

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

**CASE NUMBER: 24565/2012**

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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**AFFIDAVIT**

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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, 6<sup>th</sup> floor Braamfontein Centre, Braamfontein, Johannesburg.
2. I deposed to the founding and replying affidavits filed by the Applicants in the urgent application launched under the above case number on 4 May 2012 (“the main application”), which culminated in an order granted by Kollapen J on 17 May 2012 (“the first court order”).
3. I am duly authorised to depose to this affidavit. The resolution authorizing SECTION27 to litigate against the National Department of Basic Education (“the DBE”) and the Limpopo Department of Education (“the Provincial Department”) was attached as “**NS1**” to the founding affidavit in the main application.
4. 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. To the extent that I describe facts that are not within my personal knowledge, I attach the confirmatory affidavits of those persons who are able to confirm these facts.

## **I NATURE OF THIS APPLICATION**

5. This application is twofold:
  - 5.1 First, it seeks to enforce the first court order, which dealt with the failure by the Respondents to procure and deliver textbooks to schools throughout the Limpopo Province.
  - 5.2 Secondly, it seeks to extend the first court order and to require the Respondents to develop a plan to enable learners in the foundation phase (Grades 1, 2 and 3)

to 'catch-up' on the gaps in their syllabus caused by the fact that they did not have textbooks for over half of the academic year.

6. The applicants launched the main application on 4 May 2012 for an order declaring the failure by the Respondents to procure and deliver textbooks to be a violation of the right to basic education, and requiring the Respondents to take specified steps to remedy this violation.
7. Kollapen J, in paragraph 2 of the first court order, directed the Second Respondent, alternatively the First Respondent, *inter alia*, to deliver textbooks to learners in Grades R, 1, 2, 3 and 10 on an urgent basis, commencing on 31 May 2012 and concluding by no later than 15 June 2012.
8. The first court order also directed the Respondents to develop a catch-up/remedial plan for at least the affected Grade 10 learners in Limpopo, and to lodge a copy of this plan with the Court and the Applicants by no later than 8 June 2012. The first court order set out the requirements with which the catch-up plan must comply. These will be dealt with in more detail later.
9. A copy of the first court order is attached as "**NNS1**".
10. In essence, the need for re-enrolling this matter arises from the failure of the Respondents to comply with the first court order in the following respects:
  - 10.1 Delivery of textbooks to Grades R, 1, 2, 3 and 10 is still not complete; and
  - 10.2 The development and content of the catch-up plan does not comply with the first court order.
11. As we set out below, we chose to engage with the Respondents, particularly the First Respondent, in order to seek progress in the compliance with the first court order. We did so in order to avoid further legal proceedings, and in the hope that a

co-operative approach would result in a speedier resolution of the dispute. We now find ourselves unable to rely on the Respondents' undertakings, and have no option but to approach this Court for relief.

12. The purpose of the catch-up plan was to assist learners to close the gaps in their curriculum arising from the Respondents' failure to provide them with textbooks for the first half of the academic year. The intention was that the programme would be implemented throughout the second half of the academic year, to ensure that learners were not unduly prejudiced by this failure and to place them in the same position they would have been had textbooks been provided to learners at the commencement of the academic year.
13. The catch-up plan sought by the Applicants was sought for Grade 10 learners only. The reason for this was that due to the lengthy delays in textbook delivery, it was believed unlikely that learners in the foundation phase would benefit meaningfully from a catch-up plan covering their basic numeracy and literacy skills in the short period of six months. We therefore did not pursue a catch-up plan for learners in the foundation phase in the main application. In this application, we request the Court to order the Respondents to develop a reasonable plan in order to 'catch-up' the learners in the foundation phase.
14. The Respondents lodged their catch-up plan for Grade 10 learners with the Court and the Applicants on 8 June 2012 ("the first catch-up plan"). The Applicants are of the view that the first catch-up plan is not in compliance with the first court order and does not satisfactorily address the gaps in the learners' curricula caused by the failure of the Respondents to deliver textbooks for half of the academic year:
  - 14.1 It does not provide for extra tuition time for learners and content knowledge support for teachers.
  - 14.2 The provision of study guides as envisaged in the first catch-up plan does not on its own address the prejudice suffered by the learners. These concerns were made known to the Respondents at a meeting on 21 June 2012.

15. The Respondents subsequently provided the First Applicant – but not the Court and the Second and Third Applicants – with a document they described as the “new catch-up plan”. It is not clear whether this document is intended to replace the first catch-up plan. In any event, the Applicants submit that the new catch-up plan also falls short of what was required by this Court.
16. The Applicants therefore submit that no effective meaningful catch-up plan has been put in place.
17. The Respondents have also failed to comply with paragraph 2 of the first court order. On the date of the filing of this application, while the delivery of textbooks to learners in Grades R, 1, 2, 3 and 10 has been undertaken to many schools, it has not been completed. The attached supporting affidavits confirm that the following schools are still waiting for delivery of their textbooks to be completed:
  - 17.1 Hanyani Thomo Secondary School (“Hanyani Thomo”) – the Court is referred to the supporting affidavit of Gezani Eric Rikhotso, the Chairperson of the School Governing Body, which will be attached. As is clear from this affidavit, Hanyani Thomo is still awaiting textbooks for Grade 10 learners in Computer Application and Technology, Mathematics, Physical Science and Visual Arts. Hanyani Thomo has also not received the correct quantity of textbooks for Life Science, Afrikaans and Business Studies.
  - 17.2 Lutandale Primary School (“Lutandale”) – the Court is referred to the supporting affidavit of Tondani Lydia Masiphephethu, a parent of two learners and the Chairperson of the School Governing Body of Lutandale. Lutandale has received no textbooks at all for its foundation phase learners.
  - 17.3 Esther Maleka Comprehensive Secondary School (“Esther Maleka”) – the Court is referred to the supporting affidavit of Ephraim Nalamotse Chiloane, the Chairperson of the School Governing Body, which will be attached. Esther Maleka

has not received textbooks for Grade 10 learners in Mathematics and Physical Science. Esther Maleka has also not received its setworks for Grade 10 learners.

- 17.4 Humbelani Secondary School (“Humbelani”) – the Court is referred to the supporting affidavit of Nempheni Nuisiwa, the Chairperson of the School Governing Body, which will be attached. As is clear from the supporting affidavit, Humbelani is still awaiting textbooks for Grade 10 learners in Life Orientation, Mathematics, Physical Science, History, Accounting, Consumer Studies and Life Sciences. Humbelani has also not received the correct quantity of textbooks for Economics, Geography, Agricultural Science, Mathematics Literacy, English and Tshivenda.
- 17.5 Jaji Secondary School (“Jaji”) – the Court is referred to the supporting affidavit of Rhulani Constance Mphatudi, a parent of a learner at Jaji, which will be attached. Jaji has received no textbooks for its Grade 10 learners for Physical Science and Life Orientation. Jaji has also not received the correct quantity of textbooks for Life Science.
- 17.6 Julian Muller Primary School (“Julian Muller”) – the Court is referred to the supporting affidavit of Gerrie Nel, the Chairperson of the School Governing Body, which will be attached. Julian Muller has still not received textbooks for Life Skills, Mathematics and languages for any of its foundation phase learners.
- 17.7 Marble Hall Primary School (“Marble Hall Primary”) – the Court is referred to the supporting affidavit of Phillipus Jacobus Christoffel Coetzer, the Principal of Marble Hall Primary, which will be attached. Marble Hall Primary has still not received English reading textbooks and textbooks for Life Skills and Numeracy for any learners in the foundation phase. Marble Hall Primary has also not received its reading packs for Grade R learners.
- 17.8 Mashiyane Primary School (“Mashiyane”) – the Court is referred to the supporting affidavit of Isaac Thimedi Theledi, the Head of Department at Mashiyane, which will be attached. Mashiyane has received only one Big Book

for each grade. It has received no other textbooks for its learners in the foundation phase.

- 17.9 Ritlhavile Secondary School (“Ritlhavile”) – the Court is referred to the supporting affidavit of Khaizeni Baloyi the Chairperson of the School Governing Body, which will be attached. Ritlhavile has still not received textbooks for Grade 10 learners for Mathematics and Physical Science and teacher guides in Mathematics, Physical Science, Agricultural Science and Geography.
- 17.10 Tshianane Secondary School (“Tshianane”) – the Court is referred to the supporting affidavit of David Makabane, the Chairperson of the School Governing Body, which will be attached. Tshianane has not received textbooks for its Grade 10 learners for Life Orientation and Life Science.
18. According to the answering affidavit filed by the Respondents in the main application, there are 5 297 schools in Limpopo. The Applicants do not know exactly which schools have received their textbooks and which schools are still waiting. The Respondents have not taken any steps to ascertain which schools are still awaiting full delivery of their textbooks. It is clear, however, that there are still schools in Limpopo which have still received no textbooks at all. It is also not clear whether the procurement process for 2013 has commenced, or even whether there are any funds available for this procurement.
19. At the date of signing this affidavit, the third school term is almost complete. It is unlikely that the prejudice suffered by learners throughout Limpopo will be addressed even if textbooks for this year are delivered immediately and an effective catch-up plan is put in place to support learners for the remainder of the academic year. Learners in the foundation phase will be required to prepare for the Annual National Assessments (“ANAs”) and the end-of-year examinations (for all grades) within an unrealistic time period. They would not have had the necessary support materials to prepare for these assessments. They will be progressing to more advanced grades next year, and their curriculum will depend on them having

mastered certain skills in 2012. They cannot master these skills in the remaining weeks of 2012. This is not what was envisaged in the first court order.

20. The Applicants accordingly submit that it is necessary to extend the support of learners throughout Limpopo into the 2013 academic year, to ensure that learners are given an opportunity of meaningful catch-up of the gaps in their curriculum from the 2012 academic year. In this application, the Applicants seek an order directing the respondents to develop a plan in respect of learners in the foundation phase as well, so that they will also catch up on the gaps in their curricula.
21. In addition, the Curriculum and Assessment Policy Statements (“CAPS”) curriculum will be implemented for learners in Grades 4, 5, 6 and 11 in 2013. This means that new textbooks and workbooks are required for these grades. It is essential that the failures to procure and deliver textbooks for those learners who started the CAPS curriculum in 2012 are not repeated next year. Given the history of this matter, the Applicants are of the view that intervention is needed in order to avoid a repeat of the textbooks crisis in 2013 and to ensure that full textbook delivery is achieved by the first day of school next year.
22. The main application was brought against the Minister of Basic Education and the Member of the Executive Council in the Limpopo Department of Education. This was due to the direct responsibility of the DBE over the Provincial Department arising from the intervention in the Provincial Department in terms of section 100(1)(b) of the Constitution. Both of these Respondents have been cited in this application. However, I am advised that the recent (as yet unreported) decision of the Eastern Cape High Court in *Centre for Child Law and others v Minister of Basic Education and others (National Association of School Governing Bodies, amicus curiae)* clarified the principle that in circumstances where section 100(1)(b) is invoked, the appropriate member of the national executive assumes direct responsibility for the obligations of the provincial executive. Accordingly, the relief in this application is sought against the Minister as the responsible authority for the province’s executive obligations.

23. In the circumstances, the Applicants seek to re-enroll the present application in order:
- 23.1 To compel the Minister to conduct, or cause to be conducted, an independent verification of which schools are still waiting for textbooks for the 2012 academic year;
  - 23.2 To obtain a further order from the above Honourable Court directing the Minister to complete the delivery of textbooks for the 2012 academic year in all learning areas to all schools in Limpopo by no later than 31 October 2012;
  - 23.3 To direct the Minister to complete delivery of all textbooks for all grades for 2013 by 9 January 2013;
  - 23.4 To direct the Minister to provide monthly reports to the above Honourable Court on the process of procurement and delivery of textbooks for the 2013 academic year until the delivery of textbooks for 2013 to all learners in Limpopo and for all learning areas is complete;
  - 23.5 To direct the Minister to develop a catch-up plan that is in compliance with the first court order and the settlement agreement concluded on 21 June 2012 and made an order of court on 5 July 2012 (“the second court order”);
  - 23.6 To order that the catch-up plan referred to in paragraph 22.5 above be extended to 30 November 2013;
  - 23.7 To order the Minister to develop a reasonable plan for the 2013 school year in order to ‘catch-up’ learners in the foundation phase, such plan to be lodged with this Court by 31 October 2012; and
  - 23.8 To order the Minister to pay the costs of these proceedings on a punitive scale.

24. The re-enrolment of this application on supplemented papers is specifically permitted by paragraph 6 of the first court order. The Applicants reserve the right to rely on and refer to the papers already filed in this matter, during argument.
25. I respectfully request that the grounds of urgency raised in the founding affidavit in support of the main application be read as if expressly included herein. As with the order sought in the main application for the immediate delivery of textbooks, for each day that the learners are left without textbooks due to the Respondents' failure to comply with the order, their right to basic education is breached.
26. The urgency of the matter therefore increases with the passage of time. Schools across Limpopo are almost at the end of the third school term. In addition, the ANAs, which cover learners in Grades 1 to 9, will commence on 18 September 2012. A copy of the ANA timetable is attached as "**NNS2**". While the ANA is an assessment of the performance of learners throughout the country, learners in Grades 1, 2 and 3 in Limpopo are at a serious disadvantage because they have not had access to the necessary learning materials to prepare for the ANA. These materials have been available to their counterparts in other provinces.
27. In establishing the basis of the relief sought by the Applicants, I have structured this affidavit as follows:
- 27.1 Firstly, I deal with the background to and course of this litigation;
- 27.2 Second, I set out the events in the period between the first court order and the second court order;
- 27.3 Third, I set out the events after the second court order was granted;
- 27.4 Fourth, I set out the Applicants' concerns relating to the complete delivery of textbooks and the development and implementation of an effective catch-up plan;

27.5 Fifth, I set out why the Applicants believe it is necessary to monitor the procurement process for 2013;

27.6 Sixth, I describe the relief sought by the Applicants in this application; and

27.7 Finally, I deal with the issue of costs.

## II BACKGROUND AND COURSE OF THE LITIGATION

28. The full background to this dispute is set out in the founding affidavit in the main application. I pray that the allegations in the founding affidavit be read as if specifically incorporated herein.

29. The Respondents filed their answering affidavit on 14 May 2012. In this affidavit, the Respondents made repeated references to their undertaking to provide textbooks by 15 June 2012. Indeed, the Respondents argued that the main application was launched unnecessarily, in the light of their tender to deliver textbooks by this date.

30. The timeline attached as annexure “C” to the Respondents’ answering affidavit, and attached here as “**NNS3**” for the sake of convenience, indicates that “[t]he actual delivery will take place as from 31 May 2012 – the aim for completion within three days thereafter and not later than 15 June 2012.” The timeline confirmed that the procurement process had commenced and that plans were in place to ensure complete delivery of textbooks to schools throughout Limpopo by 15 June 2012 at the latest.

31. At the hearing of the main application on 15 May 2012, the Respondents persisted in their submission that the procurement processes had commenced and that the delivery of textbooks would take place between 31 May 2012 and 15 June 2012, in accordance with their own timeline. The Applicants therefore agreed to a deadline

of 15 June 2012 for the complete delivery of textbooks, and this deadline was included in the first court order.

32. At the hearing of this matter on 15 May 2012, counsel for the Respondents assured the Court that they already had a catch-up plan in place. They handed up a circular, a copy of which is attached as “NNS4”, sent to schools on 14 May 2012. They used this circular as a demonstration of their commitment to ensuring meaningful catch-up for Grade 10 learners within the 2012 academic year.
33. It was therefore the Respondents’ position that the first court order merely confirmed what steps they had already initiated to ensure the complete delivery of textbooks and the implementation of a meaningful and effective catch-up plan.

### III EVENTS FOLLOWING THE FIRST COURT ORDER

34. I set out below the details of events since the first court order in relation to both the delivery of textbooks and the development and implementation of the catch-up plan.
35. For the sake of convenience, however, I have set out a summary of the events that have unfolded since the first order in the table below:

DATE	EVENT
17/05/2012	First court order granted.
31/05/2012	Textbook delivery due to commence in terms of first court order.
01/06/2012	First orders for textbooks placed with publishers.
07/06/2012	First batch of textbooks delivered to central warehouse in Polokwane.
08/06/2012	First catch-up plan filed.
14/06/2012	Dispatch of textbooks from central warehouse in Polokwane to District Offices commences.

14/06/2012	Undertaking by Administrator that textbook delivery would be completed by 20/06/2012.
11/06/2012 – 15/06/2012	SECTION27 visit to 14 schools in the Mopani, Vhembe and Capricorn Districts: none of these schools had received textbooks.
15/06/2012	Deadline for textbook delivery in terms of first court order.
15/06/2012	Minister maintains that the deadline in terms of the first court order will be met.
18/06/2012	Administrator reports that 170 000 textbooks had been delivered to Grade 10 learners.
20/06/2012	DBE reports that textbook delivery is 97% complete.
21/06/2012	Meeting between SECTION27 and DBE – settlement agreement concluded and deadline for delivery by 27 June 2012 agreed to.
27/06/2012	Deadline for complete delivery of textbooks in terms of the settlement agreement and second court order.
28/06/2012	Learners instructed to go to school to collect textbooks.
28/06/2012	DBE progress report indicates that textbook delivery to foundation phase was 100% complete and to Grade 10 learners was 99% complete. On this date many schools reported that they had still received no textbooks at all.
28/06/2012	Agreement between the parties to appoint an independent person to verify state of textbook delivery.
04/07/2012	Verification by Prof Mary Metcalfe commences.
05/07/2012	Settlement agreement made an order of this Court.
16/07/2012	Verification report released – 22% of sample of 411 schools had still received no textbooks at all.
23/07/2012	Applicants address letter to Respondents asking when textbook delivery will be complete. No response received.
25/07/2012	Minister denies that learners prejudiced by Department's failure to deliver textbooks.
30/07/2012	First progress report on implementation of the catch-up plan filed.
03/08/2012	New catch-up plan provided to SECTION27 but not filed with this

	Court.
07/08/2012	Applicants write to Respondents again requesting report on delivery of textbooks and status of new catch-up plan. No response received.
07/08/2012	New catch-up plan rejected by National Portfolio Committee on Basic Education.
13/08/2012	DBE reported as saying that the situation with textbooks is “completely fine”.
14/08/2012	New catch-up plan approved by National Portfolio Committee on Basic Education despite no changes being made.
15/08/2012	DBE reports that textbook delivery is complete, despite reports from schools that they have still received no textbooks.
17/08/2012	Follow-up letter sent to Respondents. No response received.
31/08/2012	Second progress report on implementation of catch-up plan sent directly to SECTION27.

### Delivery of textbooks

36. In terms of the first court order, the delivery of textbooks was to commence on 31 May 2012 and be completed no later than 5 June 2012.
37. From 11 June 2012 to 15 June 2012, together with representatives from SECTION27 and the National Association of School Governing Bodies (NASGB), I visited fourteen schools in the Vhembe, Mopani and Capricorn Districts of Limpopo. Among these schools were Hanyani Thomo Secondary School (“Hanyani Thomo”), the Second Applicant, and Lutandale Primary School (“Lutandale”), which is attended by the Third Respondent’s two children.
38. The remaining schools we visited have asked not to be named for fear of intimidation by officials in the Department. This issue was dealt with in more detail in the main application. The complaint referred by SECTION27 to the Public

Protector regarding this intimidation is attached as “**NS2**” to the founding affidavit in the main application. Threats by the Respondents continue to discourage principals, teachers and learners from reporting the Respondents’ continued failure to deliver textbooks to their schools.

39. One of the purposes of the site visit was to follow-up on the Respondents’ compliance with the first court order: we sought to establish whether the schools had received their textbooks and whether they were satisfied with the first catch-up plan filed by the Respondents.
40. All of the schools we visited confirmed that, despite the first court order, they had not yet received textbooks, nor had they received any communication from the Respondents about the delivery of textbooks.
41. We were extremely concerned about the slow progress in the delivery of textbooks, and sought a meeting with Mr Mzwandile Matthews, the Head of the Intervention Team in the Department, to discuss these concerns. The meeting with Mr Matthews was held on 14 June 2012 and was attended by Mark Heywood and myself from SECTION27, and Manaha Aubrey Matakanya and Motsamai Lekata from the NASGB. The confirmatory affidavits of Mr Heywood, Mr Matakanya and Mr Lekata will be attached.
42. At this meeting, Mr Matthews explained that there had been delays in the procurement and delivery of textbooks, but that there were on that date three warehouses in Polokwane which were filled with textbooks waiting to be taken to the five districts. He said that the first trucks, going to the Vhembe and Mopani Districts, were leaving in the late afternoon of 14 June 2012 and that from the district warehouses, textbooks would be taken directly to schools.
43. Mr Matthews explained that books had been packed in boxes by school rather than by title, and so schools would receive their entire consignments at once. This would, he stated, increase the efficiency of the process.

44. Mr Matthews admitted that the delivery of textbooks would not be concluded by midnight on 15 June 2012. However, he had instructed the service providers to work through the night for as many nights as necessary until the delivery of textbooks had been completed. We therefore agreed not to approach this Court for further relief immediately after the expiry of the deadline on the basis that, according to Mr Matthews, there had been substantial progress and the delivery of textbooks would be completed within a few days.
45. Mr Matthews stated that delivery of all textbooks would be completed by 20 June 2012. He undertook to keep us fully updated on the progress of the delivery, as well as on any incidents which would delay this process.
46. On 15 June 2012, in the attached e-mail marked “**NNS5**”, I repeated my request to be kept updated on the progress of the delivery of textbooks, and any delays which may have been encountered. In the attached e-mail marked “**NNS6**”, Mr Matthews agreed to keep us updated on the delivery process. He confirmed that the delivery was going well and that some schools had already received their textbooks.
47. On 15 June 2012, the Minister made various statements in the media that the deadline set in the order would be complied with and that the delivery of textbooks would be completed that night. An article published by BuaNews, confirming this statement, is attached as “**NNS7**”. The Minister made this undertaking despite Mr Matthews’ concession that the delivery of textbooks only commenced on 15 June 2012 and could not practically be completed within one day.
48. In the same statement, the Minister denied that teaching and learning had been compromised due to the failure to deliver textbooks, as learners would have been using “old books” in the absence of their prescribed textbooks. As I set out below, this statement undermines the distinction between the National Curriculum Statements (“NCS”) and CAPS curricula, and the Respondents’ failure to provide learners with the tools they required for an adequate basic education.

49. On the afternoon of 15 June 2012, I telephoned Mr Hlongwane, the principal of the Second Applicant, to enquire whether Hanyani Thomo had received its textbooks. He said that he had only taken delivery of textbooks for Agricultural Science. I refer the above Honourable Court to Mr Hlongwane's supporting affidavit, which will be attached.
50. On 18 June 2012, in response to an e-mail I had addressed to Mr Matthews on an unrelated matter, he stated that approximately 197 060 textbooks had been delivered to Grade 10 learners across Limpopo. A copy of this e-mail is attached as "**NNS8**". I telephoned Mr Matthews expressing my concern that the process was slower than expected, and enquired when the delivery of textbooks was expected to be completed. He said that he could not provide me with an exact date. When I indicated the Applicants' intention to approach this Court once more if forced to do so, Mr Matthews said that there was nothing he could do to speed up the process.
51. Mr Matthews indicated in his e-mail of 18 June 2012 that textbooks for Grade 10 learners would take priority. It appeared to me from this statement that textbooks to the foundation phases had not yet commenced. I e-mailed Mr Matthews on 19 June 2012 to confirm this. A copy of this e-mail is attached as "**NNS9**". I did not receive a response from Mr Matthews.
52. On 19 June 2012, Nthabi Pooe from SECTION27 again contacted Mr Hlongwane to ask whether any more textbooks had been delivered. Mr Hlongwane stated that Biology textbooks had been delivered, but that they were not the title he ordered and there were insufficient books for the learners at Hanyani Thomo. I refer the above Honourable Court to Mr Hlongwane's confirmatory affidavit. Ms Pooe's confirmatory affidavit will also be attached to this application.
53. On 20 June 2012, the DBE's spokesperson, Panyaza Lesufi, reported on the radio station SAFM that the process of textbook delivery was 97 per cent complete and that all schools would have their textbooks by lunchtime that day. This was not in line with the reports we had received from schools across Limpopo. I therefore e-mailed Mr Lesufi and Mr Matthews to request an update at 13h00 as to whether

the delivery of textbooks had been completed. A copy of this e-mail is attached as “**NNS10**”. I did not receive a response to this e-mail. I tried to telephone Mr Matthews, but was not able to reach him.

54. On 20 June 2012, in the attached article marked “**NNS11**”, the Principals’ Association confirmed that delivery of textbooks to Grade 10 learners was still far from completion. The article further records that foundation phase learners had also not yet received their textbooks.

#### The catch-up plan

55. On 8 June 2012, the Respondents filed the first catch-up plan with the Court and served a copy on the Applicants’ attorneys. The plan, which is 47 pages in length, sets out a detailed comparison between the content of the NCS curriculum (which preceded CAPS) and the CAPS curriculum. The Applicants deny the Respondents’ position that these curricula are substantially similar. In particular, the Applicants contend that while the substance of the curricula may be similar, their approach and teaching method is entirely different. This is dealt with in more detail in the attached affidavit of Ms Bronwen Wilson-Thompson.
56. The last page of the first catch-up plan includes two paragraphs which provide that subject guides for learners and teachers will be developed and printed. The plan indicates that the delivery of these subject guides would take place between 1 and 31 August 2012, and that “*Schools that have not completed term 1 and 2 content will be expected to infuse the content from the guides in their teaching.*”
57. The Applicants were dissatisfied with the first catch-up plan and believed it to be non-compliant with the first court order. As is set out in the attached affidavit of Ms Wilson-Thompson, the Applicants are of the view that effective catch-up cannot take place without extra tuition time for learners and extra content knowledge support for teachers. This concern was echoed by the principals and teachers we met with during our site visit from 11 to 15 June 2012.

## The Settlement Agreement and the second court order

58. On 21 June 2012, following a statement by the Applicants that we intended to approach this Court once more, representatives from the DBE requested an urgent meeting with SECTION27 to ascertain whether the matter could be resolved without the need to go to court. The meeting was attended by Panyaza Lesufi and Mathanzima Mweli, the Acting Deputy Director-General: Curriculum, Policy, Support and Monitoring, from the DBE and by Mark Heywood, Adila Hassim and myself from SECTION27. Prof Mary Metcalfe was also present at the meeting as an independent mediator.
59. At this meeting, and based on the DBE's ostensible full analysis of the situation and its ability to complete the delivery process, it was agreed, *inter alia*, that –
- 59.1 Delivery of textbooks would be completed by no later than 27 June 2012;
- 59.2 The DBE would report to SECTION27 on 23 June 2012, 25 June 2012 and 26 June 2012 on the progress of delivery of textbooks to learners in Grades 1, 2, 3 and 10;
- 59.3 A circular would be sent to Principals informing them that delivery would be completed by 27 June 2012 and requesting them to make themselves available to accept delivery. They were also to be instructed to make arrangements with learners to collect their textbooks on 28 June 2012, on the basis that delivery would have been completed at that stage. The agreed intention was that learners would then have their textbooks for self study over the school holidays; and
- 59.4 The first catch-up plan would be revised to include extra tuition time for learners and extra content knowledge support for teachers. The parties agreed that this is essential in order to remedy the disadvantage that accrued to teachers and

learners as a result of the Respondents' failure to deliver textbooks for half of the academic year.

60. A copy of this settlement agreement is attached as "**NNS12**". On 5 July 2012, the settlement agreement was made an order of court. A copy of the second court order is attached as "**NNS13**".

#### **IV EVENTS FOLLOWING THE SECOND COURT ORDER**

##### Delivery of textbooks

61. As per agreement between the parties, the DBE was required to report to the Applicants on their progress in the delivery of textbooks, leading up to complete delivery on 27 June 2012. Progress reports on delivery to Grade 10 learners were delivered to SECTION27 on the status of delivery as at 22 June 2012, 23 June 2012, 25 June 2012 and 27 June 2012. Copies of these reports are attached as "**NNS14**" to "**NNS17**". Although many of these reports were delivered late, SECTION27 did not take issue with their late delivery.
62. Progress reports in respect of delivery to learners in Grades 1, 2 and 3 were never provided.
63. The DBE's additional progress report of 28 June 2012, a copy of which is attached as "**NNS18**", indicated that delivery of textbooks to Grade 10 learners was 99% complete. The DBE also indicated on this date that delivery of textbooks to learners in Grades 1, 2 and 3 had been completed. However, this was not in line with reports we were receiving from schools:

- 63.1 The Third Applicant reported on that date that no textbooks had been delivered to Lutandale Primary School. I refer the above Honourable Court to the Third Applicant's supporting affidavit.
- 63.2 Mr Hlongwane, the Second Applicant's Principal, reported that on 28 June 2012, his school had still not received textbooks for Mathematics, Physical Science and Visual Arts. I refer the above Honourable Court to Mr Hlongwane's supporting affidavit.
64. We therefore became concerned that the information in the progress reports that had been provided to us was inaccurate.
65. On 28 June 2012 a meeting and joint press conference was held. The meeting was attended by Mark Heywood and myself from SECTION27 and the Director-General of Basic Education, Mr Bobby Soobrayan, and Panyaza Lesufi and Mathanzima Mveli from the DBE. We raised our concern that the progress reports being provided to us were inaccurate. The representatives from the DBE also stated that they had concerns about the information in the progress reports not being accurate.
66. The DBE representatives agreed to appoint an independent person to verify the contents of the progress reports and to assess the status of textbook delivery to schools.
67. Prof Mary Metcalfe was appointed to conduct this verification process. Prof Metcalfe appointed a verification team which commenced its work on 4 July 2012, and was given a period of two weeks to conduct an independent verification of the progress reports relating to the delivery of textbooks to schools. The verification process sought to establish the state of delivery of textbooks to schools in Limpopo as at 27 June 2012 and as at the date that the report was completed.

68. The report was released on 16 July 2012. A copy of the full report is attached to this affidavit as “**NNS19**”.
69. The verification team’s findings, insofar as they relate to this application, are the following:
- 69.1 The Provincial Department did not order textbooks for 2012 prior to the first court order because it had overspent its budget.
- 69.2 Orders for textbooks were only placed in the first week of June 2012. This is despite the allegation in the Respondents’ answering affidavit in the main application that the procurement process had already started and that delivery of textbooks could commence on 31 May 2012. I respectfully submit that the Respondents should be called upon to explain this discrepancy.
- 69.3 The first load of books was delivered to the central warehouse in Polokwane on 7 June 2012.
- 69.4 The progress reports referred to in paragraph 62 above recorded progress in the dispatch of textbooks from the central warehouse in Polokwane to the regional warehouses in each of the education districts, and not the delivery of textbooks to schools. The report indicates that on 28 June 2012 “*very few of the textbooks had reached schools*”. It was common cause at that stage that delivery had not been completed by 27 June 2012 as per the second court order.
- 69.5 Of the 411 schools sampled by the task team:
- 69.5.1 On 27 June 2012, only 15% of textbooks had been delivered to schools;
- 69.5.2 On 3 July 2012, 48% of schools had received their textbooks; and
- 69.5.3 On 11 July 2012, 22% were still awaiting delivery of textbooks.

- 69.6 A full audit of delivery could not be completed because the weak systems that were in place had buckled, and a large number of proof of delivery notes remained outstanding. It was therefore not clear which schools had received their textbooks and which schools were still waiting.
- 69.7 Prof Metcalfe indicated in her report that *“We are unable to make an accurate assessment of how many books have actually reached schools as yet since not all [proof of delivery notes] have been received and captured and we are concerned about the number of schools that report that they do not have the correct books – in quantity, in language, or with categories missing.”*
70. Based on these findings, Prof Metcalfe made sixteen recommendations. These include a recommendation to conduct a full audit of the delivery process with a view to completing the process of delivery of textbooks to schools.
71. The response by the DBE in relation to the poor state of delivery was that we had misunderstood their undertaking: the percentage ‘of delivery’ that they had referred to on 28 June 2012 was actually a reference to ‘dispatch’. In other words, they denied that they had undertaken to deliver the textbooks but rather only to ensure that the books left the central warehouse. The DBE also contested that it is their responsibility to ensure the delivery of textbooks to schools in Limpopo despite the section 100(1)(b) intervention. The response by the DBE is contained in the document ‘Comments by the Department of Basic Education on the Report: Verification of Textbook Deliveries in Limpopo, 16 July 2012’, annexed as **“NNS20”**.
72. We contend that the DBE does not fully understand the responsibilities that they assume under a section 100(1)(b) intervention. We also contend that section 100 is not intended to permit the national executive to assume control of provincial functions indefinitely. It is an emergency measure. I am advised that this issue will be addressed in legal argument.

73. On 23 July 2012, the Applicants' attorneys addressed a letter to the Respondents' attorney. The letter requested the Respondents to provide an urgent indication as to:
- 73.1 When the DBE intends to conclude its process of following up on proofs of delivery, and its verification as to which schools in Limpopo are still waiting for their textbooks;
  - 73.2 By what date the DBE will ensure that delivery of textbooks to schools will be completed;
  - 73.3 Whether funds are available to procure textbooks for the 2013 academic year; and
  - 73.4 Whether the procurement of textbooks for the 2013 academic year has commenced.
74. A copy of this letter is attached as "**NNS21**". We received no response to this letter.
75. On 25 July 2012, the DBE released a media statement, in which the Minister denied that learners had suffered significant prejudice due to the late delivery of textbooks. The problem, she alleged, was the need for support for teachers on a more general level. A copy of this statement is attached as "**NNS22**".
76. On 7 August 2012, in the attached letter marked "**NNS23**", we repeated our request for a report on the progress of textbook delivery. A follow-up letter, a copy of which is attached as "**NNS24**" was sent on 17 August 2012. We have received no response to either of these letters.
77. On 13 August 2012, Panyaza Lesufi, the DBE spokesperson was quoted, in the attached article marked "**NNS25**", as saying that the situation with textbooks in Limpopo is "completely fine".

78. On 15 August 2012, the DBE was reported to have confirmed complete delivery of “all 1.2 million of the outstanding textbooks in Limpopo”. A copy of the article in which this statement appears is attached as **“NNS26”**. However, as is confirmed in the attached supporting affidavits, the schools referred to in paragraph 17 above are still awaiting complete delivery of their textbooks. SECTION27 has limited contact with schools in Limpopo. We thus believe that this sample may reflect the situation in many other schools.
79. It is therefore clear that a substantial number of books remains outstanding, well into the third school term. It is essential that the Respondents take urgent steps to verify which schools are still awaiting textbooks and deliver these textbooks urgently. This includes all textbooks for all learning areas, as included in both the first court order and the second court order.

#### Catch-up plan

80. As I indicated above, the first catch-up plan was filed with this Court on 8 June 2012. The Applicants were concerned that the first catch-up plan did not comply with the first court order, and the Respondents undertook to revise it to include additional tuition time for learners and content knowledge support for teachers as stated in the second court order. Their commitment to these elements is repeated in their press statement of 25 July 2012, referred to above, and attached as **“NNS22”**.
81. The importance of extra tuition for learners and content knowledge support for teachers is set out in the attached affidavit of Ms Wilson-Thomson.
82. The first progress report in relation to the first catch-up plan was filed with the Court on 30 June 2012. There was no indication in this report that extra tuition time and content knowledge support would be incorporated into the first catch-up plan.

83. On 3 August 2012, the Mr Panyaza Lesufi provided Mr Mark Heywood with a document he referred to as “the new catch-up plan”. A copy of this new catch-up plan was not filed with the Court, and is therefore attached as “**NNS27**”. The Applicants were not clear on whether the Respondents would be following the new catch-up plan or the first catch-up plan, and so sought clarity on this in their letter of 7 August 2012, referred to above and attached as “**NNS23**”. While the Applicants have concerns in relation to both of these catch-up plans, it is essential to know which catch-up plan will be followed in order to address these concerns.
84. As I indicated above, we have received no response to our letter of 7 August 2012.
85. We have therefore set out the concerns in relation to both the first catch-up plan and the new catch-up plan in the attached affidavit of Ms Wilson-Thomson.
86. It is clear from the progress reports filed by the DBE in relation to the catch-up plan, that they relate to progress in implementation of the first catch-up plan and not the new catch-up plan. The Applicants are concerned about the content of these progress reports as well.
87. On 30 July 2012, the Respondents filed the first progress report on their implementation of the first catch-up plan. This progress report includes nothing on extra tuition time for learners and content knowledge support for teachers, despite the DBE having acknowledged that this is essential for meaningful catch-up. It refers only to the publication and distribution of study guides, the content of which was to be “infused” in day-to-day teaching. This progress report does not confirm that any steps have been taken in terms of the first court order. In particular:
- 87.1 There is no identification of any gaps in the covering of curriculum for Grade 10 learners in terms of what should have been covered as opposed to what has been covered;
- 87.2 There is no indication of the extent to which teaching and learning has been prejudiced or compromised due to the lack of textbooks;

- 87.3 There is no detailed timeframe within which the catch-up plan is to be implemented;
- 87.4 There is no provision for extra classes; and
- 87.5 There is no identified goal point for the plan.
88. The progress report served on the Applicants' attorneys is similarly insufficient to indicate compliance with both the first court order and the second court order.
89. The Applicants' concerns in relation to this progress report are the following:
- 89.1 There is still no provision for extra tuition time for learners and content knowledge support for teachers. These are essential components in any meaningful catch-up plan. In failing to include these components, the DBE is in breach of its duties and two court orders which require these components to be included.
- 89.2 The progress report fails to recognise the impact of the DBE's failure to deliver textbooks on learners throughout Limpopo.
- 89.3 The progress report also fails to recognise the widespread lack of access to resources such as computers, internet and printing materials and requires schools to print their own study guides for learners.
- 89.4 There are no details regarding the proposed Spring Boot Camp, including when this is intended to take place and what the budget is. It is not clear how this can be implemented without these details. Despite this, the DBE asserts that the catch-up process will be complete by the end of October 2012.
- 89.5 The progress report reflects the DBE's continued approach of shifting the burden of the catch-up plan onto individual schools, rather than taking responsibility for

its own breaches of the right to basic education. Schools should not be responsible for developing and implementing a catch-up plan. Schools throughout Limpopo are already under-resourced and should not be forced to bear the burden of the respondents' failures.

89.6 The DBE has failed to comply with its own deadline for the delivery of subject guides. In terms of the catch-up plan filed with this Court on 8 June 2012 these were to be delivered by 31 August 2012. The progress report indicates that these study guides are still not available to learners.

90. The Applicants therefore maintain that the catch-up plans and the progress reports do not indicate compliance with either the first court order or the second court order.

91. On 7 August 2012, the National Portfolio Committee on Basic Education ("the Portfolio Committee") rejected the new catch-up plan. The members of the Portfolio Committee found that the plan was lacking in both urgency and detail and that it was *"an insult to Limpopo learners"*. A copy of the minutes of this meeting and the presentation made by the DBE are attached as **"NNS28"** and **"NNS29"** respectively.

92. The Applicants agree that the catch-up plan presented to the Portfolio Committee was inadequate. The Applicants' concerns included the following:

92.1 Meaningful catch-up depends on the complete delivery of textbooks. It was therefore necessary for the Respondents to indicate when delivery of textbooks would be complete. Without this indication, no effective catch-up plan can be implemented.

92.2 The new catch-up plan is lacking in any sense of urgency. Indeed, there are no clear timelines at all in the catch-up plan. It is therefore not clear what steps will be taken and by when.

- 92.3 The new catch-up (as with the first catch-up plan) failed to consider the requirements of paragraph 3 of Kollapen J's order.
- 92.4 The Applicants remain concerned that the Respondents continue to undermine the clear distinctions between the NCS and CAPS curricula as a way to justify the late delivery of textbooks and limit their actions in terms of a catch-up plan.
- 92.5 The new catch-up plan seeks to fit Grade 10 learners requiring catch-up into enrichment programmes designed for Grade 12 learners. The nature of these programmes is markedly different, as is the subject matter for learners in Grades 10 and 12. This does not recognize the extraordinary measures required to assist Grade 10 learners who have been without textbooks for over half of the academic year.
- 92.6 The new catch-up plan does not prioritise extra tuition for learners and content knowledge support for teachers.
- 92.7 There are no provisions for costing of the catch-up plan and for its monitoring and assessment.
93. The Applicants accordingly submit that the new catch-up plan is not in compliance with either the first court order or the second court order.
94. When the new catch-up plan was presented to the Portfolio Committee on 14 August 2012, no substantial changes had been made. A copy of the DBE's presentation is attached as "**NNS30**". The new catch-up plan was, however, approved by the Portfolio Committee. A copy of the minutes of this meeting is attached as "**NNS31**".
95. The Applicants maintain that neither the first catch-up plan nor the new catch-up plan complies with the first and second court orders. This is dealt with in more detail in the affidavit of Ms Wilson-Thomson.

## **V IMPLEMENTATION OF THE CAPS CURRICULUM IN THE 2013 ACADEMIC YEAR**

96. The CAPS curriculum will be implemented for learners in Grades 4, 5, 6 and 11 in 2013. At this stage it is still not clear whether there are funds available for the procurement of these books. As I indicated above, the Respondents have ignored the Applicants' requests for such confirmation.
97. Learners throughout Limpopo – particularly those in Grades R, 1, 2, 3 and 10 – have been severely prejudiced by the failure by the Respondents to ensure that they had the necessary learner teacher support material for this year. It is imperative that all reasonable steps are taken to avoid a similar crisis in 2013.
98. Given this fact, coupled with the Respondents' failure to comply with two court orders and numerous other undertakings, the Applicants contend that it is necessary to monitor the progress of textbook procurement for 2013. This will ensure that learners have access to the materials they require from the commencement of the academic year.
99. The Applicants therefore seek an order requiring the Respondents to submit monthly reports on the progress in procurement of textbooks for 2013, for at least learners in Grades 4, 5, 6 and 11, who all start the CAPS curriculum next year.

## **VI RELIEF**

100. I submit that it is clear that the Respondents have failed to comply with both the first court order and the second court order.
101. The extent of the Respondents' non-compliance with the orders insofar as they relate to the delivery of textbooks is not clear, and could not be clarified by Prof Metcalfe and her verification team. However, it is clear from the attached supporting affidavits that there are many schools which have still received no

textbooks for 2012 at all. Learners throughout Limpopo are still being severely prejudiced.

102. The Applicants are mindful of the time that has elapsed since the beginning of the academic year, and we do not believe that meaningful catch-up is possible in the remainder of the 2012 academic year. While we note the Respondents' insistence that the failure to deliver textbooks does not mean that no teaching and learning has taken place at all, we maintain that the quality of teaching and learning for the better part of one year has not been sufficient to meet a child's right to basic education.
103. While the content of the CAPS curriculum may not differ significantly from the content of the NCS curriculum, the approach and teaching methodology is entirely different. We therefore disagree with the Respondents' contentions in the media that their failure to deliver textbooks did not have a detrimental impact on learners in Limpopo. Since the effect on Grade 10 learners cannot be addressed adequately in the remainder of the 2012 academic year, it is necessary to extend the catch-up plan into 2013 for Grade 11 learners (learners currently in Grade 10) so that this prejudice is addressed.
104. In the main application, we did not seek catch-up in respect of learners in the foundation phase. The reason for this was that we did not believe that a catch-up plan over six months could accommodate the even and responsive pace of teaching and systematic concept development required for learners in the foundation phase. Unlike Grade 10 learners, learners in the foundation phase could not be expected to catch up on six months' worth of skills in the remaining six months of the year.
105. However, given that these learners in the foundation phase have missed out on almost a year of CAPS tuition, the Applicants contend that it has become necessary for the development and implementation of a catch-up plan for the learners currently in the foundation phase as well. The Applicants submit that this catch-up should take place throughout the 2013 academic year.

106. I am advised that these submissions will be dealt with in more detail in the attached affidavit of Ms Wilson-Thomson.

## **VII COSTS**

107. As I have set out above, the Respondents have failed to comply with two court orders granted by the above Honourable Court:

107.1 Both court orders confirmed deadlines for the complete delivery of textbooks. The deadlines were based solely on the Respondents' undertaking that complete delivery of textbooks by 15 June 2012 and 27 June 2012 was realistic. Despite this, textbook delivery is still not complete.

107.2 The requirements of the catch-up plan were also based on the Respondents' submissions as to what would be essential for meaningful catch-up. In particular, the second court order confirmed a settlement agreement entered into between the parties in terms of which it was agreed that meaningful catch-up requires extra tuition time for learners and content knowledge support for teachers. These elements are still not specifically included in the catch-up plan.

108. While the section 100(1)(b) intervention does not divest the Second Respondent of his obligations in the provision of basic education, the First Respondent has assumed direct responsibility for the discharge of the Provincial Department's obligations. She should therefore be held primarily responsible for the failure to comply with two court orders in respect of both complete delivery of textbooks and the implementation of an effective catch-up plan.

109. I am advised that in circumstances where State Respondents act in disregard of another party's rights, and in a way that frustrates their own obligation to respect the courts and ensure their effectiveness, a court has discretion to make a punitive

costs order against such State Respondent. Such orders will be made where the State obstructs – rather than facilitates – access to justice.

110. In this regard, the Constitutional Court made the following remarks in *Nyathi v MEC for Department of Health, Gauteng and another* 2008 (5) SA 94 (CC) at para 91:

*This application was brought to this court as a result of the negligent disregard of an existing court order. The ineffective negligent acts of State officials resulted in a comedy of errors which could easily have been avoided. The respondents, as organs of State, bear a special obligation to ensure that the work of the judiciary is not impeded.*

111. In these circumstances the court orders were granted to remedy a serious violation of the right to basic education. It was necessary for the Applicants to approach a court because previous undertakings made by the Respondents were not complied with. These undertakings were all based solely on the Respondents' promises as to what would be realistic for them. I submit that their undertakings on this basis, and their subsequent failure to comply with these, undermines the effectiveness of both the first court order and the second court order and frustrates the Applicants' access to justice.

112. In addition, I am advised that where litigants act in the public interest to ensure that orders of court are complied with, the law supports the principle that they should be substantially indemnified in respect of the costs they incur in doing so. The Applicants have already been forced to approach this Court twice for the relief they seek.

113. Based on these submissions, the Applicants pray for a punitive costs order against the Minister arising from her failure to comply with her direct obligations.

114. Further argument on the issue of costs will be addressed during legal argument.

## VIII CONCLUSION

115. In the circumstances the Applicants pray for an order in terms of 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**