

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

**CASE NUMBER: 24565/12**

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:  
LIMPOPO DEPARTMENT OF EDUCATION**

Second Respondent

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**APPLICANTS' HEADS OF ARGUMENT**

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**I INTRODUCTION**

1. Since the beginning of the year the Limpopo Department of Education ("the Department") has not provided textbooks to schools in Limpopo. Nor has the Department mediated such failure by putting in place any mechanisms to ensure that there is a catch-up plan to assist learners in the meantime.
2. Faced with several appeals by the Applicants for the delivery of textbooks and the implementation of a catch-up plan to close gaps in the syllabus caused by the late delivery of textbooks, the Department has raised several excuses for not delivering textbooks immediately.

3. These are the mismanagement of funds; tender irregularities and the need to place Limpopo under national administration in terms of section 100(1)(b) of the Constitution.

**Answering Affidavit, pp 451 – 452, paras 3.1 – 3.2**

4. While these issues raised by the Respondents are at best explanations for their failure to comply with their constitutional and statutory obligations, they are not excuses; they do not absolve the Department or the Department of Basic Education (“the DBE”) from acting timeously in resolving these challenges.
5. More surprisingly, the Department feels no responsibility to put in place as a matter of urgency, a clear catch-up plan while it deals with the practical difficulties of service providers and the delivery of textbooks to all schools. For various reasons it argues such a plan may not be necessary and describes such a plan as being “*a monumental waste of time and limited resources*”.

**Answering Affidavit, pp 453 – 454, para 4.4**

6. Instead the Respondents place the responsibility on each of the 1,371 schools which they say offer schooling from Grades 8 – 12 to seek “*requisite help, if any, required from the Provincial Department to resolve those problems*”.

**Answering Affidavit, p 452, para 4.1**

**Answering Affidavit, p 454, para 4.5.1**

7. Despite this, the Department does not acknowledge the importance of textbooks in learner performance. It deems textbooks as complementary to the teaching and learning process despite various documents and reports written by the Department and the DBE stating the opposite. The Department has undertaken to deliver these by “not later than 15 June” – a few days before the end of term and after the completion of mid-year exams.

**Answering Affidavit, p 453, para 4.4.2**

**Founding Affidavit, pp 135 – 137, annexure “NS24”**

**Founding Affidavit, pp 138 – 141, annexure “NS25”**

**Founding Affidavit, pp 142 – 148, annexure “NS26”**

**Founding Affidavit, pp 149 – 151, annexure ‘NS27”**

**Founding Affidavit, pp 167 – 170, annexure “NS29”**

**Founding Affidavit, pp 171 – 175, annexure “NS30”**

**Answering Affidavit, pp 465 – 467, annexure “C”**

8. In essence, therefore, the central remaining dispute in this application concerns the refusal by the Department to put in place a catch-up plan to deal with what is obviously a violation of a constitutionally-enshrined right to a basic education. While the dates proposed for the delivery of textbooks may well be what they consider the soonest and most practical, the reasons given by the Respondents are not sufficient to justify why a catch-up plan cannot and should not be put in place.

**Answering Affidavit, pp 453 – 454, para 4.4**

**Replying Affidavit, pp 476 – 478, paras 36 – 45**

9. Accordingly, this is an application by SECTION27, Hanyani Thomo Secondary School (“Hanyani Thomo”) and Tondani Lydia Masiphephethu challenging the Department’s attitude in this regard and for an order in the following terms:

- 9.1. Declaring that the failure by the Department and the Department of Basic Education (“the DBE”) to provide textbooks to schools in Limpopo is a violation of the rights to a basic education, equality, dignity and the South African Schools Act 84 of 1996 (“Schools Act”) and section 195 of the Constitution;

- 9.2. 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 Secondary School (“Hanyani Thomo”), Lutandale Primary School (“Lutandale”) and all other schools in Limpopo which have not yet received their textbooks;

- 9.3. 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; and

9.4. Directing the Department, alternatively the DBE, to lodge a copy of this “catch-up” plan with this Court and the Applicants within one week of the date of the order.

10. The Department and the DBE bear an obligation to ensure that learner teacher support materials are provided to schools timeously. It is common cause that to date, textbooks for the 2012 academic year have not been provided to schools in Limpopo. Schools throughout Limpopo have complied with their procedural obligations in ordering textbooks. The textbooks should have been delivered in December 2011 or, at the latest, January 2012. Despite this, almost halfway into the academic year, no orders for textbooks have been placed.

**Founding Affidavit, pp 6 – 7, paras 5 – 6**

**Founding Affidavit, p 9, para 11**

**Answering Affidavit, pp 465 – 467, annexure C**

11. The Department was placed under administration in terms of section 100(1)(b) of the Constitution on 5 December 2011. We submit that this should have had no impact on the timeous delivery of textbooks to schools throughout Limpopo. Indeed, section 100(1)(b) of the Constitution states that the object of such administration is to “maintain essential national standard or meet established minimum standards for the rendering of a service.” Orders for textbooks should have been placed in November 2011, before the section 100(1)(b) intervention. Given that these orders had not been placed by the time the DBE took over from the Department, the DBE was required to place orders for textbooks immediately to ensure minimal interruption in the Department’s obligations. Neither the Department nor the DBE has yet placed textbook orders with publishers. Therefore, neither the Department nor the DBE has acted in compliance with its constitutional and statutory obligations.

**Founding Affidavit, pp 11 – 12, para 22**

**Answering Affidavit, p 451, para 3.1 – 3.2**

12. As a result of these failures, learners in Grades R, 1, 2, 3 and 10 throughout Limpopo have been without textbooks containing their new syllabi for almost half of the academic year. They have not had access to the support materials designed specifically to cover their syllabi for

each school subject. There are therefore gaps in these learners' syllabi which need to be closed as part of the discharge of the obligations of the Department and the DBE.

13. In regard to this dispute the submissions of the Applicants may be summarised as follows:

13.1. There can be no doubt that the issue of textbooks and/or a catch-up plan are urgent. While the urgency of the case is disputed by the Respondents they do not substantiate their bald denial of urgency, save to undermine the Applicants' attempts to engage with the Respondents and to resolve the matter without resorting to litigation.

**Founding Affidavit, pp 12 – 13, paras 23 – 28**

**Answering Affidavit, pp 455 – 456, para 5**

**Replying Affidavit, pp 478 – 479, paras 49 – 53**

13.2. The Department has offered unsatisfactory reasons – that do not live up to its obligations – why it should not or cannot put in place a catch-up plan. Each day that passes is a perpetuation of a violation of the right of access to basic education.

**Answering Affidavit, pp 452 – 455, para 4**

**Replying Affidavit, pp 476 – 478, paras 36 – 48**

13.3. Having regard to section 29 of the Constitution, which guarantees the right of access to basic education, the Department's failure to deliver textbooks for half of the academic year is clearly an unlawful violation of a constitutionally-enshrined right.

13.4. The failure by the Department constitutes an added burden to the already disadvantaged learners, who are situated in communities of low socio-economic status. Accordingly, the Department's conduct in this regard constitutes a perpetuation of historical disadvantage.

**Founding Affidavit, pp 33 – 34, para 101**

- 13.5. Since education is a vehicle for the realisation of many other rights, failure to deliver textbooks and a catch-up plan has a much deeper effect on the lives of learners and their capacity to become active and responsible citizens.
- 13.6. In the light of all the above it will be argued that the application should succeed and that the Department cannot be allowed to undermine the very object for which it was established.
14. From the answering affidavit and from correspondence with the Respondents, it is clear that the following facts are common cause:
- 14.1. The DBE became aware on at least 5 December 2011 that textbooks for the 2012 academic year had not been ordered. This was brought to the DBE's attention by the Publishers Association of South Africa ("PASA") in a letter addressed to the Director-General of the DBE.

**Founding Affidavit, pp 92 – 93, annexure "NS12"**

**Answering Affidavit, p 451, para 3.1**

- 14.2. Firm orders for textbooks have still not been placed with publishers.

**Founding Affidavit, pp 89 – 91, annexure "NS11"**

**Answering Affidavit, pp 465 – 467, annexure "C"**

- 14.3. Textbooks are central to learner performance, and each learner should have his or her own textbook for each subject at school.

**Founding Affidavit, pp 138 – 141, annexure "NS25"**

**Founding Affidavit, pp 142 – 148, annexure "NS26"**

**Founding Affidavit, pp 149 – 151, annexure "NS27"**

**Founding Affidavit, pp 152 – 166, annexure "NS28"**

**Founding Affidavit, pp 167 – 170, annexure "NS29"**

**Founding Affidavit, pp 171 – 175, annexure "NS30"**

- 14.4. The failure by the Department and the DBE to ensure the timeous procurement and delivery of textbooks is a direct and serious violation of the right to a basic education.

**Replying Affidavit, pp 489 – 490, annexure “NSR3”**

15. What is disputed is that:

- 15.1. The issue of non-delivery of textbooks to schools throughout Limpopo is urgent.

**Founding Affidavit, pp 89 – 91, annexure “NS11”**

**Answering affidavit, p 453, para 4.4**

- 15.2. A catch up programme, devised and directed by the DBE, is necessary to remedy the harm caused by the denial of text books to learners for half a year.

**Answering Affidavit, pp 452 – 455, para 4**

16. Based on the above common cause facts, it is apparent that the primary issues to be resolved by this Court are (a) whether the Department, alternatively the DBE, has violated rights to basic education, equality, dignity, the South African Schools Act and section 195 of the Constitution and (b) the appropriate relief to be granted to the Applicants in the circumstances. The Court is also asked to grant the relief on an urgent basis.

## **II BRIEF SUMMARY OF THE FACTS**

17. Much of the answering affidavit delivered by the Respondents constitutes a bald denial of the allegations made in the Applicants' founding affidavit. As such, these allegations are taken not to have been refuted by the Respondents.

***Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (SCA)***

18. In line with the Department's policies on the procurement of textbooks, schools throughout Limpopo selected their required textbooks from the national catalogue and completed and

submitted requisition forms to the relevant district offices of the Department during November 2011. The textbooks should have been delivered in December 2011 or early January 2012.

**Hlongwane Affidavit, pp 378 – 380, paras 6 – 8**

**Hlongwane Affidavit, pp 382 – 400, annexure “MMH1”**

19. On 5 December 2011 textbook orders had still not been placed with publishers. PASA followed up with the Department on 5 December 2011, 14 December 2011 and 15 December 2011. No written response was received from the Department.

**Wafawarowa Affidavit, pp 433 – 434, paras 5 – 8**

**Wafawarowa Affidavit, p 437, annexure “BW1”**

**Wafawarowa Affidavit, pp 438 – 439, annexure “BW2”**

**Wafawarowa Affidavit, p 440, annexure “BW3”**

20. The academic year began on 18 January 2012. On this date, textbooks had still not been delivered to schools in the province. No communication had been received from the Department or the DBE as to what was causing the delay or when textbooks were expected to be delivered.

21. On 28 February 2012 SECTION27 addressed a letter to the Department and the DBE recording its concerns about the lack of textbooks and requesting an explanation for the delay and an indication as to when textbooks would be delivered. No response to this letter was received.

**Founding Affidavit, p 15, para 33**

**Founding Affidavit, pp 74 – 81, annexure “NS7”**

**Answering affidavit, p 456, para 5.6**

22. On 14 March 2012 representatives from SECTION27 met with Dr Anis Karodia, the Head of the Intervention Team in the Department. Dr Karodia indicated that the delay in the delivery of textbooks to all schools in Limpopo was being addressed and that textbooks would be delivered by mid-April 2012.

**Founding Affidavit, pp 15 – 16, para 35**

23. The Department and the DBE have made numerous undertakings to deliver textbooks to schools across Limpopo. None of these undertakings has been honoured. These include the following undertakings:

23.1. On 20 January 2012, an undertaking was made that the textbooks would be delivered “as late as” March 2012.

**Founding Affidavit, p 15, para 31.2**

**Founding Affidavit, pp 72 – 73, annexure “NS6”**

23.2. On 14 March 2012, Dr Karodia made an undertaking that textbooks would be delivered by mid-April 2012.

**Founding Affidavit, pp 15 – 16, para 35**

24. Despite these clear undertakings, textbooks have still not been ordered or delivered.

25. On 20 April 2012, the Applicants’ attorneys addressed a letter of demand to the Department and the DBE. They demanded an urgent undertaking by 24 April 2012 to deliver textbooks by no later than 2 May 2012, failing which the Applicants would institute these proceedings. When these demands were not met, on 2 May 2012 a follow-up letter was addressed to the Department and the DBE. Despite this correspondence, no orders for textbooks have been placed by the Department or the DBE.

**Founding affidavit, pp 98 – 103, annexure “NS16”**

**Founding affidavit, pp 104 – 111, annexure “NS17”**

26. On 26 April 2012, Dr Karodia addressed a letter to the textbook publishers, initiating a bidding process for the procurement of textbooks. While the letter indicates a step towards the resolution of the case, it does not demonstrate any urgency on the part of the Department or the DBE. On the contrary, the process proposed by Dr Karodia includes numerous unnecessary delays, including an unprecedented bidding process, requiring publishers to

collect orders from Polokwane and requiring delivery of textbooks to a central venue in the province.

**Founding Affidavit, pp 19 – 20, paras 50 – 51**

**Founding Affidavit, p 97, annexure “NS15”**

**Wafawarowa Affidavit, pp 434 – 435, paras 12 – 17**

27. Based on the numerous delays caused by the Department and the DBE and the history of undertakings which have not been honoured, the Applicants were forced to approach this Court for an order requiring the Department and the DBE to comply with their obligations.

### **III URGENCY**

28. The failure by the Department and the DBE to discharge their statutory and constitutional obligations is a continued and ongoing violation of the rights to a basic education, equality and dignity, as well as the principles governing public administration and the Schools Act.

29. Effective teaching and learning cannot take place without textbooks. In the absence of sufficient learning materials, learners are unable to do homework, prepare for examinations or consolidate what they learn during class. Learners without access to textbooks do not develop literacy and numeracy skills, which skills are vital for the acquisition of further knowledge in higher grades. Teachers who cannot access textbooks have insufficient materials to prepare their lessons and to ensure that the syllabus is covered adequately.

**Founding Affidavit, p 12, paras 23 – 24**

30. The textbooks should have been delivered to schools before the start of the academic year on 18 January 2012. Almost halfway through the academic year, prescribed support materials have still not been made available to learners and teachers.

31. Textbooks are a central component of the right to a basic education. The textbooks for the CAPS syllabus in particular are designed to be the primary source of information for learners, to minimise problems arising from teacher interpretation and transmission of content. Textbooks are essential particularly where teachers have inadequate content knowledge. The

significance of content knowledge increases in higher grades, including Grade 10, where it is a clear factor contributing to learner underperformance. Textbooks are an essential measure to control this.

**Wilson-Thomson Affidavit, p 418, paras 5 – 6**

**Wilson-Thomson Affidavit, p 419, para 8**

32. Contrary to its own published statements and policies the centrality of textbooks appears to be disputed by the Respondents, who suggest that learners and teachers can get by without them, and that the matter is therefore not urgent.

**Answering Affidavit, p 453, para 4.4**

33. Indeed, the Respondents allege that this is a “self-created urgency”, exaggerated and inflated and not even emerging from schools themselves.

**Answering Affidavit, p 455, para 5.**

34. This is disputed by the Applicants. These proceedings were brought because the Applicants’ attempts at engaging with the Respondents were unsuccessful. While the Applicants did what they could to resolve this matter without resorting to litigation, including giving the Respondents an opportunity to comply with their undertakings, they were ultimately forced to approach the Court for relief.

**Founding Affidavit, p 21, para 58**

**Replying Affidavit, pp 478 – 479, paras 49 – 53**

35. The failure by the Department and the DBE to provide textbooks is a serious violation of the right to a basic education, as well as the rights to equality and dignity. It is also a breach of the obligations provided for in the Schools Act and section 195 of the Constitution. The nature of these breaches is such that they are continuing and ongoing, and their detrimental effects on learners accumulate with each day that the breaches continue. Thus urgency increases with the passage of time, rather than the opposite as the Respondents aver.

36. In particular, for each day that learners do not have access to the prescribed textbooks for their school subjects, their ability to meet the relevant assessment standards is further hindered.
37. The impact of this on Foundation Phase learners in Grades R, 1, 2 and 3 is that they lose out on the essential foundations of literacy and numeracy, which underpin all of their school learning in subsequent grades.

**Wilson-Thomson Affidavit, p 418, para 7**

38. We submit that in cases of continued and ongoing rights violations, sufficient grounds exist to establish urgency and to require that these violations be remedied as soon as practically possible.

***Prinsloo v RCP Media Ltd t/a Rapport 2003 (4) SA 456 (T) at 462G – 463C***  
***Scott v Hough 2007 (3) SA 425 (O) at 435F – G***

39. Given the severity of the rights of thousands of learners across Limpopo, and the increased seriousness of these violations for every day that textbooks are not available to learners, the Applicants have established urgency and this matter should not be left to be heard in the ordinary course.
40. We accordingly pray that the matter be heard on an urgent basis.

**IV OBLIGATIONS OF THE STATE**

41. The continuing deep inequality in our educational system is a painful legacy of apartheid planning and racist resource allocation patterns. The history of such skewed educational development caused by apartheid is well-documented in several judgments of the Constitutional Court. The Department's conduct constitutes a perpetuation of the legacy of unequal education and the distorted resource allocation patterns. In particular, its failure to assume or accept the obligation to put in place a catch-up programme is simply insensitive to the plight of poor learners.

*Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC) at paras 45 – 46*

*See also Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) at para 7*

42. Section 29(1)(a) of the Constitution guarantees the right to a basic education. It provides in relevant part that:

**“(1) Everyone has the right-**  
**(a) to a basic education, including adult basic education; and**  
**(b) ...”**

43. In terms of Schedule 4 to the Constitution, basic education is an area of concurrent national and provincial competence. Both the DBE and the Department are responsible for the protection, respect, promotion and fulfilment of the right to a basic education.

44. An essential component of the right to a basic education is access to textbooks and other learner support materials. Textbooks play a vital role in student achievement. Without them, effective teaching and learning cannot take place.

**Founding Affidavit, pp 31 – 32, paras 94 – 96**

45. The obligations of the Department and the DBE in relation to the right to a basic education therefore include the provision of textbooks and other learner support materials.

46. Despite its statements to the contrary in paragraphs 4.4.1 to 4.4.3 of the Answering Affidavit, the Department has recognised the centrality of textbooks to basic education and to this end has set its own target of 100% access to textbooks by learners, meaning that each learner should have access to his or her own textbook for each school subject.

**Founding Affidavit, pp 27 – 27, paras 73 – 74**

**Founding Affidavit, pp 138 – 141, annexures “NS25”**

**Founding Affidavit, pp 142 – 148, annexure “NS26”**

47. A similar target has been set by the DBE, in its statement 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.”

**Founding Affidavit, p 27, para 76**

**Founding Affidavit, pp 149 – 151, annexure NS27**

48. The Delivery Agreement for the Basic Education Sector and the Action Plan to 2014 similarly prioritise access to textbooks and other high-quality learning materials, on the basis that shortages of these materials are “unacceptable”.

**Founding Affidavit, pp 27 – 28, paras 78 – 80**

**Founding Affidavit, pp 167 – 170, annexure “NS29”**

**Founding Affidavit, pp 171 – 175, annexure “NS30”**

49. Both the Department and the DBE have therefore clearly recognised the centrality of the provision of textbooks to their obligations arising from section 29(1)(a) of the Constitution. They have set themselves high standards with which they are to comply: both the Department and the DBE have bound themselves to provide one textbook for each learner in every relevant subject at school.

50. The Schools Act creates a distinction between two types of schools, namely “section 21 schools” and “non-section 21” schools. The school governing bodies of section 21 schools are allocated functions in terms of section 21(1) of the Schools Act, which provides as follows:

(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.*

51. Where no such allocation of functions is made, then a school will be classified as a non-section 21 school and the functions set out in section 21 remain to be discharged by the Department. Thus, the Department bears the obligation to purchase textbooks and other educational materials for all schools whose governing bodies have not been specifically allocated this function in terms of section 21 of the Schools Act. Non-section 21 schools are not empowered to procure textbooks directly from publishers; they must do so through the Department in accordance with its policies and procedures.

52. The procedure for the procurement and delivery of textbooks is centralised: textbooks are selected from a centralised national catalogue and orders are placed with publishers by the Department. There are no mechanisms in place for non-section 21 schools to order textbooks directly from the publishers should the Department fail to place orders.

**Founding Affidavit, pp 25 – 26, paras 69 – 70**

**Founding Affidavit, p 134, annexure “NS23”**

**Founding Affidavit, pp 135 – 137, annexure “NS24”**

53. On 5 December 2011, the Department was placed under administration in terms of section 100(1)(b) of the Constitution.

**Founding Affidavit, pp 69 – 70, annexure “NS4”**

54. In terms of this section, when a province fails to fulfil its statutory or constitutional obligations, the national government is empowered to intervene *“by taking appropriate steps to ensure the fulfilment of that obligation”* by assuming responsibility for the relevant obligation to:

- 54.1. maintain essential national standards or meet established minimum standards for the rendering of a service;
  - 54.2. maintain economic unity;
  - 54.3. maintain national security; or
  - 54.4. prevent that province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole.
55. In terms of the Government Gazette notice issued on 5 December 2011, the Minister assumed responsibility for all of the functions of the Department from the date of the notice until the termination of the intervention of the national executive.

**Founding Affidavit, pp 69 – 70, annexure “NS4”**

56. The Minister therefore became responsible for the maintenance of essential national standards for service delivery. Accordingly, for as long as the Department remains under administration, the obligation to provide textbooks, along with all other responsibilities ordinarily resting on the Department, falls with the DBE.
57. From the principles set out above it follows that:
- 57.1. Both the Department and the DBE are bound by the right to a basic education and must take steps to protect, respect, promote and fulfil this right;
  - 57.2. Textbooks are an essential component of the right to a basic education;
  - 57.3. The Department and the DBE, in addition to being bound by the Constitution to provide textbooks, have bound themselves to a target of one textbook per subject per learner, having recognised the importance of textbooks as essential classroom resources;
  - 57.4. If school governing bodies are not granted the power to procure their own textbooks, the obligation to procure and deliver textbooks rests on the Department; and

57.5. This obligation, together with the Department's other obligations, was assumed by the DBE on 5 December 2011 when the section 100(1)(b) intervention took effect.

## **V RELEVANT CONSTITUTIONAL PROVISIONS**

58. The failure by the Department and the DBE to provide textbooks to learners in Limpopo is in breach of the following constitutional provisions:

58.1. Section 29(1)(a), which guarantees the right to a basic education;

58.2. Section 9, which guarantees the right to equality;

58.3. Section 10, which guarantees the right to dignity; and

58.4. Section 195, which sets out the principles governing public administration.

59. While the socio-economic rights contained in sections 26 and 27 of the Constitution are "progressively realized" and "subject to the state's available resources", the right to a basic education is framed in absolute terms. The state has a duty to act immediately in order to give full effect to the right. The right is also not framed as a right **of access to** a basic education. Thus the duty of the state is not simply to remove barriers to basic education; the state must ensure that all of the components of a basic education are met. An argument by the state that it does not have the resources available to realize the right to a basic education does not obviate the duties imposed on the state.

**Mandla Seleokane: 'The right to education: Lessons from Grootboom' in *Law, Democracy and Development* Vol 7(1) – 2003**

60. In this regard, the Constitutional Court has held as follows:

*It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that*

*the right be "progressively realised within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible".*

**Governing Body of the Juma Masjid Primary School and another v Ahmed Asruff Essay N.O. and others (Centre for Child Law and another, amici curiae) 2011 (8) BCLR 761 (CC) at para 37**

61. The absolute nature of the right to a basic education arises in part from the fact that it lays a foundation for other fundamental rights. In this regard, the United Nations has described the right as follows:

*Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.*

**General Comment 13 on the right to education (Art. 13 of the International Covenant on Economic, Social and Cultural Rights) UN Document p 6**

62. In particular, the right to a basic education lays a foundation for the rights to dignity and equality. While the right in section 29(1)(a) is conferred on "everyone" it is clear from the relative allocation of resources to different schools in different areas that the right is not equally enjoyed by all learners throughout South Africa. Public schools in Limpopo are situated in predominantly rural areas. Learners in Limpopo are particularly vulnerable. Many of them come from families of low socio-economic status, with high rates of unemployment. Spaul has

established a close link between socio-economic status and learner performance, as well as a relationship between rural settings and learner performance.

**Founding affidavit, pp 253 – 299, annexure “NS33”**

63. Arising from the complete failure by the Department and the DBE to ensure the procurement and delivery of textbooks for the 2012 academic year, it is obvious that learners in Limpopo do not have the same access to resources as their counterparts in other provinces. Thus the poor position of these already vulnerable learners is perpetuated by their lack of access to basic resources which would ensure adequate levels of schooling in line with those available to other learners throughout South Africa.
64. The violations by the Department and the DBE of the rights to equality and basic education in turn limit the learners’ rights to dignity, as guaranteed by section 10 of the Constitution.
65. Although the Respondents refer to massive *“mismanagement of funds”* and *“tender irregularities”* in the province the Department and the DBE have not at any stage raised the lack of resources as an explanation for their failure to provide textbooks. Dr Karodia has alluded to the fact that the Department has *“no money”*. He has not, however, provided further evidence to support this. Neither is there any explanation as to why it was necessary to procure *“the necessary funds from the National Treasury to buy and deliver the necessary study material for the schools.”*

**Founding Affidavit, pp 84 – 85, annexure “NS9”**

**Answering Affidavit, p 451, para 3.1**

**Answering Affidavit, p 452, para 3.2.3**

66. In any event, it is not sufficient for state departments merely to assert that they do not have sufficient resources to fulfill their constitutional obligations; they must provide evidence to support this assertion. Details of resource constraints are necessary in order for a court to assess the reasonableness of that state department’s conduct, and in order to hold that state department accountable.

***Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others 2005 (2) SA 359 (CC) at para 88***

67. Apart from a bald allegation of resource constraints made by Dr Karodia, no further evidence as to the resources available to the Department and the DBE in respect of these obligations has been made available.

68. Further, the facts of this case and the immediacy of the obligations of the Department and the DBE call for a more robust approach to the question of availability of resources. The Constitutional Court, in relation to the obligations of the State to provide access to adequate housing, stated the following:

*The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the city to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.*

***City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another 2012 (2) SA 104 (CC) at para 74***

69. Any resource constraints faced by the Department are of its own making. Learners in Limpopo should not be left to suffer the consequences of this.

70. The Respondents have not put up any evidence on justification of their breaches of sections 9, 10 and 29(1)(a). Accordingly, we do not deal with section 36 in these heads of argument.

71. In addition to their breaches of the constitutional rights of learners throughout Limpopo, the Respondents are also in breach of section 195 of the Constitution. According to this section, the following principles guide all 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.*

72. Both the report submitted by Dr Karodia and the affidavit deposed to by Mmbulahiseni Solly Tshitangano in the Labour Court provide clear evidence of breaches of section 195. These breaches include the following:

72.1. Resources have not been used in an efficient, economic and effective manner;

72.2. Neither the Department nor the DBE has conducted itself with the required ethical standards, or the required degrees of transparency and accountability; and

72.3. Timely, accessible and accurate information has not been provided.

**Founding Affidavit, pp 113 – 127, annexure “NS20”**

**Founding Affidavit, pp 300 – 375, annexure “NS34”**

## **VI RELIEF**

73. The substantive relief sought by the Applicants is threefold:

73.1. First, the Applicants seek a declarator that the failure by the Department and the DBE to provide textbooks to schools in Limpopo is a violation of their rights to a basic education, equality, dignity and the Schools Act, as well as a breach of section 195 of the Constitution;

73.2. Second, the Applicants seek an order 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 schools in Limpopo which have not yet received their textbooks for the 2012 academic year; and

73.3. Third, the Applicants seek an order directing the Department, alternatively the DBE to immediately develop a “catch-up” plan for at least the Grade 10 learners throughout Limpopo and to lodge a copy of this plan within one week of the date of the order of this Court.

74. The Applicants also seek leave to approach this Court on the same papers, supplemented as the circumstances may require, for further relief. In this regard we submit that this case requires close monitoring by this Court to ensure that the Respondents comply with any order made against them.

75. The importance of textbooks as a component of the right to a basic education has been established. It is on these grounds that we submit that the Department, alternatively the DBE, must be ordered to deliver textbooks to learners throughout Limpopo on an urgent basis. Our submissions on urgency set out above establish a case for delivery as soon as possible.
76. Learners at Hanyani Thomo commence their mid-year examinations on 4 June 2012. Schools throughout Limpopo similarly commence their mid-year examinations in late May or early June 2012. Mid-year examinations throughout Limpopo will be concluded at the end of the school term on 22 June 2012. We submit that given the fact that learners are scheduled to write mid-year tests and exams in early June 2012, the delivery of textbooks should take place no later than 31 May 2012.
77. The delivery of textbooks almost halfway into the school year will provide learners with the materials they require for the remainder of the academic year, and assist them to some degree in preparing for their mid-year tests and exams. This delivery is not, however, sufficient to ensure that the direct and severe violation of the learners' rights is adequately remedied. The Department and the DBE bear an obligation to ensure that the consequences of the delay in the delivery of textbooks caused by them are addressed adequately and appropriately and not left at the feet of thousands of learners.
78. The urgent delivery of textbooks must be implemented hand-in-hand with an appropriate "catch-up" plan to ensure that those gaps in the learners' education created by the failure by the Department and the DBE to comply with their obligations are closed and that the long-term impact of these failures is minimised.
79. This Court has the power under section 172(1)(b) of the Constitution to make any order that is just and equitable to remedy the rights violations arising from the Respondents' conduct. In this regard, courts may be required to fashion new remedies where existing traditional remedies do not provide sufficient redress. The relevant consideration is what steps are required to ensure the effective protection and enforcement of fundamental rights in the circumstances of each case.

***Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at para 19***

80. The Court is therefore empowered to order the Respondents to adopt and implement a “catch-up” plan if it is demonstrated that such a plan would remedy the gaps left in the learners’ syllabus arising from the failure by the Respondents to provide textbooks for almost half of the academic year.

81. Such a “catch-up” plan is not unprecedented. The disruptions in education caused by the 2010 public service strike and the 2010 FIFA World Cup were addressed through the arrangement of catch-up camps for learners as well as additional weekend classes.

**Wilson-Thomson Affidavit, p 420, para 14**

**Answering Affidavit, p 460, para 11.2**

82. The plans out in place were a resounding success: the national pass rate for matric learners rose by a significant 7.2% in 2010, to a level of 67.8%. On the Minister’s own assessment of the results, learner success in 2010 was dependent on appropriate catch-up plans being put in place to manage the disruptions caused by the public service strike and the World Cup.

**Wilson-Thomson Affidavit, p 420, paras 15 – 16**

83. School holidays in Limpopo commence on 23 June 2012 and will run until 15 July 2012. We submit that this is an ideal opportunity to run a school holiday catch-up programme for learners.

84. The Applicants seek an order directing the Respondents to lodge a copy of the “catch-up” plan with this Court and with the Applicants within one week of the date of the court order. This plan must include provision for the Department and the DBE to report weekly to this Court and to the Applicants the extent of their compliance with the court order and the progress of the catch-up plan, until such time as the gaps in the learners’ syllabus caused by the lack of textbooks have been closed and the violations of the learners’ rights adequately remedied. Such a supervisory order falls within the powers of this Court to grant appropriate relief under section 172 of the Constitution.

***Minister of Health and others v Treatment Action Campaign and others (No 2)*  
2002 (5) SA 721 (CC) at paras 104 – 107**

***Sibiya and others v Director of Public Prosecutions, Johannesburg, and others 2005 (5) SA 315 (CC) at para 62***

85. In addition, the “catch-up” plan proposed by the Applicants must, in order to close gaps left in the syllabus caused by a lack of textbooks, be communicated effectively and appropriately to the relevant participants. The “catch-up” plan must be communicated to participating schools, learners and parents. It must also be communicated to teachers and other employees of the Respondents who will be responsible for its implementation.

***Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 (5) SA 721 (CC) at para 123***

86. Neither the Department nor the DBE has contended that they have insufficient resources to comply with the order prayed for by the Applicants. We submit that both delivery and catch-up are fundamental to an appropriate remedy to address the rights violations by the Department and the DBE.

**VII COSTS**

87. The Applicants ask for an order in terms of prayers 1 to 8 of their notice of motion, including that the Respondents be ordered jointly and severally to pay the Applicants’ costs including the costs of two counsel.

88. This application has been brought in the public interest, in order to advance the fundamental constitutional rights of learners throughout Limpopo. The relief prayed for by the Applicants will, if granted, have a positive impact on the rights of learners throughout the province, and not only those cited in this application.

89. The Applicants seek to hold the Respondents accountable and to ensure that they discharge their constitutional and statutory obligations. In cases where private parties are forced to initiate court proceedings against State Departments to enforce their constitutional obligations, those private parties should not have to bear the costs of bringing such claims, unless exceptional circumstances exist to justify this.

90. This principle has been asserted by the Constitutional Court as follows:

*The rationale for this general rule is threefold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door.*

***Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 (CC) at para 23***

***See also Bothma v Els and others 2010 (2) SA 622 (CC) at paras 94 – 97***

91. This application has been brought out of necessity. The Applicants attempted to resolve this matter out of court and relied on numerous undertakings by the Respondents which were never honoured. When the problem of lack of textbooks arose, the Department and the DBE undertook publicly to deliver textbooks by the end of March 2012 at the latest; this was never fulfilled. On 14 March 2012, Dr Karodia confirmed that textbooks would be delivered by mid-April 2012; this was never done. Despite numerous follow-ups by PASA dating back to 5 December 2011, the Department and the DBE have yet to place orders with publishers.

**Founding Affidavit, p 15, para 31.2**

**Founding Affidavit, pp 72 – 73, annexure “NS6”**

**Founding Affidavit, pp 15 – 16, para 35**

**Founding Affidavit, p 19, para 47**

**Founding Affidavit, pp 92 – 93, annexure “NS12”**

**Founding Affidavit, pp 94 – 95, annexure “NS13”**

**Founding Affidavit, p 96, annexure “NS14”**

92. Given the nature and urgency of the case, and repeated undertakings by the Respondents which have not been honoured, it is clear that the Applicants had no other option but to approach this Court for relief.
93. We submit that if this application succeeds, the Respondents should bear the costs, including the costs of two counsel.
94. Should the application be dismissed, we submit that the circumstances are such that no costs order should be made.

**MUZI SIKHAKHANE**

**ADILA HASSIM**

**Chambers, Sandton**

**15 May 2012**