SWAZILAND HIGH COURT

CIVIL CASE NO. 335/09

BETWEEN

SWAZILAND NATIONAL EX-MINERS WORKERS ASSOCIATION...	**FIRST APPLICANT**
CEBISAMADODA NXUMALO...	**SECOND APPLICANT**

AND

THE MINISTER OF EDUCATION.	**FIRST RESPONDENT**
THE PRIME MINISTER-	**SECOND RESPONDENT**
SWAZILAND GOVERNMENT ...	**THIRD RESPONDENT**
THE ATTORNEY-GENERAL . . .	**FOURTH RESPONDENT**

CORAM:	**AGYEMANGJ**
FDR THE APPLICANTS:	**T.R. MASEKD ESQ.**
FDR THE RESPONDENTS:	**M. VILAKATI ESQ.**

JUDGMENT

In this application brought on urgency, the applicants are asking the court to make interim orders calling upon the respondents to show cause if any, on a date and time to be determined by this court, why:

1. They should not be ordered to make free education in public schools available for every Swazi child under the constitutional obligation imposed on the State in terms of S. 29 (6) read together with S. 60 (8) of the Constitution of Swaziland Act 001 of 2005;

2. They should not make available their education policy in so far as implementation of the constitutional requirement under the said S. 29 (6) read together with S. 60 (8) for scrutiny, so as to determine their compliance with their constitutional obligation.

The first applicant herein is described as an Association duly established by its Constitution, having its place of business at Esthel House, Manzini, with a registered membership of six hundred and seven Swazis once employed as miners in South Africa through The Employment Bureau of South Africa (TEBA). A copy of its Constitution exhibited as Annexure ND2 describes it as "a body corporate existing separately from its members, with perpetual succession, capable of entering into contractual and other relations and of suing and being sued in its own name..."

The second applicant sues in his personal capacity of a citizen of Swaziland, a parent of a minor child in grade 6, as well as a member of the first applicant.

The first and second respondents are cited in their official capacities of: Minister responsible for Education, and as Prime Minister respectively. The third respondent is the Swaziland Government, and the fourth respondent, the principal legal advisor to the Government of Swaziland. In an eleven-paragraph founding affidavit sworn to by one Ndlavela Dlamini President of the first applicant, duly authorized so to do on its behalf by resolution marked Annexure ND1, and in a twelve-paragraph confirmatory affidavit of the second applicant, the applicants have alleged a number of matters:

It is the contention of the applicants, that the third respondent (of which the second respondent is the head, and whose educational policy is implemented by the first respondent), has contravened S. 29 (6) of the 2005 Constitution of the Kingdom of Swaziland (hereafter referred to as "the Constitution") which provides as follows:
"Every Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade".

It is the contention of the applicants, that because the first applicant's members including the second applicant, most of them indigent, have found it increasingly difficult to pay the school bills of their children, they expected the Government of Swaziland (referred to hereafter as the third respondent and alternately the Government) to fulfil its alleged constitutional mandate of providing free primary education for their children in primary school during the period of three years following the promulgation of the Constitution, in accordance with S. 29 (6) of the Constitution.

When it appeared to the first applicant that the expectation of its members was in some peril, the first applicant approached the Prime Minister (hereafter referred to as the second respondent) per letter (marked Annexure ND3) and requested that the government assume responsibility for the education of the children of ex-rniners from Grade 1 to Form Five. When this, and a subsequent approach towards engagement in December 2007 appeared to yield no fruit, the applicants herein who believed their cause of action to seek the enforcement of the Constitution to have accrued, commenced the instant proceedings.

The applicants contend in the instant application that the obligation of the third respondent to provide free education provided for in S. 29 (6) of the Constitution is further buttressed by S. 60 (8) of the Constitution which reads: "Without compromising quality, the State shall promote free and compulsory basic education for all and shall take all practical measures to ensure the provision of basic health care services to the population".

The applicants contend that the combined effect of the two provisions aforesaid, vests a justiciable right in both applicants to invoke the jurisdiction of this court conferred by S. 35 (1) of the Constitution for the enforcement of this right. This is because the membership of the first applicant comprises parents of Swazi school children who have the responsibility to see to it that their children go to school, while the second applicant, a member of the first applicant, is a citizen of Swaziland, and a parent of a Grade 6 pupil said to be entitled to the right to education free of charge.

The applicants contend that the first respondent has intimated that due to economic constraints, the third respondent will not fulfil its alleged constitutional duty to provide education free of charge or may at best suspend same through progressive implementation including the channelling of about E1,000,000 to areas of priority and also, the care of orphaned and vulnerable children first. And indeed in a document exhibited by the applicants marked ND4, titled "Re: Introduction of Free Primary Education (FPE)", the first respondent defined the constitutional requirement of free primary education to mean "a consolidated programme aimed at creating an environment characterized by minimum barriers to quality primary education". He also indicated therein, a progressive implementation (roll out) which he said begun in 2003 AD and included an increase in grants to orphaned and vulnerable children, subsidies through the provision of free textbooks, exercise books and stationery, as the mode in which the third respondent would provide free education. While the first respondent declared that implementation would not be realized due to the "dire shortage of teachers, and schools infrastructure and equipment", he indicated that in the near future implementation would be by way of grants to children enrolled in Grade 1 to begin with until "the whole primary school cycle (was) covered".

This, the applicants contend is discriminatory and is in any case, in violation of S. 29 (6) of the Constitution which provides for implementation of free primary education within three years of the coming into force of the Constitution. The applicants contend also that the third respondent is also obligated to craft a comprehensive policy on

education in line with the objective of free education for children contained in S. 60 (8) of the Constitution.

The applicants thus seek a two-fold remedy: that this court compel performance of the third respondent's alleged constitutional obligation to provide free primary education for every Swazi child and also, to produce before the court, the third respondent's policy on education to enable the court assess if it be in accordance with the said constitutional provision.

The first respondent deposed to an answering affidavit and averred that the citing by the applicants of a multiplicity of respondents was superfluous in the present proceedings. He raised points of law *in limine* challenging the *locus standi in judicio* of both applicants. The first respondent, acting on the advice of the third respondent, alleged that S. 29 (6) of the Constitution created a right in Swazi children attending public primary schools which could be vindicated in two ways: by the said children by themselves with the assistance of their parents, or by the parents in a representative capacity. For this reason, and also because the first applicant was an Association which he contended could only vindicate its own rights and not those of its members, and particularly where as in the instant case, the rights of the children of its members and not the members themselves were concerned, he alleged that the first applicant was not clothed with the legal capacity to bring this action. Regarding the suit of the second applicant, the first respondent contended that a proper construction of the Constitutional provision S. 29 (6), mandated the Government to provide free education progressively, starting with the children in primary Grade One. He argued that the second applicant whose child was in grade 6 was thus not included in the group entitled fee education and in that circumstance, not clothed with the capacity to enforce compliance.

In argument learned counsel for the third respondent asserted that a careful reading of S. 35 (1) of the Constitution indicates that persons who may enforce the Bill of rights are: A person, natural or juristic acting in his own interest, or such person acting

in the interest of a group of which he is a member, or a person acting in the interest of a detained person.

Learned counsel arguing in the alternative, at first relied on the *South African* cases of *Ahmadiyya, Anjuman Islamhore (South Africa) and anor v. Muslim Judicial Council (Cape Town) and ors 1983 (4) SA 855 (C)* to aver that the first applicant a universitas, could not bring a suit to vindicate the rights of its members, a position in line with the common law restriction on the competence of a voluntary Association to bring a representative action on behalf of its members. The alternative argument was that the competence of the first applicant lay in an action on behalf of its members regarding the infringement of the rights of the members themselves and not, as in this instance, where it is the children of the members and not the members themselves whose rights had been infringed. Regarding the capacity of the second applicant learned counsel echoed the matters stated in the answering affidavit of the first respondent, set out before now.

On the merits of the application, the first respondent asserted that the case of the applicants was misconceived in that the Government of Swaziland had complied with its mandate under S. 29 (6) of the Constitution and was providing free education as defined in the context of Swaziland. He deposed that the definition of free education in the context of Swaziland as set out in the Constitution, did not mean the provision of primary education free of charge to the parents of children. He maintained that the term referred to "a consolidated programme aimed at creating an environment characterised by minimum barriers to quality primary education" and asserted that this included the provision of stationery, textbooks, qualified teachers, accommodation for teachers, infrastructure such as classrooms, and capitation grants. These he alleged the government had provided, leading to a phenomenal increase in the enrolment of school-going children. He alleged that in the areas of deprivation such as with the shortage of teachers and the adequate provision of accommodation for them, the Government had put in place various interventions aimed at providing teachers and adequate infrastructure, including an increase in enrolment at teacher training colleges and the sourcing of donor funds. He deposed

further, that another mode, by which the government had implemented its constitutional mandate, was to target orphans and vulnerable children as a group deserving education free of charge.

Learned counsel for the respondents, declaring in argument that S. 29 (6) was clumsily drafted, contended that the said provision did not cast an obligation on the Government or subject its implementation to the availability of resources or progressive implementation.

He thus urged the court in its consideration of same, to have regard to international law and recognise that socio-economic rights such as the right to free education are programmatic and achievable incrementally, and in consequence, to interpret it to "include a primary obligation on Government to progressively realise the right within the limits of its resources". He urged the court thus to find that the third respondent had complied with its responsibility to progressively provide free primary education which responsibility included the ventures it had undertaken, and to do so starting with children in the first grade and not across all primary school grades. He asserted that this progressive implementation of free education in primary schools undertaken by the Government was recognised in *Articles 13 and 28 of the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child respectively.*

Lastly, while the first respondent denied that the Government had a responsibility to provide this court with its policy documents on education, asserting that it was Parliament, and not the courts that had the responsibility to monitor the implementation of the directive principles contained in Chapter 5 of the Constitution, learned counsel contended that should the court deem it fit to grant the reliefs, sought, a declaratory as opposed to a mandatory one should be made thus giving the third respondent, room to adopt policies necessary for the carrying out of the court's orders.

In argument, learned counsel for the applicants first addressed the matter of the locus standi of the applicants herein. Armed with such cases as: *Minister of Home Affairs v. Fisher and anor (1980) AC 319 at 328 PC; S v. Zuma 1995 (4) BCLR 401;* from many parts of the Commonwealth, legal writings and other scholarly research including C. *M. Peter's Human Rights in Tanzania Selected Cases and Materials, (1997) p.674* from which he culled various excerpts from the Tanzanian case of *Mtikila v. Attorney-General* (although he did not supply

the citation thereof), learned counsel for the applicants invited the court to find

that the applicants were properly before this court by reason of the modern trend whereby issues of locus standi are relaxed in public interest litigation. Learned counsel made a forceful argument that in many countries in the Commonwealth, constitutional provisions have been given broad and liberal interpretation where a narrower interpretation would exclude persons seeking to uphold constitutional provisions in the public interest. He also urged that the provisions of S. 35, S25 and S2 of the Constitution had done away with the common law principle of showing an interest above others in proof of standing in public interest litigation. It is for this reason he said, that the first applicant, an Association ought not to have the courts' doors closed against it in the present instance. He furthermore argued that parents having the responsibility to see that their children attend school, are clothed with capacity to seek redress in this

court regarding the enforcement of the rights of their children to free primary education in face of the lack of legal capacity of the said children. Citing the dictum of Kruger A.J in the South African case of *Highveldridge Residents Concerned Party v. Highveldridge TLC, 2002 (6) SA 66 at 77-78 G-A* which dealt with the locus standi of voluntary associations regarding the enforcement of the South African Bill of Rights as persuasive authority, he urged the court to find that in so far as the members of the

first applicant, a collective of parents have such locus standi, so does the first applicant that represents the said members.

Learned counsel added that S. 35 (1) which contains the provision for the enforcement of the Bill of Rights in the Constitution of Swaziland, can be accessed by individuals or groups such as the first applicant where it considers the rights of its members are being infringed. He argued also regarding the second applicant, that he was also clothed with such capacity by reason of his being a citizen of the land who can seek redress where a provision of the Constitution is perceived to be violated in accordance with S. 2 (2) thereof. Moreover, having a child in Primary Grade 6, his suit was proper as he had the legal standing as a parent of a child entitled to free education together with the other members of the Association, to bring this suit. On the merits of the case, learned counsel reiterated the matters contained in the founding affidavit and contended that the Government of Swaziland had so far not complied with the constitutional provision contained in S. 29 (6) of the Constitution, for it had merely introduced subsidies by way of the provision of

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some components of free education such as textbooks, among others. Citing such international Law instruments as: the *Universal Declaration of Human Rights: Art. 26(1),* the *International Convention on Economic, Social and Cultural Rights: Art. 14,* and the *United Nations Convention on the Rights of The Child: Art. 28* which provide for free compulsory basic education for States Parties thereto, learned counsel furthermore contended that the definition of free education canvassed by the first respondent speaking for himself and the third respondent, was incorrect.

He urged the court to find that free primary education as provided for in S. 29 (6) of the Constitution, meant primary education free of charge, and at no cost to the persons so entitled. He canvassed further for the court to find that same was to be implemented by the third respondent within three years of 2005 when the Constitution came into force, and not to commence after that period as apparently understood by the latter.

Lastly learned counsel contended that this court, charged with the upholding of the Bill of Rights provided for under the Constitution, had power, in accordance with the provisions of S. 151 thereof, to scrutinise and test the policy of the government on education for the purpose of ensuring that it is in compliance with the Constitution. Relying on the South African case of *Minister of Health and ors v. TAC and ors (No. 2) 2002 (5) SA 721* where the court addressed the issue regarding the circumstances under which the court could veer into the domain of the executive arm of government and examine government policy for constitutional compliance, he urged the court to so find although the making of such policy was provided for in the Constitution in the Chapter providing for Directive Principles of State Policy which provisions are generally not justiciable. At the close of the arguments, these matters stood out as issues for determination:

1. Whether or not the applicants have locus standi in judicio to approach this court regarding the prayers aforesaid

3. Whether or not the s. 29 (6) requires the Government to provide education free of charge;

4. Whether or not free education is limited to children of first grade;

5. Whether or not the third respondent has complied within the period stipulated

6. Whether or not the court can order the production of the Government's educational policy for its scrutiny.

The first issue set out arises out of an objection on procedure and not on the substance of this application. While bearing in mind the admonition of the Court of Appeal ***Shell Oil (Pty) Ltd v Motorworld (Pty) Ltd T/A Sir Motors Appeal Case No. 23/20006 39,*** in the exhortation to uphold substantial justice as opposed to technical justice, I say that the issue of *locus standi in judicio* is paramount in an application of this nature and must necessarily be addressed as a preliminary issue.

To the question whether the applicants herein have locus standi, my answer is that they do, individually and jointly and I say so for the reasons appearing hereunder.

I first deal with the first applicant's standing and in that adventure, I set out the relevant parts of S. 35 (1) of the Constitution being the standing relied on and canvassed by the applicant:

"Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be contravened in relation to that person or a group of which that person is a member...then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress" The provisions referred to in that excerpt are SS 14-34 of the Constitution found in Chapter 3 thereof, and concern the protection of fundamental rights and freedoms (referred to hereafter as the Bill of Rights). As learned counsel for the respondents rightly pointed out, S. 35 (1) spells out three categories of persons who are granted standing in the right to seek redress for the violation of any of the provisions contained in the Bill of Rights. These include a person who is aggrieved or stands in apprehension that any of his rights under the Bill of Rights has been, is being, or is in danger of being infringed. I daresay that this reference to a person, includes a juristic person such as the first applicant duly incorporated as provided for in the Interpretation Act No. 21 of 1970. An argument has been canvassed by learned counsel for the respondent that as a universitas, the first applicant cannot sue on account of the infringement of its members' rights as its interest is distinct from the interest of the members. I find this position untenable. It is my view that this issue of the entitlement of children to free primary education gives the right of suit not only to the children who will enjoy the right, but also to the parents who have the duty of providing education to the said children.

This is because the latter group, although not direct beneficiaries of the right, are responsible for paying school bills when the children are denied the right. For this reason, they are so closely affected by it as to suffer injury should the free primary education scheme not be implemented, thus vesting in them individually and as a group, the right to seek a remedy.

The first applicant is an Association with a constitution that sets out ten principal objects all relating to the promotion of the interests of its members and their

communities. These span economic pursuits, education and training, improvement of the political, social and economic interests of, and the general welfare of the members.

In the founding affidavit, the said members of the first applicant were described as parents of children in primary school. I have said before now, that such parents have a right in themselves to bring a suit to seek a remedy regarding the infringement of the right of the children to free education which right is closely bound with their interest.

In that circumstance, where the first applicant as an Association with the mandate to see to and to protect the welfare of its members identifies with the interest of its members, it acquires the legal standing to sue for a remedy regarding an injury to an interest it has identified with as its own. In this viewpoint, I find reinforcement in such cases of persuasive authority as ***Highveldridge Residents Concerned Party v. Highveldrigde TLC 2002 (6)***

SA 66. See *per* ***Kruger AJ*** whose position on the locus standi of voluntary associations in seeking redress regarding the rights of their members enshrined in the South African Bill of Rights I associate myself with; "...the restrictions placed by the common law on this legal standing of voluntary associations cannot and should not apply without qualification to voluntary associations seeking to invoke S. 38 to seek redress in the event of the Bill of rights having allegedly been infringed or threatened...to hold otherwise would...to disregard the "interest of the poorest in our society" who are...more often than not, dependent upon action taken by informally structured associations of civil society so that legitimate issues may be addressed on their behalf..." This circumstance obtains not because rules of standing no longer matter in constitutional cases as canvassed by learned counsel for the applicant, but because the protection, upholding and defence of the Bill of Rights contained in the Constitution Ss 14 - 34, have been given to persons and groups including natural and legal persons who may enforce same before the courts in accordance with S. 14 (2) of the Constitution as read with S. 35 (1) thereof.

The question of legal standing has become a vexed one in many commonwealth jurisdictions, and courts, as well as counsel appearing before them have often confused the lines drawn between legal standing in public interest litigation, and legal standing in connection with the infringement of individual or group rights as protected by constitutions. This is the difference: whereas public interest litigation for the defence and upholding of constitutions has so evolved that courts have become liberal with the application of rules of standing in so far as interest or injury suffered are concerned, litigation in respect of individual or group rights still require demonstration of an interest or injury which confer legal standing in line with the common law requirement adhered to in ***Eagles Landing Body Corporate v. Molewa NO 2003 (1) SA 412 at p. 36.*** That the Constitution has not made a change in the common law in this circumstance is demonstrated in this: that provisions giving a right of suit to persons and/or groups with regard to the latter situation are carefully worded to make same accessible upon the infringement of a right in relation to that person. The 2005 Constitution of Swaziland shares sophistication with constitutions of countries that have seen fit to set out therein, the right of suit in the two different circumstances. More particularly, to relieve the courts of this land of the irksome duty of determining standing in public interest litigation, the drafters of the Constitution put therein, S. 2 (2) thereof, which permits any citizen of the land to question acts of persons perceived to be in violation of the Constitution in a judicial forum.

Courts of Swaziland thus no longer have the burden of navigating foreign shores in order to find precedents of cases in which individuals with no direct injury, interest, right or standing may institute proceedings in the court for interpretation and enforcement of the Constitution. I found it burdensome that learned counsel for the applicant took the court into such a foray, navigating currents and eddies in lands vexed with such issues and unaided with provisions such as S. 2 (2) of the Constitution of Swaziland, when such a delicious repast has already been provided for in our Constitution.

With regard to litigation under the Bill of Rights in our Constitution however, I have said before now, that contrary to the assertions of learned counsel as supported by

erudite but inapplicable judgements of other jurisdictions, legal standing is still important and is spelt out in these words: S 14 (2): ***"The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld...where applicable to them, by all natural and legal persons in Swaziland and shall be enforceable by the courts..."*** S. 35 (1): ***"Where a person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened* in relation to that person or a group of which that person is a member..."** (my emphases). I have no hesitation for reasons set out before now, to find that the first applicant has locus standi to bring this application in its own name to vindicate the right to free primary education arising out of the interest of its members it has identified with as its own in line with its principal objects, and I so hold. The matters up for consideration regarding the second applicant are somewhat different and call up matters that must be determined during the consideration of the merits of the application.

Without delving into such matters at this point then, I hold that the second applicant as the parent of a child in Grade Six has the locus standi as one affected by the deprivation of the child's constitutionally guaranteed right to free education.

Now I move on to determine the merits of this application and in this adventure, I examine the duty imposed on the third respondent by S. 29 (6) of the Constitution.

The said provision reads: *"Every Swazi child shall within three years of the commencement of this Constitution* have the *right to free education* in public schools at least up to the end of primary school, *beginning with the first grade"* (my emphases).

What is meant, by free education?

The applicants have urged the court to find that free education means the provision of education free of charge.

As aforesaid, the first respondent has set out a definition in his answering affidavit which in a nutshell refers to a programme by which significant barriers to quality education are progressively removed, within the limits of government's resources.

Learned counsel for the respondents finding himself in some difficulty has urged the court not to read S. 29 (6) as it stands, contending that the language thereof does not sufficiently conform to the requirements of free education advocated for in two international instruments: *Articles 13 and 28 of the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child* respectively which influenced the drafting of S. 29 (6J. In saying this, learned counsel for the respondents has asked the court to adapt the wording of the obligation placed upon the third respondent to provide free education in the Constitution, to the intentions of the drafters of the said international instruments. He urges this upon the basis that these instruments which have been ratified or acceded to by the Kingdom of Swaziland, recognise the need for progressive implementation within the resources of the country, a circumstance lacking in the language of S. 29 (6). I find the argument uninspiring. First of all I must bring to the fore that although helpful in helping the court achieve a purposive interpretation of the words used in S. 29 (6), these international instruments may not be made to hold sway over a constitutional provision which taken in the context in which it appears, lends itself to a literal interpretation. It must be borne in mind that these international instruments although ratified and acceded to by the Kingdom of Swaziland, do not as yet form part of her laws. S. 238 (2) and (4) of the Constitution sets out clearly the mode by which international agreements become binding on Swaziland: by an Act of Parliament, or by a resolution of at least two-thirds of the members at a joint sitting of the two chambers of Parliament; and the mode by which such become law in Swaziland - by an Act of Parliament. This is not to say that such instruments should have no bearing at all on the interpretation of constitutional provisions. Indeed, on occasion, it may be crucial to have regard to same in order to arrive at the true meaning and purport of a provision within the spriprit of the Constitution. But such recourse should only be had where it becomes "relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law" see per ***Mohomed DP in Azanian Peoples Organisation***

(AZAPO) and ors v. President of the Republic of South Africa 1996 (4) SA 671 at 688 (CC).

In the present instance, there is no indication, contrary to the assertion of learned counsel for the respondents, that S. 29 (6) as it stands, sins against the said international instruments ratified or acceded to by Swaziland. Indeed it seems to me that it is rather in consonance with same although the drafters of the Constitution, having regard to the Swaziland situation apparently created a right for every Swazi child that placed an obligation on the Swaziland Government perhaps more imperative and extensive than obtains in the said instruments. Furthermore, it is my view that even where recourse is had to the said international instruments, they will not, in view of their purport which is the realisation of a universal compulsory basic education free of charge, discourage the application of S. 29 (6) based on a literal interpretation thereof. In the instant case, by reason of the clear and unambiguous use of the words "free education" appearing in the context of S. 29 (6) even with the said international instruments as a background to their being, I see no reason not to adhere to the golden rule of interpretation which is to interpret the word "free" as used in connection with the provision of goods and services, (education being in such a category), in its ordinary grammatical usage to mean: at no charge. I reiterate that the context in which the word "free" appears in S. 29 (6) as an adjective to describe the word "education", leaves no ambiguity in the reader. Nor in my view, does the literal interpretation that such provision be at no cost to the recipient lead to injustice or absurdity so as to warrant recourse being had to other rules of interpretation calling in aid extraneous material. It seems to me that the respondents are seeking to have the court give the words "free education", an interpretation which in context, will only do violence to the language, will at best be artificial, and in reality, be absurd. I must decline the invitation of learned counsel for the respondents to resort to other rules of construction in order to achieve the interpretation urged by him which will not be in line the purport and the spirit of the entire Constitution: the aspiration of a people towards a free society that seeks the welfare of its own.

I do not hesitate to say that the items listed by the first respondent as having so far been provided by the third respondent, which items are described by learned counsel to be the components of free education provided in fulfilment of the obligation under S. 29 (6), can by no means be said to have discharged the constitutional obligation laid upon the Government to provide free education.

There is no doubt in my mind when I say that the Government's efforts so far efforts amount only to a subsidy on the access to education and no more.

I am reinforced in my opinion by the fact that the first respondent himself appeared not to be confident in the stance he adopted regarding the meaning of the provision of free education in the affidavit he swore to, and vacillated between two positions for whereas in one breath he steadfastly declared that the provision of what he described as the components of free primary education

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> constituted the fulfilment of the government's constitutional mandate of providing free primary education under S. 29 (6), he acknowledged that to the group of children described as Orphaned and Vulnerable Children (OVCs), the provision of free education was absolute and at no cost. The question is, if the provision of the said components fulfilled the Government's constitutional obligation in that same amounted to "free education" as provided for in S. 29 (6), what did the first respondent mean when he deposed that due to financial constraints, the Government had only been able to select areas of priority for attention including the provision of primary education free of charge to the OVCs in fulfilment of that, same constitutional mandate?

I findd upon the Government to provide free primary education was to do so at no that cost or charge to the children so entitled. I must be quick to clarify - by reason the of a passing comment made by learned counsel for the applicants, that the consti provision of free education does not of essence include the provision of school tution uniforms. It however no doubt, includes tuition at no cost, provision of textbooks al (which on the showing of the first respondent, has already been done) and obliga where possible, exercise books and stationery, and I so hold.

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place The next question to be answered in this judgment is this: who is entitled to free education as provided for in S. 29 (6) of the Constitution?

The respondents contend that due to the expression "beginning from the first grade" appearing at the end of that provision, implementation was intended to be directed at children in the first grade only. It is for this reason that the locus standi of the second applicant has been challenged, for the respondents allege that a child in any other grade is not entitled to the free education provided for under S. 29 (6) so that a parent of such a child cannot have legal standing to vindicate the right. They also allege that implementation will be progressive limited to the grade one children and running its course as the children the ladder to other primary grades.

This interpretation is with respect unfortunate. It seems to me commonsense that the words sought to be interpreted be read as appearing in context in the entire provision. I set out again the said S, 29 (6): *"Every Swazi child shall within three years of the commencement of this Constitution* have the *right to free education* in public schools at least up to the end of primary school, *beginning with the first grade"* (my emphases).

It seems to me that S. 29 (6) which begins with "Every Swazi child" and ends with "beginning with the first grade", could only have been meant to be read as a

continuing thought expressed in a single unbroken sentence. In my judgement, the said expression can only mean that every Swazi child will be entitled to free education and that such free education will commence as soon as the child enters the first grade. This would mean that all Swazi children who were already in school at the commencement of implementation would be entitled to free education and that such would include children in the first grade. For clarity, I will add that regarding children who would come in thereafter, the provision of free education would commence when they entered Grade One and not at preschool or any time after the first grade.
It seems to me that it is a sin against the rules of interpretation for the expression "beginning with the first grade" not to be read as qualifying the main subject matter which is: "every Swazi child", but rather as if it were standing alone which in essence is the interpretation canvassed by the respondents and is evidently absurd.

I find then that the constitutional obligation on the third respondent to provide free education in the public primary school is directed at every Swazi child attending a public primary school whatever the grade, and not otherwise.

That it is a responsibility not to be abdicated by the third respondent for whatever reason or excuse, including lack of funds, shortage of teachers et al, is clear from the use of the word "shall" which in the context in which it has been used in S. 29 (6) as an accruing right, appears to be an imperative, compelling compliance, and not merely a directory or permissive expression.

What is the period of implementation? S. 29 (6) provides that all Swazi children be provided with free education in public primary schools *"within three years of the commencement of (the) Constitution".* It seems to me that the operative word is *"within"* which in ordinary grammatical usage, means: inside of. It seems to me that any interpretation that places the implementation period after the three years specified and not during the course of the three years following the coming into force

of the Constitution will do violence to the clear and unambiguous stipulation therein contained.

I find that the commencement of the provision of free education to all Swazi children of all grades was to be during the course of the three years following the date of the corning into force of the Constitution and I so hold. This gives a right of suit to an aggrieved entitled person immediately after the three year period if there is no such implementation.

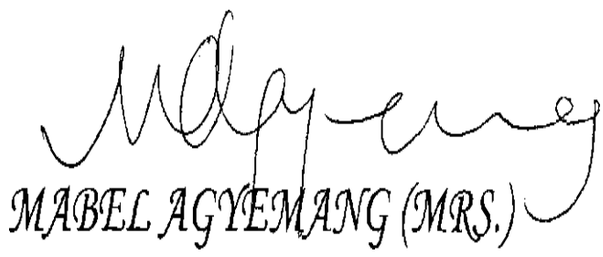
Is the court entitled to order the Government to produce its educational policy before it for the purpose of examination to ensure compliance with the constitutional provision? It seems to me that it can, seeing that it has been made the watchdog of the Constitution by S. 151 (2) thereof.

There is no gainsaying that in order to preserve and respect the separation of powers, the judiciary as an arm of Government ought to tread softly when it comes to acts that may amount to interference in executive or legislative matters. Even so, where there is reasonable belief that any policy of the executive arm will flout the express provisions of the Constitution, the court which is given the responsibility of enforcing provisions of the Constitution may call for such policy to be laid before it for judicial scrutiny, to ensure compliance. I find support in the pronouncement of the Constitutional Court of South Africa in ***Minister of Health and ors v TAC and ors (No. 2) 2002 (5) SA 721*** at ***755.*** Yet it is my belief that the situation that may warrant such judicial interference must be grave indeed and lending itself to no other remedy. It is rny view that in the instant suit where both counsel have asked the court to make a declaratory relief as to whether or not every Swazi child of whatever grade, attending a public primary school is entitled to the provision of education free of charge, it is unnecessary and certainly superfluous for the court inclined to grant such relief, to further order the respondents to produce the Government's policy on education before it for scrutiny.

Having heard all the arguments in this application and having read the affidavits filed in support of, and against the application therefore, I go ahead to grant, the application and enter judgment for the applicants in the following terms:

I make a declaration that every Swazi child of whatever grade attending primary school is entitled to education free of charge, at no cost and not requiring any contribution from any such child regarding tuition, supply of textbooks, and all inputs that ensure access to education and that the said right accrued during the course of the period of three years following the corning into force of the Constitution.

I make a further declaration that the third respondent being the Government of Swaziland has the obligation to provide education free of charge, at no cost, to every child so entitled.



MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE

Costs awarded on the ordinary scale to the applicants.

DATED THE 16th DAY OF MARCH, 2009