

**IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER:

In the matter between:

SECTION27

First Applicant

HANYANI THOMO SECONDARY SCHOOL

Second Applicant

TONDANI LYDIA MASIPHEPHETHU

Third Applicant

and

MINISTER OF BASIC EDUCATION

First Respondent

MEMBER OF THE EXECUTIVE COUNCIL:

Second Respondent

LIMPOPO DEPARTMENT OF EDUCATION

FOUNDING AFFIDAVIT

I, the undersigned

NIKKI STEIN

hereby state under oath:

1. I am an adult female attorney employed by SECTION27, a non-profit organisation having its offices at 23 Jorissen Street, 6th floor Braamfontein Centre,

Braamfontein, Johannesburg. I am duly authorised to depose to this affidavit and to bring this application on behalf of the Applicants. I attach as “**NS1**” a copy of a resolution of SECTION27’s Board of Directors in this regard.

2. The facts contained in this affidavit are both true and correct and, unless the context indicates otherwise, within my personal knowledge. Where I make legal submissions, I do so on the advice of the Applicants’ legal advisors.
3. In this affidavit I refer to government policy documents and various economic studies. Where I do so, I have attached only the relevant pages of these documents so as not to burden this Court. Full copies of the documents referred to in this affidavit will be provided on request.

I PURPOSE AND OVERVIEW OF APPLICATION

4. This is an application for an order directing the Limpopo Department of Education (“the Department”), alternatively the National Department of Basic Education (“the DBE”), to place orders for and secure the delivery of textbooks to the Second Applicant and to all public schools across the Limpopo Province that have still not received their complement of textbooks for the 2012 academic year.
5. As of the date of filing this affidavit, the Second Applicant has not received textbooks for the 2012 academic year, despite having submitted the necessary requisition forms in mid-November 2011. I have confirmed with the principals of nine schools in the Mopani and Vhembe Districts that they too have not received textbooks. This appears to be a pattern across the province. I am unable to disclose the identities of the principals due to their fear of disciplinary action and victimization by officials in the Department. In this regard I have attached as “**NS2**” a complaint that SECTION27 lodged with the Public Protector on 8 March 2012.

6. The textbooks should have been delivered during December 2011 or early January 2012, before the commencement of the 2012 academic year on 18 January 2012. While the failure to deliver textbooks affects all grades at all schools, the biggest impact is felt by those grades which have started the new Curriculum and Assessment Policy Statement (CAPS) curriculum. These are grades R, 1, 2, 3 and 10.
7. Since the introduction of the new CAPS curriculum in 2012, there have been no CAPS textbooks in any schools in Limpopo. The learners and teachers in Limpopo therefore do not have the necessary support materials for the prescribed curriculum. Teachers are forced to teach the curriculum to learners using outdated textbooks or no textbooks at all. Learners do not have access to the necessary materials to do their homework, prepare for lessons and examinations or clarify and consolidate what they learn during their lessons. I refer the above Honourable Court to the supporting affidavit of the school principal of the Second Applicant.
8. The Applicants contend that this failure by the Department and the DBE to deliver textbooks is in breach of the following:
 - 8.1 The right to a basic education as guaranteed by section 29 of the Constitution;
 - 8.2 The right to equality as guaranteed by section 9 of the Constitution;
 - 8.3 The right to dignity as guaranteed by section 10 of the Constitution;
 - 8.4 The Department's obligations in terms of the South African Schools Act 84 of 1996 ("Schools Act"); and
 - 8.5 Section 195 of the Constitution, which prescribes the basic values and principles that must govern public administration.

9. The Applicants accordingly bring this application on an urgent basis for the delivery by the Department, alternatively the DBE, of textbooks to all public schools throughout Limpopo.

10. The structure of this affidavit is as follows:
 - 10.1 First, I describe the parties to this application;

 - 10.2 Second, I set out the Applicants' contentions as to why this matter should be heard on an urgent basis;

 - 10.3 Third, I deal with the Applicants' standing to bring this application;

 - 10.4 Fourth, I provide a background to this application and the engagement between SECTION27 and the Department and the DBE to resolve the lack of textbooks in Limpopo;

 - 10.5 Fifth, I describe the general education crisis in Limpopo, in order to contextualise this application;

 - 10.6 Sixth, I set out the obligations on the Department and the DBE to provide textbooks;

 - 10.7 Seventh, I describe the impact of the failing education system on learners;

 - 10.8 Eighth, I set out the violations of the constitutional rights of learners;

 - 10.9 Ninth, I set out the relief sought by the Applicants and the considerations applicable to the order requested in the notice of motion; and

 - 10.10 Tenth and finally, I deal with the issue of costs.

11. The crux of this case is that four months into the school year, textbooks are still not available to learners and educators. It is common cause that textbooks are an essential learning tool. Despite continued engagement with the Department and the DBE, including three requests by SECTION27 to the Department and the DBE to make the textbooks available, textbooks for the 2012 academic year have still not been ordered. Immediately prior to the launch of this application we learnt that the DBE has indicated that it would provide the textbooks by mid-June 2012. Given the DBE's failure to deliver on previous undertakings, the lateness in the year and the relief we seek in order to mitigate the prejudice to learners, we are compelled to bring these proceedings.

II PARTIES

12. The First Applicant is SECTION27, a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. SECTION27 is a company incorporated in terms of section 21 of the Companies Act 61 of 1973. SECTION27 conducts public interest litigation to ensure access to justice as inexpensively and expeditiously as possible. SECTION27's objects are set out in the attached document marked "NS3".
13. SECTION27 is formally accredited as a law clinic by the council of the Law Society of the Northern Provinces in terms of the Attorneys Act 53 of 1979. This application is brought in SECTION27's own name due to our intimate engagement with learners, parents and teachers in Limpopo during the course of this year. They are unable to bring this application themselves.
14. One of SECTION27's priority areas is the right to a basic education as guaranteed by section 29 of the Constitution. In this regard, its objects are, *inter alia*, to advocate for:
 - 14.1 the creation of learning environments that are conducive to learning and development; and

- 14.2 the availability of resources such as textbooks for learners.
15. In order to achieve these aims SECTION27 also participates in research, advocacy and legal action to change the socio-economic conditions that undermine human dignity and development, prevent poor people from reaching their full potential and lead to the spread of diseases that have a disproportionate impact on the vulnerable and marginalised.
16. Some examples of SECTION27's work on the right to a basic education are:
- 16.1 Assisting learners who have been victims of sexual violence by their educators in securing the necessary support and protection, as well as ensuring that disciplinary and criminal proceedings are brought against the educators concerned. In this regard we are working with the Gauteng Department of Education and other partner organizations in ensuring systems which are more responsive and effective in dealing with this problem;
- 16.2 Representing Equal Education, an NGO campaigning for the right to a basic education, in engagements with the Western Cape Department of Education to secure access to textbooks for learners in the Western Cape; and
- 16.3 Research on the content of the right to a basic education and the concomitant government obligations.
17. It is on this basis that the First Applicant regards itself as having the requisite *locus standi* to bring this application.
18. The Second Applicant is Hanyani Thomo Secondary School ("Hanyani Thomo"), a secondary school in Thomo Village, Mopani District. Hanyani Thomo is attended by 1 516 learners in grades 8 to 12. Hanyani Thomo has not received textbooks for the 2012 academic year. This primarily affects grade 10 learners, who are learning

under the new CAPS curriculum, but do not have the necessary textbooks to support this curriculum. The principal of the Second Applicant, Mr Mashangu Maurice Hlongwane, represents Hanyani Thomo in this application. His supporting affidavit will be attached.

19. The third applicant is Tondani Lydia Masiphephethu the parent of two learners at Lutandale Primary School (“Lutandale”) in Thohoyandou, Vhembe District. Mrs Masiphephethu’s children are aged 12 and 8 and are in grades 6 and 3 respectively. Mrs Masiphephethu brings this application in her capacity as a parent of learners who have not been provided with textbooks for the 2012 academic year. Her supporting affidavit will be attached to this application.
20. The First Respondent is the Minister of Basic Education (“Minister”), in her capacity as the head of the DBE. The Minister bears obligations in terms of determining education policies and administering funds appropriated for education. The Minister bears an obligation to ensure compliance with the obligations of the DBE and the Department. The Minister’s principal place of business is at Sol Plaatje House, 222 Struben Street, Pretoria. Service on the Minister is effected care of the State Attorney, Pretoria.
21. The Second Respondent is the Member of the Executive Council (“MEC”) for the Department. The Department bears responsibility for basic education throughout the Limpopo Province, and for the administration of funds allocated to education. The provision of textbooks and other learner teacher support materials (“LTSM”) is the primary responsibility of the Department. The Department’s principal place of business is at corner 113 Biccard and 24 Excelsior Street, Polokwane. Service on the Department is effected care of the State Attorney, Pretoria.
22. On 5 December 2011, the Department, together with a number of other provincial departments in Limpopo, was placed under administration in terms of section 100(1)(b) of the Constitution. The DBE has accordingly assumed full responsibility for the obligations of the Department in order to ensure that the

minimum standards for the Department's obligations are met. This includes the obligation to provide textbooks to schools throughout Limpopo. As well as being cited in respect of the discharge of her own obligations, therefore, the Minister is responsible for the Department's obligations for as long as the Department remains under administration. The notice in the Government Gazette dealing with the section 100(1)(b) intervention is attached as "NS4".

III URGENCY

23. This application has been brought on an urgent basis. The applicants contend that the delay in delivering textbooks to schools across Limpopo constitutes a continued violation of learners' rights to a basic education, equality and dignity. As I set out in more detail below, textbooks are an essential learning tool and proper teaching and learning cannot take place without them. Without textbooks, learners are unable to prepare for their lessons, do their homework or study for examinations. They do not have access to the necessary materials to clarify and consolidate what they learn in class. Teachers are also unable to prepare for their lessons and ensure that the learners' curriculum is adequately covered.
24. The breach by the Department and the DBE of their obligations to provide textbooks to learners is manifestly serious. The effects of this breach are felt by learners every day. Learners who do not have access to textbooks do not develop the skills necessary to grasp the content of the prescribed curriculum for each of their subjects. In particular, students who do not have access to textbooks perform poorly on reading tests, and therefore do not acquire the reading skills necessary to learn the subject matter in their other subjects. The evidence I refer to below also establishes that learner's mathematics and reasoning skills are compromised by a lack of textbooks.
25. For each day that learners do not have access to textbooks for each of their school subjects, there are gaps in their prescribed curricula which cannot be closed. More than one third of the academic year has passed without access to

essential learning materials. Any further delay in providing learners with textbooks is a perpetuation of the violation of their right to a basic education in terms of the Constitution.

26. These challenges are aggravated by the fact that learners are scheduled to write examinations in June 2012. I refer the above Honourable Court to the supporting affidavits of Mr Hlongwane and Mrs Masiphephethu.
27. Learners cannot be expected to prepare for their examinations without access to their prescribed textbooks.
28. If the breach by the Department and the DBE is allowed to continue unabated, the resulting impact on the learners' right to a basic education will be severe and irreversible.

IV STANDING

29. The applicants bring this application in several capacities:

29.1 First, in their own interest. As I set out more fully above, the First Applicant is a public interest law centre which seeks to use the law to promote, *inter alia*, the right to a basic education. One of the First Applicant's core activities is to ensure that learners are provided with the materials and support they require in order to learn. The Second Applicant is a secondary school in Limpopo which has not received textbooks for distribution to its learners for the 2012 academic year. The Third Applicant is a parent of primary school learners who have not received their textbooks for the 2012 academic year.

29.2 Second, in terms of sections 38(b) and (c) of the Constitution, the application is brought in the interests of learners, educators and parents throughout the Limpopo Province. Learners in Limpopo have the right to a basic education, which right includes the provision of textbooks by the Department and the

DBE. The Department and the DBE are in breach of their corresponding obligations. The learners concerned cannot individually bring these proceedings against the Department and the DBE. They lack the necessary resources and knowledge of their rights. They are young and do not all have access to legal services. This application is being brought in their interests.

29.3 Finally, the provision of textbooks to learners across Limpopo and the enforcement of the right to a basic education is a matter that falls in the public interest. The state of education in Limpopo is a grave concern to the public, and has a serious impact on the public. The extent to which learners receive an adequate basic education affects their abilities to participate meaningfully in their societies on a political, economic, social and cultural level. It is therefore in the public interest that the right to a basic education be realised and that textbooks be delivered to these learners.

30. I submit on these grounds that the Applicants have standing to bring this application.

V BACKGROUND TO THIS APPLICATION

31. The lack of textbooks in Limpopo was drawn to SECTION27's attention through media reports at the commencement of the academic year that Limpopo schools were still awaiting delivery of their textbooks.

31.1 A report in the City Press dated 11 January 2012 and attached as "**NS5**" indicates concern that textbooks had not yet been delivered to schools one week before they were due to open. In that article, national education spokesperson Panyaza Lesufi stated that the DBE expected a "*minimum of disruptions*" in supplying CAPS materials. He confirmed that the Minister had visited Limpopo on the previous day to address the lack of textbooks, and that the DBE would be working with National Treasury to reach a solution.

- 31.2 On 20 January 2012, two days after the commencement of the academic year, the Mail & Guardian reported that there was still no indication as to when textbooks would be delivered to Limpopo schools. It was evident at that stage that while the Department should have ordered textbooks towards the end of 2011 – before the section 100(1)(b) intervention by the DBE – it had still not done so. At that stage, it was anticipated that the textbooks would reach schools “*as late as*” March 2012. A copy of this report is attached as “**NS6**”.
32. On 2 February 2012, together with my colleague Thabang Pooe, I visited several schools in the Mopani District in Limpopo and were instructed by each of these schools that textbooks had not yet been delivered and that there was no indication as to when they would be delivered. The schools had received no communication from the Department or the DBE indicating what was being done to address the education crisis. Ms Pooe’s confirmatory affidavit will be attached.
33. On 28 February 2012, SECTION27 addressed a letter to the DBE and the Department, indicating its concerns that textbooks had not been delivered and requesting, *inter alia*, an indication as to when textbooks would be delivered to Limpopo schools. A copy of this letter is attached as “**NS7**”.
34. A follow-up visit was made on 16 and 17 February 2012 and textbooks had still not been delivered.
35. On 14 March 2012, together with Thabang Pooe and Daygan Eagar, a researcher at SECTION27, I was invited to a meeting with Dr Anis Karodia, the Head of the Intervention Team in the Department. The purpose of the meeting was to discuss a number of the challenges being faced by schools in Limpopo, including operational expenses, infrastructure and textbooks. I elaborate on these challenges in the next section of this affidavit. When asked about textbooks, Dr Karodia responded as follows:

The way the tender was awarded was unscrupulous. We have ordered the textbooks with National. The database was given to the Publishers Association who ordered and printed the textbooks. But we are not going to pay them because they did not receive the tender properly. We need R220m in order to get the textbooks. We are trying our best; the textbooks will be delivered latest by mid April.

36. Confirmatory affidavits from Mr Eagar and Ms Pooe are attached.
37. SECTION27 therefore undertook to follow up with the Department and the DBE in mid-April 2012, allowing Dr Karodia an opportunity to comply with his undertaking despite the serious delays in the delivery of textbooks.
38. On 15 April 2012, Ms Pooe contacted nine schools in the Mopani and Vhembe Districts and these schools confirmed that they had not received their textbooks as per Dr Karodia's undertaking at the meeting on 14 March. None of the schools had been given any indication as to when textbooks would be ordered and delivered.
39. The fact that textbooks have still not been delivered was confirmed in an article in the City Press on 22 April 2012, a copy of which is attached as "**NS8**". This article reports that learners remain without textbooks four months into the school year and that the delay could be due to an irregular tender awarded to EduSolutions for R320 million. The article also indicates that the DBE has taken over the procurement process in respect of textbooks.
40. Prior to this application being launched, Mark Heywood, the Executive Director of SECTION27, corresponded with Dr Karodia to clarify certain issues and confirm facts relating to the delivery of textbooks. Mr Heywood's confirmatory affidavit will be attached.

41. On 2 May 2012, Dr Karodia e-mailed Mr Heywood, indicating that the matter had been resolved with the DBE and with the publishers. He indicates that *“the supply of textbooks will now take place through the month of May, and definitely completed by the 15 June, 2012.”* A copy of this e-mail is attached as **“NS9”**. I submit that this response is unsatisfactory, based on the following:
- 41.1 Both the Department and the DBE have committed on numerous occasions to delivery of textbooks by a given date: in January 2012, a commitment was made to deliver the textbooks by no later than March 2012. At the meeting with Dr Karodia on 14 March 2012, he undertook to have textbooks delivered by no later than mid-April 2012. To date, the textbooks have not been delivered.
- 41.2 In any event, delivery of textbooks by 15 June 2012 is too late. Delivery of textbooks in June would mean that learners have been without textbooks for half of the school year. As confirmed by Mr Hlongwane and Mrs Masiphephethu, mid-year tests and examinations are scheduled to commence before this date. Learners will not be able to prepare for these tests and examinations without their prescribed textbooks. In the expert affidavit of Bronwen Wilson-Thomson, which will be attached, she points out that the delay creates a significant hindrance to the ability of learners to meet the required assessment standards.
- 41.3 Despite the serious and continued violations of learners’ rights, the Department and the DBE have failed to act with any degree of urgency. It is essential at this stage that emergency measures be taken to ensure the immediate delivery of textbooks to schools across the province.
- 41.4 As is clear from the supporting affidavit of Mr Heywood, Dr Karodia has repeatedly stated that the issue of textbooks was removed from his purview. Dr Karodia has also communicated this to Brian Wafawarowa, the Executive

Director of the Publisher's Association of South Africa (PASA). Mr Wafawarowa's confirmatory affidavit will be attached.

- 41.5 In any event, the e-mail received from Dr Karodia does not constitute a formal response to the Applicants' letter of demand.
42. Mr Heywood therefore responded to Dr Karodia, in the attached e-mail marked "NS10". He asked whether firm orders for textbooks have been placed with publishers, and on what basis Dr Karodia has undertaken to provide textbooks to schools "through the month of May". Mr Heywood also asked why the delivery of textbooks could not take place sooner, given the extensive delays to date.
43. Dr Karodia responded in the attached e-mail marked "NS11". In this e-mail Dr Karodia indicates that orders for textbooks have not yet been placed. He does not indicate when orders will be placed or why the delivery of textbooks cannot take place before 15 June 2012. In addition, while in his earlier e-mail Dr Karodia indicated that textbooks would definitely be delivered by 15 June, his later e-mail indicates that the DBE "*is hoping to complete the process*" by that date.
44. While we appreciate that Dr Karodia is doing his best to resolve the problem of textbooks in Limpopo, it is evident from the Department's and the DBE's previous unfulfilled commitments and the report from Dr Karodia that the issue was removed from his purview, that the urgent delivery of textbooks remains beyond his control.
45. The evidence of Mr Wafawarowa bears out the inexplicable delay by the Department in ensuring the provision of textbooks. Mr Wafawarowa's supporting affidavit will be attached to this application.
46. PASA represents the publishers who provide textbooks to the government upon receipt of an order. As early as December 2011 the publishers were concerned about the delay by various provincial education departments in placing orders for

textbooks. In particular, the publishers noted that there was simply no order received from the Department.

47. Mr Wafawarowa brought this to the attention of the Director-General of Education, Mr Soobrayan (“the Director-General”), in a letter dated 5 December 2011, a copy of which is attached as “**NS12**”. This letter was followed with an email from Mr Wafawarowa to the Director-General and other officials on 14 December 2011 detailing the status of textbook placement orders in each of the province. A copy of this e-mail is attached as “**NS13**”. In relation to Limpopo, Mr Wafawarowa states as follows: *“Nothing yet – Orders apparently ready but provincial DBE has not signed off so no orders placed”*. On 15 December 2011 Mr Wafawarowa wrote again to the Director-General and other officials requesting assistance in obtaining clarity on what textbooks are required in order to ensure timely delivery. A copy of this email is attached as “**NS14**”.
48. To date, PASA has received no firm orders for textbooks in Limpopo. No explanation has been forthcoming from the Department or the DBE as to why such a lengthy delay occurred, and the steps that they are taking urgently to provide the textbooks.
49. On 26 April 2012, Dr Karodia addressed a letter to the publishers, ostensibly initiating a negotiation process based on cost of textbooks, cost of delivery to a central venue in Limpopo and the availability of stock. The letter indicates that orders will be placed on compact disc for collection by publishers from Polokwane. A copy of this letter is attached as “**NS15**”.
50. Its contents are dealt with in detail in Mr Wafawarowa’s supporting affidavit. He indicates that:
 - 50.1 The initiation of a negotiation process is both unprecedented and unnecessary: the bidding process was conducted at the stage of compilation of a national catalogue of textbooks, at which stage both book titles and prices were agreed on.

- 50.2 Collection of orders on compact disc from Polokwane by publishers based in Cape Town is both impractical and unnecessary, and causes further delays in the process.
- 50.3 The delivery of textbooks to a central venue in the province causes even further delay, as arrangements will then need to be made to deliver textbooks to the various district offices and then to the relevant schools.
- 50.4 There is no indication that the speed at which orders can be processed is a criterion taken into account by the DBE. The matter is not being treated with any degree of urgency; instead, additional steps are being added to the process which steps cause further delays.
51. I note further that there is no provision in this letter made for the procurement of numeracy learning materials for the Foundation Phase (Grades R, 1, 2 and 3). The Big Books, Graded Readers and Phonics Programmes referred to cover the literacy aspect of the CAPS Foundation Phase, but not the numeracy aspect. It follows that even on the procurement of this list of materials, Grades R, 1, 2 and 3 will remain without their necessary numeracy textbooks.
52. On 20 April 2012, the Applicants' attorneys addressed a letter of demand to the Respondents, demanding the following:
- 52.1 An undertaking, by no later than 24 April 2012, to deliver textbooks to Hanyani Thomo and Lutandale and to schools across Limpopo by no later than 2 May 2012; and
- 52.2 If it is not possible to deliver textbooks by 2 May 2012, an explanation as to why this is not possible and an indication as to when the textbooks will be delivered.
53. A copy of this letter is attached as **"NS16"**.

54. Neither the DBE nor the Department responded to this letter until 3 May 2012.
55. On 2 May 2012 the Applicants' attorneys addressed a follow-up letter to the Department and the DBE, requesting an urgent response to our letter of demand. A copy of this letter is attached as **"NS17"**.
56. On 3 May 2012, the Director-General in the DBE responded to this letter, indicating that the matter had been passed on to Dr Karodia. This is despite the fact that, according to Dr Karodia, the issue of textbooks has been removed from his purview. A copy of this letter is attached as **"NS18"**. There is also no undertaking to treat the matter as urgent as per the Applicants' request.
57. On 3 May 2012, Dr Karodia e-mailed the applicants' attorneys of record, indicating that he is unable to deal with this matter before 7 May 2012. A copy of this e-mail is attached as **"NS19"**.
58. It is clear from the extensive engagements between the applicants and the DBE and the Department, as well as PASA's engagements with the DBE and the Department, that despite its centrality to the right to a basic education, the matter of textbooks is not being prioritized and afforded the requisite urgency. Both the Department and the DBE have undertaken on a number of occasions to resolve the matter. On each of these occasions, the Applicants have allowed them the opportunity to do so.
59. Despite this, at the time of signing this affidavit, orders for textbooks have yet to be placed and the Department and the DBE have yet to put measures in place to ensure that the matter is resolved on an urgent basis. On the contrary, they appear to have initiated a process which is unduly lengthy and impractical.
60. Given the context of this case, the Applicants do not believe that any measures short of litigation would succeed in securing access to textbooks for learners. It is clear that a court order is necessary in order for the matter to be resolved. It

therefore became necessary for the Applicants to approach the above Honourable Court for relief.

VI THE EDUCATION CRISIS IN LIMPOPO

61. The failure to provide textbooks for the 2012 academic year is not an isolated failure by the Department and the DBE to discharge their constitutional obligations in respect of learners across Limpopo. It is necessary to contextualise this application within the general education crisis, so as to illustrate the limited ability of the schools across the province to control and mitigate the negative impacts of the failure by the Department and the DBE to provide textbooks.
62. This failure is a symptom of a Department which, according to Dr Karodia, is “*in a state of morass and decay.*” On 12 March 2012, Dr Karodia submitted a report on the state of the Department. In this report he observes the following:

There seems to be no leadership and direction offered by the headquarters and those in charge of institutional governance and co-ordination. To this end, the districts are left to their own devices and thus bad habits become the order of the day. As an example, many clients have complained that the circuit managers have become a law unto themselves, are authoritarian in the execution of their duties, many of them visit schools unannounced, seize documents, take the original documents, Photostat documents, afford no leadership and some are inadequately qualified, are abrupt and go about their duties without a sense of purpose. . . . All done and said, Districts do not function optimally and gradually are becoming an impediment to the Limpopo Education Department, as morass and decay sets in compromising the tenets of education, public administration and public management, coupled with poor financial management and poor invoking of management principles, and thus these districts are being eroded and soon will not serve any tangible benefit to the education

dynamics within the province. This has to be arrested and remedied with the urgency that it requires.

63. A copy of Dr Karodia's report is attached as **"NS20"**.
64. The schools in Limpopo do not have the means to mitigate the negative impacts of the lack of textbooks for learners. These schools are vulnerable and there are major obstacles to teaching and learning throughout the province. As is evident from the research I set out below, learner performance in Limpopo is poor and will not improve until learners receive appropriate learning materials.
65. SECTION27 has addressed the Department and the DBE on numerous issues, including the failure to provide operational funding, which enables schools to cover their day-to-day operational expenses such as purchasing chalk, paper and cleaning materials and paying cleaning staff. These funds are intended to cover all expenses of a non-capital nature, excluding remuneration of staff. The obligation to provide this operational funding arises from the Schools Act. I attach as **"NS21"** and **"NS22"** letters dated 13 February 2012 and 28 February 2012 from SECTION27 to the Department and the DBE detailing our concerns.
66. Importantly, the lack of funds for day-to-day operational expenses has limited the ability of schools to photocopy worksheets, as they cannot afford paper or toner, and are unable to pay for the maintenance of their photocopy machines. The result of this is that in many schools there are no materials which may be used by learners for their school lessons, homework and examination preparation. I refer the above Honourable Court to the supporting affidavit of Mr Hlongwane.

VII THE OBLIGATION OF THE DEPARTMENT AND THE DBE TO PROVIDE TEXTBOOKS

67. The Schools Act creates a distinction between two types of schools: schools which are granted powers under section 21 of the Schools Act ("section 21 schools") and

those which are not (“non-section 21 schools”). Section 21 of the Schools Act provides as follows:

Allocated functions of governing bodies

- (1) Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions:*

 - (a) To maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;*
 - (b) to determine the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;*
 - (c) to purchase textbooks, educational materials or equipment for the school;*
 - (d) to pay for services to the school;*
 - (dA) to provide an adult basic education and training class or centre subject to any applicable law; or*
 - (e) other functions consistent with this Act and any applicable provincial law.*
- (2) The Head of Department may refuse an application contemplated in subsection (1) only if the governing body concerned does not have the capacity to perform such function effectively.*
- (3) The Head of Department may approve such application unconditionally or subject to conditions.*
- (4) The decision of the Head of Department on such application must be conveyed in writing to the governing body concerned, giving reasons.*
- (5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal to the Member of the Executive Council.*
- (6) The Member of the Executive Council may, by notice in the Provincial Gazette, determine that some governing bodies may exercise one or*

more functions without making an application contemplated in subsection (1), if –

(a) he or she is satisfied that the governing bodies concerned have the capacity to perform such function effectively; and

(b) there is a reasonable and equitable basis for doing so.

68. Those schools which are granted the relevant powers under section 21 of the Schools Act procure their textbooks directly from service providers. Non-section 21 schools rely on the Department for the procurement and delivery of textbooks. Hanyani Thomo and Lutandale are non-section 21 schools. They access their budgets through the completion of requisition forms, which are then submitted to the relevant District Offices of the Department for processing. The Department will then arrange for the procurement and delivery of textbooks according to the requisition forms received.
69. This process is set out in the Department’s Prescripts for Management of School Funds in Public Schools, the relevant pages of which are attached as **“NS23”**, and in the DBE’s newsletter ‘Curriculum News: Improving the Quality of Learning and Teaching Strengthening Curriculum Implementation from 2010 and Beyond’, the relevant pages of which are attached as **“NS24”**.
70. In 2011, the DBE implemented a centralised national ordering system for textbooks, as a measure to bring down the cost of textbooks. The process for ordering textbooks for the CAPS curriculum, as set out in annexures **“NS23”** and **“NS24”**, is the following:
- 70.1 The DBE provides a national catalogue of all approved materials to schools, including descriptions of the materials to allow schools to make informed decisions about which materials to order.
- 70.2 Schools will select material for each subject based on discussions with the relevant subject teachers, Heads of Department and subject advisors.

- 70.3 Schools are then required to complete requisition forms and submit these to the relevant provincial department. These requisition forms are then submitted to the DBE, which will then place consolidated orders with the relevant service providers.
- 70.4 To ensure timeous receipt of textbooks, the delivery process is decentralised. The total number of textbooks ordered by each province is delivered to the relevant provincial department, which department will then contract with service providers for the delivery of textbooks to individual schools.
71. As is set out in the supporting affidavit of Mr Hlongwane, requisition forms for textbooks for Hanyani Thomo for the 2012 academic year were completed and submitted on 17 November 2011.
72. Despite the procedural requirements having been complied with, however, none of the non-section 21 schools in Limpopo have received their textbooks for the 2012 academic year.
73. The Department's Annual Performance Plan for 2011/12, the relevant pages of which are attached as "NS25", sets out annual targets for 2011/12. The provision of LTSM, including textbooks, is reflected in these targets. The Department sets a target of 100% access to textbooks by learners. As is apparent from the facts of our case, the Department is failing to comply with its own targets.
74. The Department developed a Curriculum Strategy, the relevant pages of which are attached as "NS26", to address poor learner performance. This includes the provision of textbooks to improve learner performance. The importance of textbooks is recognized by the Department in its Curriculum Strategy when it states the following:

The availability and retention of learning support materials is a vital ingredient in the delivery of quality learning and teaching. . . . When resources such as learner and teacher support materials are insufficient, teachers experience great difficulty in planning and conducting lessons even if there were enough of other resources. If one takes seriously the observation that in developing countries the availability of textbooks is associated with student performance and pass rate, then lack of learning materials in schools clearly points to our learners not performing well in their learning.

75. The Curriculum Strategy also includes the objective of providing “*additional support materials for learners and teachers*” and “*to expand and intensify the integration of ICT in teaching and learning to enhance curriculum delivery.*” We are in agreement with the Department about the importance of providing additional material and computer technology to all schools. These are essential measures to close the inequality gap in access to quality education in South Africa. However, the failure to provide basic material such as textbooks does not bode well for the delivery of more sophisticated learning materials.
76. This is reiterated by the DBE. In its newsletter ‘Curriculum News: Planning for 2010 and Beyond’ (the relevant pages of which are attached as “**NS27**”) the DBE states that “*[e]ach learner should have a textbook for each of his/her subjects to take home, do homework, and study from or to prepare for subsequent lessons, tests and exams.*”
77. Similarly, in President Zuma’s State of the Nation address in 2011, a copy of which is attached as “**NS28**”, he indicated a “triple T” approach to basic education: Teachers, Textbooks and Time. President Zuma stressed that “*[t]he administration must ensure that **every child has a textbook on time***” (Emphasis added).
78. Arising from poor performance across South Africa, the Minister signed a Delivery Agreement for the Basic Education Sector (“Delivery Agreement”). A copy of the

Delivery Agreement is attached as “**NS29**”. This is a negotiated charter reflecting the commitment of key players in education to twelve outcomes. The Delivery Agreement notes that basic education is a top priority of the administration and is a prerequisite to South Africa’s long-term development goals. Sub-output 2 of this Delivery Agreement is the increase in access to high quality learning materials.

79. The percentage of learners having access to the required textbooks and workbooks for the entire school year is one of the indicators included in the Delivery Agreement used to measure the extent to which the DBE’s obligations are being met. Given that no learners in Limpopo have access to the necessary textbooks for the CAPS curriculum, the DBE is clearly failing to comply with its obligations.
80. These goals are translated into an ‘Action Plan to 2014: Towards the Realisation of Schooling 2025’ (“Action Plan”), the relevant pages of which are attached as “**NS30**”. The Action Plan recognises that proper learning and teaching cannot take place without proper access to textbooks, and notes that the 11% of parents complaining about a lack of textbooks in 2008 is still “*much too high*” and that shortages of textbooks and other learning materials are “*unacceptable*”.
81. Both the Department and the DBE have therefore recognised the importance of providing textbooks to learners to improve their performance. Despite this, learners throughout Limpopo have been without textbooks for one third of the academic year.
82. In addition to the policies developed by the Department and the DBE, textbooks are an essential component of the right to a basic education.

VIII THE IMPACT OF A FAILING EDUCATION SYSTEM ON LEARNERS

83. Poor learner performance throughout South Africa has been a matter of concern for many years. Learners are performing consistently poorly in literacy and

numeracy, as well as in languages and mathematics. The Department’s own Curriculum Strategy, the relevant pages of which are attached as “NS26”, recognises these poor levels of performance on both national and provincial levels. Grade 12 performance in Limpopo dropped from 70.6% in 2004 to 55.7% in 2006, and continues to decline. In 2010, Grade 12 performance was at 57.9%, marking the seventh year of performance below the national target of 60%.

84. Learner performance results for 2009/10 are set out in the Annual Performance Plan for 2011/12 as follows:

Subject	Grade	Performance (%)
Mathematics	6	28%
Languages	6	26%
Numeracy	3	15.9%
Literacy	3	6.85%
Mathematics	12	39.3%
Physical Science	12	31.8%

85. Textbooks play a pivotal role in student achievement. Economists have engaged with various studies focused on the determinants of educational achievement within a South African context. These are generally based on econometric assessments of large datasets which seek to find out the statistical relationship between various individual, school and teacher level variables. Several studies have been done internationally and in a South African context. These vary based on the dataset and sample used, the variables which can be considered (based on the questions asked in the survey or test) and the economic model and framework used. These studies have provided much insight into the impact of several resources on educational achievement from a statistical perspective.
86. While there is much debate over the impact of many resources on educational achievement with conflicting results internationally, one area in which there is

strong evidence relates to the strong positive impact of textbooks on learners' performance and educational achievement. Various studies in South Africa on the impact of textbook availability in schools are overwhelmingly positive, showing that the educational returns from access to textbooks are large and significant.

87. The Southern and Eastern African Consortium for Monitoring Educational Quality (SACMEQ) was established in 1995 to undertake research, monitoring and training activities to compare the general conditions of schools in Southern and Eastern Africa and to generate information to be used by policy-planners in education. SACMEQ has a membership of fifteen countries, including South Africa. Its most recent project, referred to in this affidavit as "SACMEQ III" or "the SACMEQ Report", commenced in 2007 and involved approximately 60 000 learners, 8 000 educators and 2 800 principals.
88. A full background to the SACMEQ Report is set out in the 'SACMEQ III Project Results: Pupil achievement levels in reading and mathematics', attached hereto as "**NS31**".
89. The portion of the SACMEQ Report addressing levels and trends in school systems is attached as "**NS32**". This document records learners' access to educational resources under the categories "essential classroom resources", "desirable physical resources" and "desirable human resources".
90. Textbooks are classified as an "essential classroom resource" on the basis that effective teaching and learning cannot take place without them; they provide a minimum standard of educational environment to which all learners are entitled. The category of essential classroom resources also includes teacher guides (reading), teacher guides (mathematics), dictionaries, exercise books, pens, pencils, rulers, writing boards, learner sitting and writing places, tables and chairs for teachers, libraries, radios and water. In respect of each of these essential classroom resources a minimal benchmark value of 85% has been set.

91. Table 3(a) in the SACMEQ Report indicates that only 36% of South African learners in grade 6 have their own textbooks for mathematics. The figures for Swaziland indicate that 100% of learners have their own mathematics textbook. Similarly, 62% of learners in Botswana, 56% of learners in Lesotho and 52% of learners in Mozambique have their own mathematics textbooks.
92. The results for reading textbooks are similar: 45% of South African grade 6 learners have their own reading textbooks. In Swaziland, 99% of learners have access to their own reading textbooks. In Botswana, Lesotho and Mozambique, 63%, 56% and 53% of learners respectively have their own reading textbooks. South Africa therefore falls significantly behind its neighbouring countries in the provision of textbooks.
93. The results in both reading and mathematics achievement are set out in the SACMEQ III Project results, referred to above and attached hereto as “**NS31**”.
94. These results have been analysed by Nic Spaul, an economist from Stellenbosch University. A copy of this analysis is attached as “**NS33**”. Spaul illustrates the clear vulnerability of learners from backgrounds of low socio-economic status, finding that when ranked by the performance of the wealthiest 25% of students, South Africa ranks fourth out of fifteen countries for reading. When ranked according to the poorest 25% of learners, however, South Africa ranks fourteenth. Mathematics rankings show a similar pattern: the wealthiest 25% of learners rank sixth out of fifteen, and the poorest 25% rank twelfth.
95. In considering the impact of textbook availability on performance, Spaul finds that learners with their own reading textbooks perform significantly better than learners who have to share their textbooks with more than one other learner. He links this to socio-economic status as follows:

Similar to the trends seen in grade repetition and homework frequency, richer students are far more likely to have access to reading textbooks than

*their poorer counterparts. Amongst the poorest 20% of students, 36.8% either do not have a reading-textbook or must share with two or more students. The figure for the richest 20% of students is only 15.3%. Given that the reading-performance gains to reading textbooks are only evident when students either have their own textbook or share with not more than one other, policy should focus on ensuring that no student need share with more than one student. **Given the well-defined, and relatively low costs of this policy option, it would seem that providing reading textbooks where they are in short supply – particularly in poor schools – is the low hanging fruit of the South African primary education system.** (Emphasis added)*

96. Similar conclusions have been reached by other economists, including Van der Berg ('How effective are poor schools? Poverty and educational outcomes in South Africa', CEGE Discussion Paper 69, January 2008), Van der Berg and Louw ('Unraveling the mystery: Understanding South African schooling outcomes in regional context', Paper to the Conference of the Centre for the Study of African Economies, Oxford University, 21 March 2006), Gustaffson ('Using the hierarchical linear model to understand school production in South Africa', Stellenbosch Economic Working Papers, January 2007) and Crouch and Mabogoane ('No magic bullets, just tracer bullets: The role of learning resources, social advantage, and education management in improving the performance of South African schools', *Social Dynamics*, 27: 1, 60 - 78). In order to avoid burdening this court with prolix papers I have not annexed these studies to my affidavit, but they will be made available to the Court upon request.
97. The consequences of the delay in the provision of textbooks should not be borne by the learners. We contend that the Department and the DBE bear an obligation to mitigate the harm that has been inflicted on the learners by their conduct. We therefore submit that the Department and DBE should immediately put in place a "catch-up" plan for, at least, the affected learners in Grade 10. In her affidavit, Wilson-Thomson observes that it may be difficult for the learners in the foundation phase to catch-up during the remainder of the year due to their

tender age. However, it is imperative that the Grade 10 learners are afforded the opportunity to catch-up.

98. "Catch-up" programmes are not unprecedented in the DBE. As Wilson-Thomson points out such programmes have been implemented with success during 2007 after protests by the South African Communist Party; during the 2010 FIFA World Cup and during 2010 after the public service strike.

X THE VIOLATION OF THE CONSTITUTIONAL RIGHTS OF LEARNERS

99. Section 29 of the Constitution guarantees the right of access to basic education. Unlike the socio-economic rights contained in sections 26 and 27 of the Constitution, the education right is not subject to the state's available resources. It is also not intended to be progressively realised. The right to a basic education is to be realised immediately, in order to enable learners to grow up to be informed and responsible citizens. As is clear from the research above, the provision of textbooks is a key component of the right to a basic education.
100. As well as being a right in itself, education is a vehicle for the realisation of a host of other constitutional rights, including dignity and equality. This is made clear by the manner in which education was used during the apartheid era to suppress the majority. Black learners during the apartheid era were offered a fraction of the resources spent on the education of white learners, and this has resulted in marked disadvantage and inequality of opportunity. It is clear that education is key in closing these gaps, enabling all learners to become active and responsible citizens and to contribute to their society.
101. Schools in Limpopo are situated in predominantly rural areas. Most learners come from backgrounds of low socio-economic status. The poor standard of education in these schools is to a large degree a remnant of apartheid, and for as long as these under-resourced schools are not provided with the resources they require the effects of apartheid and the inequality in education will be perpetuated.

102. In his analysis of SACMEQ III referred to above and attached as “NS33”, Spaul points out the strong link between education and wealth, arising from the legacy of apartheid. The poor receive a far inferior quality of education to their wealthier counterparts, and this perpetuates the divide. In addition, the legacy of apartheid means that, in reality, black learners generally receive a far inferior quality of education to their white counterparts. The failure to provide these learners what they require in order to address these inequalities constitutes unfair discrimination on the basis of race.
103. Education is also one of the recognised social determinants of health. There are clearly-established links between adequate education and good health, and these two rights are mutually reinforcing. Restricted access to an adequate basic education therefore has implications for the health of the learners and their surrounding communities.
104. I am advised that the legal submissions will address the argument that textbooks are an essential component of the right to a basic education.
105. The abject failure by the Respondents to ensure access of learners to basic learning tools and the dismissive approach to the applicants and the publishers is a violation of section 195 of the Constitution. Section 195 provides:

195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.*
- (b) Efficient, economic and effective use of resources must be promoted.*
- (c) Public administration must be development-oriented.*

- (d) *Services must be provided impartially, fairly, equitably and without bias.*
 - (e) *People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
 - (f) *Public administration must be accountable.*
 - (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*
 - (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
 - (i) *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*
- (2) *The above principles apply to-*
- (a) *administration in every sphere of government;*
 - (b) *organs of state; and*
 - (c) *public enterprises.*

106. Dr Karodia's report and the attached affidavit of Solly Tshitangano (annexure "NS34"), evidence the violation of section 195 by the Department and the DBE. Mr Tshitangano is the former Head of the Integrity Management Unit in the Office of the Premier in Mpumalanga where he was employed from September 2006 to June 2009. Mr Tshitangano joined the Department in June 2009 as Head of the Budget. In his affidavit to the Labour Court, Mr Tshitangano contends that he was unfairly dismissed for disclosing a wide range of irregularities in relation to tenders and financial management in the Department, specifically relating to the purchase of textbooks.

107. The irregular use of the Department's resources is also detailed by Dr Karodia, in his report to the Head of the Department dated 12 March 2012. A copy of this report is attached as **"NS20"**.
108. This report reflects abuse of resources by senior officials in the Department, including failure to comply with supply chain management policies. Resources are being misdirected and mismanaged, and Dr Karodia recommends that immediate steps be taken to address this.

XI RELIEF

109. The Applicants seek compliance by the Department and the DBE with their obligations under the Constitution and the Schools Act. Specifically, we seek an order:
- 109.1 Declaring that the failure by the Department and the DBE to provide textbooks to schools in Limpopo is a violation of the rights to a basic education, equality, dignity and of the Schools Act and section 195 of the Constitution;
- 109.2 Directing the Department, alternatively the DBE, to provide textbooks for Grades R,1,2,3 and 10 on an urgent basis, and by no later than 31 May 2012 to Hanyani Thomo, Lutandale and all other schools in Limpopo which have not yet received their textbooks;
- 109.3 Directing the Department, alternatively the DBE, to immediately develop a "catch-up" plan for at least the affected Grade 10 learners in Limpopo. Such a plan should provide for additional classes either after school hours during the week or on Saturdays until the lost curriculum is covered;

- 109.4 Directing the Department, alternatively, the DBE to lodge a copy of this “catch-up” plan with this Honourable Court and the Applicants within one week of the date of the order; and
- 109.5 Granting leave to the Applicants to approach the above Honourable Court on the same papers, supplemented as the circumstances may require, for further relief.

XII COSTS

110. This matter has been brought by the Applicants in the public interest as a measure to ensure that schools throughout Limpopo receive the textbooks ordered by them. This will ensure proper teaching and learning can take place in all of the schools for the remainder of the 2012 academic year.
111. SECTION27 has made an effort to engage with the Department and the DBE to have this matter resolved without resorting to litigation. Despite undertakings to have the matter resolved, however, learners throughout Limpopo remain without textbooks. It has therefore become necessary for the Applicants to approach this Court for an order directing the Respondents to discharge their constitutional and statutory obligations.
112. On this basis, the Applicants submit that the Respondents should be directed to pay the Applicants’ costs in bringing this application.

CONCLUSION

113. I submit that the failure by the Department and the DBE to provide prescribed textbooks to learners across Limpopo is in breach of their constitutional and statutory obligations. This failure is a continuing violation of the rights to basic education, dignity and equality as well as section 195 of the Constitution. It is also

in breach of the obligations arising from the Schools Act and the Delivery Agreement.

114. The Applicants accordingly pray for the relief as set out in the Notice of Motion to which this affidavit is attached.

DEPONENT

SIGNED AND SWORN BEFORE ME AT _____ ON THIS THE ___ DAY OF _____ 2012, THE DEPONENT HAVING ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT SHE HAS NO OBJECTION TO TAKING THE OATH AND THAT SHE CONSIDERS THE SAME AS BINDING ON HER CONSCIENCE.

COMMISSIONER OF OATHS