

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: 18678/2007

WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY

Applicant

v

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

GOVERNMENT OF THE PROVINCE OF THE WESTERN CAPE

Second Respondent

JUDGMENT DELIVERED THIS THURSDAY, 11 NOVEMBER 2010

CLEAVER J

[1] This application concerns the rights of severely and profoundly intellectually disabled children in the Western Cape.

[2] The applicant is a body corporate which has as its members non-governmental organisations which care for children in the Western Cape with severe and profound intellectual disabilities. The members of the forum care for approximately 1000 children with such disabilities.

[3] The following facts are not in dispute:

3.1 The state establishes and funds schools which include schools known as “*special schools*” which cater for the needs of children who are classified as having moderate to mild intellectual disabilities (IQ levels of 30 – 70).

3.2 Children with an IQ of under 35 are considered to be severely (IQ levels of 20 – 35) or profoundly (IQ levels of less than 20) intellectually disabled. Such children are not admitted to special schools or to any other state schools.

3.3 The state makes no direct provision for the education of children with severe or profound intellectual disabilities (the affected children). It also does not provide schools in the Western Cape for such children.

3.4 In the Western Cape the only education available to such children is at special care centres which are run by non-governmental organisations, such as the members of the applicant. As already mentioned approximately 1000 of these children are cared for by the members of the applicant at what are termed 'Special Care Centres'.

3.5 Children who cannot obtain access to Special Care Centres receive no education at all.

3.6 There are insufficient Special Care Centres to cater for all such children.

3.7 The only contribution which the state makes to the education of such children is a subsidy paid by the Department of Health to the organisations which provide this service.

3.8 The financial support is less than the state provides for the education of children who are not so disabled. In the Western Cape

3.8.1 the Department of Health pays an annual subsidy of R5 092 per child for children with severe or profound intellectual disabilities who attend Special Care Centres.

3.8.2 the respondents spend R6 632 per child per annum on children who attend mainstream schools.

3.8.3 the respondents spend R26 767 per child per annum on children with mild to moderate intellectual disabilities who attend special schools.

3.9 Although counsel for the state submitted during the course of argument that for children who do not qualify for admission to special schools, no amount of education would be beneficial, that was not the case put forward for the respondents in the papers. In the papers the parties were *ad idem* that children with severe or profound intellectual disabilities are able to benefit from education and training and the applicants made it clear in their papers that this view has long been internationally accepted.

3.10 Such children have needs which are much greater than those of children who do not have this degree of disability for the majority of the children have secondary disabilities such as epilepsy, visual and/or hearing impairment and cerebral palsy.

[4] The applicant contends that since the state provision for children with severe or profound intellectual disabilities is

4.1 Very much less than is provided for other children.

4.2 Inadequate to cater for the educational needs of these children; and

4.3 Only made available where a non-governmental organisation provides such facilities,

The policy and practice of the respondents infringes the rights of these children in respect of their right to education, their right to equality, the right to human dignity and their right to protection from neglect and degradation.

[5] Each of these issues will be dealt with separately.

THE RIGHT TO EDUCATION

[6] Section 29(1)(a) of the constitution provides that everyone has the right to a basic education, including adult education. This right has both a positive and negative dimension as was recognised by the Constitutional Court in *ex parte Gauteng Provincial Legislature* in which the court stated, with reference to the interim constitution, that

*“Section 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.”*¹

[7] The respondents recognise the right of everyone, including the affected children, to education, but submit that the steps taken by the respondents in this regard must be interpreted in the light of the socio-economic history of the country and that when this is done, it will be seen that the rights of the affected children are not being infringed.

[8] A substantive portion of the answering affidavits is taken up with an explanation of the steps taken by the government to transform the 14 race based departments of

¹ *Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at paragraph [9].

education which it inherited from the pre-1994 government. The respondents explain that the following steps were taken:-

8.1 In March 1995 the Department of Education published the White Paper on Education and Training which was published in draft form for consultation and was given extensive media coverage. It was noted in that paper that services for learners with special educational needs (LSEN) as well as education support systems, which included all education-related services in relation to health, social work, vocational and general guidance and counselling were racially based.

8.2 New education and training policies to address the legacies of under-development and inequitable resources had to be established based on the constitutional guarantees of non-discrimination and equal education for all.

8.3 All the vast needs in education could not be met at once or satisfied in a short period and in the result it took some ten years and five further white papers to develop the educational policy now in place which is spelled out in great detail in White Paper 6 which bears the heading 'Special Needs Education Building an Inclusive Education and Training System' which was published in July 2001.

[9] The main features of White Paper 6 are summarised in the heads of argument provided by the respondents' counsel and the following extracts are relevant:-

9.1 *"The policy does not exclude the children concerned. On the contrary, it is acknowledged that different learning needs arise from a range of factors including physical, mental, sensory, neurological and developmental impairments, and differences in intellectual ability. It also acknowledges that the learners who are most vulnerable to barriers to learning and exclusion in South Africa are those with disabilities and impairments."*

9.2 *"There is a systematic moving away from using segregation according to categories of disabilities as an organising principle for institutions. The provision of education for learners with disabilities is based upon the intensity of support needed to overcome the debilitating impact of those disabilities. There is an emphasis placed on supporting learners through full-service schools that will have a bias towards particular disabilities depending on need and support. The policy*

also directs how initial facilities will be set up, how the additional resources required will be assessed and it indicates how learners with disability will be identified, assessed and incorporated into special, full-service and ordinary schools in an incremental manner.”

- 9.3 *“The policy states that special needs education is a sector where the ravages of apartheid remain most evident. Apartheid special schools were organised according to two segregating criteria, race and disability. The impact of this policy was that only 20% of learners with disabilities were accommodated in special schools. In 2001 statistics showed that only about 64 200 learners with disabilities or impairments were accommodated in about 380 special schools. At that stage it was estimated that there were 280 000 learners with disabilities or impairments who were unaccounted for.”*
- 9.4 *“The following objectives are outlined as key strategies in White Paper 6:”*
- 9.4.1 *“Special schools should be qualitatively improved and gradually converted into resource centres providing professional support to neighbourhood schools, and integrated into district-based support teams.*
- 9.4.2 *The process of identifying, assessing and enrolling learners in special schools should be overhauled and be replaced by one that acknowledges the central role played by educators, lecturers and parents.*
- 9.4.3 *Disabled children and youth of school-going age who do not attend school should be mobilized. Approximately 500 out of 20 000 primary schools within mainstream schooling should be designated and converted to full-service schools, beginning with the 30 school districts that are part of the National District Development Programme.*
- 9.4.4 *Within mainstream education, governing bodies and professional staff should be introduced to the model of inclusive education. The range of diverse learning needs and intervention in the Foundation Phase should be identified early.*

- 9.4.5 *District-based support teams, designated full-service and other primary schools and educational institutions should be established, to provide a coordinated professional support service that draws on expertise in further and higher education and local communities, targeting special schools.*
- 9.4.6 *Learners are not categorised or excluded from a school according to their level of intelligence. Instead, the policy provides for basic education of learners with intellectual disabilities at three types of schools, namely special schools, full-service schools (ordinary public schools that have the capacity to accommodate learners with mental disabilities), and mainstream schools. The school at which a child will be enrolled will depend on the level of need, ranging from one to five. Children at levels four and five who are severely disabled and receive disability grants have the greatest need.*
- 9.4.7 *Children with severe intellectual disabilities whose needs are greatest may be able to access support at special schools on a full-time or part-time basis. Special schools provide education to learners who require intense levels of support, such as accommodation in settings requiring secure care or specialised programmes with high levels of support. These learners often require services by specialised health care; access to specialised equipment; and facilities which are accessible to, for example, learners who are blind or bound to a wheelchair. Learners who do not require this support on a frequent basis would be placed in mainstream schools. Special schools will also provide particular expertise and support, especially professional support in curriculum, assessment and instruction as part of the district support team to neighbourhood schools, in particular full-service schools. Special schools will also provide life-skills, training and programme-to-work linkages. For example, a special school has specialised skills available among its staff and has developed learning materials to assist learners who are visually impaired. There may also be facilities for Braille available at the school. The professional staff at such a special school could run a training workshop and produce learning materials in their district for other educators on how to provide additional support in the classroom to visually-impaired learners. For these reasons, White Paper 6 proposes a qualitative upgrading of the services of special schools and a focus on the training of staff for their new roles. This process of*

upgrading would take place once an audit of the programmes, services and facilities in all 378 special schools and independent schools is completed.

- 9.4.8 *All special schools will be strengthened with further resources and capacity. These include specialised staff providing support in the form of trans-disciplinary support teams based at schools or visiting schools on an itinerant basis. The trans-disciplinary teams consist of staff from provincial, district, regional and head offices and from special schools granting educators access to appropriate pre-service and in-service education and training; and professional support services. Special schools will also fulfil the role of resource centres for full-service schools and main stream schools. To this end, the provincial departments have successfully trained staff at 30 special schools in all nine provinces to work at resource centres. In addition there are 30 district-based support teams to provide support in an integrated way as outlined above.*
- 9.4.9 *White Paper 6 proposes the designation and conversion of about 500 out of 20 000 primary schools to full-service schools, beginning with the 30 school districts that are part of the national District Development Programme. These are schools that will be equipped and supported to provide for the full range of learning needs among learners. As stated in White Paper 6, it is impossible in the medium term to convert all 28 000 schools and colleges to provide the full range of learning needs. Despite this, the Department pursues a policy of inclusion of learners with disabilities who do not require intense levels of support, in full-service schools. These schools will be assisted to develop their capacity to provide for the full range of learning needs and to address barriers to learning. Special attention will be paid to developing flexibility in teaching practices and styles through training, capacity-building and the provision of support to learners and educators in these schools.*
- 9.4.10 *The policies outlined in White Paper 6 will lead to more cost-effective usage of resources in the long term when the proposed model is fully operational. However, in the short-term additional funding will be required for special needs education. This funding will be sought from a range of sources, more particularly from provincial education budgets and donor funding, both local and international.*

9.4.11 *Given the funding constraints, the first respondent has proposed a realistic timeframe of 20 years for the attainment of the inclusive education and training system. There is a detailed implementation plan comprising immediate to short-term steps (2001 – 2003); medium-term steps (2004 – 2008); and long-term steps (2009 – 2021). For the short to medium term, i.e. the first five years, a three-pronged approach to funding is proposed. The chief sources of funding are new conditional grants from the national government, funding from the budgets of provincial education departments and donor funds. It is however important that the limited financial resources available for the education and training of individuals with barriers to learning are targeted to those with the greatest need on the basis of poverty/income/socio-economic status.*

9.4.12 *As regards staffing, the objective of the post-provisioning strategy is to allocate posts in accordance with the actual educational support needs of the learners concerned and not on the basis of category of disability. The revised resourcing model will create a dedicated pool of posts for the educational support system. The post-establishment model will have to be revised. The revision will focus on the development of an appropriate post-distribution mechanism, guidelines for post-utilisation and structural and organisational arrangements to ensure flexibility in the deployment of posts. Particular attention will be given to optimising the expertise of specialist support personnel, such as therapists, psychologists, remedial educators and health professionals.”*

[10] The respondents say that the objective of the inclusive education and training system proposed in White Paper 6 is to create a wider spread of educational support services in line with what learners with disabilities require. This means that learners who require low intensive support will receive this in ordinary schools; those requiring moderate support in full service schools; and learners who require high intensive educational support in special schools.

[11] In 2005 the National Department of Education developed the National Strategy on Screening, Identification, Assessment and Support (“the SIAS Strategy”). This is directed at determining the nature and level of support required by learners with special education

needs and also outlines the procedures to ensure that all learners with Level 4 and 5 needs (learners who require moderate and high levels) of support such as learners who are disabled and receive social security grants are admitted to schools and receive the necessary support.

[12] In June 2005 the National Department of Education published three sets of guidelines for the implementation of White Paper 6.

12.1 The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Full-Service Schools. These guidelines explain the main principles upon which full-service schools are founded, describe their characteristics and outline the institutional development process of such schools.

12.2 The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Full-Service Schools as Resource Centres. These guidelines provide a conceptual framework for an inclusive system of education. They provide *inter alia* that disability should be seen not only in medical terms, but also in terms of the rights of the disabled person and contain operation procedures for a paradigm shift from special education to inclusive education.

12.3 The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: District Support Teams. These guidelines sketch the roll of support providers employed by the National Department of Education to assist education institutions such as schools and early childhood centres to identify and address barriers to learning and to promote effective teaching and learning.

[13] Provincial and Education Departments have thus far trained 800 district officials and educators of full service and special schools in the implementation of the SIAS Strategy.

[14] In November 2007 the National Department of Education published guidelines to ensure that all special schools become fully functional and contain the preparatory steps for the development of special schools as special school resource centres. Such resource centres are to have professional teaching and specialist support staff, physical

infrastructure such as facilities for learners with physical disabilities, therapy rooms, incontinence facilities and rooms for orientation and mobility training and the fitting and adjustment of assistive devices. The guidelines also provide that a special school may admit only learners who require support in the area of specialisation; that learners must undergo a screening and assessment process in terms of the SIAS Strategy before being considered for placement and that no learner with very high needs may be refused admission on the basis of the severity of the learner's support needs.

[15] Thirty ordinary schools have been identified for conversion into full service schools and physical infrastructure improvements were being completed in 12 of these. In 2006 and 2007 district based support teams had been established in 30 designated districts and had started to provide support services to special school resource centres.

[16] With all this as background, counsel for the respondents submitted that the right of the affected children to education, being a socio-economic right, should not be seen in isolation but together with other socio-economic rights such as housing, food, water, health care and social security.

[17] Ultimately the defences put up by the respondents are:-

* The SIAS Strategy and policy expounded in White Paper 6 indicates how the state intends to deal with the affected children. Having regard to the scarceness of resources available to the respondents, there will be children who meet the SIAS criteria who will receive education and there will also be children who do not meet the criteria. In respect of these it is submitted that no amount of education will be beneficial for them and they will be dependent on the imparting of life skills to them by their parents.

* The respondents have limited resources and have to make difficult policy choices as to the distribution of these resources in the face of competing demands and are accordingly not in a position to make any further contribution to the education of the affected children. In this connection it is argued that the right to education should not trump rights to housing, food, water, health care and social

security. It is also submitted that because of the size of the problem facing the state, the court should be inclined to soften the budgetary impact of an unqualified reading of the right to education referred to in s 29(1)(a) of the constitution.

[18] As to the submission that steps taken by the respondents to implement White Paper 6 are sufficient to comply with the provisions of s 29(1)(a) insofar as the affected children are concerned, the fact is that at present children with severe or profound intellectual disabilities are excluded from special schools. More importantly White Paper 6 or the current implementation of government policy makes no provision for such children to be catered for by special schools at present. The respondents only say that their objective is to ensure, at an unspecified time in the future, that such children are catered for by special schools. Moreover, the furthest that the respondents go at this stage is to say that such children *“may be able to access support”* at special schools. They do not indicate what form this support will take, when it will occur, where it will be provided and to what extent it will be provided. The defence, as I understand it is that for the foreseeable future, the SIAS Strategy will continue to be employed. This in turn means that at least some of the affected children will continue to be taught at the special care centres provided by the applicant’s members for which no subsidy is received.

[19] As to when some of the affected children may be admitted to special schools, the respondents say that they will only be admitted if they are able to *“acquire sufficient skills”* or if they *“achieve the minimum outcome and standards linked to the grade of education”*. Admission to a special school will be on the basis of an assessment of a child’s level of educational need. Children who fall inside Levels 4 and 5 of the SIAS Strategy will be admitted to special schools. Those whose level of need are higher than that *“will receive education through Partial Care Centres”* such as those run by the applicant’s members. On the respondents’ case therefore it is clear that when their policies are implemented there will be children with severe or profound intellectual disabilities who will be excluded from the schooling to be provided by the respondents as they will fall outside Levels 4 and 5 of the SIAS Strategy. Perhaps it is for this reason that counsel for the respondents

submitted that no amount of education would be beneficial for children failing to qualify for admission to special schools. This was a surprising submission for which no support is to be found in the papers. The applicant's expert, Professor Christopher David Molteno who is currently Emeritus Professor in the Department of Psychiatry and Mental Health at the University of Cape Town and an authority in the field says the following *inter alia* in support of the application:-

*** It is necessary to adopt a holistic approach for severely or profoundly disabled children, to enable them to develop their ability and potential to the fullest extent. I describe below the nature of the education which they need, and from which they can benefit.*

** For many years it has been internationally accepted that children with severe or profound intellectual disabilities are entitled to and are capable of benefiting from education.*

** Their needs are different from those of other children, but are no less vital. They go to the heart of the ability of the children to lead a life with the necessary dignity, fulfilment and as much independence as is possible.*

.....

** It is my professional experience and opinion that children with profound or severe intellectual disability are able to benefit very substantially from appropriately designed and supported educational programmes. Their needs are substantially greater than those of children without these disabilities."*

The submission made on behalf of the respondents is also inconsistent with White Paper 6 which makes it clear that all children require education.

[20] The need to provide fully for mentally or physically disabled children is recognised world-wide. The United Nations Convention on the Rights of the Child states in article 23 *"a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community."*

Article 28 confirms the right to education. Article 29(1)(a) states that

“the education of the child shall be directed to... [t]he development of the child's personality, talents and mental and physical abilities to their fullest potential”.

[21] The African Charter on the Rights and Welfare of the Child provides in Article 11(1) and (2)(a) that

“[e]very child shall have the right to an education” and “[t]he education of the child shall be directed to... the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential...”

Article 13 provides:

“1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.”

[22] Article 15 of the Revised European Social Charter provides for the right of persons with disabilities to independence, social integration and participation in the life of the community, and recognises the importance of education for those purposes. In dealing with a complaint under the Revised European Social Charter, the European Committee of Social Rights held as follows:

“... the Committee views Article 15 of the Revised Charter as both reflecting and advancing a profound shift of values in all European countries over the past decade away from treating them as objects of pity and towards respecting them as equal citizens... The

underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of 'independence, social integration and participation in the life of the community'. Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education 'in the framework of general schemes, wherever possible'. It should be noted that Article 15 applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age...'²

[23] Closer to home is the Convention on the Rights of Persons with Disabilities and its optional protocol which were ratified by South Africa on 30 November 2007.

The preamble of the Convention provides:

"(m) Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,..

(r) Recognizing that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child...

Article 24 of the Convention provides

"1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

² Autism of Europe v France (Complaint No 13/2002).

(b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

(c) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

(c) Reasonable accommodation of the individual's requirements is provided;

(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures...

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities."

[24] Inasmuch as the state currently cooperates with and relies on organisations such as the applicant to provide education for mentally disabled children, it must be borne in mind that this does not relieve the state from its constitutional obligation. This is clear from the *Modderklip Boerdery* case in which the constitutional court held:-

*"[45] ...It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the State, of providing the occupiers with accommodation..."*³

[25] A case in point is that of *O'Donoghue* which was heard in the Irish High Court where the court held that the failure of a government to provide 'primary education' in the context of the Irish Constitution for Intellectually Disabled Children was in breach of the constitution. The obligation of the Irish state was expressed as follows:-

"I conclude, having regard to what has gone before, that there is a constitutional obligation imposed on the State by the provisions of Article 42.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be. Or, to borrow the language of the United Nations Convention and Resolution of the General Assembly -- "such education as will be conducive to the child's achieving the fullest possible social integration and individual development; such education as will enable the child to develop his or her capabilities and skills to the maximum and will hasten the process of social integration and reintegration".

*This process will work differently for each child, according to the child's own natural gifts, or lack thereof. In the case of the child who is deaf, dumb, blind, or otherwise physically or mentally handicapped, a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted, than would be regarded as appropriate for a child suffering from no such handicap."*⁴

³ *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, Amici Curiae* 2005 (5) SA 3 (CC).

⁴ *O'Donoghue (a Minor) suing by his mother and next friend O'Donoghue v The Minister for Health, The Minister for Education, Ireland and the Attorney General* [1993] IEHC 2; [1996] 2 IR 20 (27th May, 1993). This judgment was approved by the Irish Supreme Court in *Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 IR 505 (12 July 2001).

[26] The defence that the respondents are unable to afford further expenditure on education and that the government's failure to do so is justifiable for its rational connection to a legitimate government purpose is in my view misplaced. The question as to whether a differentiation bore a rational connection to a legitimate government purpose was dealt with by the Constitutional Court in *Harksen v Lane and Others*⁵, which dealt with an alleged unfair discrimination in terms of the equality clauses in the interim constitution. During the course of his judgment, Goldstone J dealt with the stages of enquiry which become necessary where an attack is made on a provision in reliance on the equality clause in the interim constitution. He recorded the first stage in the following manner:-

“(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.”

In my view, the portion of the judgment quoted relates clearly to the situation when there is an attack on the equality provision and does not apply to an attack on the breach of s 29(1)(a). This must be so, for otherwise the government would be able to resist every bill of rights challenge on the basis that it was pursuing a legitimate government purpose and was therefore not bound by the bill of rights. In any event, the reliance on a rational connection to a legitimate government purpose does not address the issue as to why the affected children have been singled out for manifestly less favourable treatment than others and why any shortage in funds is not imposed on all children, including the affected ones. A government purpose which imposes a differential treatment on the affected children cannot in my view be said to be rational. It must be remembered that the applicants do not ask that the needs of the affected children be met by the provision of extra funds. What they ask of the respondents is to spread the available funds fairly between all children, including the affected children. I am accordingly of the view that the appellant has established that the rights of the affected children to receive a basic education are being infringed.

⁵ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

THE RIGHT TO EQUALITY

[27] The respondents resist the contention that they do not infringe the rights of the affected children to equality as provided for in s 9 of the Constitution for the following reasons:

1. They contend that there is no differentiation in the manner in which the affected children are treated when compared with the manner in which other children are treated.
2. If there is indeed a differentiation, they contend that such differentiation is linked to a legitimate government purpose and is therefore justified.
3. They point out that the educational policy as spelt out in White Paper 6 contains no reference to the differentiation of the treatment of the affected children.
4. If it is found that they in fact do infringe the rights of the affected children to equality, they contend that such infringement is justified under s 36 of the Constitution.

The relevant portions of s 9 of the Constitution read as follows:

“9 *Equality*

- (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

...

- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”*

[28] Points 1 and 3 are inter-related and I will deal with them first. The respondents are of course correct in emphasising that the policy set out in White Paper 6 does not in

terms differentiate between the affected children and other children. That is conceded by the applicant whose case is, as already set out, that the policy spelled out in the paper does not assist the affected children at present and that on the available evidence, the affected children are not likely to be accommodated into the schooling system until about 2021. As in the case of the education challenge, the respondents place much store on the steps taken prior to the publication of White Paper 6 and what has been done since. They set out in great detail how the educational policy was altered after 1994 so that when White Paper 6 saw the light of day, the government's policy had moved from categorising children with disabilities by providing special education for them in a non-racial system in which they are to be included in the school system as explained in para [9]. Affidavits have also been filed by the respondents dealing with the restructuring of the social security system, the provision of social security grants to alleviate poverty and payment made in respect of child support for more than 8,6 million children under Children's Act No 28/2005 which gives effect to the right of children to social services and the right to be protected from maltreatment, neglect, abuse and degradation. As to the implementation of the policy set out in White Paper 6 the first respondent has proposed what is termed a realistic time frame of 20 years for the attainment of the inclusive education and training system. The implementation plan comprises immediate to short term steps (2001 – 2003); medium term steps (2004 – 2008); and long term steps (2009 – 2021). The respondents say that the implementation of the strategies which I have outlined have started to have an impact on the enrolment of children and youth with disabilities, for in 2008 there had been a significant increase in the enrolment of learners who previously did not attend school. There is in fact no further information as to what impact the strategies have had on youth with disabilities save that the respondents say that more than 10 000 learners have been enrolled in special and main stream schools. The case for the respondents is that the steps which have been taken have been addressed through large scale intervention much of which was made possible by donor funding from the Nordic countries, since the Department of Education has been forced to rely on this funding due to its extremely limited resources and competing demands on the public purse such as housing, health care and social services. In the light of this, it is

submitted, relying on the *Bel Porto*⁶ decision, it recognised the grossly unequal education system which had been inherited by the state that the steps which I have outlined are rationally linked to legitimate government purpose and that accordingly such disparity which exists between the affected children and other children is justified.

[29] The portion of the judgment in *Harksen v Lane and Others* quoted in paragraph [26] is apposite for the issue of equality is under consideration. The question is accordingly whether the differentiation between the affected children and other children bears a rational connection to a government purpose. In my view the answer is the same as that which was reached when examining the educational challenge. As Woolman and others have remarked⁷ and the manner in which the Constitutional Court has approached both qualified rights and unqualified rights suggests that it will be hesitant to read s 29(1)(a) in a full and unqualified manner. Presumably the same will apply to the implementation of the equality provisions in s 9(3) of the Constitution, but I agree with counsel for the applicant that before this can be done, the respondents should at the very least have

1. Explained why the budgetary shortfall should be carried by the affected children instead of being shared by all.
2. Explained why it is reasonable and justifiable that the most vulnerable should pay the price in contradiction to what the Constitutional Court held in *Grootboom*⁸ and
3. Provided a budgetary analysis which shows what resources are available and what would be the additional cost of meeting the rights of these children.

[30] The respondents sought to explain just how much it would cost to provide full equality of education for the affected children by referring to portions of the affidavits filed on behalf of the applicant. In doing so they applied a monetary value to the ideal form of education which they perceived to be the applicant's case. This approach misconceives

⁶ *Bel Porto School Governing Body and Others v Premiere, Western Cape and Another* 2002 (3) SA 265 (CC).

⁷ S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) s 348.

⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

the information put up by the applicant, for nowhere does the applicant ask that the ideal type of education with all its ramifications be provided for the affected children. Their case is simply that the respondents are expected to indicate why the available funds are spread in such a manner that the affected children are cut out of the picture entirely. Such information as the respondents did provide in respect of expenditure does not in my view meet point 3 above.

THE SECTION 36 ARGUMENT

[31] The defence that the failure to provide education to the affected children and their unequal treatment, if so found by the court, is justified in terms of s 36 of the Constitution was not raised in the pleadings, but only in counsel's heads of argument. This is not permissible for the applicant was not given a proper opportunity to deal with the issue. Should I be wrong however in disregarding the submissions made by counsel for the respondents I will nevertheless deal with these submissions.

[32] Section 36(1) sets out the requirements for a justified limitation.

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.”*

[33] As I understand the submissions advanced on behalf of the respondents, it is that three Acts were laws of general application, namely

1. The South African Schools Act 84 of 1996 (“the Schools Act”)
2. National Education Policy Act 27 of 1996 (“NEPA”)
3. The Mental Health Care Act No 17 of 2002.

It is clear that none of the three Acts referred to contain any provision which authorises an infringement of the rights of the affected children and in my view the fact that they are laws of general application does not have the result, as respondents' counsel will have it, that s 36 kicks in. For this to happen, the Acts must limit the rights of the affected children to be treated equally. Were this not so, any law of general application could be relied upon as a source for the limitation referred to in s 36, even though no such limitation is contained in the Act. That the limitation is to be contained in the law of general application itself was made clear in *August and Another v Electoral Commission and Others*⁹. In that case the Electoral Commission, acting in terms of the Electoral Act, a law of general application, had ruled that prisoners were not entitled to vote in the general election. The Constitutional Court found that the Commission was obliged to take reasonable steps to create the opportunity for eligible prisoners to register and vote and its failure to do so constituted a threatened breach of s 19 of the constitution. Section 19 provides for every citizen to be free to make political choices and for every adult citizen to be entitled to vote in the elections for any legislative body established in terms of the constitution. The submission on behalf of the Electoral Commission that the infringement of the prisoners' rights was justified in terms of s 36 of the constitution was dealt with by the court in the following manner in paragraph 23 of the judgment.

"In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so."

[34] That brings me to what I consider to be the main thrust of the submission made by the respondents' counsel which is to the effect that if a power is sourced in a law of general application and the effect or determination of the law brings about a limitation of rights, s 36 kicks in. As I understand counsel's submission, it boils down to this; that the policy contained in the white paper is authorised in terms of NEPA and therefore that policy which applies countrywide and which in effect discriminates against the affected

⁹ 1999 (3) SA 1 (CC).

children is justified in terms of s 36 of the constitution. In advancing this argument counsel made reference to the following:

34.1 The objectives of NEPA as set out in s 2 of that Act include the determination of national policy by the minister in accordance with certain principles and the monitoring and evaluation of education.

34.2 Section 3(1) of NEPA enjoins the minister to determine national education policy and in terms of s 3(4) the minister is required to determine national policy for the planning, provision, financing, coordination, management, governance, programs, monitoring, evaluation and well-being of the education system.

34.3 The directive principles of national education are set out in s 4 of NEPA which provide for the education system to contribute to the full personal development of each student; to the moral, social, cultural, political and economic development of the nation at large; to achieving equitable education opportunities and the redress of past inequalities in education provision; endeavouring to ensure that no person is denied the opportunity to receive an education to the maximum of his or her ability as a result of physical disability; to recognising the aptitudes, abilities, interests, prior knowledge and experience of students; and achieving a cost-effective use of education resources and sustainable implementation of education services.

[35] Reference was made to s 2(1) of the Schools Act which provides that the Act refers to school education throughout the Republic. In terms of s 2(2) of the Schools Act, the member of the Executive Council of a province responsible for education must exercise any power conferred upon him or her under the Act after taking full account of the applicable policy determined in terms of NEPA.

[36] Reference was also made to the Mental Health Care Act in order to highlight the fact that its object is to provide for the care and treatment of persons who are mentally ill and the fact that s 3(a) of that Act provides that the objects of the Act are to regulate mental health care in a way that: makes the best possible mental health care, treatment and rehabilitation services available to the population equitably, efficiently and in the best

interest of health care users within the limits of available resources; and coordinates access to mental health care, treatment and rehabilitation services to various categories of mental health care users.

[37] In the ultimate analysis the submission by the respondents' counsel is that the authority to discriminate between the affected children and other children including less severely mentally affected children is to be found in the policy spelled out in the White Paper. Counsel went on to submit that having regard to the nature and extent of the limitation, the benefits that the White Paper seeks to achieve outweigh the immediate needs of the children concerned.

[38] Respondents' counsel was unable to refer us to any authority which supported his submission that the determination of the policy in terms of NEPA was sufficient to bring the provisions of s 36 into play. Such authority as was made available to us, *Hoffmann v South African Airways*¹⁰ does not support the respondents' case. In Hoffmann the court held:-

*"I conclude, therefore, that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by s 9 of the Constitution. The third enquiry, namely whether this violation was justified, does not arise. We are not dealing here with a law of general application."*¹¹

[39] The weight of South African academic writers is against the submissions made on behalf of the respondents. Currie and De Waal are of the view that a mere policy or practice (even of an organ of state) cannot qualify as law.¹² Professor Liebenberg relying also on Hoffmann is of the view that:-

*"Policies, practices and programmes do not generally constitute laws of general application."*¹³

¹⁰ 2001 (1) SA 1 (CC).

¹¹ At paragraph 41.

¹² Ian Currie and Johan De Waal (Eds) *The Bill of Rights Hand Book, 5th Edition*, p169.

¹³ *Socio-Economic Rights: Adjudication Under a Transformative Constitution*, Sandra Liebenberg, p94, Juta, 2010.

while Woolman states that

*“Whether ‘mere’ norms and standards, directives or guidelines issued by government agencies or statutory bodies qualify as laws of general application remains unclear.”*¹⁴

Cheadle, Davis and Haysom, relying on Hoffmann’s case, are of the view that a limitation of right must have its source in a law of general application.

“It cannot be located in an executive act or policy, unless an authorising law permits such limitation.”

They go on to explain

*“The policy underlying this requirement is partly premised on the foundational democratic values. It is only a democratically elected legislature that has the power to limit rights in order to advance or defend social interests. This requirement is also based on a fundamental assumption underlying the rule of law, namely that a law must apply equally to all and not be arbitrary in the scope of its application.....”*¹⁵

[40] In the present case, it is clear that none of the Acts referred to authorise any limitation on the rights of the affected children. The white paper on which the respondents seek to rely is merely a document issued by the Department of Education.

[41] On what has been put before us I am not persuaded that the respondents have discharged the onus of establishing that the provisions of s 36 apply.

[42] If it should be found that s 36 is applicable, my view is that in any event the respondents have failed to establish that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The case for the respondents is that having regard to the steps which it has taken to address the inequities of the past in providing education to as many learners as possible, the

¹⁴ *Constitutional Law of South Africa*, 2nd Ed (Vol 2), Woolman and Others, Chapter 34 (34-53), Juta.

¹⁵ *South African Constitutional Law, The Bill of Rights*, Cheadle Davis, Haysom, LexisNexis Butterworths, p30-8 *in fine*.

budgetary constraints which they are faced with are such as to justify the limitation. In doing so considerable reliance is placed on the judgment in *Bel Porto*.¹⁶

“The fact that there may be more than one rational way of dealing with the particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.”

[43] To start with, regard must be had to the concept of reasonableness as explained by the Constitutional Court in *Grootboom*.¹⁷ Writing for the court Jacob J held as follows:-

“[43] ... A program that excludes a significant segment of society cannot be said to be reasonable. ...

[44] Reasonableness must also be understood in the context of the Bill of Rights as a whole.... The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹⁸

In *Khosa’s*¹⁹ case the following important principle was enunciated:-

¹⁶ *Bel Porto School Governing Body and Others v Premiere, Western Cape and Another* 2002 (3) SA 265 (CC) at paragraph 45.

¹⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

¹⁸ *Government of the Republic of South Africa and others v Grootboom and others (supra)*.

¹⁹ *Khosa and Others v Minister of Social Development and Others; Mahlalele and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC)

“It is also important to realise that even when where the State may be able to justify not paying benefits to everyone who is entitled to those benefits under s 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole.”²⁰

This means of course that the respondents must establish that the rights of the affected children to equality have not been infringed by discriminating against them on the grounds of intellectual disability.

[44] In the *Khosa* case, the Constitutional Court rejected the government’s submission that the provision of social security to permanent residents would impose too heavy a financial burden on the state. One of the reasons for coming to this conclusion was that there had been no clear evidence as to what the cost of providing the social grants amounted to and that what was available to the court, it appeared that the costs of including permanent residence in the system would only be a small proportion of the total cost. In the matter before us, the case for the applicants is not that the affected children should be fully provided for, but merely that they should not be excluded from the provision of any assistance.

[45] In view of the foregoing, I conclude that the applicant has established that the respondents are infringing the rights of the affected children, both in respect of the positive dimension of the right, by failing to provide the children with a basic education and also in respect of the negative dimension of the right, by not admitting the children concerned to special or other schools. As I have attempted to show, there is in my view no valid justification for the infringement of the rights of the affected children to a basic education and to equality.

[46] From what has been set out in this judgment it must in my view also follow that the children’s rights to dignity have been infringed since they have been marginalised and

²⁰ *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others (supra)* at paragraph 45.

ignored and in effect stigmatised. The failure to provide the children with education places them at the risk of neglect for it means that they often have to be educated by parents who do not have the skills to do so and are already under strain. The inability of the children to develop to their own potential, however limited that may be, is a form of degradation.

[47] From the foregoing it must follow that the children's rights to dignity and to be protected from neglect and degradation have also been infringed and there is no valid justification for such infringement.

[48] Insofar as the applicant's case is concerned, the cost of providing basic education to the small number of affected children will be small in relation to the overall budget. The special care centres in the Western Cape provide education to approximately 1000 children while it is estimated that there are approximately 1500 children with severe or profound intellectual disabilities in the Western Cape.

[49] The applicant accepts that what it terms the systemic and sustained breach of the rights of the affected children cannot be cured overnight and that it is not possible or appropriate for the court to prescribe in detail what program should be established to meet the needs and rights of the children. As to the 'systemic' breach, the applicant's deponent says that since approximately 1997 the applicant has been engaged in negotiations with the Western Cape Department of Education, and to a lesser extent the Western Cape Departments of Health and Social Services in an attempt to achieve an improvement of the plight of profoundly or severely intellectually disabled children and details are furnished as to the many meetings held by the members of the applicant with the Department of Education over the period October 1997 to October 2005. In October of that year the forum held a general meeting of its Special Care Centre members and so-called Education Management and Development Centres and principals of special schools to evaluate the clustering progress which had been set up by the department. The applicant has a negative view as to the impetus and support given to the training of the staff and principals of the Education Management and Development Centres and

says that despite co-operation from certain special needs schools with regard to clustering, no further progress was made, with the exception of one pilot project. The applicant accordingly now seeks the grant of a structural interdict in terms whereof the respondents should be ordered to submit a program to the court as to how the respondents intend to remedy the breach of the rights of the affected children and to report on a periodic basis as to the progress made and what further progress is intended. As to the reason why such an interdict may be granted, reference may be had to the judgment in *City of Cape Town v Rudolph*²¹ in which Selikowitz J held as follows:-

“Section 38 of the Constitution contemplates that where a right in the Bill of Rights has been infringed, a court may grant 'appropriate' relief. Section 172(1)(b) states that when deciding a constitutional matter, a court may make 'any order that is just and equitable'. Appropriate or just and equitable relief is relief which will be effective. The relief must be chosen for its ability to protect the constitutional right which is infringed, and fashioned to meet the nature of the infringement. What will be effective, depends on the factual context of the case. If the relief is not effective, the right is not vindicated.

In Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)... Ackermann J said that:

'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.' ...

'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.'

The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents... makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is 'necessary', 'appropriate' and 'just and equitable'.”

²¹ 2004 (5) SA 39 (C).

[50] In my view this is an appropriate matter in which a structural interdict may be granted. Such relief has been granted on numerous occasions and is appropriate when the court does not wish to prescribe to the respondent the detail of what steps must be taken. Relief of this nature see also *Rail Commuters Action Group and Others v Transnet Limited t/a Metro Rail and Others*²². In *Kiliko and Others v Minister of Home Affairs and Others* this court held as follows:-

*“... as the manner in which the Department discharges its duties and obligations to refugees not only deleteriously affects the freedom and dignity of a substantial number of disadvantaged human beings, but also fails to adhere to the values embodied in the Constitution, I incline to the view that the instant case is an appropriate one for the granting of a structural interdict...”*²³

[51] In *N and Others v Government of Republic of South Africa and Others (No 1)*²⁴, while recognising that the grant of a structural interdict might amount to an unwarranted interference with the authority and discretion of the executive arm of the government, the court held:-

“However, nothing rational or workable has been forthcoming from the respondents with regard to the applicants... I am of the view therefore that structured relief is justified based on the facts before me and the circumstances of the case. The respondents submit that this application was unnecessary because they are implementing the operational plan and guidelines. Having carefully considered the evidence before me, I come to the conclusion that such steps as have been shown to have been taken by the respondents are unworkable and characterised by delays, obstacles and restrictions.... To my mind, such an order is justified in the special circumstances of this case, more especially, as I see it, there has been and continues to be a violation of the applicants' constitutional rights. There is nothing forthcoming from the respondents... A structured order with a supervisory component is therefore just, equitable and appropriate”.

²² 2003 (5) SA 518 (C).

²³ 2006 (4) SA 114 (C) at paragraph [32].

²⁴ 2006 (6) SA 543 (D) at paragraph [32].

[52] In the circumstances I conclude that the applicant is entitled to the relief sought and accordingly make the following orders:

1) It is declared that the respondents have failed to take reasonable measures to make provision for the educational needs of severely and profoundly intellectually disabled children in the Western Cape, in breach of the rights of those children to:

- 1.1 a basic education
- 1.2 protection from neglect or degradation
- 1.3 equality
- 1.4 human dignity

2) The respondents are directed forthwith to take reasonable measures (including interim steps) in order to give effect to the said rights of severely and profoundly intellectually disabled children in the Western Cape, including (but not limited to):

2.1 ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic education of an adequate quality;

2.2 providing adequate funds to organizations which provide education for severely and profoundly intellectually disabled children in the Western Cape at special care centres, such as to enable them to:

2.2.1 have the use of adequate facilities for this purpose;

2.2.2 hire adequate staff for this purpose;

2.3 providing appropriate transport for the children to and from such special care centres;

2.4 enabling the staff of such special care centres to receive proper accreditation, training and remuneration; and

2.5 making provision for the training of persons to provide education for children who are severely and profoundly intellectually disabled.

3. The respondents are directed, within twelve months of the date of this order, to deliver to the applicant and to file at this court a report, under oath, as to their implementation of paragraph 2 of this order. The said report may deal with any relevant matter that the respondents wish to raise or report. In addition, the respondents are required to set out the detail of:

- 3.1 what steps they have taken to give effect to paragraph 2 of this order;
- 3.2 what further steps they will take to give effect to paragraph 2 of this order:
- 3.3 when they will take each further step to give effect to paragraph 2 of this order.

4. The applicant may, within one month after service upon it of the said report, to deliver its commentary under oath on the said report.

5. The respondents may, within a further period of two weeks after service upon them of the applicant's commentary, deliver their reply under oath to the said commentary.

6. The applicant shall be entitled, if so advised, to enrol the matter for hearing thereafter for determination of whether there has been compliance with paragraph 2 above and for such other relief as the applicant may seek in the light of the exchange of information referred to in paragraphs 3, 4 and 5 above.

7. The first and second respondents are to pay the applicant's costs of this application, which costs include the costs of employing two counsel, the one paying the other to be absolved.

ALLIE J

I agree.

R B CLEAVER

R ALLIE