the aforegoing and related issues on which the applicants seek a declarator. In **Shoba v OC Temporary Police Camp, Wagendrift Dam et al** 1995 (4) SA 1 (A) at 14F-15B **Corbett CJ** held:
*"Generally speaking, the Courts will not, … deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see **Ex parte Nell** 1963 (1) SA 754 (A) at 759H-760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (**Nell's case**, at 760B-C). In **Nell's case**, supra at 759A-B, **Steyn CJ** referred with approval to the following statement by **Watermeyer JA** in*

Durban City Council v Association of Building Societies *1942 AD 27, at 32, … ;*

'The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'

I shall assume in applicant's favour that the subsection applies to procedural rights, as well as substantive rights. Even on that assumption I do not see how the declaration sought by the applicant could be regarded as relating to an existing, future or contingent right. By the time the matter was heard by ***Hurt J*** *the applicant no longer sought or wished to seek orders for the inspection of the premises and a search for the torture apparatus. He merely wanted to be advised whether, had he made application in camera and without notice in January 1993, he would have been entitled to obtain such orders. … It is not a matter upon which the judgment of the Court would be binding on the interested parties. Accordingly, the arguments of applicant's counsel notwithstanding, I am of the opinion that* ***Hurt J*** *correctly refused to make an order under the subsection."*

See further generally **Radio Pretoria v Chairman, ICASA** 2005 (1) SA 47 (SCA) at 54H-56J and cases there cited.

38. The applicants have not spelled out the reasons for couching their prevailing Notice of Motion as they did. Not that their motivation is of any significant moment. However, the applicants faced an almost insurmountable obstacle on how to counter the respondents' point in limine to the effect that the application should be dismissed solely on the grounds that if the respondents' decisions were set aside and the implementation of their decisions thereby reversed the affected children would be prejudicially affected thereby. The respondents contended *in limine* that therefore the applicants were duty bound to see to the appointment of a *curator ad litem* for the children.

39. The respondents' aforesaid objection was well taken. It bears mentioning that the respondents had already raised the following points in limine on the 30th November 2004 during an opposed application for a postponement before me and **Williams J**. On the 3rd December 2004 giving judgment thereon I stated in para 12 thereof:

39.1. "12. Adv Willem Olivier, SC, for the MEC and HOD was ambivalent on whether the respondents sought an opportunity to file opposing papers relative to the application for an interdict pending the outcome of the main application. In the end he, still vacillating somewhat, seemed to contend himself with the following points in limine:

12.1 That there has been a material non-joinder of those learners and/or their parents whose rights would be adversely affected by the grant of an order in favour of the applicants in the main application. He has submitted that the application should accordingly not be entertained and that, in any event, a curator ad litem should have been appointed for the children. See ***Minister of Welfare and Population Development v Fitzpatrick and Others*** *2000 (3) SA 422 (CC);* ***Narodien v Andrews*** *2002 (3) SA 500 (C);* ***Girdwood v Girdwood*** *1995 (4) SA 698 (C) at 708J - 709A;* ***Lubbe v Du H Plessis*** *2001 (4) SA 57 (C); In re* ***Moatsi se Boedel*** *2002 (4) SA 712 (T);* ***Sonderup v Tondelli and Another*** *2001 (1) SA 1171 (CC) at 183D; and* ***S v Nkosi*** *2002 (1) SASV 135 (W) at 144c ff all collected in* ***Laerskool Middelburg v Departementshoof, Mpumalanga*** *2003 (4) SA 160 (T) at 176G-J;*

12.2 That it is untenable for the applicants to propagate the perpetuation of the apartheid-era status quo that accords the "Afrikaans enkel-medium skole" the status of a holy cow. He argued that this remedy which is sought is untenable and incompatible with several provisions of the Constitution and its preamble."

39.2. At para 20 of that judgment I stated:

"20. On a conspectus of all the factors adverted to I am not satisfied that the applicants have made out a prima facie case for an interlocutory interdict. See Prest, ***The Law & Parctices of Interdicts****, 1996 Edition, pp 49 to 80. It is accordingly unnecessary to deal at this stage with the points in limine raised by Mr Olivier in para 12 supra. They may, of course, still be raised when the main application is heard. As regards the specific issues raised on both sides of the divide we find it undesirable and precipitous to express firm views or to make concrete findings thereon as it is more appropriate for the Court hearing the main application to do so. The interlocutory application therefore stands to be dismissed."*

40. The applicants chose not to see to the appointment of a curator ad litem over a period of more than five months. Mr Raath, in a desperate bid to overcome the objection raised, sought to propound the view that section 28(1) of the Northern

Cape School Education Act provides that the school governing body stand *in loco parentis* to the learners as regards matters affecting the governance of the school. This may be so respecting to learners (and the parents) who support the applicant-schools to retain the status of the affected schools as Afrikaans single-medium school. I express no firm view on the SGB's competency to do so. However, such guardianship certainly does not extend to the children whom the school governing bodies have hitherto fought tooth and nail to keep out of the schools. The school governing bodies manifestly harbour a serious conflict of interest as regards the controversially admitted children.

41. I make bold to say that even if the applicants had made out a compelling case on the merits for the setting aside of the impugned decisions, which they have not and moreover are not now asking for, I cannot fathom how we could have excluded the affected children from the schools without the intercession of a *curator ad litem* to independently and in an unbiased fashion see to the children's best interests. If need be we would have *mero motu* appointed a *curator ad litem*. See **Du Toit v Minister of Welfare and Population Development** 2003 (2) SA 198 (CC) at 201G tot 202A whereat the Court held:

"(The children) enjoyed the support of Advocate Stais of the Johannesburg Bar, who was appointed by this Court to act as curator ad litem to represent the interests of the children who are the subject of this application and also other children born and unborn who may be affected by this Court's order. In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution which provides that:

'Every child has the right -

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.'

Advocate Stais filed a thorough report concerning the welfare of the (affected) children of the second applicant and children generally. He also made submissions at the hearing of the matter."

This is an authorative statement which is binding on us.

42. As regards the crystallized points in para 34.2 (above) dealing with the issue in which the respondents request the Court (in paras 5.6 and 5.7 of the amended Notice of Motion) to compel the respondents to comply with the terms stipulated therein I wish to reiterate the salutary attitude of the Courts not to encroach onto the province of administrative agencies and the executive, provided it is essential to do so and then within certain specific confines. The Courts have variously enunciated the principle thus:

42.1. In **Bell Porto School Governing Body v Premier, Western Cape** 2002 (3) SA 265 (CC) at 292C the Court stated:

"[87] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision."

42.2. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)** 514G -515B (par 48) the Court declared:

"In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

42.3. In **Premier, Mphumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal,** 1999 (2) SA 91 (CC) the Constitutional Court held at 109H:

"In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."

See further **Du Preez and Another v Truth and Reconciliation Commission** 1997 (3) SA 204 (A) at 231I-232E.

43. It is therefore unnecessary, superfluous, uncalled for and presumptuous for us to gaze into the future and to direct how the respondents are to perform their functions or exercise their discretion in the coming days as if they have already failed to comply with the terms of a specific court order. See: **Permanent Secretary, Department of Welfare, Eastern Cape & Another v Ngxuza and Others** 2001 (4) SA 1184 (SCA) par 15 (p1197C-G); **Hawker v Life Office Offices Association of SA & Another** 1987 (3) SA 777 (C) at 780H-I by **Howie J** (As he then was).

44. If the affected children were represented by a curator ad litem the likely relief that they would have succeeded with is that set out in paragraph 5.5 of the Notice of Motion (or the judgment) which states that the Court should declare:

"That the First and Second Respondents acted ultra vires their powers and contrary to the provisions of section 6 (2) of Act 84 of 1996 (Northern Cape) by unilaterally laying down a language policy for applicant-schools pursuant to their decisions dated the 31st August 2004 and the 1st September 2004, respectively."

45. However, because even this innocuously looking remedy sought harbours hidden prejudicial consequences for the unrepresented affected children. We cannot, in these circumstances, come to the applicant's rescue.

The relief claimed in the aforesaid latter portion of the amended Notice of Motion also stands to be dismissed.

PANSALB AS *AMICUS CURIAE*

46. As pointed out earlier PANSALB only showed up after argument which had lasted two days (11 and 12 May 2005) had been concluded. In other words after the hearing was over and we were effectively seized with the matter. This turn of events necessitated a postponement to the following day (13/05/2005). In order to minimize costs we admitted PANSALB provisionally and ordered (on the latter date) that Heads of Argument be delivered on whether it was procedurally permissible for PANSALB to intervene at such a late stage. The Heads obviously also dealt with the aspects that PANSALB sought to address.

47. PANSALB's counsel, Adv Aslam Bava, has not dealt with the question whether they were competent to intervene after the hearing was over as requested. However, he only dealt with legal aspects pertaining to the language issue and PANSALB's responsibility in that respect. The fact that PANSALB did not traverse the facts of the application prompted the Department to withdraw its opposition to their intervention. The applicant-schools at no stage took issue with PANSALB's intercession.

48. We have dealt with the intercession of the *Amicus Curiae* on the basis that the hearing was re-opened. We have assumed, without deciding, that we were competent to adopt this procedural approach which can of course not serve as a precedent and is strongly discouraged. Of significance is that we are satisfied that PANSALB's intervention, except the delay and the attendant added costs, was not prejudicial to any party as far as the merits were concerned.

49. In his Heads Mr Bava makes, inter alia, the following submissions:

"18. The goal of the Amicus Curiae and which the Amicus Curiae submits should form the basis of the decision that this Honourable Court comes to is that of maximizing multilingual communicative competence rather than increasing language barriers among people.

19. The Amicus Curiae's view is that where language is used as a basis to gain some sort of advantage in segregation or the promotion of a monolingualism then this enters into the arena where language itself then becomes a problem in that it fosters a domination and a segregation of society."

50. PANSALB's submissions aforequoted bears a lot in common with what the MEC has written to the applicant-schools in a part of the letter quoted in para 9 of the judgment (but in clause 6 of the quoted letter) whereat he states:

"In fact, I hold the view that it is in the interests of Afrikaans to learn to co-exist with the other cultures, especially in public spaces. After all, it is the intention of policy to strengthen and encourage the multi-cultural and multi-lingual character of our society. The insular positioning of the Afrikaans-speaking learners in public spaces at the expense of the rights of others is Constitutionally unsound."

51. PANSALB cautions, though, that:

"12. It is important to note that in the matter of ***S v Pienaar*** *2000 (2) SACR 143 (NC) and at page 149 thereof* ***Judge Buys*** *quoted the Canadian case of* ***R v Beaulac*** *1999 (1) SCR 768 and quoted from the judgment which states the following:*

'The language of the accused is very personal in nature; it is an important part of his or her cultural identity.'

13. In ***S v Pienaar*** *and at page 150* ***Judge Buys*** *(refers to) another Canadian case* ***Ford v Quebec (Attorney General)*** *1988 (2) SCR 712 and quotes the following portion:*

'Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. … It is also the means by which the individual expresses his or her personal identity and sense of individuality."

52. Dual-medium, whether it be Setswana and Afrikaans or English and Afrikaans or whichever combination of languages, cannot be construed, and more importantly, cannot have the effect of denying learners the use of the language of their choice. **Olivier J** of this Division puts the issue thus in **Hoërskool Victoria-Wes en Andere v Die Departementshoof, Departement van Onderwys, Noord-Kaapse Provinsiale Regering**, Case No 357/2004 (Kimberley), Delivered on 19/04/2004 (Unreported) at p 42 (para 17):

"Dit (section 29 (2) of the constitution) sluit hoegenaamd nie na my oordeel die situasie uit waar dubbelmediumonderrig toegepas word nie. Al wat in so 'n geval sal gebeur, is dat die Afrikaans-sprekende leerders in 'n bepaalde periode hulle lesse

in Afrikaans sal ontvang, wat immers die amptelike taal van hulle keuse is, en dat hulle in dieselfde periode dieselfde les dan weer in Engels sal aanhoor. Ek kan glad nie sien hoe so 'n sisteem die Afrikaanssprekende leerders sal ontsê van enige regte ingevolge artikel 29 (2) van die Grondwet nie." I agree fully.

53. What remains is for us to examine briefly what the effect and ramifications are of the non-existence of a language policy in the applicant-schools. In accordance with the aforementioned Norms and Standards section that deals with the rights and duties of the provincial department of education, read with section 29 (2) of the Constitution, the postulate is that it has to be reasonably practicable to provide education in a particular language of learning and teaching if 40 learners in Grades 1 to 6 or 35 learners in Grades 7 to 12 in a particular grade request to be taught in a specified official language in a particular school.

54. To paraphrase the words of the Supreme Court of Appeal in the **Mikro Primary** case in correlation with the case under discussion, it follows that (on the version of the applicants) the 109 learners (Seodin), the 60 (Kalahari) and the 73 (NC Agricultural High) or many more, on the respondents' version, had a constitutional right to receive education in English in a public educational institution provided by the State if reasonably practicable. Although these learners did not initially have a constitutional right to receive their Education in English at Seodin Primary School or Kalahari High School or Northern Cape Agricultural High School, as the case may be, it has become immaterial as they now have a legitimate expectation to remain at these schools. See **Mikro Primary School** (*supra*) paras 30 to 31 thereof.

55. In accordance with the ratio in the aforesaid **Mikro Primary School** case (*supra* at para 33) the MEC or the functionaries of the Department cannot determine the language policy of a school. In other words the applicant-schools (Seodin, Kalahari and NC Agricultural High School) are still without a language policy notwithstanding the fact that the affected children are currently receiving tuition in English in a dual-medium (English-Afrikaans) setting or environment. This situation is brought about by the following interpretation by the SCA at para 33 p987B-D)where it is stated:
*"In **Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys** 2003 (4) SA 160 (T) at 170I-171A and 171J-172A [also reported at [2002] 4 All SA 745 (T) – Ed] Bertelsmann J held that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. I*

do not agree. Section 6 (1) of the Act authorizes the Minister of Education to determine norms and standards for language policy in public schools. It does not authorize the Minister of Education him or herself to determine the language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so. As stated above, it is in terms of section 6 (2) the function of the governing body of a public school to determine the language policy of the school subject to the Constitution, the Act and any applicable provincial law."

56. In the view that I take of this matter, and this must be made absolutely plain, the affected children have now acquired a vested right to be at the various schools whereat they are learners and cannot be removed therefrom without an order of this Court. It would be a sad day in the South African historial annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilized schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools. That there are two competing interests at play in this case has clearly manifested itself: The right to receive an education in a language or medium of choice on one hand and the right to receive a basic education or an education up to the level contemplated in the various Education Acts on the other. This is where the principle enunciated by the Constitutional Court in **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at 436C-F (para 104) comes in. The Court held:

"[104] The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could

reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'."

57. The question may arise whether the Department and the schools may now proceed with the intake of English-speaking learners to the affected schools for 2006. I fail to fathom on what valid or rational basis learners could be excluded from the schools on the grounds that the schools prefer to be Afrikaans-medium schools and that the SGBs still intend to consult with the MEC with a view to the determination of a language policy for those schools.

The SGBs can only determine the language policy of the schools in terms of section 16 (1) of the Northern Cape Schools Act *"after consultation with the Department, subject to the Constitution, the South African schools Act and the approval of the Member of the Executive Council."* The Department and the MEC are not required or obliged to rubber-stamp a language policy that offends against the legal precepts set out in the aforequoted legislation. See also generally **Kimberley Girls' High School v Head, Department of Education, Northern Cape** 2005 (5) SA 251 (NC) at 258C-260E.

58. The applicant-schools have made the averment that only Afrikaans schools are targeted and that this would not have happened if Afrikaans-speaking children wanted to enroll in a Setswana or isiXhosa school for instance. A quick research by me has revealed that, for the lack of a better description, a "dedicated group of attorneys and advocates" in the Northern Cape have since about 1995 dealt with most cases between the schools and school governing bodies on the one hand and the Department of Education on the other.

58.1. They are best placed to advise their clients that the scenario sketched by **Alkema AJ** in 1999 in **High School Carnavon v MEC for Education Northern Cape** (1999) 4 ALL SA 590 (NC) at 593g-594b as typical of the numerous school cases that served before us over the years. **Alkema AJ** stated:

"This application marks another chapter in a long history of litigation between the parties.

The learners of the school are predominantly, if not exclusively, from the so-called "white" community of Carnarvon. The other two schools in Carnarvon share the same facilities, and their learners are almost exclusively from the so-called "coloured" or "black" communities of Carnarvon. The school has a capacity for 540 learners, whereas its actual number of learners is 250, being slightly less than one half of its capacity. The other two schools are located within a radius of approximately two kilometers from one another.

The first respondent and her predecessor have since 1996 taken various steps in an attempt to amalgamate the schools in Carnarvon with a view to using the available resources in an economic and effective manner. Various terms have been used in the affidavits to describe these steps, such as "rationalize", "merge" and "amalgamate". I will stick to the term used in these proceedings, namely "amalgamate".

For reasons which are not relevant for present purposes, the governing body has fiercely resisted al attempts at amalgamation. The school and its governing body take the view that the respondents have no statutory or other legal right to amalgamate the schools. Although the South African Schools Act 84 of 1996 makes provision for certain mechanisms such as the closure of a public school and the forfeiture of assets to the State, there is at present no statutory mechanism in place which provides for the forced amalgamation of public schools."

58.2. In **Government of the RSA and Others v Grootboom and Others** 2001 (1) SA 46 (CC) at 53D-E the Constitutional Court in a different context stated:

"[2] This issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that, unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage."

58.3. The "housing" and "land-invasion" in the **Grootboom**-case could be substituted with "schooling" and "school-invasion" *in casu*. It is therefore not surprising that the flow of learners will always be from the poor communities to the better equipped and better resourced schools. This is a legacy of apartheid and reality of life that we have to live with for some time to come. To suggest that only

Afrikaans schools are targeted is over-simplistic but certainly not the case in the current matter. As to what will happen when the flow is reversed it is not for the Court to speculate or gaze into the crystal-ball. Courts deal with matters on a case-by-case basis and on the merits of each case.

It is for these considerations that the applicants cannot succeed on anyone of the remedies prayed for.

THE COSTS ISSUE

59. There were several interlocutory applications between the parties in which they each attained varying degrees of success. As will be noted the various Courts hearing these applications in each case reserved the question of costs and directed same to be determined in conjunction with the main application:

59.1. In the opposed application for a postponement brought by the respondents (the Department) heard on 30th November 2004 the Department was successful. In granting the postponement I remarked, *inter alia*:

"Even if the respondents (the Department) did not bring the application for a postponement I cannot envisage how the main application could have been heard because no Heads of Argument have been filed by any of the parties. The record is extremely bulky and, incomplete as it is, comprises in excess of 2140 pages. The indexing and pagination, as the Registrar's date stamp reflects, was only done on the 23rd November 2004."

This left the Department too little time to consult and settle the Answering Affidavit. It was therefore unwise of the applicant-schools to have opposed the requested postponement.

59.2. The applicant-schools sensing that the postponement sought was inevitable brought a counter-application in the form of an interim interdict which, if granted, would have defeated the whole object of the main application by excluding the affected children from the schools to which they were already admitted for the ensuing year. This purported to be a master stroke by the applicant-schools but was ill-conceived. We dismissed the application and reserved costs.

59.3. The main application was postponed for hearing on the 1st and 2nd of February 2005. In the interim the applicant-schools brought an application for the admission of the second amendment of the Notice of Motion referred to in para 4 of this judgment. The motivation for the proposed amendment was that there were new

developments which necessitated what I have described in the aforesaid para 4 as a "radical departure from the original Notice of Motion that was sought (and) constrained us to allow the postponement sought by the respondents (the department) because it was necessary for them to deal in their Answering Affidavit with the then fresh points of departure". The application was postponed *sine die* and the costs were once again reserved.

59.4. On the 4th February 2005 the applicant-schools brought an urgent application in which they requested that the main application be set down for hearing for 19 – 22 April 2005 and for leave to deliver yet a further set of papers. The proposed set was not incorporated in the application nor was there any explanation or inkling what the further set will entail. Needless to say the Department could not consent *in vacuo* to this further procedural step envisaged and the main application was further postponed *sine die* for this purpose and to further enable the respondents an opportunity to have sight thereof before they could decide upon or indicate their next line of action.

There is by now a full realization that the applicant-schools cannot be held blameless for a share of the delay of this case.

59.5. On the 17th December 2004 in case 1444/2004 the Department obtained an order against the applicant-schools to allow its officials to install temporary class-rooms where required on their premises or related premises. **Williams J,** who heard the application, reserved the costs.

59.6. On the 7th January 2005 First to Fourth applicant-schools obtained an order on urgency which authorized the applicants access to the affected schools to obtain certain information which they intimated they required for the main application, but never in fact used such information.

60. A further factor to take into account on the costs question appears from the remarks of the Constitutional Court in **HOD, Department of Education, Limpopo Province v Settlers Agricultural High School & Others** 2003 (11) BCLR 1212 (CC) at 1215E-F where it stated:

"There can be no doubt that it would be in the interests of justice for differences in the interpretation of the relevant provisions to be resolved. The issues are socially and legally complex. They touch on the intricate interrelationship between the rights of the governing bodies to make decisions on suitable candidates for employment at schools, and the need for transformation to overcome racial and gender imbalances in education."

61. In **Mkontwana v Nelson Mandela Metropolitan Municipality & Another et al** 2005 (1 SA 530 (CC) the Court made this pronouncement concerning costs at para 74 (561I-562A):

"However, (the parties) raised important issues and concerns about legislative provisions that intrude upon the important right of an owner to transfer property. An order obliging them to pay the costs of this application would have a chilling effect on members of South African society who wish to approach a court to raise important constitutional concerns. In the circumstances, there should be no order as to costs in relation to proceedings in this Court or in the High Court."

62. In the result the main application is unsuccessful and should be dismissed. For the reasons aforegoing there should be no order as to costs.

ORDER:

1. **The application of the applicant-schools is dismissed.**
2. **There is no order as to costs.**

_____

F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

I concur:

_____

C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION

I concur:

_____

P L GOLIATH
ACTING JUDGE
NORTHERN CAPE DIVISION

For Applicants:	**Adv R J R Raath, SC with him Adv J I du Toit**
Instructed by:	**van der Wall & Partners**
For Respondents:	**Adv F W A Danzfuss, SC with him Adv N Snellenberg**
Instructed by:	**Haarhoffs Inc**