IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **24611/11**

In the matter between:

JACOBUS DU PLESSIS BOTHA N.O.	First Applicant
ESTELLE BOTHA N.O.	Second Applicant
GERHARD BOTHA N.O.	Third Applicant
(In their capacities as trustees for the time being of the Kobot Besigheid Trust (IT969/2009)	

and

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, WESTERN CAPE	First Respondent
THE GOVERNING BODY OF THE GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHOORN)	Second Respondent
GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHOORN)	Third Respondent
CENTRE FOR CHILD LAW	Fourth Respondent
THE COMMUNITY OF GROOTKRAAL	Fifth Respondent
THE INDEPENDENT CHURCH OUDTSHOORN	Sixth Respondent
TRUI KIEWIETS	Seventh Respondent

T.M

KATRINA MEI Eighth Respondent

EQUAL EDUCATION *Amicus Curiae*

AMICUS CURIAE'S ANSWERING AFFIDAVIT TO FIRST RESPONDENT'S SUPPLEMENTARY EXPLANATORY AFFIDAVIT DEPOSED TO BY JOHN HILTON LYNERS

I, the undersigned,

TSHEPO MOTSEPE

do hereby make oath and state as follows:

1. I am an adult male and the General Secretary for Equal Education, a membership based democratic movement of learners, teachers, parents and community members. It is a non-profit organisation registered under number 068-288-NPO. with its head office situated at Isivivana Centre, 2nd Floor, 8 Mzala Street, Khayelitsha.

2. The facts set out herein are within my personal knowledge and belief unless stated to the contrary and I believe same to be both true and correct. Where I make legal submissions, I do so on the advice of the legal representatives for the *Amicus Curiae*, Equal Education ("EE"). I believe in the correctness of such advice. Where

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I may rely on information conveyed to me by others, I indicate the source of such information and also believe in the correctness thereof.

3. For the ease of reference, I shall continue to refer to the parties as they are in the main application.

4. I shall reply to the First Respondent's Supplementary Explanatory Affidavit insofar as it is necessary for the EE to do so. Insofar as the other parties file answering affidavits also, and should it become necessary for the assistance of this Honourable Court that the EE address the content thereof, the EE shall seek leave to do so. More specifically, I am advised that the Centre for Child Law ("CCL"), the Fourth Respondent herein, will file an updated report in due course. In the circumstances, the EE will seek to respond to and address the content of such report. The EE's rights are accordingly reserved.

Ad paragraph 4 thereof

5. The deponent claims that the purpose of his affidavit is to address the court on *"changed circumstances"* since his last affidavit of 13 December 2011. The EE notes that the affidavit however provides no updated information on the present circumstances of the learners at Grootkraal Primary, their best interests and how those factors have informed the decision-making process. The affidavit, albeit insufficiently, relates primarily to the Department's current financial position and

factors that have affected it, and a cursory dismissal of the contents of CCL's report.

Ad paragraphs 9 to 13 thereof

6. The EE has previously argued that the MEC should have, and in fact must have, considered using his powers conferred under section 58 of the South African Schools Act 84 of 1996 ("SASA") to expropriate the land upon which Grootkraal Primaryis situated for purposes of securing the school's tenure. Section 58 empowers the MEC to do so if it is in the public interest and for the purposes of education in a province. It is imminently in the public interest for the MEC to expropriate Grootkraal Primary, a school which has serviced the Western Cape rural community it surrounds for about 90 years.

7. Given the fact that the MEC had tried to conclude a new lease, as well as the exorbitant amount demanded by the Trust for rental, the significant distance to the nearest school and the duration for which the school has been tied to the land, the reasonable response from the MEC ought to have been to consider invoking section 58.

8. The White Paper on the Organization, Governance and Funding of Schools, General Notice 130 of 1996, which was published approximately nine months before SASA was promulgated, shows that the purpose behind sections 14 and 58

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was to ensure that public schools on private land are provided with a sense of certainty and continuity. It is clear, given the history of insecurity experienced by farm schools and the provision made for them in the SASA, that the intent was to provide these schools with a long-term solution regarding tenure - a solution that the MEC has not shown a willingness to engage with.

9. Section 58 was intended to provide a safeguard and to serve as a powerful mechanism for the MEC and an affected school where there was an obstructive landowner trying to frustrate the MEC's attempts to secure tenure. I refer here particularly to our submissions made at paragraphs 19 and 20 of EE's Supplementary Affidavit dated 27 January 2012.

10. The allegation made by Mr. Lyners, that a lease agreement would have likely brought an end to litigation regarding Grootkraal is speculative. A lease of a few years would amount to a temporary solution. It would not confer upon Grootkraal Primary the security of tenure they are legally entitled to under the SASA.

11. The level of uncertainly in relation to Grootkraal is aggravated by Mr Lyners' evidence of the Western Cape Education Department's ("WCED's") financial troubles and the probability of the tender process taking up to 9 months, assuming the process is successful and there are appropriate service providers.

Ad paragraph 15 thereof

12. Although the EE's view is that a lease agreement is unlikely to provide long-term security of tenure, it is noted that there is no evidence as to the calculation of the rental offered by the MEC. That is, quotations as to market-related rental for the area and the like. That, we suggest, would be useful for the Court to take into account.

Ad paragraphs 17 and 18 thereof

13. On Mr Lyner's version, when faced with the prospect of eviction in 2011 the MEC's apparently 'quick and efficient response' to the Grootkraal matter amounted to an attempt to facilitate a smooth relocation to Voorbedag. This seems to indicate that to have been the MEC's knee-jerk reaction. There is no evidence whatsoever that he reasonably applied his mind or, even applied his mind at all, to the possible use of section 58. Instead of considering every possible way in which the school could remain in its current location, it appears that only the relocation of Grootkraal was ever contemplated. The creative label "relocation", not contemplated by the SASA, in itself is indicative that there is no intention to conduct thorough consultation aimed at addressing the community needs, the best interests of the children and the implications of the available options.

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Ad paragraphs 19 to 24 thereof

14. Mr Lyners bemoans the escalating cost of relocation but has put forth no evidence of the WCED's own cost–benefit analysis of expropriation versus relocation and accordingly appears to have failed to apply his mind thereto. The proposition that Grootkraal will operate separately from Voorbedag, but on the same property, effectively duplicating resources and costs, evidently opens itself to criticism.

15. In addition, references to concerns regarding the WCED's budget raises anxiety as to the sustainability of the duplicate schools on the same property and the concomitant costs.

Ad paragraph 26 thereof

16. Notwithstanding reference by the MEC to "relocation" of the school, rather than "merger" we note mention in this paragraph to "the learners at Grootkraal continuing their education at Voorbedag".

Ad paragraph 28 thereof

17. Grootkraal Primary School is, from the evidence produced by CCL, the nearest available public school that parents *are able to afford.* The WCED has undertaken to provide transport in terms of their scholar transport policy. However, upon

application of this policy, at least 71 of Grootkraal Primary School learners, who travel from Oudtshoorn to the school, would not qualify for scholar transport. The WCED, in applying the criteria for qualification, could argue that Voorbedag is not the nearest available pubic school thus disqualifying them. This will be addressed in detail at the hearing of the application.

18. The idea that parents may apply for fee exemptions, is not as simple as the WCED has suggested. This is evidenced by pending litigation involving the WCED in *Michelle Saffer v HOD, Western Cape Education Department and Five Others* under case number 18775/2013. This case relates to difficulties with the Regulations Relating to the Exemption of Parents from the Payment of School Fees GG 1052 of 18 October 2006.

19. In that case, the applicant has asked the court to declare that the State had failed in its constitutional and statutory obligations to ensure that fee exemption applications in the Western Cape are dealt with in a lawful manner. Whilst this case centred on the discriminatory impact suffered by single and divorced mothers/ single-parent homes, it also highlights the obstacles parents face when attempting to secure fee exemptions. The High Court refused to grant a declaratory order to the effect that the Western Cape Education Department had not taken sufficient steps to ensure proper implementation of fee exemption regulations. The matter has been taken on appeal to the Supreme Court of Appeal.

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20. Mr Lyners makes vague reference to the possibility of parents enrolling their children into no fee-paying schools in Oudtshoorn, but no evidence whatsoever is offered on learner enrolment rates, the availability of spaces, if any, and the adequacy of education at these no-fee schools. Also, no information is provided on whether these schools can accommodate the language of learning and teaching needs of the Grootkraal Primary School learners.

21. Furthermore Mr Lyner's critiques the CCL for not determining the cost difference between schooling at Voorbedag and Grootkraal, yet offers no financial feasibility report itself.

Ad paragraphs 29 and 30 thereof

22. Not only do Mr Lyners comments display the highest level of insensitivity, they also indicate a failure to appreciate one of the necessary elements that should inform a decision around expropriation: the value which the community attaches to a school and the community's wishes regarding its fate. To state that this is irrelevant when making a decision as to whether to *"deprive a property owner of its property"* shows that the MEC is either oblivious or disrespectful to the significance of the views held by the parents of learners at Grootkraal.

23. Also, Mr Lyners dismisses these parents' voices as irrelevant without any attempts made to hear from them directly or to make any effort to understand their views.

There has been no display of any intention on the part of the MEC to engage in any way with the parents and the greater community.

24. It would appear that the MEC expects CCL to do the WCED's job for it. It is for the department to make enquiries as to the circumstances of affected learners, including whether transportation to Voorbedag would be in their best interests or if other arrangements would be most viable, sustainable and suitable to them. The WCED is best placed to comment on the sustainability of its own transport arrangements but has instead failed to provide any information on the costs of transportation in comparison to the cost of expropriation.

25. It is of concern that the MEC attempts only to debunk the findings of the report of the CCL, rather than meaningfully engage with the substance of it.

Ad paragraph 31 thereof

26. Mr Lyners fails to consider that the decision to be made by this Honourable Court does not depend on the employment situation and general family circumstances of the learners *currently* attending the school. Cognizance has to be taken of the broader historical pattern of attendance at the school, the variation in which has been perpetuated by the lack of security of tenure, the seasonal and unsecure nature of the employment of the parents in the community, and more importantly, the impact thereof on the education of children in such rural areas.

Ad paragraph 33 thereof

27. The photographs of Voorbedag classrooms and grounds are irrelevant to this matter, unless the MEC ultimately intends to merge the two schools. The Voorbedag classrooms are permanent structures, not the intended temporary structures for Grootkraal.

Ad paragraphs 35.1 to 35.3 thereof

28. Statements regarding the *"inconvenience learners might suffer"* display a lack of understanding. These are young primary school learners. There are many factors to be considered including potential safety concerns involved in the use of scholar transport and the suggestion that the problem can be solved by school starting a few minutes later is an over-simplification of the issue.

29. Again, Mr Lyners has characterised the impact on learners as a minor inconvenience without the MEC having engaged with these learners at all. This is true also with regard to the impact of road conditions and heavy rains vis-à-vis the increased distances.

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Ad paragraph 35.4 thereof

30. Regarding possible drop-outs, learners are merely stating what they feel. The MEC has an obligation to gauge this and investigate the underlying reasons as it is in the best interests of these children to attend school. It ought not be waved away by simply labelling it as an "ill-informed" allegation.

31. Again, reference is made to *"potential inconvenience"* that would befall learners should their school shift location. One, this diminishes the significant impact that being uprooted would invariably have on learners and two, it does so without making any attempt at engaging with learners to adequately assess the extent of how it will affect them.

Ad paragraph 37 thereof

32. It is telling that the MEC's understanding as to the choice between Voorbedag and Grootkraal is being merely one of distance. It begs the question whether any other considerations informed the MEC's plan to "relocate" and the way the best interests of the learners was assessed, if at all.

33. Once again, the MEC's failure to consider the historical context and the importance of security of tenure has been exposed by this over-simplification of the issues.

Ad paragraph 38 thereof

34. Considering the fact that the MEC envisages a relocation to Voorbedag as opposed to a merger it is unclear to what extent the prohibitive costs of constructing a "new school" will be avoided. Once again the lack of an actual cost-benefit analysis and insufficient detail is problematic.

35. The cited advantage of the so-called relocation, that the desire for a new school would be realized immediately, is not the case on the MEC's own papers. It will take at least 9 months, possibly a longer period. In any event, the MEC has not explained whose desire it is to have a "new" school. The community, the school, the teachers and the learners, it appears, have expressed a desire to remain at Grootkraal at its current location.

Ad paragraph 44 thereof

36. It would appear that the MEC is playing semantics. This is a blatant attempt to circumvent statutory processes by characterising their proffered solution as a "relocation" and thus to once again deny the community a chance to voice their opinions. This compounds the MEC's existing failure to engage directly with the community on the issue of expropriation.

37. It is highly unacceptable that the MEC has simply filed a notice to abide the Court's decision when it should be playing a more active and not passive role in the entire process. The obligation on the MEC to play a direct role in this process was articulated by the Constitutional Court in the case of *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) inter alia at paragraphs 45 and 46. One must also be reminded of the Order of Henney J dated 15 July 2011 in which "meaningful engagement" was directed to take place. To date, it cannot be said that there has been compliance with this Order.

Ad paragraph 53 thereof

38. There is no mention made of what empowering provision these steps were taken under and in which these events unfolded. It is noteworthy also that there are no confirmatory affidavits filed, which renders the evidence relating to the Circuit Manager's initial visit hearsay.

39. In any event, factual detail as to the content of the meetings is necessary in order to assist this Honourable Court in arriving at a final decision.

Ad paragraphs 54 to 57 thereof

40. Mr Lyners refers to the arrangements regarding the simultaneous operation of the two schools as not being insurmountable. Whether they are insurmountable or not cannot be determined without an indication of what these arrangements will be. The necessary detail, however, is glaringly omitted.

41. Mobile classrooms are never intended to be a permanent solution. The need for security of tenure is once again being side-stepped by placing the learners in temporary and inadequate facilities. The department's plan amounts to moving learners to mobile classrooms with no indication as to whether this is a temporary solution or if the Grootkraal learners are expected to learn in these conditions indefinitely. No explanation is provided as to the maximum life span of these structures or the impact of weather conditions on maintenance costs. It is my understanding that these are expensive to set up and costly to maintain.

42. It is also of grave concern should Grootkraal be closed, the school relocated or merged with Voorbedag, only later to be shut down due to financial resources. The MEC must provide greater detail, and map out a determinable plan if access to education and the best interests of these children are to be determined.

43. It bears highlighting that the MEC points to the need/demand for "considerable forward planning". That is precisely what is expected in these circumstances, and there has been ample time already since 2011 to do so.

Ad paragraph 58 thereof

44. In concluding its report CCL recommends that the MEC consider expropriating the land on which Grootkraal is located for the public benefit. The MEC provides a one line response: *"Having regard to the investigation conducted by CCL, its recommendation that expropriation ought to be considered, is without merit."* This statement begs the question whether expropriation has been considered thoroughly, or at all, as well as the MEC's objectivity and willingness to think outside of its relocation option.

45. In its report CCL recorded that it had asked the department whether there was a costing exercise done comparing the erection of permanent structures as opposed to expropriating the land. In its response, the MEC simply dismissed expropriation on account of *"access to ample State owned land"* at Voorbedag. A sufficient amount of land at a distant location should bear lesser weight in deciding if it is in the public interest to expropriate.

46. During the course of compiling its report CCL also asked the MEC, via letter, what considerations were taken into account in rejecting the option of expropriation. The MEC responded:

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"...the relevance of this enquiry is not readily apparent in that the department's decision not to expropriate the property in the circumstances is not the subject of review proceedings. In any event the department has access to available property in the vicinity".

47. Although the failure to expropriate was not subject to review proceedings the MEC's actions in this regard were and remain pertinent as they implicate the MEC's approach to safeguarding the best interests of Grootkraal learners and their right to access a basic education.

48. The MEC's lack of receptiveness to engage with the issue of expropriation is evidenced by the aforesaid statement. The SASA confers the power to consider an expropriation solely on the MEC but in almost five years MEC, Ms Debbie Schäfer, (and her predecessor in title, MEC, Mr Donald Grant) have never come on affidavit to state and justify their position on expropriation to the Court nor have any requests for consideration been adequately responded to.

49. The EE first posed the question on the desirability of expropriating the land upon which Grootkraal operates to then MEC, Mr Donald Grant, in a letter dated 4 January 2012. In that letter the EE enquired whether the MEC had considered the use of his section 58 power under the Act to expropriate. Should he not have done so, the EE wanted the reasons for this. If the MEC had considered but ultimately dismissed expropriation the EE asked for those reasons.

50. As legal proceedings were already underway the EE's attorneys also sent a letter to all the parties requesting permission to enter the proceedings herein as *amicus curiae* on that same day. The letter was therefore never formally responded to but rather addressed later by the department during the litigation.

51. At the stage that the EE sent the letter, the department had already elected to abide by the Court's decision. Mr Lyners attested to an explanatory affidavit on behalf of the MEC on 13 December 2011. Mr Lyners' affidavit does not make mention of whether expropriation was ever considered. However, the way the affidavit paints the department's understanding of its options in relation to Grootkraal's fate is quite telling.

52. Mr Lyners explains that on 17 March 2011 the department received a letter from the Kobot Business Trust which threatened eviction if the department did not vacate the property by 31 June 2011. The prospect of a mutually agreeable lease had apparently become *"more remote"*. This forced the department to:

"consider alternative arrangements which would address the continued education of the School's learners. It could only consider relocating the school – either to State owned land or to premises purchased or leased by the Department. As stated above, the applicant's offer to sell a portion of land to the Department would be too costly."

53. The land referred to by Mr Lyners is not the land which the school occupies. More importantly, the department's understanding that relocation was the *"only"* option is indicative that consideration of expropriation never entered the decision-making process.

54. Mr Lyners explains that the department *"had to relocate* [the school] *in light of the fact that it could not meet the Applicant's demands for a new lease agreement."* The department depicts itself as passive, cornered by an owner insisting on excessive rental which it cannot afford. However, section 58 was inter alia inserted into the SASA precisely to empower the MEC to expropriate land where the rental demanded is unreasonably high but the need for the school to remain persists.

55. It appears from the papers that the department was clearly kowtowing to the demands of the Trust and seemingly operating under the incorrect assumption that the Trust was, by virtue of ownership, in a position to dictate the future of Grootkraal Primary. To illustrate, the department received a letter of demand that the school be vacated by 31 June 2011 and *"in accordance with the applicant's notice to the Department to vacate"* Grootkraal's principal received an email stating that the school would close on that precise date.

56. A letter to the school by the department tells this same story:

"The difficulty in respect of Grootkraal UCC Primary School is that the owners of the property on which Grootkraal UCC Primary School is located, has indicated that the WCED must find alternative accommodation for the 160 children enrolled at Grootkraal by the end of June 2011. The WCED is therefore required to ensure that the learners are accommodated from the beginning of the third term, that is, 18 July 2011. In the absence of any alternative site near to Grootkraal the WCED has arranged for mobile classrooms to be placed at Voorbedag".

57. Responding to the EE's contentions on expropriation Mr Lyners, in his affidavit of 14 February 2012, states:

"I confirm that the Department did in fact consider expropriation, but in light of the alternative measures available to the Department, decided to relocate the school. The school will be situated on state owned land approximately 17kms from its present location. The Department is also of the view that the property at Voorbedag . . . is more suitable than the existing premises."

58. No reasons are given as to why expropriation was deemed unsuitable or why "relocation" was considered the most favourable option. In fact, it is not even clear from Mr Lyner's affidavit that the then MEC had himself applied his mind to the matter.

59. Not only does the Department not display an appreciation for the historical context of farm schools and how that bears relevance when making an assessment on expropriation under section 58, Mr Lyners, in one broad sweep, essentially and tellingly dismisses this context as one that is *"irrelevant and ought to be disregarded"*.

60. Instead Mr Lyner's makes a broad proclamation that in the event of a relocation of Grootkraal *"the learners' right to education remains unaffected."*

61. During its investigation CCL met with the MEC's legal representative on 10 April 2012. CCL enquired about the approach adopted and reasons underpinning the decision to relocate. The representative was not positioned to respond but promised to provide answers.

62. On 4 July 2012 CCL sent a letter to the State Attorney enquiring, amongst other things:

"115.2 In respect of the Department's decision to move the school to Voorbedag Primary School please indicate: …

115.2.4 Whether the Department conducted a costing exercise in respect of the cost of moving the school to Voorbedag Primary School, including the cost of erecting permanent structures at Voorbedag Primary School and

providing transport for learners, as opposed to the cost of expropriation of the land currently occupied by the school;

115.2.5 The considerations taken into account by the Department in coming to the decision to move the school; and

115.2.6 The considerations taken into account by the Department in rejecting the option of expropriating the land occupied by the school."

63. On 17 September 2012, the State Attorney responded, in part, as follows:

"116.5 ***Paragraph 115.2.4***

The lease agreement with the present owner expired. It threatened to evict the Department. Expropriation was not considered a viable option. The Department had access to ample state owned land at Voorbedag Primary School on which it can accommodate the school and its learners as a separate school.

116.6 ***Paragraph 115.2.5***

The Department relocated the school because agreement on the terms for a new lease agreement could not be reached and the owners threatened to evict the Department.

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116.7 ***Paragraph 115.2.6***

The relevance of this enquiry is not readily apparent in that the Department's decision not to expropriate the property in the circumstances is not the subject of review proceedings. In any event, the Department had access to available property in the vicinity."

64. The department's response suggests that *"ample state owned land"* seems to be the only factor underpinning a decision to relocate. Significantly, the letter remains silent on CCL's enquiries regarding a cost-benefit analysis in respect of relocation versus expropriation. Instead the letter simply states that expropriation was considered unviable without *any* further elaboration.

65. From the department's own response, as I have already explained, it is clear that the decision to relocate was simply a knee jerk reaction to unsuccessful lease negotiations and a quick fix attempt to the threat of an eviction. Importantly, when responding to CCL's direct question on the issue, the department lists *no* other considerations as informing its decision to relocate.

66. The department somehow did not deem it necessary to engage with CCL on the issue of why (assuming it was even considered) the option of expropriation was

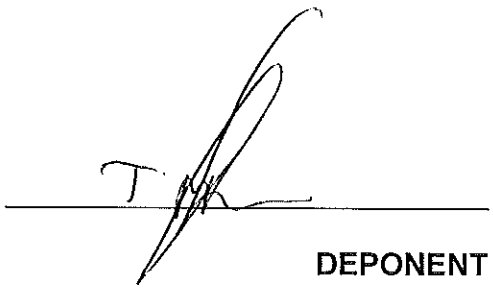
rejected. Rather the department adopts an elusive attitude which displays a complete lack of appreciation of the MEC's obligations under the circumstances.

Ad paragraph 59 thereof

67. The concept of discussing long-term plans with the School and all interested parties is exactly what was envisaged by the Order of Henney J to the effect that there should be "meaningful engagement". Since 15 July 2011 when that Order was granted, it appears, no such discussions have taken place and only short-term solutions have been considered.

Ad paragraph 60 thereof

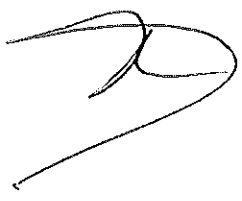
68. The EE is in agreement with the contents of this paragraph.



DEPONENT

I CERTIFY THAT:

1. The Deponent has acknowledged to me that:



1. He knows and understands the contents of this declaration;
2. He has no objection to taking the prescribed oath;
3. He considers the prescribed oath to be binding on his conscience;

2. The Deponent thereafter uttered the words: *"I swear that the contents of this declaration are true, so help me God".*

3. The Deponent signed this declaration in my presence at the address set out hereunder on this 16 day of **November 2016**.

CLERK OF THE COURT
PRIVATE BAG X1
2016 -11- 16
KHAYELITSHA
UMABALANA WENKUNDLA

COMMISSIONER OF OATHS

T.M.