IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 135/2012

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION GAUTENG PROVINCE	First Applicant
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Applicant
DISTRICT DIRECTOR JOHANNESBURG EAST D9 – GAUTENG DEPARTMENT OF EDUCATION	Third Applicant

and

THE GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Respondent
RIVONIA PRIMARY SCHOOL	Second Respondent
CELE: STHABILE	Third Respondent
MACKENZIE: AUBREY	Fourth Respondent
DRYSDALE: CAROL	Fifth Respondent

FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT IN THE APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

1. A school governing body is democratically composed and intended to function in a democratic manner. Its primary function is to look after the best interests of the school and its learners. It is meant to be a beacon of grass-roots democracy in the local affairs of the school. Its powers are not absolute or in its exclusive preserve: they are subject to the Constitution, the South African Schools Act, 84 of 1996 ("the Schools Act" or "SASA") and any applicable national or provincial law.[1]

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[1] *Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) 415 paras [57]-[59] at 436B-437C

2. Whilst a minority of public schools, amongst them many former model C schools, have ensured that education of a progressively high quality is provided to learners attending such schools, the various education departments have failed dismally in doing so.

3. For some years there was a stand-off between the school governing bodies in Gauteng and the Gauteng Department of Education ("the Department") as to who has the power to determine the capacity of a public school. On 8 February 2011 matters came to a head when, in the words of his lordship Justice Mbha, "*Mr Matabane in his capacity as the District Director … marched the learner to the nearest Grade 1 classroom and deposited her on an empty desk.*"[2] That desk had been installed earlier

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2 Vol 7: Judgment par 13, p 658 l 12-16

that morning for a child with attention and learning difficulties.

4. Mbha J held that section 5(5) of SASA does not grant a school governing body the unqualified power to determine a public school's admission policy, and that the power to determine the maximum capacity of a public school in the Gauteng Province vests in the Gauteng Department of Education and not in the school governing body.[3]

5. In a well-reasoned judgment the Supreme Court of Appeal ("SCA") unanimously upheld the appeal and made the following declaratory order: "*It is declared that the instruction given to the principal of the Rivonia Primary School to admit the learner contrary*

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3 Vol 7: Judgment par 109, p 703 l 8-19

to the school's admission policy, and the placing of the learner in the school, were unlawful."[4]

THE FUNDAMENTAL FLAWS IN THE APPLICANTS' LEGAL ANALYIS

6. The applicants' legal analysis does not deal with, or consider, the following provisions:

6.1. SASA: sections 5A[5], 20(1)(a), 36(1) and 58C[6]

6.2. Regulation 7 of the regulations for the admission of learners to public schools ("the Gauteng regulations" or "2001 regulations").[7]

6.3. The National Education Policy Act, 27 of 1996 ("NEPA"): section 3(4).

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4 Vol 8: Judgment p 735, l 6-8

5 Inserted by section 5 of Act 31 of 2007

6 Inserted by section 11 of Act 31 of 2007. The SCA dealt with s 58C in par 38 of its judgment, Vol 8: p 745 l 18-26

7 Made under s 11(1) of the Gauteng School Education Act, 1995

6.4. The admission policy for ordinary public schools[8]: sections 5 to 9, 33 to 34 and 43.

7. It is generally accepted that an act must be read as a whole to construe its provisions[9]. This is also referred to as the *ex visceribus actus* approach. According to Du Plessis, *Re-Interpretation of Statutes*, the Constitutional Court has frequently relied on this approach, which seems exceptionally apt for purposes of constitutional interpretation.[10]

8. The applicants have not interpreted SASA having regard to all its provisions. It is a fundamental flaw that, in our submission, contributes to their incorrect interpretation of SASA. The applicants' contended interpretation is contrary to the plain meaning of

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8 Promulgated by General Notice 2432, GG 19377 of 19 October 1998

9 *Venter v R* 1907 TS 910 at 913; *Jaga v Dönges NO & Another* 1950 (4) SA 653 (A) at 662G-H

10 P 112-113 and the authorities mentioned in footnote 197

sections 5(5) and 5A of SASA, and the applicants are calling on this court to unduly strain the language of the legislation on which they rely.

THE PROVISIONS OF THE SCHOOLS ACT

9. Section 5(5) of SASA makes it clear that the admission policy of a public school is determined by the school's governing body, subject to the Schools Act and any applicable provincial law.

10. Section 5A was introduced in 2007. It provides as follows:

> "*(1) The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for-*
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> *(a) school infrastructure;*

(b) capacity of a school in respect of the number of learners a school can admit; and

(c) the provision of learning and teaching support material.

(2) The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following:

(a) in respect of school infrastructure, the availability of-

(i) classrooms;

(ii) electricity;

(iii) water;

(iv) sanitation;

(v) a library;

(vi) laboratories for science, technology, mathematics and life sciences;

(vii) sport and recreational facilities;

(viii) electronic connectivity at a school; and

(ix) perimeter security;

(b) in respect of the capacity of a school-

(i) the number of teachers and the class size;

(ii) quality of performance of a school;

(iii) curriculum and extra-curricular choices;

(iv) classroom size; and

(v) utilisation of available classrooms of a school;

(c) in respect of provision of learning and teaching support material, the availability of-

(i) stationery and supplies;

(ii) learning material;

(iii) teaching material and equipment;

(iv) science, technology, mathematics and life sciences apparatus;

(v) electronic equipment; and

(vi) school furniture and other school equipment.

(3) When determining policy in terms of sections 5 (5) and 6 (2) a governing body must comply with the norms and standards contemplated in subsection (1).

(4) A governing body must, within a period of 12 months after the Minister has prescribed the norms and standards contemplated in subsection (1), review any policy that it has determined in terms of sections 5 (5) and 6 (2) to ensure that such policy complies with the norms and standards."

11. As correctly found by the SCA, if there is any doubt that section 5(5) necessarily includes the determination of a school's capacity, which is central to admission to the school and forward planning, such

doubt is removed by section 5A. It correctly described section 5A(3) as a "*critical section*".[11]

12. The applicants completely ignore these sections. Instead they rely on sections 3(3), 3(4) of SASA, and section 39(2) of the Constitution, as well as sections 3 and 14(1) of the Gauteng School Education Act and regulations 2, 13 and 14 of the 2001 regulations.

THE IRRATIONALITY OF THE HEAD OF DEPARTMENT'S DECISION

13. The submission that a governing body reduces its own school's and the systemic capacity by means of an admissions policy is unsustainable. The facts of this case illustrate that. In terms of section 36 of SASA the governing body of Rivonia Primary has successfully done what the section demands, namely supplementing the State resources in order to improve

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[11] Vol 8: p 745 par 37, l 2-17

the quality of education provided to all the learners at the school. 46% of these learners are black. Because of the steps taken by the governing body, all learners, including the 46%, receive an education of progressively high quality laying a strong foundation for the development of their talent and capability, as SASA envisages.

14. Because of the importance of the foundation phase, Grades 1 and 2, the governing body built extra classrooms and employed additional educators.[12] Instead of 4 teachers per Grade, there are 5 teachers in Grades 1 and 2. That is why there are less than 30 learners per class in Grades 1 and 2. It has nothing to do with an "*exercise in obfuscation*" or "*an arithmetical process known only to the*" governing

12 Vol 5: RA par 29.2, p 435 l 6-13; par 34.1.2 p 437 l 9-12; par 35.3, p 439 l 4 – 440 l 10

body.[13] In Grades 3 to 7 there are only 4 classes per grade.

15. The Head of Department decided that the school had capacity for "*at least*" 150 learners in Grade 1.[14] Taken to its logical conclusion, this means that the Head of Department, relying on the 10th day statistics and the wholly inappropriate Post Provisioning model,[15] had determined the minimum capacity of the school at 1050 (since learners proceed to Grade 7 once admitted, and the admission of 150 learners to Grade 1 every year over seven years, requires a total capacity of 1050). Nowhere has he, or any other deponent, stated what the maximum capacity of the school is. This means that the class sizes in Grades 3 to 7 will be at least 150 per Grade. The learner/educator

13 Applicants' heads of argument par 36 and 36.3
14 Vol 4: AA par 98.8 l 4-8
15 Vol 4: AA par 45.1, l 8-15; Vol 5: RA par 39, p 442 l 1 – 444 l 2

ratio, using the number of educators paid by the Department, will then be 47:1.[16]

THE NATIONAL EDUCATION POLICY ACT

16. The Minister of Education has, in terms of the National Education Policy Act, determined an admission policy for ordinary public schools. It was promulgated by General Notice 2432 in the Government Gazette 19377 of 19 October 1998. Sections 5 to 14 of this policy deal with the administration of admissions. Section 5 makes it clear that the Head of Department of a Province is only responsible for the administration of the admission of learners to a public school and must determine a process of registration for admission to public schools.[17]

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16 1050 divided by 22.
17 Sections 5 and 6

17. Section 7 states that the admission policy is determined by the governing body of the school and that the governing body of a public school must make a copy of the admission policy available to Head of Department.

18. Section 8 states that a Head of Department must coordinate the provision of schools and the administration of admissions of learners to ordinary public schools with governing bodies to ensure that all eligible learners are suitably accommodated in terms of the South African Schools Act, 1996.

19. Sections 33 to 35 deal with school zoning. Section 33 states that Head of Department, after consultation with representatives of governing bodies, may determine feeder zones for ordinary public schools in order to control the learner number of schools and

coordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other.

20. Section 34 provides as follows:

"If a feeder zone is created -

(a) preference must be given to a learner who lives in the feeder zone of a school or who resides with his or her parents at an employee's home in the feeder zone;

(b) a learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed;

(c) a learner who lives within the feeder zone of school A must be referred to a

neighbouring school if school A is over subscribed. If school B is oversubscribed an alternative school within a reasonable distance must be found by Head of Department. If that is not possible, school A must admit the learner;

(d) the preference order of admission is -

(i) learners whose parents live in the feeder zone, in their own domicile or their employer's domicile;

(ii) learners whose parent's "work address" is in the feeder area; or

(iii) other learners, first come first served."

21. Regulation 7 of the Gauteng Regulations mirrors, with minor amendments, the provisions of section 34.

22. The zoning system and Regulation 7 of the 2001 regulations, deal with the problem that the Department faces. For reasons that remain unexplained, in this instance the Department did not apply regulation 7. Instead of using existing laws and regulations, the Department ignores them, and encroaches on the legitimate powers of governing bodies.

THE DEPARTMENT'S FAILURES

23. The Head of Department administers admissions. The primary reason the Department advances for the need to interpret SASA as granting the Head of Department the power to determine the capacity of public schools is that it is the only way of ensuring that all learners receive a basic education.

24. It is the duty of the State to ensure that there are enough school places so that every child who lives in a province can attend school.[18]

25. The date of commencement of SASA is 1 January 1997. At that stage every MEC who could not comply with section 3(3) because of a lack of capacity had to take steps to remedy such lack of capacity as soon as possible and make an annual report to the National Minister on the progress achieved in doing so.[19]

26. There is no evidence that the MEC for the Gauteng Province submitted annual reports to the Minister and what those reports showed. The only inference is that no such reports were submitted and that successive

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18 SASA: Section 3(4)
19 SASA: Section 3(4)

MEC's have failed to take appropriate steps to remedy any perceived lack of capacity.

27. In terms of Regulation 2(3) of the 2001 regulations, the governing body of a school had to make a copy of the admission policy of the school available to the Head of Department for certification. The governing body of the Rivonia Primary School did so. This admission policy, as well as the 2011 admission policy, made it clear what the capacity of the school was. The Head of Department did not take issue with these policies. In fact, the 2010 policy was signed by two Departmental officials, one of which was the District Director.[20]

28. As pointed out in the *Ermelo* case, planning is vitally important for a school and cannot be done on an *ad hoc* basis.

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20 Vol 5: RA 3, p 517-528

29. The Department has produced no evidence of any attempt by it to deal with its alleged systemic problems by changing existing or determining new feeder zones of schools in the area "*after consultation with representatives of school governing bodies*" as required by paragraph 33 of the Admission Policy for Ordinary Public Schools issued under NEPA on 19 October 1998, and by Gauteng regulation 7(1) before its amendment in May 2012.

30. In this instance the Department simply did not apply Gauteng regulation 7 at all, even though there were public schools within a reasonable distance from Rivonia Primary that had capacity. Evidence of this is in the minutes of the CAT meeting held on 30 November 2010.[21]

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21 FA: p 25; Vol 2 p 165, l 20 - p 166 l 27

30.1. It appears from this minute that Parkhurst had 22 spaces for Grade 1 learners.

30.2. The problem of dysfunctional schools was also raised. A Departmental official, Mr Petlele, agreed that this was a problem but not a district problem, actually a national problem.

30.3. It was also minuted that there were schools close to schools in the D9 district where learners could go to, but not in the D9 district itself.

30.4. In addition, the parents at the prison school were sending their children to other schools, and the Department did not attend to the problems at that school.

31. The lack of proper planning by the Department, its persistent failure to address the problem of

dysfunctional schools and its failure to apply regulation 7 is no reason to ignore the clear meaning of SASA and undermine the role and function of a democratic institution that is one of the essential pillars of the new education system.

32. The parlous state of education in South Africa is so well known that the Court may take judicial notice thereof. Even if the Court is not prepared to take judicial notice, there is undisputed evidence of this in this case. The SACMEQ III project results of pupil achievement levels in reading and mathematics makes dismal reading[22]. It is a damning indictment of the National and Provincial Education Departments.

33. In stark contrast to this, in 2008 the vast majority of the Grade 3 learners at Rivonia Primary were reading at a skill and comprehension level that boded well for

22 Vol 5: RA1 pp 488-514

meeting international standards. In her report Dr Pauline Masher identified factors that contributed to this state of affairs.[23] These included the educator/learner ratio that ensures that teachers can offer individual support to learners, special resources available to struggling learners, the fact that the majority of educators are native English speakers, and the quality and dedication of staff to work toward and maintain a high standard of quality in teaching literacy.

34. The governing body, by employing educators and building additional classrooms, is fulfilling its statutory duty to provide a better education to learners who live, or whose parents work, in close proximity to Rivonia Primary. By doing this, they also free resources that the Department is supposed to use in fulfilling its

23 Vol 6: RA8 p 573

obligations. This is part of the on-going process of redressing the imbalances of the past. Unfortunately the Department is not fulfilling its obligations in this process.

THE CHANGE OF EMPHASIS IN THE DEPARTMENT'S STANCE

35. The deponent of the Department's original answering affidavit in the court *a quo* is Mr Len Davids, at the time the Deputy Director of the Gauteng Department of Education. The MEC filed a confirmatory affidavit. In the answering affidavit Mr Davids unequivocally stated the following:

> *"The question of school capacity is not one which can legitimately be determined by the admission policy drawn up by an individual school governing body. Rather it is one which*

has to be determined at a systemic level by the Provincial Education Department."[24]

"*If the governing bodies of these former model C schools were to be allowed to determine their school capacities at levels far lower than those of the rest of the public schooling system, the ratio in discriminatory historical privileges bequeathed by apartheid would be capable of entrenchment under the new democratic order*."[25]

"[Rivonia Primary School] *draws a learner enrolment that remains disproportionately "white" when compared to the overall demographic profile of the Province*."[26]

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24 AA: para 5.1 p 288 l 1-5
25 AA: para 5.1 p 288 l 15-20
26 AA: para 5.1.1 p 289 l 2-4

"*… This Court should adopt an interpretation that promotes the equitable use of public education resources and that prevents the entrenchment within the public education system of disparities that are the product of racial discrimination and education provision under apartheid*."[27]

"*School capacity does not lie within the power of a School Governing body to determine, by virtue of their authority to determine school policy*."[28]

"*I … deny that issues of capacity fall to be determined by the governing body in terms of its power to formulate admissions policy*."[29]

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27 AA: para 24.1 p 306 l 8-12
28 AA: para 24.2 p 307 l 4-6
29 AA para 102.1 p 333 l 8-12

36. In its heads of argument in both the court *a quo* and the SCA, the Department made the following express submission: "*In effect, the applicants assert a right through the Rivonia Primary admissions policy to protect a peculiarly privileged position within the public schooling system and a privileged position that is linked to the historical racial disparities in the resourcing of public education under apartheid.*"

37. It is clear from these statements that the Department accused the school and governing body of entrenching racial inequalities of the apartheid era and relied on that as a basis for interpreting the legislation to deprive the school's governing body of the power to determine the capacity of a school.

38. The Department now contends that it did not accuse the school and governing body of racism, and that

the school's admission policy may deal with capacity, but cannot do so rigidly.

39. As far as the racism allegation is concerned, it is clear what Mr Davids and the Department said. This is also how the journalist of The Times newspaper interpreted the answering affidavit. The headline of its article of 1 April 2011 was "*School damned as racist*."[30]

40. On the second issue the Department now seems to concede that a governing body may determine a public school's capacity, but that its decision may always be overruled by the Head of Department.

41. Apart from a general submission that such an interpretation is required to give effect to sections 3(1) and 3(3) of SASA, the Department relies on regulation 13(1) of the 2001 regulations.

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30 Vol 5: RA 2 p 515

42. On the Department's interpretation of this regulation, any decision relating to the admission of learners to a school is finally to be made by the Head of Department, and he or she may do so without having any regard to the admissions policy. This interpretation leads to the absurd conclusion that the admissions policy becomes entirely irrelevant since the Head of Department's may always override the admissions policy.

43. This interpretation is clearly untenable and wrong. The Head of Department administers admissions, and in so doing any decision taken by him or her in terms of regulation 13(1) must be in accordance with the admissions policy. The admissions policy must, of course, comply with the provisions of The Constitution, the Schools Act and applicable provincial law, and the Head of Department has the power not to certify

the policy if it does not comply. Moreover, the Head of Department has substantial remedies available to him or her under the Constitution, PAJA and section 22 of SASA (which provides for removal of a governing body's powers) if a school's governing body transgresses these limitations.

SECTION 146 OF THE CONSTITUTION

44. The applicable provincial law may not conflict with national legislation. If it does, national legislation prevails over the provincial legislation where sections 146(2) or (3) apply.

45. In terms of schedule 4 of the Constitution, education at all levels, excluding tertiary education, is a functional area of concurrent national and provincial legislative competence. Sections 146 to 150 of the Constitution deal with conflicts between national and

provincial legislation falling within a functional area listed in schedule 4. Section 146(2) provides that national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of a prescribed number of conditions are met. These include:

"*(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.*

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing-

(i) norms and standards;

(ii) frameworks; or

(iii) national policies."

46. SASA (and particularly sections 5(5) and 5A thereof) and NEPA are legislation that squarely fall within the provisions of section 146(2)(b). They require uniformity over the nation and expressly establish norms and standards and national policies.

47. In terms of section 146(5) provincial legislation only prevails over national legislation if subsection (2) or (3) does not apply. In this case section 146(2)(b) clearly applies.

48. Moreover, section 146(6) provides as follows:

> "*(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.*"

49. The submission that a regulation issued by a MEC in a province may prevail over national legislation in circumstances where section 146(2)(b) applies, is startling. There is also no evidence that the 2001 Gauteng regulations have been submitted to, or approved by, the National Council of Provinces.

50. The Supreme Court of Appeal's interpretation of regulation 13(1) is correct: it empowers the HOD to administratively set aside a principal's refusal to admit a learner, if the refusal does not comply with the applicable legal requirements. It does not contradict or override sections 5(5) and 5A of SASA. It would be *ultra vires* if it did.

51. The governing body has never contended that its policy is "*inflexibly binding*". The facts show that it is not the case, and that the school has consistently

applied the policy in a flexible manner. The Department has in fact incorrectly used the school's flexible application of its policy, as a basis for submitting that there is additional capacity and that the governing body has deliberately determined its capacity below what the infrastructure can and should support. The Department cannot have it both ways.

52. The rational way of discharging the Department's constitutional and statutory obligation is to comply with existing legislation, in particular section 3(4) of SASA, and regulation 7 of the 2001 regulations, and by spending its allocated infrastructure budget which it has failed to do.

53. The Head of Department must make admission decisions having due regard to the admission policy

of the school. If he or she has legitimate objections to the policy, it should not be certified and reasons for the non-certification must be given. If this does not have the required effect on a transgressing school, the Head of Department has substantial remedies under section 22 of SASA and under PAJA.

54. These are the Department's lawful and effective statutory remedies for individual transgressions by schools. Misinterpretation of the legislation is not a valid remedy.

THE POSITION OF THE SCHOOL PRINCIPAL, MS DRYSDALE

55. The Department charged the Principal, Ms Drsydale, with misconduct. She faced a disciplinary hearing and faced possible dismissal. The disciplinary hearing was a long and drawn-out process and Ms Drsydale eventually pleaded guilty. The Department gave her

a final written warning and a fine equivalent to one month's salary.

56. The Supreme Court of Appeal's judgment was handed down on Friday, 30 November 2012. On Monday, 3 December 2012 Ms Drysdale received a written notification that the sanction will be implemented. It was only when Ms Drysdale indicated that she will appeal that the Department agreed to suspend the implementation pending this application for leave to appeal.

57. This decision by the Department flew in the face of the following comments of the SCA:

> *"[55] I mentioned earlier that Ms Drysdale was sanctioned for failing to comply with the HoD's unlawful instruction. Although the sanctions imposed on Ms Drysdale are not before us, I am*

confident that the department is sufficiently gracious to withdraw these sanctions in the light of this judgment."

58. In view of the Department's conduct subsequent to the judgment, it is necessary for this Court to consider the question whether the instruction to Ms Drysdale was lawful or not, and if so, whether she should be sanctioned for her conduct.

59. In light of the SCA's judgment, it was not necessary for it to deal with the submission that, even if the governing body did not have the power to determine the capacity of the school, the MEC and Head of Department could not simply have ignored the provisions of the admission policy that had been certified, but had to take steps to set it aside. This

submission is based on the judgments in *Mikro*[31] and *Ermelo*.

60. It is in this context that the Court is requested to deal with the sanction imposed on Ms Drysdale.

CONCLUSION

61. The application for leave to appeal, alternatively the appeal, should be dismissed with costs, including the costs of two counsel.

G C PRETORIUS SC
A KEMACK SC
Counsel for the first and second respondents

Chambers, Sandton
4 April 2013

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31 *Minister of Education, Western Cape and Others v Governing Body Mikro Primary School and Another* 2006 (1) SA 1 (SCA)

LIST OF AUTHORITIES

Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) 415;

Venter v R 1907 TS 910 at 913;

Jaga v Dönges NO & Another 1950 (4) SA 653 (A)

Minister of Education, Western Cape and others v Governing Body Mikro Primary School and Another 2006 (1) SA 1 (SCA)

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