IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CASE NO: CCT

In the matter between :

THE HEAD OF DEPARTMENT : DEPARTMENT OF EDUCATION, FREE STATE PROVINCE	**Applicant**
and	
WELKOM HIGH SCHOOL	**1st Respondent**
GOVERNING BODY OF WELKOM HIGH SCHOOL	**2nd Respondent**
and	
HARMONY HIGH SCHOOL	**1st Respondent**
THE GOVERNING BODY OF HARMONY HIGH SCHOOL	**2nd Respondent**

FOUNDING AFFIDAVIT

I, the undersigned

BABANE MARANYANE

State under oath that

INTRODUCTION

1. I am a Senior Assistant State Attorney at the office of the State Attorney, Bloemfontein. I am the applicant's attorney of record and am duly authorised by the applicant to depose to this affidavit in support of this application for leave to appeal to this Court .

2. The facts contained within this affidavit are, save where indicated otherwise, within my own personal knowledge and are, to the best of my knowledge true and correct.

3. This is an application for leave to appeal from the judgment and order of the Supreme Court of Appeal in SCA cases 766/2011 ("the Welkom Case") and 767/2011 ("the Harmony Case") which were heard together, both in the Free State High Court and the Supreme Court of Appeal.

4. The applicant is THE HEAD OF DEPARTMENT OF EDUCATION IN THE FREE STATE PROVINCE ("the Head of Department" and "Department" respectively). The Head of Department was the respondent before the High Court and the appellant before the Supreme Court of Appeal.

5. In the Welkom case, the first respondent is Welkom High School which is a public school, and the second respondent is the Governing Body of the Welkom High School. The first and second respondents were the first and second

applicants in the Welkom Case before the High Court and the first and second respondents in the Welkom Case before the Supreme Court of Appeal.

6. In the Harmony case, the first respondent is Harmony High School which is a public school, and the second respondent is the Governing Body of Harmony High School. The first and second respondents were the first and second applicants in the Harmony Case before the High Court and the first and second respondents in the Harmony Case before the Supreme Court of Appeal.

7. In this application, the Head of Department seeks leave to appeal to this Court from the judgment of the Supreme Court of Appeal dismissing his appeal on 28 September 2012. A copy of the judgment of the Supreme Court of Appeal is attached as Annexure **"A"**. The Head of Department's appeal that was dismissed by the Supreme Court of Appeal was an appeal against the judgment and order handed down by Mr Justice Rampai in the Free State High Court on 12 May 2011 in the following terms:

> *"92.1 The first respondent does not have the authority to instruct or compel, the school principal to act in a manner contrary to an adopted policy of the school governing body;*
>
> *92.2 The first respondent does not have the authority in law to instruct the school principal to take any action in contravention of or contrary to the learners pregnancy policy of the applicants or to the*

decision taken by the first applicant's principal in accordance with the learner pregnancy policy duly opted by the second applicant;

92.3 The first decision taken by the first respondent on the 16 September 2010 as contained in annexure "WEL3" and a second decision taken by the first respondent on the 2nd November 2010 as contained in annexure "HAR7" were valid in law;

92.4 The respondents are finally restrained from taking any action or actions directly or indirectly calculated to defy, contravene, subvert or in any manner to undermine the decisions by the applicants taken in terms of their learner pregnancy policies;

92.5 The two learners concerned shall be entitled to attend formal classes at the schools, to remain at the schools and in their current grades and to be taught, to learn and to be examined until the completion of their high school careers."

A copy of the High Court judgment is attached as Annexure **"B"**. The third paragraph of the order of the High Court referred to Annexures "WEL3" and "HAR7". These annexures were letters written on behalf of the Governing Bodies of Welkom and Harmony High Schools reflecting the decisions to exclude the two learners. Copies of the two letters are attached as Annexures **"C"** and **"D"** respectively.

8. The background to the litigation giving rise to this application for leave to appeal is the following:

    8.1. The two respondent schools have purported, without legal authority, to adopt pregnancy policies that provide for the automatic exclusion from school of pregnant learners and thereby

        8.1.1. discriminate unfairly against pregnant learners in breach of section 9 of the Constitution; and

        8.1.2. violate the fundamental rights of these learners to education in breach of section 29 of the Constitution.

    Copies of the Welkom and Harmony High School pregnancy polices are attached as Annexures **"E"** and **"F"** respectively.

    8.2. In terms of these pregnancy policies, learners who fall pregnant may not be readmitted to school in the year that they give birth and must accordingly repeat a year of schooling. These exclusionary provisions of the pregnancy policies ("the exclusionary provisions") operate without regard to the health of the learners, their wishes and those of their parents, their capacity to catch up any school work that they miss due to their pregnancies, or the point in the school year at which they give birth.

    8.3. Neither of the respondent schools notified the Department of the pregnancy policies they had purported to adopt. Instead, they mechanically implemented these policies without reference to the

Department. In the process many pregnant learners were excluded from school in the year that they gave birth. The first that the Department learnt of these policies was when the learners whose cases prompted the applications in the Court a quo turned to the Department for help.

8.4. Faced with appeals for assistance from learners who were being denied access to school in terms of the unlawful and unconstitutional exclusionary provisions of the pregnancy policies of the respondent schools, the Head of Department issued instructions to the principals of the two schools (who are his employees) to readmit the learners forthwith. By so doing, the Head of Department exercised his powers as employer of the principals in terms of the Employment of Educators Act 76 of 1998 ("the EEA") and acted in accordance with his obligations under section 7(2) of the Constitution to act positively to respect, protect, promote and fulfil the fundamental rights protected in the Bill of Rights. His intervention prevented further invasion of the fundamental rights of the affected pregnant learners and saved both of them from exclusion from school for the balance of 2010 and having to repeat their 2010 school year in 2011.

8.5. The respondent schools contended that the instruction of the Head of Department infringed the powers of the school governing bodies and accordingly applied to the High Court for the relief that was ultimately granted by Rampai J.

8.6. Although the Head of Department had pertinently raised the unconstitutionality of the two schools' pregnancy policies as his primary defence to the interdictory relief claimed by the schools and the governing bodies, and had filed Rule 16A notices which led to the intervention of the Human Rights Commission as an *amicus curiae* in both cases, the High Court held that it could not consider the constitutionality of the pregnancy policies in the absence of a counter-application from the Department for an order declaring the pregnancy policies unconstitutional and invalid.

8.7. The High Court proceeded to hold that the Head of Department had no legal power to act in the manner that he did and that his instructions to the principals violated the constitutional principle of legality. The High Court held that the only remedy available to the Head of Department to prevent his employees at a school from acting unconstitutionally on the basis of a pregnancy policy adopted by the governing body of that school was to call on the governing body to change the policy and to apply to the High Court for relief if it refused to change the policy. The High Court accordingly issued an order granting the schools the relief that they sought.

8.8. Although the High Court had refused to entertain the Department's constitutional challenge to the exclusionary provisions of the pregnancy policies of the two schools and the decisions taken in reliance theron ("the exclusionary decisions") to exclude the two learners from school, as appears from paragraph 92.3 of the judgment quoted in paragraph 7

above, read with Annexures **"C"** and **"D"**, the order issued by the High Court declared that the exclusionary decisions were valid.

8.9. The Supreme Court of Appeal broadly agreed with the reasoning of the High Court and dismissed the Head of Department's appeal. As appears from paragraphs 28 and 29 of Annexure **"A"**, the Supreme Court of Appeal did vary the order of the High Court *inter alia* to remove the declaratory relief in relation to the exclusionary decisions. However, the the Supreme Court of Appeal ordered that

> *"In each case, for as long as the pregnancy policy remains in force, the [Head of Department] is interdicted and restrained from directing the school principal to act in a manner contrary to the policy adopted by the school governing body"*

8.10. I respectfully submit that this interdictory relief is relief which will have the effect of protecting decisions taken in reliance of the exclusionary provisions of the two pregnancy policies from administrative correction and will thus facilitate continuing violations of the fundamental rights of pregnant learners.

9. This application for leave to appeal accordingly raises the following important constitutional issues:

9.1. The operation of the principle of legality in the tri-partite relationship between the Department, principals who are its employees and the

governing bodies of the schools at which those principals are employed, and more particularly

9.1.1. the power of governing bodies to adopt “pregnancy polices” which purport to provide for the mandatory exclusion of pregnant learners from school, and

9.1.2. the power of the Head of Department to issue an instruction to his employees, for whom he is vicariously liable, not to act in a manner that is unlawful or unconstitutional.

9.2. The related issue of the separation of powers between the judiciary and the executive and the power of the Head of Department to require his employees not to act inconsistently with the Constitution without first approaching the High Court to endorse the issue of such an instruction;

9.3. The constitutionality of the pregnancy policies of the two respondent schools; and

9.4. The responsibilities of the Courts themselves to protect fundamental rights, and not to grant interdictory relief which is opposed on the grounds that it will facilitate the ongoing violation of fundamental rights, unless they have satisfied themselves that the interdict sought will not have such an effect.

10. I have structured this affidavit as follows:

10.1. First I address the issue described in paragraph 9.3 above. I list the offensive provisions of the pregnancy policies of the two schools and show that these are unconstitutional and invalid. In the process, I touch on the facts of the disputes in the two schools that gave rise to the applications in the High Court. (The respondents ultimately all accepted that the learners could return to their schools. So no relief still turns on the facts of the individual disputes. Nevertheless the facts provide useful illustrations of the unconstitutionality of the schools' pregnancy policies).

10.2. Then I address the interests of justice in granting the Department leave to appeal.

10.2.1. I show that the Department has reasonable prospects of success in its proposed appeal; and

10.2.2. I address the interests of justice in a decision of this Court on the constitutional issues raised in the appeal.

THE UNCONSTITUTIONALITY OF THE PREGNANCY POLICIES OF THE TWO SCHOOLS

The Welkom Policy

11. The Welkom policy has been attached as **Annexure "E"**.

11.1. The policy is overtly punitive in intent. It is introduced with the following statement:

> *"As a result of the high rate of teenage pregnancies in South Africa the government in conjunction with the Education Department has urged schools to take **a tougher stance** on learner pregnancies."* (emphasis added).

11.2. It purports to impose obligations on pregnant learners which manifestly violate their right to privacy in relation to their own bodies by stating:

> *"A learner that is pregnant or has reason to believe that she may be pregnant needs to immediately inform a member of staff, preferably a senior female, which has been appointed by the principal."*

11.3. It then compounds this violation of privacy by encouraging other learners to report on suspected pregnant learners:

> *"If a learner or any member has a suspicion that another learner may be pregnant, this should also be brought to the attention of the appointed member of staff."*

11.4. It discriminates unfairly against pregnant learners and limits their fundamental right to education by requiring them to leave school and to repeat their school year:

> *"In the year that the learner's child is born, the learner may not return to Welkom High School. This applies to all learners, regardless of the following :*

- *The month the baby is born in, whether it is January, June or October. This means a matriculant who falls pregnant and delivers a baby in June will not be allowed to write the matric final exams. If a learner delivers a baby in December, she will only be allowed to return to school in the second January following the birth, i.e. if the baby is born in December 2008, the learner may only return in January 2010.*

- *The grade of the learner will be irrelevant, in other words matriculants will not enjoy preferential treatment because it is their final year at school.*

- *The age of the learner will be irrelevant which means that if the learner, after leave of absence is too old to attend school at a secondary school level, recommendations for adult education will be made."*

The Harmony Policy

12. The Harmony Policy has been attached as **Annexure "F"**.

    12.1. The Harmony Policy is framed in less punitive terms than the Welkom Policy. Yet it too discriminates unfairly against pregnant learners and violates their fundamental rights to education and privacy.

    12.2. Clause 4.1 obliges other learners to inform on any of their fellow learners who are pregnant;

12.3. Clause 4.4 obliges a pregnant learner to take leave of absence from school at the start of the eighth month of pregnancy; and

12.4. Clause 4.5 states:

> *"No learner should be readmitted in the same year that they left school due to a pregnancy."*

12.5. Clause 4.6 prohibits a pregnant learner from returning to school without a medical certificate certifying her fitness.

The Policies Encourage Violations of Privacy and Dignity

13. Both policies encourage other learners and school authorities to invade the fundamental rights of girl learners to privacy, dignity and bodily integrity by "sniffing out" their pregnancy status. The policies are also calculated to stigmatise pregnant learners for being pregnant. These unseemly effects of the policies were illustrated by the evidence in the two matters.

13.1. Thus, in the Harmony case, the evidence revealed the following:

13.1.1. Two years before the events giving rise to the present case, the Harmony learner was suspected by school authorities of "looking pregnant" and was ultimately compelled to visit a doctor and to produce a medical certificate before the school authorities left her alone.

13.1.2. In June 2010 the school authorities again suspected the learner of "seeming to be pregnant".

13.1.3. When the learner returned to school after having given birth in the June July recess and her mother denied her pregnancy (presumably to avoid the punitive educational consequences and stigma that would flow from any admission), a whispering campaign started against the learner:

> *"Learners then reported to educators that the child is at school after giving birth during the recess"*
>
> *"The complaints… intensified"*

13.1.4. The principal then required the learner's mother to produce medical proof that her daughter had not given birth.

13.1.5. The governing body joined the investigation and wrote a letter to the mother of the learner asking her to confirm whether or not her daughter had given birth.

13.1.6. When this letter went unanswered and the school was told that a mystery caller reported to the Department that the learner had given birth, the school decided to exclude the learner.

13.1.7. By the time the learner was forcibly excluded from school, it is common cause that she had already been back at school for a full term (approximately three months) after the birth of her baby.

13.2. The stigma that underlies the policies was clearly illustrated by the founding affidavit in the Welkom application where the respondents complained that the learner had to be excluded from school because

> *"Young children in Grade 8 are also exposed to a highly pregnant Learner in their midst, which also creates an environment not conducive to the high standard of moral values that the Welkom High SGB so dearly attempts to vest amongst all Learners at Welkom High."*

13.3. The thoughtlessness and carelessness that frequently accompanies such stigmatising conduct is reflected in the fact that Welkom Governing Body member who deposed to this statement, did so on 12 November 2010, more than two weeks after the learner had given birth on 25 October 2010. So there was no longer any notional threat of the Grade 8 learners being tainted by the visible presence of *a "highly pregnant Learner in their midst"*.

The Policies are Unconstitutional

14. This application for leave to appeal is concerned primarily with the exclusionary provisions of the pregnancy policies and the exclusionary decisions taken in

reliance thereon. The exclusionary provisions manifestly limit the fundamental rights of pregnant learners in terms of sections 9(3), 28(2) and 29 of the Constitution. The deleterious effect of the exclusionary provisions on the education of pregnant learners is well illustrated by the statistics furnished by Harmony High School itself in relation to learners who were subject to the exclusionary provisions. These statistics show the following:

14.1. Between 2007 and 2010 there were 25 pregnancy cases at Harmony.

14.2. 3 of the 25 pregnant learners fell pregnant in their final year and were still expecting during the final exams in their matric year. They were accordingly allowed to write these exams and were not affected by the exclusionary provisions of the policy.

14.3. Another 3 of the 25 pregnant learners had fallen pregnant in 2010 and were, at the time of filing of affidavits, away from school because they had been compulsorily excluded from returning to school during the 2010 school year. It was, accordingly, too early to tell what the ultimate effect of the exclusionary provisions on their school careers would be.

14.4. The learner whose case prompted the Harmony application in the Court a quo was a special case because the Head of Department intervened on her behalf to secure her return to school.

14.5. That left 18 pregnant learners who were victims of the exclusionary provisions and whose post-pregnancy policy school experience was

known. Of these 18 learners, only 6 learners returned to the school. So two thirds of the learners (12 out of 18) who were subjected to the exclusionary provisions prior to 2010, ended up leaving the school permanently.

15. I respectfully submit that

15.1. The exclusionary provisions limit section 9(3) of the Constitution because they discriminate on the listed ground of pregnancy

15.2. That discrimination is therefore presumptively unfair,

15.3. The presumption of unfairness is reinforced because the exclusionary provisions are calculated to stigmatise learners for being pregnant and to present pregnancy as a state worthy of stigma - this is clear from the evidence in both cases as has been illustrated in paragraph 13 above.

15.4. Apart from discriminating on the listed ground of pregnancy in a manner calculated to stigmatise, the exclusionary provisions

15.4.1. are gender discriminatory in that they apply compulsory exclusionary (and punitive stigmatising) provisions to pregnant female learners but not to male learners who impregnate female learners, and in so doing reinforce sexist stereotypes that it is girls who are to blame for unwanted pregnancies, and

15.4.2. are irrational, unfair and disproportional in that they compel all pregnant learners to miss the remainder of the school year and to repeat a year of school after they have given birth, irrespective of

15.4.2.1. the time of the year in which the particular learner gives birth,

15.4.2.2. the capacity of the learner to return to school to complete the school year in which she gave birth,

15.4.2.3. the wishes of the learner and her parents,

15.4.2.4. the family circumstances of the learner and her baby,

15.4.2.5. the consequences to the learner of missing a full school year, or

15.4.2.6. the best interests of the learner and her baby.

15.5. The exclusionary provisions also limit the fundamental rights protected by sections 28(2) and 29 of the Constitution in obvious respects:

15.5.1. the exclusionary provisions clearly limit pregnant learners' section 29 fundamental right to basic education because they force pregnant learners to leave school for the balance of the year in which they are pregnant and to repeat that school year the following year - that, in itself, is a limitation of the section 29 right because the learners are temporarily denied access to school.

15.5.2. the statistics quoted in paragraph 14 above from the Harmony experience show that the actual limitation caused by the exclusionary provisions may be far more significant – two thirds of the learners subject to the exclusionary provisions at Harmony have never returned to the school.

15.5.3. the exclusionary provisions operate without reference to the personal circumstances of the pregnant learner or her new-born child. It is accordingly inevitable that they will operate contrary to their best interests and in violation of section 28(2) in many cases.

15.5.3.1. the Harmony statistics illustrate this proposition: it could not have been in the best interests of the two thirds of affected Harmony learners, or those of their babies, for the learners to leave school prematurely because of falling pregnant;

15.5.3.2. the individual facts of both of the present cases also show how the exclusionary provisions would have operated against the best interests of the learners involved:

15.5.3.2.1. in both cases, the learners were excluded from school close to the end of the school year and would have had to repeat their school years but for the intervention of the Head of Department;

15.5.3.2.2. as a result of the intervention of the Head of Department, both learners were allowed to write their final examinations in 2010 and successfully passed these examinations and were promoted to the next grade in 2011.

15.6. No justification case was advanced by the respondents for any of these limitations of fundamental rights because the respondents elected not to engage with the constitutional complaints raised against the exclusionary provisions and the exclusionary decisions by both the Department itself and the Human Rights Commission which intervened as *amicus curiae*.

THE DEPARTMENT'S PROSPECTS OF SUCCESS ON APPEAL

Introduction

16. For the reasons set out in the preceding section, I respectfully submit that the Department has at least reasonable prospects of showing that the exclusionary provisions of the pregnancy policies are unconstitutional and invalid.

17. That being the case, I respectfully submit that it was not open to the High Court or the Supreme Court of Appeal to grant relief that was calculated to protect acts taken in reliance on these unconstitutional exclusionary provisions and in violation of the fundamental rights of affected pregnant learners. I will address this topic first, whereafter I will address the independent ground of appeal of the Department based on the issues described in paragraphs 9.1 and 9.2 above.

Sections 8(1) and 172(1) of the Constitution and the Duties of the High Court in relation to Relief based on Potentially Unconstitutional Acts or Instruments

18. I respectfully submit that once the Department had shown a *prima facie* case that the exclusionary provisions and the exclusionary decisions were unconstitutional, the High Court and the Supreme Court ought not to have granted any of the relief sought by the respondents.

    18.1. in respect of the declaratory relief granted in paragraph 92.3 of the High Court judgment, this much is clear from paragraph 28 of Supreme Court of Appeal judgment which explains why the High Court order was varied to exclude this relief;

    18.2. I respectfully submit that, by virtue of sections 8(1) and 172(1) of the Constitution, the interdictory relief granted by the high Court and upheld by the Supreme Court of appeal ought also not to have been granted

19. In terms of section 8(1), the Bill of Rights is binding on the judiciary.

    19.1. Accordingly, the judiciary accordingly cannot grant interdictory relief that is calculated to facilitate ongoing violations of fundamental rights.

    19.2. In circumstances like the present case, where interdictory relief was resisted on the basis that it was founded on pregnancy policies that violated the Bill of Rights and would, if granted, facilitate ongoing violations of fundamental rights, the High Court ought to have

19.2.1. investigated the complaint of unconstitutionality directed against the pregnancy policies, and

19.2.2. declined to grant the interdictory relief sought on the basis of these policies unless it was satisfied that there was no merit to the constitutional complaint against these policies.

20. Quite apart from section 8(1), section 172(1)

20.1. obliges a Court deciding a constitutional matter within its power to declare that any law or conduct inconsistent with the constitution is invalid to the extent of such inconsistency (paragraph (a)), and

20.2. limits the further remedial power of Courts in constitutional matters to the making of orders which are just and equitable (paragraph (b)).

21. In the present case there were two broad constitutional complaints raised in the matter:

21.1. the respondents' complaint about the legality of the Head of Department's instruction to the principals not to act on the basis of the unconstitutional and unlawful exclusionary provisions of the pregnancy policies, and

21.2. the Department's complaint about the constitutionality of the pregnancy policies.

22. I respectfully submit that in so far as the respondents based interdictory relief on their complaint that the instruction of the Head of Department was unlawful, the

High Court could not grant such interdictory relief unless it was just and equitable to do so. In this regard, I respectfully submit further that

22.1. It could never be just and equitable to grant interdictory relief that was calculated to facilitate ongoing violations of fundamental rights in terms of unconstitutional exclusionary provisions of the two schools' pregnancy policies.

22.2. The High Court and Supreme Court of Appeal accordingly had to consider the Department's constitutional complaint against the exclusionary provisions in order to decide whether or not to grant the interdictory relief sought.

22.3. Once the constitutionality of the exclusionary provisions had to be considered by the High Court and the Supreme Court of Appeal, these Courts ought to have found these exclusionary provisions unconstitutional and issued appropriate orders of constitutional invalidity in relation to them; alternatively if they though that the issues had been inadequately canvassed on the papers notwithstanding the repeated opportunities afforded to the respondents to engage with these issues, the Courts ought

22.3.1. to have afforded the respondents a further opportunity to address the constitutional case raised against the exclusionary provisions and the exclusionary decisions and thereafter decided this constitutional issue; alternatively

22.3.2. simply to have refused the interdictory and declaratory relief claimed by the respondents on the grounds that the respondents had not established that the exclusionary provisions and the exclusionary decisions were consistent with the Constitution.

The Legality Issues

23. Both the Supreme Court of Appeal and the High Court appear to have held that the exclusionary provisions of the pregnancy policies fell within the power of the two governing bodies under the South African Schools Act 84 of 1996 ("the Schools Act") to adopt a code of conduct for their respective schools. I respectfully submit that this proposition is incorrect.

23.1. A code of conduct prescribes the standards of conduct expected of pupils, the punishments that may be imposed for conduct falling short of these standards and the procedures by which such punishments may be imposed (see s 8 of the Schools Act).

23.2. Pregnancy is a listed ground in the prohibition of unfair discrimination in section 9(3) of the Constitution. The Schools Act cannot be interpreted to treat pregnancy as a species of misconduct and accordingly a condition that is capable of being regulated or managed in terms of a code of conduct.

23.3. Moreover, I respectfully submit that the Schools Act cannot be interpreted tacitly to confer on governing bodies a power of the sort asserted by the

respondents, namely a power compulsorily to exclude pregnant learners from school for a period of up to a year:

23.3.1. The obligation to provide access to education is the obligation of the State. So the scheme of the Schools Act is to vest the Head of Department with control over decisions which exclude learners from school.

23.3.2. Section 3(1) of the Schools Act makes clear that school attendance is compulsory up to the end of the school year in which a learner turns 15 or is in Grade 9.

23.3.3. Section 3(6)(b) of the Schools Act provides that anyone who prevents a learner subject to compulsory attendance (like the learner in the Welkom case) from attending school, commits a criminal offence.

23.3.4. In terms of section 4(1) of the Schools Act, only the Head of Department may exempt learners from compulsory school attendance

23.3.5. The Schools Act regulates in detail the circumstances in which learners can be suspended or expelled from school for disciplinary reasons, and circumscribes the powers of governing bodies in this regard. In particular,

23.3.5.1. Section 9(1A) to 9(1E) and 9(2) of the Schools Act ensure that governing bodies have no powers, without the consent of the Head of Department, to expel a learner from school or to suspend a learner from school for more than seven days, save in cases where they have suspended a learner pending a decision by the Head of Department to act on their recommendation to expel that learner.

23.3.5.2. There are no provisions of the Schools Act which suggest that a governing body can compulsorily excluded a learner from school in any circumstances other than these provisions vesting governing bodies with a limited power to suspend learners for disciplinary reasons.

24. I respectfully submit that

24.1. If the exclusionary decisions were unconstitutional for the reasons set out in paragraphs 11 to 15 above, or *ultra vires* the two governing bodies for the reasons set out in paragraph 23 above, the Head of Department was entitled to instruct the principals not to give effect to these decisions;

24.2. This is because the Head of Department is the employer of both principals and is vicariously liable for their unlawful or unconstitutional conduct. As employer, he accordingly has the authority to instruct them not to act in a

manner that will violate the constitutional rights or learners or that will otherwise be unlawful. (In this regard I point out that the exclusion of the Welkom learner may well have amounted to a criminal contravention of section 3(6)(b) of the Schools Act because she was still subject to compulsory school attendance).

25. I respectfully submit further that the Schools Act makes clear that in the tripartite relationship between the Department, principals and governing bodies, principals as departmental employees are subject to the authority of the Department and may not implement governing body decisions which are at odds with departmental instructions or policy. Thus section 16A(3) of the Schools Act expressly provides that any assistance offered by a principal to a governing body must not be in conflict with

> *"(a) instructions of the Head of Department;*
>
> *(b) legislation or policy (in the sense of departmental policy – see s 16A(2)(f) of the Schools Act);*
>
> *(c) an obligation that he or she has towards the Head of Department, the Member of the Executive Council or the Minister; or*
>
> *(d) a provision of the Employment of Educators Act, 1998 (Act 76 of 1998), and the Personell Administration Measures determined in terms thereof."*

26. The High Court and the Supreme Court of Appeal held that the only remedy for the Head of Department to stop his employee violating the constitutional rights of

learners at the behest of a school governing body, or in terms of an invalid school governing body policy, is to apply to Court for an order determining the unlawfulness of the governing body instruction or policy. I respectfully submit that

26.1. Such an approach is inconsistent with the reasoning of this Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) at paras 49 and 50 and *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at paragraphs 55 and 56 in relation to the need to protect the autonomy of the administrative process and to respect administrative mechanisms that "*provide immediate and cost-effective relief*".

26.2. It infringes the separation of powers between the judiciary and the executive because it interferes with public administration by requiring public employers to obtain judicial sanction before they can issue instructions to public employees; and

26.3. It is also an approach that is calculated to undermine the fundamental rights of learners because the unrecoverable cost to the Department of bringing High Court proceedings each time a governing body of one of the 1369 public schools in the Free State instructs a principal to act in a manner inconsistent with the fundamental rights of a learner is such that a rational use of the disposable portion of the education budget in the

overall interests of education in the province will preclude the institution of legal proceedings by the Department in most such cases.

26.4. By way of illustration, as appears from the latest budget speech of the Member of the Executive Council of the Department (attached as Annexure **"G"**), in order to promote learning in mathematics, the Department currently runs a maths incentive programme which provides R100 000 for top maths schools - for the cost to the Department of the present litigation alone,

26.4.1. several additional schools could have been incentivised in this manner; or

26.4.2. hundreds of additional learners could have been included on the school feeding scheme discussed in the budget speech.

The Interests of Justice in the Appeal

27. The constitutional issues raised in the present appeal include

27.1. issues of importance with significant implications for public education in the whole country,

27.2. issues of importance concerning the responsibilities of the High Court in relation to relief which may facilitate violations of fundamental rights, and

27.3. issues of importance relating to the legality principle and the separation of powers between the judiciary and the executive.

28. For the reasons set out above, I respectfully submit that if leave to appeal is granted, the Department will have reasonable prospects of success in respect of both of its independent grounds of appeal.

29. In all the circumstances, I respectfully submit that the interests of justice support the grant of leave to the Department to appeal to this Court against the judgment and order of the Supreme Court of Appeal.

CONCLUSION

30. For the reasons set out above, the Head of Department respectfully asks for leave to appeal directly to this Court from the judgment handed down by the Supreme Court of Appeal on 28 September 2012.

____
DEPONENT

THUS DONE AND SIGNED before me at   on the   day of OCTOBER 2012, the deponent having acknowledged that she knows and understands the contents of this affidavit, that she has no objection to taking the prescribed oath and that she considers the oath as binding on her conscience.

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COMMISSIONER OF OATHS