CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 60/12
[2013] ZACC 10

In the matter between:

KWAZULU-NATAL JOINT LIAISON COMMITTEE	Applicant
and	
MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF EDUCATION, KWAZULU-NATAL	First Respondent
PROVINCIAL HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, KWAZULU-NATAL	Second Respondent
MINISTER FOR BASIC EDUCATION	Third Respondent
and	
CENTRE FOR CHILD LAW	Amicus Curiae

Heard on : 22 November 2012

Decided on : 25 April 2013

JUDGMENT

CAMERON J (Moseneke DCJ, Froneman J, Khampepe J, Skweyiya J and Yacoob J concurring):

[1] The applicant – an association of independent schools in KwaZulu-Natal – seeks leave to appeal against a decision of the KwaZulu-Natal High Court, Pietermaritzburg (High Court) dismissing its application to enforce payment of certain monies it claims to be due to the schools it represents. Leave to appeal was refused by both the High Court and the Supreme Court of Appeal.

[2] The application stems from a subsidy the first respondent, the Member of the Executive Council for Education in KwaZulu-Natal (MEC), granted to independent schools in the province in accordance with section 48 of the South African Schools Act[1] (Schools Act). On 22 September 2008, the second respondent, the Department of Education in the province of KwaZulu-Natal (Department), issued a notice (2008 notice) to independent schools in KwaZulu-Natal setting out "approximate" funding levels for 2009. These respondents were represented jointly in the proceedings with the third respondent, the national Minister for Basic Education (Minister).

[3] The 2008 notice, reproduced below, was directed to principals of independent schools, owners of independent schools, and associations of independent schools in KwaZulu-Natal. It was headed "SUBSIDIES TO INDEPENDENT SCHOOLS 2009/2010". The notice provided a table to the recipients "[t]o determine the level in which your school shall be based". It went on to say that "[i]n order for schools to

[1] 84 of 1996. See below n 14 to n 18 for relevant provisions of section 48 of the Schools Act.

prepare budgets for 2009 approximate funding levels will therefore be"[2] as set out. The notice concluded by stating that "[i]t should be noted that subsidy allocations will be reviewed annually."

"KZN EDUCATION

Private Bag X9044
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3200
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UMNYANGO WEZEMFUNDO
ISIFUNDAZWE SAKWAZULU-NATALI

REF: Circulars 2008

ENQUIRIES: S.L.N. KHESWA

DATE: 22 September 2008

All:

Principals of Independent Schools
Owners of Independent Schools
Associations of Independent Schools in KwaZulu-Natal

SUBSIDIES TO INDEPENDENT SCHOOLS 2009/2010

1. To determine the level in which your school shall be based (in comparison with the January 2004 school fees), the following table is provided as a guide.

Primary		Secondary	
Level	Fees (January 2004)	Level	Fees (January 2004)
1	Below R2 528.50	1	Below R2 698.00
2	R2 528.50 – R5 057.00	2	R2 698.00 – R5 396.00

[2] Emphasis in original.

3	R5 057.00 – R7 585.50	3	R5 396.00 – R8 094.00
4	R7 585.50 – R12 642.50	4	R8 094.00 – R13 490.00
5	Above R12 642.50	5	Above R13 490

The above figures are based on 2005/2006 state per capita expenditure of R5057 for Primary level and R5396 for Secondary level.

2. In order for the schools to prepare budgets for 2009 **approximate** funding levels will therefore be as follows:

Level	**% of state per capita amount**	**Amount per learner**
5 Primary	0%	R0.00
5 Secondary	0%	R0.00
4 Primary	15%	R1 137.45
4 Secondary	15%	R1 190.25
3 Primary	25%	R1 895.75
3 Secondary	25%	R1 983.75
2 Primary	40%	R3 033.20
2 Secondary	40%	R3 174.00
1 Primary	60%	R4 549.80
1 Secondary	60%	R4 761.00

The above figures are based on the 2009/10 state per capita expenditure of

Primary: R7 583

Secondary: R7 935

3. It should be noted that subsidy allocations will be reviewed annually.

Yours sincerely

[Signature]

Mr. S.L.N. Kheswa [signed 22/09/08]
Chief Education Specialist
Schools Affairs
Head Office."[3]

[4] This undertaking the Department later qualified by a further circular to independent schools. This was by letter dated 5 May 2009, which the provincial Superintendent General signed on 18 May 2009, and the schools concerned received only later. The letter was headed "REDUCTION OF BUDGETS IN THE 2009/10 MTEF" and stated that as part of the province's "turn around strategy in dealing with the current cash crisis", the recipients had to "please expect a cut not exceeding 30% in [their] current subsidy allocation for the financial year 2009/10".

[5] The Department received a total budget for the 2009/10 financial year of R24.8 billion, of which R19.2 billion was allocated for salaries. R2.7 billion was for operational expenses, R1.6 billion for infrastructure, machinery and equipment, and R1.4 billion for subsidies to public ordinary schools, independent schools, public special schools, and further education and training colleges. When the 2008 notice was issued, only 97 schools were included in the subsidy structure. Accordingly, the subsidies had to be paid out from the then budgetary allocation to independent schools of R55.861 million.

[3] The 2008 notice.

[6] The first two tranches for 2009 were paid only in mid-July. They reflected a reduction of 30% from the amounts indicated in the 2008 notice.

[7] Later during 2009, meetings were held and correspondence exchanged between the applicant and the Department regarding the two notices, the subsidies and the shortfalls. Despite the applicant's attempts to secure payment of the full subsidies for 2009, the subsidies eventually paid to independent schools for that year were, on average, 30% less than those set out in the 2008 notice.

[8] In November 2010, the applicant brought proceedings to enforce what it said were the "promises" in the 2008 notice.

High Court

[9] In its founding papers the applicant relied on the 2008 notice as constituting an enforceable promise to pay the amounts set out in it for the whole school year of 2009. Hence it sought an order directing the Department to pay the exact shortfall in the subsidies actually received in 2009 as compared to that set out in the 2008 notice. Alternatively, the applicant sought an order for payment of a percentage of the shortfall.

[10] Against this, the respondents argued that there was no acceptable evidence that the "promise" was made with the intention of creating an enforceable obligation.

[11] As a starting point, Koen J stated that he was "prepared to accept in favour of the applicant" that the 2008 notice was made with the intention to create contractual obligations. But did the 2008 notice contain terms sufficiently certain to give rise to enforceable obligations? This depended on the meaning of "approximate" in the notice. The Court found that the word is unambiguous in that it means "almost exact" or "very close". It said that to conclude that the 2008 notice conveyed a promise that the exact amounts would be paid would either be to ignore the word "approximate" or to assign it meaning that it does not have. Therefore, the applicant was not entitled to the payments it sought.

[12] The alternative claim to be paid a percentage of the shortfall also failed. The High Court was not convinced that "approximate" could be given fixed content with reference to the prior conduct of the parties. To give fixed meaning to "approximate" would be arbitrary and would amount to making an agreement for the parties.

[13] The High Court therefore dismissed the application, with costs of two counsel. As already indicated, the High Court also refused leave to appeal, as did the Supreme Court of Appeal.

In this Court

Applicant's submissions

[14] The applicant seeks leave to appeal to this Court. It contends that the High Court found that the parties acted with the intention of bringing enforceable obligations into existence (*animo contrahendi*). It should, therefore, have endeavoured to uphold and enforce the contract, and should have given meaning to "approximate". This is especially so because the Department had partially performed in terms of the contract, and because the right to a basic education is directly implicated.

[15] The applicant submits the High Court was wrong not to fix an approximate percentage and to conclude it would be making a contract for the parties. Courts regularly define generally imprecise terms in a particular contractual setting. In the present case, the Department in previous years paid amounts very close to those indicated in previous notices. The High Court ought to have relied on this to give meaning to "approximate".

[16] Taking into account past practice and that the applicant's schools had budgeted in reliance on the 2008 notice, payment of 70% was not substantial performance. In fact, having regard to the respondents' position, the applicant submits that its alternative relief, though still competent, essentially falls away, and that it is most appropriate for this Court to direct the second respondent to pay the exact amounts stipulated.

[17] This Court has held that the law of contract must be infused with constitutional values such as ubuntu and human dignity, and that contracting parties must relate in good faith. The applicant argues that this is an instance par excellence.

[18] The applicant counters the respondents' "insufficient funds" defence by contending that a lack of funds is no impediment to an order against government. The MEC could have applied to the Minister or the Minister of Finance for further money. Anyhow, the MEC has already overspent the budget by R171.892 million, and the province by R1.899 billion, so there is no reason why they could not overspend a little more. Lastly, to accommodate the applicant's schools' learners in public schools would be 17 times as expensive.

Respondents' submissions

[19] The respondents argue that the applicant's remedy lies not in the law of contract, but in public law – which the applicant has not pleaded. In any event, there is not enough evidence to determine whether it is just and equitable to order the Department to make the payments.

[20] The respondents say the case is not about the right to a basic education, but rather the constitutional provision permitting state subsidies for independent schools.[4] They claim that the constitutional issues raised are not those advanced by the applicant.

[4] Section 29(4) of the Constitution.

Rather, they are: i) whether an administrative undertaking made in the exercise of a statutory power gives rise to an enforceable contract; ii) whether such an undertaking gives rise to a legitimate expectation; iii) whether the remedy lies in contract or public law; and, if it lies in contract, iv) the relevance of the respondents' constitutional and statutory obligations.

[21] The relief sought, whether founded in contract or public law, affects the statutory obligations and budgetary functions of the province. Section 48 of the Schools Act empowers the MEC to grant subsidies to a registered independent school from funds appropriated by the provincial legislature for that purpose. Sections 39 and 63 of the Public Finance Management Act[5] (PFMA) oblige the Head of Department (HoD) and the MEC to ensure that their expenditure is in accordance with the budget vote of the provincial department.

[22] The respondents contend that the 2008 notice merely served as a guideline to independent schools. It was not an offer, which schools were called on to accept, nor was there a right to negotiate in terms of a contract. The essential defining factors of a contract are thus not present, even without the difficulties associated with "approximate". Moreover, a contract that purports to bind the MEC in a manner that conflicts with his obligations to public schools and his discretion to grant subsidies only in terms of the budget vote would be incompatible with the law and unenforceable.

[5] 1 of 1999.

[23] The respondents note that the development of the common law was not argued before the High Court. They contend that, while the constitutional questions whether undertakings of this kind are contracts and whether the law of contract needs to be developed are clearly important, they do not warrant granting leave to appeal.

[24] Regarding remedy, the respondents submit that "considerations of justice and equity behove" them to bring the applicant's possible success in public law to the Court's attention. There has been insufficient argument on whether the undertaking gave rise to a legitimate expectation, and, if so, what remedy should be granted. But if these questions are reached, this Court should either remit the matter to the High Court, or call for comprehensive factual submissions.

Amicus curiae

[25] In this Court, the Centre for Child Law (amicus), a registered law clinic based at the University of Pretoria, whose main objective is to establish and promote child law and to uphold the rights of children, was admitted as amicus curiae.

[26] It makes three submissions. First, the right to a basic education in the Bill of Rights extends to learners at both public and independent schools. Given that subsidies to independent schools assist the realisation of the right to a basic education, it is inappropriate to regard an independent school and the state as mere parties to a contract.

The right to a basic education comes under threat when the state reduces, or does not pay, promised subsidies. The negative obligation the state bears to respect existing access to rights is heightened because the subject of the right is a child, and because the text of section 29(1)(a) of the Constitution is, unlike other socio-economic rights, without internal qualification.

[27] Second, when a provincial education department promises a subsidy in terms of the applicable statutory and constitutional framework, it creates a legitimate expectation in respect of the amount promised. Here, there was both a promise and past practice in relation to the payment of the subsidy. The necessary value judgement, it says, must be made upon the foundation of the legislative framework, which includes the Constitution, the Schools Act, and the statutory Amended National Norms and Standards for School Funding[6] (Norms).

[28] The amicus' third argument is that the facts relating to the promise and past practice that give rise to a legitimate expectation are adequately pleaded on the papers. The Court should not inquire formalistically whether the label "legitimate expectation" was used, but must rather determine whether its elements (a promise and/or settled practice and resultant prejudice) are pleaded and supported by the facts on record. The Court is thus in a position to make a finding regarding the legitimate expectation of the affected schools, and to grant appropriate relief.

[6] Government Gazette 29179, Government Notice 869, 31 August 2006.

Leave to appeal

[29] For leave to appeal there must be a constitutional issue, and the interests of justice must favour its grant. At least one constitutional issue is in plain view – the right to a basic education of the learners at the applicant's schools – and the contentions the applicant advances have prospects of success. The requisites for leave have been established.

Did the 2008 notice give rise to an enforceable undertaking?

[30] The 2008 notice clearly constituted an undertaking by the Department to pay the schools, to which the notice was directed, the approximate amounts set out in it. In argument, counsel for the respondents confirmed that the undertaking was given with an intention to honour its terms. This is undoubtedly correct. The question is whether the courts can enforce the undertaking, or any part of it.

[31] Courts enforce undertakings when parties agree by contract to be bound by their terms; when the undertaking gives rise to a legitimate expectation and administrative fairness requires some measure of their enforcement;[7] or when any other legal principle

[7] The current position in our law is that where a party has a legitimate expectation he or she is entitled to procedural fairness. That is, an opportunity to be heard before an adverse decision is made. Our courts have expressly left open the question whether a legitimate expectation may give rise to a substantive benefit. See for example *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 96 and *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) at para 15. For a detailed discussion of substantive legitimate expectation see *Duncan v Minister of Environmental Affairs and Tourism and Another* 2010 (6) SA 374 (SCA) at para 13.

or rule requires enforcement. In its affidavits, the applicant said its case was that it relied purely on a promise or undertaking to pay. It said that it was "neither here nor there" whether this derived from administrative action or "something akin to a contractual obligation". But the form of the applicant's case is important. If enforcement is sought on the basis of administrative action, the proceedings should have been instituted under the Promotion of Administrative Justice Act[8] (PAJA), in the form of a review, and (subject to condonation) within the 180-day period PAJA allows.[9] None of this was done.

[32] Nor is this only a matter of form. The respondents' defence was that the undertaking in the 2008 notice could not be fulfilled because of a budgetary knock-on. The Department's budgetary allocation for the 2009 school year had been reduced, and hence they could not pay the amounts set out in the 2008 notice. The record of the budget allocation and decision-making would have been highly pertinent to a claim to enforce a promise at administrative law. It is not before us.

[33] The result is that, despite the amicus' argument to the contrary, it is not possible to consider the applicant's claim for payment for the whole of the 2009 school year on the

[8] 3 of 2000.

[9] Section 7(1) of PAJA provides that proceedings for judicial review must be instituted without unreasonable delay and in any event within 180 days, though section 9(2) provides that a court may extend the 180-day period "where the interests of justice so require".

basis that the Department breached the right to just administrative action when it revoked the undertaking in May 2009.

[34] Given this dearth of evidence, should we remit the matter to the High Court to obtain it? I do not think so. Counsel for the applicant discouraged remittal. The applicant's members have run out of money and, he implied, energy and time for further legal contest on this issue. They have schools to run. He strongly urged that the matter be decided, do or die, on whether the 2008 notice's promise was enforceable. The applicant is master of the process it has initiated (*dominus litis*). I would respect its wishes. The matter should not be remitted.

[35] On what basis can the applicant claim enforcement of the undertaking? I do not think that the undertaking is enforceable because of an agreement. A contract is an agreement between parties, entered into with the intention of creating binding obligations, to perform according to the terms agreed. Government often contracts, of course, and the courts give effect to the obligations it undertakes in doing so. Our courts have indeed enforced agreements concluded in response to circulars or notices setting out the terms on which governmental subsidies may be procured.[10] But here there was no

[10] See *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 (1) SA 257 (AD), where film producers who registered their films for subsidy purposes under a departmental circular setting out the tax and subsidy benefits due to them, and then produced and marketed the films, were held to benefit from contractually enforceable obligations on the part of the state.

contract. The undertaking was not extended as part of a bilaterally binding agreement, which is the hallmark of contractually enforceable obligations.

[36] Nor was there any intention on the part of the Department, or indeed the schools, to be contractually bound by a private agreement. The Department seems to me to have been extending an undertaking that it intended to make payments in accordance with its statutory and constitutional obligations. This is distinct from an intention to enter into legal obligations for the purpose of concluding an enforceable contract.

[37] Nevertheless, the setting in which the 2008 notice promised payment to its recipients indicates that it was seriously given, in the expectation that it would be relied upon, and that payment in its terms would indeed be forthcoming, subject only to the possibility of due revocation. These indications are set out in the ensuing paragraphs.

[38] First, under the Bill of Rights, everyone has the right to a basic education.[11] The right is given in unqualified terms[12] and, in contrast to other socio-economic rights in the Bill of Rights, is not subject to progressive realisation. The Constitution expressly states that it does not preclude state subsidies for independent educational institutions.[13]

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[11] Section 29 of the Constitution provides in relevant part:

> "(1) Everyone has the right—
>
> (a) to a basic education, including adult basic education".

[12] See *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 37.

[13] Section 29(4) of the Constitution provides: "Subsection (3) does not preclude state subsidies for independent

[39] The Schools Act empowers the Minister by notice in the Government Gazette to determine norms and minimum standards for granting subsidies to independent schools.[14] The MEC "may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school."[15] Non-compliance with a condition, subject to which a subsidy was granted, empowers the HoD to terminate or reduce the subsidy "from a date determined".[16] The HoD may not use this power to terminate or reduce the subsidy without hearing the affected school,[17] and an appeal against termination or reduction lies to the MEC.[18]

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educational institutions."

[14] Section 48(1) of the Schools Act, under the heading "[s]ubsidies to registered independent schools", provides:

> "The Minister may, by notice in the Government Gazette, determine norms and minimum standards for the granting of subsidies to independent schools after consultation with the Council of Education Ministers and the Financial and Fiscal Commission and with the concurrence of the Minister of Finance."

[15] Id section 48(2) provides:

> "The Member of the Executive Council may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school."

[16] Id section 48(3) provides:

> "If a condition subject to which a subsidy was granted has not been complied with, the Head of Department may terminate or reduce the subsidy from a date determined by him or her."

[17] Id section 48(4) provides:

> "The Head of Department may not terminate or reduce a subsidy under subsection (3) unless—
>
> (a) the owner of such independent school has been furnished with a notice of intention to terminate or reduce the subsidy and the reasons therefor;
>
> (b) such owner has been granted an opportunity to make written representations as to why the subsidy should not be terminated or reduced; and
>
> (c) any such representations received have been duly considered."

[18] Id section 48(5) provides:

> "The owner of an independent school may appeal to the Member of the Executive Council against the termination or reduction of a subsidy to such independent school."

[40] The Norms are of great significance to the applicant's case. The Norms note the "valuable educational services" provided by independent schools.[19] They note that independent school enrolment amounts to about two percent of the total nation-wide but that if all independent learners were to transfer to public schools, "the cost of public education in certain provinces might increase by as much as five percent".[20] In other words, independent schools constitute a saving on the public purse.

[41] And indeed the practice of granting state subsidies to registered independent schools is well established in South Africa.[21] The Norms explain that the Ministry bases its subsidy policy on both fiscal and social grounds. On fiscal grounds, the state has a "constitutional and statutory responsibility to provide school education to all learners".[22] State subsidies to independent schools "cost the state considerably less per learner than if the same learners enrolled in public schools". The subsidy policy is therefore "cost efficient for the state".[23]

[42] The Norms further note that the Schools Act enables the MEC to grant subsidies to registered independent schools,[24] and records that the Norms themselves are intended to

[19] Item 47 of the Norms.

[20] Id Item 48.

[21] Id Item 49.

[22] Id Item 54.

[23] Id.

[24] Id Item 172.

"provide a stable and principled basis for MECs in all provinces, to decide the eligibility for subsidy and the level of subsidies for registered independent schools".[25]

[43] Subsidies are calculated on a per-learner basis according to verified enrolment at a school at the beginning of each term.[26] A provincial education department may deviate from the subsidy and fee levels set out in the Norms "only on good cause shown" to the national Department.[27]

[44] At the provincial level, the Kwazulu-Natal School Education Act[28] (KZN Act) as well as the regulations set out in the Notice Regarding the Registration of and Payment of Subsidies to Independent Schools[29] (KZN Regulations) further make express practical provision for subsidies to be paid to independent schools.

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[25] Id Item 173.

[26] Id Item 194.

[27] Id Item 193.

[28] 3 of 1996. See, particularly, section 37 of the KZN Act, which provides:

> "(1) A registered independent school may annually, on or prior to the prescribed date, apply to the Secretary in writing for the prescribed subsidy.
>
> (2) The Secretary may at his/her discretion grant or refuse an application referred to in subsection (1). He/she shall not grant any application unless he/she is satisfied that the registered independent school complies with the prescribed requirements.
>
> (3) If the Secretary is of the opinion that a requirement, subject to which a subsidy is granted under subsection (2), has not been complied with, he/she may at any time terminate or reduce the subsidy from a date determined by him/her: Provided that the Secretary shall, before he/she terminates or reduces such subsidy, give the owner of the independent school or his/her representative, an opportunity to make representations to him/her in connection with the proposed termination or reduction."

[29] Provincial Gazette 5387, Provincial Notice 287, 28 October 1999.

[45] So while it is correct that the state is not obliged to pay subsidies to independent schools, when it does so in terms of national and provincial legislation it is plainly acting in accordance with its duty under the Constitution in fulfilling the right to a basic education of the learners at the schools that benefit from the subsidy. And once government promises a subsidy, the negative rights of those learners – the right not to have their right to a basic education impaired – is implicated. As will emerge, once the due date for the payment of a promised subsidy has passed, those rights are most acutely implicated.

[46] In keeping with this constitutional setting, the 2008 notice itself clearly envisaged that the schools would prepare their budgets in reliance on it. Not only that, but it was expressly issued on the basis that the schools would incur expenditure relying on its terms.

[47] This constitutional and statutory setting makes it plain that the 2008 notice was not a mere record of ex gratia payments the Department proposed to afford the applicant's schools as a favour. No. The notice was issued in fulfilment of the Department's duty under the Constitution, realised in the Schools Act and KZN Act, and particularised in the Norms and KZN Regulations, to help the applicant's schools do their job of educating the learners attending them. That duty stems from the fact that all learners, including those at independent schools, are entitled to basic education.

[48] Even though the 2008 notice may not have given rise to an enforceable agreement between the applicant and the respondents, it constituted a publicly promulgated promise to pay. And, once the due date for payment of a portion of the subsidy had passed, this created a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from its promise. This is by no means new to our law. Before the Constitution, the Appellate Division found "nothing peculiar" in the notion that the state can unilaterally make a promise to pay that becomes enforceable at the instance of those intended to benefit from it. In fact, the Court found it "strange to think that the government's undertaking in terms of [a] notice can be made enforceable only once it has been accepted and converted into a contract". In *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid*,[30] that Court said:

> "Naturally, it can happen that a contractual relationship may be created between the executive and a subject, as where a commercial agreement is concluded, but in the present case we are dealing with the making available of financial assistance to subjects from the State coffers by way of a purely beneficial grant; something so unique to the administrative law relationship that I can see no space for a finding of contractual liability on the part of the State. . . . At face value the notice states that the executive binds the State to compensate subjects who meet certain requirements. . . . In contrast to the

[30] 1992 (4) SA 1 (A) at 18C-I. The original text reads as follows:

> "Dit kan natuurlik gebeur dat 'n kontraktuele verhouding geskep word tussen die uitvoerende gesag en 'n onderdaan, soos wanneer 'n kommersiële ooreenkoms beklink word, maar in die huidige geval is die beskikbaarstelling aan onderdane van geldelike bystand uit die Staatskas deur middel van 'n suiwer begunstigende beskikking, iets wat so eie is aan 'n administratiefregtelike verhouding dat ek geen ruimte daarin kan sien vir 'n bevinding van kontraktuele aanspreeklikheid van Staatskant nie. . . . Op die oog af verklaar die kennisgewing dat die uitvoerende gesag die Staat verbind tot die vergoeding van onderdane wat aan sekere vereistes voldoen. . . . Anders as in die geval van twee individue wat op privaatregtelike terrein beweeg, is daar niks vreemds in die gedagte dat die Staat eensydig aanspreeklikheid teenoor sy onderdane opdoen nie. Inteendeel sou dit vreemd wees om te dink dat die owerheid se onderneming ingevolge die kennisgewing slegs deur middel van aanname en omskepping tot 'n kontrak afdwingbaar gemaak kan word."

> situation where two individuals are operating in the area of private law, there is nothing peculiar in the idea that the State can undertake obligations towards its subjects unilaterally. On the contrary, it would be strange to think that the government's undertaking in terms of the notice can be made enforceable only once it has been accepted and converted into a contract." (My translation.)

Retroactive reduction of subsidies after date for payment has fallen due

[49] A government promise to pay subsidies in an approximate amount can seldom be incapable of retraction or reduction. The principal reason will usually be budgetary constraints. Indeed, in this case there is no indication to gainsay the respondents' evidence that the Department was hit with a 7.5% overall budgetary cut for 2009, and that its knock-on effect simply had to be implemented. As the Department explained in the May 2009 circular and the respondents' answering affidavit, the 7.5% cut, "as well as the additional funds required to cater for the newly registered 28 independent schools", led to the 30% reduction announced.

[50] For these reasons, it seems to me that the letter of May 2009 constituted an effective signal by the Department that schools henceforth could no longer rely on the undertaking in the 2008 notice. Whether that signal could be over-ridden in law by any legitimate expectation on the part of the schools is not a question we can decide in this case.[31]

[31] See [31]-[33] above.

[51] But it does not follow from this that the Department is not liable for part of the payments promised for 2009.

[52] In *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*[32] (*Premier, Mpumalanga*), this Court suggested that "it may be that in many cases a retroactive termination of benefits will not be fair no matter what process is followed unless there is an overriding public interest".[33] This statement was made along the way of the Court's reasoning (*obiter*), and was not part of its binding basis of judgment. But in my view it reflects a sound principle of our constitutional law. It is that a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed. This is not because of a legitimate expectation of payment. Legitimate expectation relates to expected conduct. Rather, this principle concerns an obligation that became due because the date on which it was promised had already passed when it was retracted.

[32] [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

[33] Id at para 41, with the footnoted comment by the Court that "[i]t is not surprising that the European Court of Justice has taken the view that the retroactive implementation of policy changes by government will be unlawful unless it can be shown that the retroactivity is justified by an overriding public interest." The Constitutional Court cited *Karl Spagl v Hauptzollamt Rosenheim* [1990] ECRI-4539 and *J Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321 where the European Court of Justice had to decide the validity of amendments limiting the granting of "special reference quantities" to dairy farmers. The crucial consideration on the amendments was their retroactive effect on the "legitimate expectations" of the affected farmers. The European Court of Justice reasoned that the legitimate expectations of the farmers concerned must be balanced with the "general interest" of the European Community, but in that Court's eyes the discrimination could not be justified. See also the discussion in Schwarze *European Administrative Law* (Sweet and Maxwell Limited, London 1992) at 867-8.

[53] The principle applies in this case. The scheme of the Norms and the KZN Regulations provide for the determination and communication of subsidies on an annual basis so as to enable schools to budget, plan and set their fee structures for the following year. Importantly, the scheme does not merely suggest general guidelines for payment of subsidies promised – it sets deadlines.

[54] Item 195 of the Norms, positioned under the heading "Date of subsidy payments", reads:

> "[Provincial Education Departments] must ensure that the first term's subsidy is paid no later than 1 April in each school year. Subsequent subsidies must be paid no later than six weeks after the beginning of each school term."

[55] Section 50(1) of the Schools Act provides that an MEC "must" by notice in the Provincial Gazette determine requirements for amongst others "criteria of eligibility, conditions and manner of payment of any subsidy to an independent school" (emphasis added). This the MEC did in the KZN Regulations. Those provide that payment of subsidies to independent schools "will be made retroactively each quarter."[34] This conforms exactly with Item 195 of the Norms.

[34] Regulation 4(3) of the KZN Regulations.

[56] This means that once an MEC has, out of funds appropriated by the provincial legislature for subsidies, granted a subsidy to an independent school,[35] his or her department has a legal obligation to pay no later than 1 April.[36] This obligation is enforceable at the instance of those in favour of whom a promise was made to pay a subsidy once the due date for the payment has passed. That obligation is enforceable here.

[57] When the Department issued its May 2009 letter, it was already obliged, under the Norms and KZN Regulations, to have paid the first term's subsidy as promised in the 2008 notice. Its delay in doing so constituted a breach of its obligations under the Norms and the Schools Act. It seems both legally and constitutionally unconscionable that, more than a month after the first tranche of the promised subsidy had already fallen due under the national Norms and the provincial regulation, the Department should peremptorily reduce it.[37]

[58] It is true that this was not the clasp on which the applicant originally pegged its hopes. The applicant relied in its founding and subsequent papers on what it simply and persistently described as an enforceable undertaking to pay the entire year's subsidy without any reduction. This cast the claim in contractual, or ostensibly contractual,

[35] Section 48(2) of the Schools Act above n 15.

[36] Item 195 of the Norms.

[37] Indeed some schools, when they eventually were paid the first-tranche subsidy, were given even less than half of the anticipated approximate amount (despite the indication that the reduction in subsidies would not be more than 30%).

terms. In my view the undertaking is indeed enforceable, but on broader public law and regulatory grounds rather than bilateral agreement.

[59] Recognising that the basis for enforcing a portion of the applicant's claim had not expressly been pleaded, this Court after the oral hearing invited additional written submissions. The parties' views were sought on whether the applicant would be entitled to an order for payment of the approximate subsidies in the light of Item 195 of the Norms and Regulation 4(3) of the KZN Regulations.[38] Further, they were afforded an opportunity to present submissions on whether it would be permissible for the Court, in the light of the case the applicant advanced and the evidence, to grant partial relief in respect of the portion of the subsidy that fell due on 1 April 2009.[39]

[60] In response, the applicant and the amicus strongly contend that, at minimum, Item 195 of the Norms and Regulation 4(3) of the KZN Regulations obliged the respondents to pay the first-tranche payment. The amicus submits that the scheme of the Norms

[38] The directions dated 30 January 2013 read in relevant part as follows:

> "Is the applicant entitled to an order for payment of the approximate subsidies for the whole of the 2009 school year or, at least, that portion that had fallen due for payment on 1 April 2009, on the basis that the first respondent is obliged to do so in the light of—
>
> a) Item 195 of the Norms and Standards for School Funding of 2006; and
>
> b) Regulation 4(3) of the KwaZulu-Natal Notice Regarding the Registration of and Payment of Subsidies to Independent Schools published under Provincial Notice No. 287 dated 28 October 1999, issued under sections 46(2) and 50(1) of the South African Schools Act 84 of 1996."

[39] The directions dated 30 January 2013 read in relevant part as follows:

> "In the light of the case the applicant advanced on the papers and in oral argument, and the evidence, is it permissible for the Court to grant partial relief in respect of the portion of the subsidy that fell due on 1 April 2009 on the basis that the reduction in subsidy could not be applied retroactively to that portion?"

(mirrored in the KZN Regulations) ensures increasing certainty as particular milestones are reached in the school and financial year. The entitlement to receive a subsidy "solidifies" from an expectation, when indicative amounts are announced, to an accrued right once the payment deadline has passed. Once that date has passed there is no longer a lawful basis on which the subsidy amounts can retroactively be reduced as happened here. I agree with this submission.

[61] The respondents accept that provincial Regulation 4(3) means the payment of a subsidy to a particular school is approved in principle on an annual basis. But they submit it does not guarantee the level of the subsidy in all circumstances. To the extent that there was a retrospective reduction of subsidies already due and payable, the effect of that retrospectivity is to be tempered by the applicant's knowledge that the amount would be reduced owing to budgetary constraints and other exigencies.[40]

[62] But this answer falls grievously short. The respondents provide no compelling answer to the legally enforceable obligation the Norms and KZN Regulations imposed to pay the amounts promised in the 2008 notice by 1 April. It cannot be countenanced, legally or constitutionally, that the amount of the subsidy be reduced unilaterally after the date for payment has by regulation already fallen due. This is so regardless of whether the intended beneficiary might have been able to divine the possibility of a cut. The

[40] The respondents refer here to the applicant's attempts to have 28 additional schools obtain subsidies. See [72] below.

respondents' hands were tied once the due date for payment stipulated in the regulation had passed.

[63] The reasons lie in reliance, accountability and rationality. First, reliance. The schools budgeted for the whole year in reliance on the 2008 notice. The reduction in subsidy announced in the letter of May 2009 would severely disappoint them. But they could adjust their future outlays. They could not do so in regard to the tranche that had already fallen due. Their entitlement should therefore be taken to have crystallised.

[64] Second, accountability. Governance is hard. And the hardest part, no doubt, is budgeting. Government officials are slaves to the resources allocated to them. Budget cuts can lacerate their departmental spending plans and projections. Hence courts should respect the effect of budget cuts.[41] But their impact on those to whom undertakings have been made should be announced quickly. As smartly as possible. Constitutional accountability and responsiveness demand this.[42] It can never be acceptable in a

[41] See for example *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 29, where this Court stated:

> "The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."

[42] Section 195 of the Constitution provides in relevant part:

> "Basic values and principles governing public administration
>
> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> . . .

democratic constitutional state for budget cuts to be announced to those to whom undertakings have been made after payment has by regulation already fallen due.

[65] Last, rationality. Government officials must, in dealing with those who act in reliance on their undertakings, act rationally. A budget cut announced in relation to payments promised but not yet made would be regrettable. But it may be rational. Behaviour and expectations can be tailored to it. But it is impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed. Revoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it.

[66] These principles apply here. The subsidies promised in the 2008 notice could not be subject to retroactive diminution in the absence of "an overriding public interest".[43] Apart from budgetary cuts, there appears to be none. And, indeed, the fact that the Norms and KZN Regulations obliged the payment of the subsidy's first portion by 1 April 2009 meant that there could be no overriding public interest in the ex post facto retraction of the promise.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

[43] See *Premier, Mpumalanga* above n 32 at para 41.

[67] The applicant concedes that it did not specifically argue for relief on the basis of the obligation created by the regulation. However, its founding affidavit expressly invoked Item 195 of the Norms, and reliance on statutory obligations was foreshadowed in its papers.

[68] In support, the amicus submits that a claim arising from the Norms read with the KZN Regulations is adequately pleaded. And, it says, the evidence on record lays a sufficient basis to find the applicant schools had a right to be paid the first-quarter tranche due on 1 April 2009.[44] Further, this Court has previously adopted remedies for a situation where a claim is apparent from the papers and the evidence, even if it was not the cause of action expressly advanced or argued.[45] With this I agree. As in the cases the amicus mentions, there is no prejudice to the respondents here.

[69] It follows that the applicant has established an entitlement to payment of the undertaking set out in the 2008 notice up to 1 April 2009. It is not necessary to decide whether, had the matter been pleaded or evidenced differently, there may have been a legitimate expectation entitling the applicant to payment of the final three tranches of the 2009 school year subsidy.

[44] The amicus referred the Court to portions of the record in which the basis for a claim in public law was pleaded and, they contend, established on the facts.

[45] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) and *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).

[70] The respondents urged that if the Court finds that the applicant pleaded sufficient facts to found a remedy in public law, they be granted an opportunity to present further evidence relevant to affordability. In my view, there is no need for further evidence. The respondents were not entitled to reduce, retroactively, subsidies the payment date for which had passed, regardless of budgetary adjustments. Of course affordability is a major issue in governance. But payment dates are also of great significance to citizens and others relying on payment from the public coffers. When national norms and specific regulations require payment by a particular date, government is legally obliged to pay.

[71] This is by no means a radical intervention. Accountability and rationality demand that government prepare its budgets to meet payment deadlines. It cannot reach back and diminish accrued rights in order to manage its own shortfalls. Any further evidence relating to budgetary constraints is therefore unnecessary.

The 28 "extra" schools

[72] It was a theme of the respondents' answering affidavits that the applicant had sought, after the 2008 notice, to add 28 extra schools to the 97 members it previously represented. It seems to me that only those schools that were actually affiliated with the applicant at the time the 2008 notice was distributed, and thereby received notice of the promised subsidies, can benefit from it.

"Approximate"

[73] The 2008 notice sets out "approximate funding levels" specified in Rand amounts. In my view there is no reason why this Court cannot order a party to pay an amount of money that is "approximate" to a specified sum.[46]

[74] There are neither practical nor linguistic obstacles to granting an order that a party must pay an opposing litigant an "approximate" amount specified. As an adjective, approximate, according to the Concise Oxford English Dictionary,[47] means "fairly accurate but not totally precise." In its verbal sense, it means to "estimate fairly accurately." There is no reason why a court order must be "totally precise". Courts frequently give orders that are very general indeed.[48] The only novelty here is that the order relates to an approximate amount of money, and it is usual that amounts of money payable by court order are precise.

[75] The 2008 notice specified exact sums, and undertook to pay them approximately. That is an obligation that is coherent and legally enforceable. And the Department is

[46] See, for example, *Fluxman v Brittain* 1941 AD 273 at 293, where the Appellate Division had to interpret the meaning of "moderate" amounts in an agreement in which the employee had agreed to leave his undrawn share in profits in the business. Tindall JA found the condition not void for vagueness. On the contrary, he stated that a determination of what "moderate" amounts would mean "would be possible on evidence of the various relevant facts, such as, for example, the financial position and requirements of the business at such time." The reasoning by the other members of the Court made it unnecessary to address Tindall JA's view regarding the enforceability of "moderate" amounts. However, none of the other judges explicitly disagreed with his conclusion on this.

[47] *Concise Oxford English Dictionary* 11 ed (Oxford University Press, Oxford 2009).

[48] See, for example, *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 111, where this Court made a declaratory order stating that the first and second respondents were obliged to ensure that "reasonable measures" are taken to provide for the security of rail commuters.

obliged to engage with the schools to find finality in complying. The Department will tender performance in terms of the Court's order. If the recipient schools consider its tender inadequately "approximate" to the Rand amounts specified, they can apply to the High Court for appropriate relief.

[76] I would on this limited basis grant leave, allow the appeal, and give an order for the payments which fell due on 1 April 2009, with costs in this Court and below.

Condonation

[77] This Court, by way of directions dated 24 October 2012, invited parties to respond to submissions of the amicus by 9 November 2012. The respondents explain that due to an "administrative error" they only took note of this invitation on 8 November 2012, which is when their counsel became aware of the directions. The respondents therefore seek condonation for the late filing of their response. Condonation is not opposed and little prejudice, if any, was suffered by the delayed response. I would therefore grant condonation for the late filing of the submissions in response to the amicus' written submissions.

Order

[78] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.

3. The appeal succeeds.

4. The order of the High Court is set aside and in its place, there is substituted—

   "The second respondent is directed to pay to the schools affiliated with the applicant on 22 September 2008 the approximate amounts specified in the notice of that date which had fallen due for payment on 1 April 2009."

5. The respondents are ordered to pay the applicant's costs, in this Court and in the High Court, including the costs of two counsel.

FRONEMAN J:

[79] How important is the legal label one attaches to a set of facts upon which a party relies for a remedy under the law? Not decisively so, I would suggest, in a matter where the facts are not essentially disputed and no material prejudice to any party flows from whatever label is assigned to them by the formality of the law. This is that kind of case, but the opposing parties urged us to attach different labels to the facts upon which relief was sought, and determine the outcome according to the label. The invitation should be resisted – substance should count, not form.

[80] Formalism has many meanings, but Professor Cora Hoexter helpfully describes one of its meanings as "a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a

concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense."[49] (Footnote omitted.) She explains:

> "In cases displaying formalistic legal reasoning the merits often seem strangely divorced from the outcome of the case, so that it is difficult and perhaps even embarrassing to explain the case to a layperson. There is often a reliance on what one might call *code*: legalistic shorthand that lawyers may understand, however dimly, but that others will find impenetrable and altogether mystifying. Above all, as Alfred Cockrell has observed, there is a tendency to avoid substantive reasons in the form of 'moral, economic, political, institutional or other social consideration[s]' and instead to put up a screen of formal reasons.[50] Thus formalism as I describe it here frequently entails a kind of misdirection: not adverting to the real or fundamental reasons behind a particular result, not saying what one really thinks."[51]

[81] The facts here are not in dispute. As had been the case in previous years the Member of Executive Council, Department of Education KwaZulu-Natal (MEC) granted a subsidy to independent schools in KwaZulu-Natal. On 22 September 2008 the Department of Education, KwaZulu-Natal (Department) issued a notice to independent schools (schools) setting out approximate funding levels for the year 2009. As in the past, the schools relied on the promised subsidy for their operation. During May 2009 the Department sent a circular to them indicating that budgetary constraints necessitated a reduction of not more than 30% in the subsidy allocation for the financial year 2009/10.

[49] Hoexter "Contracts in Administrative Law: Life after Formalism" (2004) 121 *SALJ* 595 at 597.

[50] Cockrell "Rainbow Jurisprudence" (1996) 12 *SAJHR* 1 at 5, referring to Atiyah and Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford 1987) at 1 ff.

[51] Hoexter above n 49 at 597.

The subsidies paid for 2009 on average reflected a reduction of 30% from the amounts indicated in the initial notice. The applicant, representing the schools, then sought to enforce the undertaking to pay the full amount mentioned in the notice or a percentage thereof, as determined by the court. In this Court, the applicant contends that a 30% reduction falls outside any understanding of "approximate". Finally, and most importantly, the matter concerns the right to a basic education.[52]

[82] In the main judgment Cameron J eschews formalism and finds for the applicant on the basis that the retraction of the undertaking to pay may only operate prospectively and cannot apply to those amounts for which the date of payment had passed, that is, for the first term of 2009.[53] He gives substantive reasons for holding the Department to its word in relation to that limited period.[54]

[83] The substantive justification the main judgment gives for preventing a public official from retracting a lawful promise to pay an amount to someone after the date for payment has passed is that it is "legally and constitutionally unconscionable"[55] when tested against the standards of "reliance, accountability and rationality."[56] But the same may be said of the promise to make payments for the whole year, even after the

[52] Section 29 of the Constitution.

[53] See main judgment [62] above.

[54] Id [63]-[71] above.

[55] Id [57] above.

[56] Id [63]-[65] above.

Department indicated on 5 May 2009 that it was reducing the allocated subsidy to pay by not more than 30%. The applicant also relied on the promise to pay the later amounts; the first and second respondents remained accountable for what they had done; and their retraction still needed to be rational. So what prevents testing the payment of the later amounts against the standards of reliance, accountability and rationality?

[84] According to the main judgment the enforcement of this part of the claim should have been brought under the provisions of the Promotion of Administrative Justice Act[57] (PAJA). In addition, the record of the budgetary allocation and decision-making process would have been highly pertinent to enforce a claim at administrative law.[58]

[85] I agree with the reasoning that it is just and equitable to enforce the promise made by the Department, but I consider that this rationale also applies to the promises made for the whole of the year, not only for the first term. It is for this reason that I take issue with the main judgment. In addition, to the extent that a label given to a claim is decisive, the applicant's whole claim may comfortably be accommodated within the law of contract, as it is pleaded. The first reason seeks to engage with the reasoning of the main judgment and accepts its premises, but attempts to push its reach further on the basis of its own logic. The second deals with the formalistic argument, not made in the main judgment,

[57] 3 of 2000.

[58] See main judgment [31]-[32] above.

that the outcome is dictated by labels – a proposition I resist, but nevertheless feel compelled to meet on its own terms.

Procedure and substance

[86] The applicant brought its application by way of notice of motion. Even if it chose review of administrative action as the formal label it was not obliged to use rule 53[59] –

[59] Rule 53 of the Uniform Rules of Court provides:

"Reviews.

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall—

(a) within fifteen days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office

the procedural mechanism for a review – for that purpose. The rule exists principally in the interests of an applicant, and an applicant can choose to waive a procedural right.[60] In this case, where a litigant brings proceedings against the state, "the latter can always, in answer to an ordinary application, supply the record of the proceedings and the reasons for its decision".[61] There was thus nothing in the form of the proceedings in the High Court that prevented the first and second respondents from producing the record of the budget allocation and decision-making in regard thereto, or anything else they considered relevant. They could have done it whether the claim was based in contract or in administrative law. The blame for their failure to do so cannot be laid at the applicant's door.

[87] The reliance the applicant placed on the promise to pay was a reliance that the promised amounts were for the whole financial year, not only for the first term.[62] The schools budgeted for the whole year in reliance on the notice. There is nothing on record

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of the registrar at which he will accept notice and service of all process in such proceedings; and

(b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings."

[60] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (AD) at 661.

[61] *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) SA 313 (SCA) at para 5.

[62] The notice is headed "SUBSIDIES TO INDEPENDENT SCHOOLS 2009/10". KZN Education Subsidy notice dated 22 September 2008. See also main judgment [3] above.

to indicate that they were prejudiced only in respect of the earlier tranches paid but not in respect of the later ones.

[88] The accountability of the respondents similarly did not stop at the end of the first term. Accountability is an ongoing and fundamental responsibility under the Constitution.[63]

[89] What remains in the substantive analysis is the question of rationality. On the respondents' own version, the cost of accommodating the learners in public schools would increase the budget by at least 5% in KwaZulu-Natal alone, as opposed to keeping them in the independent schools. Remember that under the Bill of Rights, everyone has the right to a basic education.[64] It is an unqualified right.[65] There is no rational basis that I can discern how the means used – reducing the subsidies to independent schools – can rationally advance or contribute to the end – the advancement of the right to a basic education – if it will effectively raise the cost of public basic education.

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[63] Section 1 of the Constitution in the relevant part provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 195(1) of the Constitution in the relevant part provides:

> "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (f) Public administration must be accountable."

[64] Id section 29(1).

[65] See *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 37.

[90] That is the first reason for my disagreement with the limited ambit of the main judgment's finding, namely that its substantive logic or reasoning reaches further than it is prepared to countenance.

[91] The second is that if we have to use formal labels, which the parties urged us to do, the applicant's choice of contract is plausible and acceptable. But for that to be done some cobwebs need to be cleared.

Public/private law divide

[92] The distinction between public and private law comes to us from Roman law.[66] To the extent that the distinction rested on the dual assumptions that public law dealt with unequal power relationships and was political in nature, while private law was apolitical law between equals,[67] it needs better justification, but that is not our concern here. For present purposes it suffices to state that this Court has recognised that under the Constitution the divide between public and private law is more diffuse,[68] and that our

[66] Cockrell "'Can You Paradigm?' – Another Perspective on the Public Law/Private Law Divide" in Bennett and Others (eds) *Administrative Law Reform* (Juta & Co, Ltd, Cape Town 1993).

[67] Id at 228.

[68] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 78 and Hoexter *Administrative Law in South Africa* 2 ed (Juta, Cape Town 2012) at 446-51.

courts have enforced agreements concluded in response to circulars or notices setting out the terms on which governmental subsidies may be procured.[69]

[93] There is thus nothing in principle that hinders one from enquiring whether the facts before us may attract the label of being a contract under our law. In that enquiry it will be useful to examine whether there is anything that prevents constructing this matter as one falling under the law of contract from both perspectives, the law of contract on the one hand and administrative law on the other.[70] These perspectives overlap and are interconnected, but convenience permits separate discussion before drawing the strings together in conclusion.

'Pure' contract

[94] Our law of contract, unlike English law, enforces promises seriously made, not bargains.[71] Not all promises are enforced, only those made "seriously and deliberately and with the intention that a lawful obligation should be established", in the words of Wessels AJA in *Conradie v Rossouw*.[72] There have been different formulations of this "redelike oorsaak" or underlying cause for a contract,[73] but what *Conradie* settled more

[69] See *Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 (1) SA 257 (AD) (*Ninja*).

[70] Compare Ferreira "The Quest for Clarity: An Examination of the Law Governing Public Contracts" (2011) 128 *SALJ* 172 at 175.

[71] See Christie *The Law of Contract in South Africa* 5 ed (LexisNexis Butterworths, Durban 2006) at 8.

[72] 1919 AD 279 at 324.

[73] Id, De Villiers AJA, writing for the majority of the court said, at 320:

than 90 years ago was that consideration is not a requirement for a valid contract in our law.[74] And although the underlying rationale for rejecting consideration as a separate requirement for the validity of a contract is that mere serious agreement between parties is sufficient to constitute a contract, our law is also practical enough to recognise that it must, as a general rule, concern itself with the external manifestations, and not the workings of the minds of parties to a contract.[75] When a person thus expresses his or her intention in relation to the formation of a contract the decisive question is often not what he or she subjectively intended, but what it leads the other party, as a reasonable person, to believe was his or her intention.[76] Once again, this has been formulated in many ways by our courts. Perhaps the most famous and enduring is that of Innes J in *Pieters & Co v Salomon*:[77]

> "When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him *bona fide* in that sense, then there is a concluded contract. Any unexpressed reservations hidden in

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> "According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (*Grotius* 3.6.2). The promise must have been made with the intention that it should be accepted (*Grotius* 3.1.48); according to Voet the agreement must have been entered into *serio ac deliberato animo*. And this is what is meant by saying that the only element that our law requires for a valid contract is *consensus*, naturally within proper limits – it should be *in* or *de re licita ac honesta*."

Solomon ACJ was more succinct, at 288:

> "An agreement between two or more persons entered into seriously and deliberately is enforceable by action."

See also *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (AA) (*Saambou*) at 990-1.

[74] *Conradie* above n 72 at 289.

[75] *South African Railways & Harbours v National Bank of South Africa, Ltd* 1924 AD 704 (*SA Railways*) at 715-6.

[76] See also, for a further example, *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (AD) at 239.

[77] 1911 AD 121 at 137.

> the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware."

[95] In *Saambou*[78] it was stated that it would lead to greater clarity if the concepts of "redelike oorsaak" and that of *animus contrahendi* (intention to contract) be separated, so that the latter should not overlap with the former.[79] The intention to contract would then be found in the express or implied intention to be bound by the acceptance of an offer made. In the context of assessing the intention of the offeror, Professor Christie says:

> "[T]he phrase 'lack of *animus contrahendi*' is appropriate to describe those cases in which from the surrounding circumstances or the manner in which the 'offer' was made, or both, it is clear to the court and was or ought to have been clear to the offeree that the 'offer' was not intended to be taken seriously."[80]

[96] It can hardly be gainsaid that the promise by the Department to pay the subsidies was made with the serious intention to honour the promise. That the underlying cause for making it was its statutorily undertaken obligation matters not at this stage, although it might play a role later in determining the legality of the contract.

[97] As far as the intention to contract (*animus contrahendi*) is concerned, it seems to me to be somewhat artificial to say that even though the promise to pay the subsidies was

[78] *Saambou* above n 73.

[79] Id at 991.

[80] Above n 71 at 30.

made seriously with the intention to honour the promise, it was made with no concern as to whether the schools would accept the subsidy. I agree with the finding made in the main judgment that the schools acted in reliance on the promise that the subsidy would be paid to them. The Department was, or should have been, aware of this. I would add that this inference is strengthened by the conduct of the parties in relation to the payment of subsidies in previous years after similar promises of payment. In purely contract law terms, unaffected by possible administrative law considerations, it seems to me that the past and present conduct of the Department would have satisfied the requirement of intention to contract had the promise been made by it as a private person.

[98] By parity of reasoning the same must be said in relation to acceptance of the promise to pay the subsidy by the schools. Their conduct in reaction to the promise made in 2008, the same as what it was to similar subsidy promises made and executed in previous years, is more than adequate evidence of acceptance.[81]

[99] The content of the promise is enforceable, for the reasons set out in the main judgment.[82]

[100] Contract law, unaffected by administrative law considerations, is thus no bar to finding for the applicant in contract. Do administrative law or other public law

[81] Offer and acceptance may be demonstrated by conduct: see *SA Railways* above n 75.

[82] See main judgment [70]-[71] above.

considerations prevent the promise of the subsidy and its acceptance being recognised as a contract?

Contract and public administration

[101] The potential interplay between principles of contract law and those of administrative law is a contested and controversial subject on which, I think it is fair to say, the final word has yet to be spoken.[83] This case does not involve procurement, a major area of dispute. For present purposes we should restrict the inquiry into to whether administrative law principles impact on: first, the formation of a contract between the schools and the Department; second, the content of the contract; and third, the termination of the contract.[84] From what follows it will be apparent that in applicable instances administrative or public law considerations may come into play at each of these levels, but on the facts before us it is only necessary to consider the first, namely those relevant to the formation of the contract.

[83] Decisions in the Supreme Court of Appeal do not appear to be altogether harmonious: compare *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA); *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA); and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA). For academic discussion see: Bolton *The Law of Government Procurement in South Africa* (LexisNexis Butterworths, Durban 2007); Hoexter above n 49; Hoexter above n 68; Ferreira above n 70; and Quinot *State Commercial Activity: A Legal Framework* (Juta & Co. Ltd, Cape Town 2009).

[84] Compare Ferreira above n 70 at 174 ff.

[102] It is an adjunct of the rule of law, or legality, that the state cannot act outside its constitutional or legislative powers.[85] There is no dispute here that the state may award subsidies to independent schools in terms of the Constitution.[86] Nor is it disputed that the subsidy was granted to the schools in terms of section 48 of the South African Schools Act.[87] And as we have seen from the *Ninja* case,[88] payment of public subsidies may be done by way of contract in our law. The constraint derived from administrative law here is thus not one based on the state acting beyond its constitutional or legislative powers, but something else.

[103] What else may it be? It seems to be something to the effect that no *intention to contract* may be inferred where the primary source of the state's obligation derives from legislation and may be enforced by administrative law remedies. But that flies in the face of the acceptance in our law that the same facts may give rise to different causes of action.[89]

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[85] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 17; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1998] ZACC 21; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148; and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[86] Section 29(3) and (4) of the Constitution.

[87] 84 of 1996. Sections 39 and 63 of the Public Finance Management Act 1 of 1999 oblige the first and second respondents to ensure that their expenditure is in accordance with the budget vote of the provincial department.

[88] Above n 69 at 268.

[89] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (AD) at 496.

[104] There may, however, be a substantive and valid reason underlying the purported exclusion of other remedies in a matter with public law overtones. The increasing overlap between private and public law in the modern contracting state is a reality also in other countries. In the United Kingdom the general rule that it would be contrary to public policy and an abuse of the process of court to permit a person to enforce rights protected by public law by way of action and not by review, enunciated by Lord Diplock in *O'Reilly and Others v Mackman and Others*,[90] is subject to exceptions where disputes involve a mix of public law and private law ingredients. The exceptions should be dealt with on a case-by-case basis.[91] More recently the following was stated in *Mercury Communications Ltd v Director General of Telecommunications and Another*:[92]

> "The recognition by Lord Diplock that exceptions exist to the general rule may introduce some uncertainty, but it is a small price to pay to avoid the over-rigid demarcation between procedures reminiscent of earlier disputes as to the forms of action, and of disputes as to the competence of jurisdictions apparently encountered in civil law countries where a distinction between public and private law has been recognised. It is of particular importance, as I see it, to retain some flexibility, as the precise limits of what is called 'public law' and what is called 'private law' are by no means worked out. The experience of other countries seems to show that the working out of this distinction is not always an easy matter. In the absence of a single procedure allowing all remedies – quashing, injunctive and declaratory relief, damages – some flexibility as to the use of the different procedures is necessary. It has to be borne in mind that the overriding question is whether the proceedings constitute an abuse of the process of the court."[93]

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[90] [1983] 2 AC 237 at 285.

[91] Id.

[92] [1996] 1 All ER 575.

[93] Id at 581. For a general discussion see Brownsword *Contract Law - Themes for the Twenty-First Century* 2 ed (Oxford, 2006) at 229-40.

[105] So there might be substantive concerns that by using one procedure – enforcing a contractual claim – a litigant may gain an unfair advantage, to the detriment of the state, which he or she would not have had if another procedure – review – had been used. Whether that might be a good substantive defence to a claim based on contract is, however, not possible to determine without investigation of the facts of each case.

[106] The lack of an intention to contract was the only real defence that the Department offered to the contractual claim of the applicant. The promise to pay the subsidies to the schools is reasonably susceptible to a construction that it was an offer to the schools which was accepted by them. Nothing in private contract law or in public administrative law excludes that construction as a matter of principle.

[107] It was open to the Department to put up a more detailed defence on the papers. Procedurally nothing prevented it from doing that. It could have raised the defence of unfair procedural advantage by pointing out in what way the applicant benefitted unfairly from proceeding on contract. It could have raised the defence that even if the formation of the contract was accepted, its content was nevertheless contrary to public policy because it fettered the state's discretion to expend public money in the public interest. Or it could have pleaded that the contract was terminated by subsequent impossibility or illegality because of statutory budgetary obligations. These defences may have proved successful if the facts and law supported them. But we do not know whether that would

have been so, because the Department did not raise these defences properly on the papers. On the papers as they stand there is nothing to prevent the making of the promise and its acceptance by the schools being labelled as a contract between the parties.

Conclusion

[108] I thus, in the first place, support the substantive reasoning made for the order in the main judgment, but on an extension of that reasoning I would not restrict its operation only to the first term payments of 2009. I arrive at the same result even if one goes the route of contract.

NKABINDE J:

Introduction

[109] I have had the privilege of reading the judgments prepared by my colleagues, Cameron J (main judgment), Mogoeng CJ and Jafta J, Froneman J and Zondo J. I agree with the main judgment that condonation and leave to appeal should be granted. There can be no doubt that this matter raises important constitutional issues. The issues concern subsidies for independent educational institutions, implicate the right to a basic education which may be accessed through those institutions and involve the interpretation of a subsidy notice. Further issues relate to whether the claim is based on a promise giving rise to a legitimate expectation and whether the appropriate remedy lies in the law of contract or in public law.

[110] The existence of independent schools, through which the right to a basic education may be accessed, is a factual reality in South Africa. Many independent schools will have an interest in the decision of this Court on the merits of the applicant's case. This is the first occasion on which this Court has been asked to determine the appropriateness of the claim for payment of subsidies to independent schools based on an alleged enforceable promise or the alleged intention to contract by the parties for the payment of subsidies which, if established, would give effect to the fundamental human right to a basic education and prevent the state from escaping its obligation to pay. While I do not agree that the contentions advanced by the applicant have prospects of success, this is not the only consideration, nor is it always decisive, in considering whether to grant leave to appeal. A consideration of what is in the interests of justice involves the weighing up of relevant factors, including the prospects of success. Other factors include the importance of the issues raised and the public interest.[94] The issues raised are of considerable public importance and stand to have an impact beyond the parties before us. In view of the important issues raised and the constitutional right implicated, the interests of justice dictate that leave to appeal should be granted. While I do not agree with Mogoeng CJ and Jafta J or with Zondo J that leave to appeal should be refused, I support their analysis of the merits of the applicant's case.

[94] See for example *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at paras 20-1 and 25; *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; and *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 10.

[111] The appeal should not succeed and the order of the KwaZulu-Natal High Court, Pietermaritzburg (High Court) should not be set aside. In particular, I do not agree that the notice issued by the Provincial Head of Department, Department of Education, KwaZulu-Natal (the Department) in 2008 (2008 notice) constituted a promise to pay the allocated funds, nor do I agree that the alleged promise constituted an enforceable obligation. The reasons follow.

[112] The circumstances that give rise to this application are set out in the main judgment. I will not deal with them in detail except for those upon which I base my findings and conclusion.

Background

[113] This application arises from a subsidy allocation in terms of a notice issued by the second respondent, the Department. The notice provides a table in terms of which the subsidy level for each independent school for 2009 would be based.[95] Paragraph 1 of the notice expressly states that "[t]o determine the level in which your school shall be based (in comparison with the January 2004 school fees), the following table is provided as a *guide*". (Emphasis added.) The table shows the primary and secondary school fees for January 2004. Below the table, it is stated that the "figures are based on 2005/2006 state

[95] The 2008 notice is headed "SUBSIDY TO INDEPENDENT SCHOOLS 2009/2010". The entire 2008 notice is referred to in the main judgment at [3] above.

per capita expenditure of R5057 for primary level and R5396 for secondary level." The following then appears in the second paragraph of the 2008 notice:

"2. In order for schools to prepare budgets for 2009 **approximate** funding levels will therefore be as follows:

Level	**% of state per capita amount**	**Amount per learner**
5 Primary	0%	R0.00
5 Secondary	0%	R0.00
4 Primary	15%	R1 137.45
4 Secondary	15%	R1 190.25
3 Primary	25%	R1 895.75
3 Secondary	25%	R1 983.75
2 Primary	40%	R3 033.20
2 Secondary	40%	R3 174.00
1 Primary	60%	R4 549.80
1 Secondary	60%	R4 761.00

The above figures are based on the 2009/10 state per capita expenditure of

Primary: R7 583

Secondary: R7 935

3. It should be noted that subsidy allocations will be reviewed annually."

[114] In a circular dated 5 May 2009 and signed 18 May 2009, the Department reduced the "approximate funding levels" by 30%[96] in the light of a budget cut of 7.5% by the KwaZulu–Natal Provincial Treasury, and also because additional funds were required to cater for 28 newly registered independent schools which were added at the behest of the

[96] In a letter headed "Reduction of budgets in the 2009/MTEF", dated 5 May 2009 and signed by the provincial Superintendent General on 18 May 2009.

applicant. These new schools were not included when the subsidy levels were projected. According to the respondents, the inclusion of the 28 new schools resulted in the payment amounts projected in the 2008 notice not being complied with as there were more schools sharing the allocated R55,861 million. The 30% reduction resulted in discussions on the subsidy issues between the Department's officials and the applicant.[97]

[115] The allocation of R55,861 million for independent schools was discussed at the meeting of 19 May 2009 between the applicant and the officials of the Department. The applicant was informed that the inclusion of new schools in the subsidy allocation increased the number of eligible schools from 97 to 125. This meant that a balance of R41,557 million was to be distributed to all eligible schools for the next three payments – a cut of 30% to accommodate all independent schools. It was also explained that the year-on-year budget increase had traditionally been fixed at 6.5%, but that the 2009 budget decreased by 7%. It was explained further that the 30% cut would mean an effective cut of 6-8% per school based on the subsidy received.

[116] Significantly, the applicant noted that there would be a reduction in the allocation to independent schools in order to accommodate new schools. At the meeting of 19 May 2009, one of the members of the applicant expressed appreciation to the Department for having included the new schools in the subsidy allocation. After the explanation by the

[97] At the meeting held on 19 May 2009, the Department explained that the delay in paying the fourth quarter payments for 2008/2009 was due to the withholding of payments for the first tranche by the Finance Division because transfers are regulated by the Division of Revenue Act 2 of 2008 and voting had not yet taken place.

Department, the applicant decided to meet with the MEC to discuss the issue of increasing the budget allocation to accommodate new schools. Consequently, when the applicant's efforts to reach agreement came to naught, semi-urgent proceedings were instituted in the High Court. Essentially, the applicant's complaints were that the amount allocated in the provincial budget for independent school subsidies was too low and that the subsidies promised were not paid in full or timeously, as required by Regulation 195 of the Amended National Norms and Standards for School Funding (Norms and Standards).[98]

Litigation background

[117] The applicant sought relief for "the full extent of the subsidies that [the] Department promised to pay to [the relevant independent schools]". Alternatively, it sought payment of a percentage of the shortfall to be determined by the Court and costs in the event of opposition. The 2008 notice relied upon allegedly constituted such promise. The applicant sought to enforce that promise.

[118] The applicant described the applicable constitutional[99] and legislative framework in section 48 of the South African Schools Act[100] (Schools Act) and the Regulations

[98] Government Gazette 29179, Government Notice 869, 31 August 2006.

[99] Section 29 of the Constitution provides, in relevant part:

> "(1) Everyone has the right—
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

promulgated under the Schools Act[101], in terms of which the Norms and Standards for granting a subsidy to independent schools are laid out. The applicant contended that, while the 2008 notice only contained indications, the schools were entitled to proceed on the assumption that the "subsidies would not deviate materially from the indications provided". It needs to be acknowledged at the outset that section 29 of the Constitution,

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. . .

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions."

[100] 84 of 1996. See main judgment above n 14-8.

[101] See above n 98. The Norms and Standards, promulgated in terms of the Schools Act, include norms for both public and independent schools.

Regulation 48 indicates that independent school enrolment amounts to about 2% of total nation-wide school enrolment and that if all independent school learners were to transfer to public schools, the cost of public education may increase by as much as 5% in certain provinces.

Regulation 54 acknowledges that the right to establish and maintain reputable, registered independent schools is protected by the Constitution and that the payment of subsidies to such schools is not precluded. It also accepts that public subsidies to independent schools would cost the state considerably less per learner than if the same learners enrolled in public schools.

Regulation 173 sets out that the regulations dealing with subsidies to independent schools are intended to provide a stable and principled basis for MECs in all provinces, to decide the eligibility for subsidies and the level of subsidies for registered independent schools.

In terms of Regulation 176, an independent school may be considered for a subsidy if it meets the conditions of eligibility, which include that it must—

(a) be registered by the provincial education department (PED);

(b) have made an application to the PED in the prescribed manner;

(c) have been operational for one full school year; and

(d) be a registered non-profit organisation in terms of the Non-Profit Organisations Act 71 of 1997.

Regulation 187 deals with the manner in which subsidies are to be calculated.

Regulations 191 and 192 (dealt with later in this judgment) as well as Regulation 193 deal with the circumstances in which subsidy levels may be changed.

Finally, Regulation 195 stipulates that the first term's subsidy must be paid by no later than 1 April in each school year and subsequent subsidies must be paid no later than six weeks after the beginning of each school term.

section 48 of the Schools Act and certain Regulations governing state subsidies for independent schools,[102] constitute an important constitutional and legislative framework.

[119] Relying on the alleged promise, the applicant said that the Department had previously "paid exactly what it had promised" and that "there is no reason why [the High Court] should not order [the Department] to honour its indications for 2009 in the same fashion." (Emphasis removed.)

[120] The respondents denied that the promise was enforceable. They maintained that the decision to reduce the subsidy was an administrative one which should have been challenged under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The respondents referred to the departmental circular dated 18 May 2009 which explained the reasons for the reduction.[103] The figures in the 2008 notice, the respondents said, were

[102] Id.

[103] The circular reads:

> "REDUCTION OF BUDGETS IN THE 2009/10 MTEF
>
> 1. As part of the Province's turn-around strategy in dealing with the current cash crisis, as well as the carry-through effects the cash situation will have on the 2009/10 MTEF, it was agreed by Cabinet that a reduction in [the] department's equitable share allocation is required.
> 2. As such, each department is required to effect a reduction in their equitable share allocation which is equivalent to 7.5 per cent of their 2009/10 MTEF *Goods and services* budget in accordance with 'THE PROVINCIAL TREASURY CIRCULAR: NO, PT (2) OF 2009/10'.
> 3. In addition, funds are required to be redistributed in order to cater for new schools that have become eligible for [a] subsidy in the current financial year. Refer to Government Gazette Notice No. 29179 dated 31 August 2006 paragraphs 191, 192 (a), (b), (c) and 193.
> 4. Due to the above please expect a cut not exceeding 30% in your current subsidy allocation for the financial year 2009/10.

"projected" and "mere approximations" and further that "the Respondents cannot be held to them." The respondents referred to items 191 and 192(b) of the Norms and Standards.[104] They explained that the Department did not have funds to pay the 30% shortfall.

[121] The applicant asserted in its replying affidavit that it "stands or falls by its contention that it relies on an undertaking or promise by [the Department] to pay a certain subsidy." It submitted that it is entitled to rely on the promise for payment of an amount as promised. According to the applicant, the claim is fact-specific for the 2009-2010 year. The applicant contended that "[w]hether that promise or undertaking is characterised as being of an administrative nature or something akin to a contractual obligation is neither here nor there." It said that "[i]f it is characterised as an administrative act then it is clearly unlawful . . . [and if] it is contractual, then [the] applicant is entitled to claim specific performance." The applicant argued that the fact that the respondents do not have the necessary monies to make payments sought did not preclude the High Court from ordering the Department to pay the promised amount. It criticised the respondents for failing to adduce evidence supporting the claim that they cannot pay.

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5. Your cooperation in this regard will be highly appreciated."

[104] Items 191 and 192(b) are set out in full at [142] below.

[122] In dismissing the application with costs the High Court accepted, in favour of the applicant, that the 2008 notice was made with the intention of bringing an enforceable obligation into existence (*animo contrahendi*).[105] On whether the notice contained terms sufficiently certain to give rise to an enforceable obligation in law, the Court first determined the meaning of "approximate".[106] Interpreting the word objectively, the High Court held that the word means "almost exact" or "very close" and is not ambiguous in its meaning.[107] It held:

> "To reach the conclusion that the [2008 notice] conveyed a promise that the actual amounts referred to in the [2008 notice] would be paid, would either be to ignore the word 'approximate', which would offend against the basic principles of interpretation, or would amount to assigning it a meaning it clearly does not have."[108]

[123] Leave to appeal was refused by both the High Court and the Supreme Court of Appeal.

In this Court

[124] The applicant steadfastly relies on the 2008 notice which, it maintains, constituted a promise to pay the allocated funds and is enforceable. In its further written submissions[109] the applicant contends that the statutory provisions give compelling

[105] See High Court judgment at para 9.

[106] Id at para 10.

[107] Id at para 11.

[108] Id.

[109] Pursuant to the directions dated 30 January 2013.

support for the contention that the promise is binding and therefore enforceable. It argues that item 195 of the Norms and Standards read together with Regulation 4(3) of the Notice Regarding the Registration of and Payment of Subsidies to Independent Schools[110], "create an obligation on the [MEC] to pay the approximate subsidies of the entire 2009 school year to [the] applicant's members."

[125] Although the applicant correctly accepts that it did not argue for relief on the above statutory basis, it contends that by express reference to the statutory provisions, which includes item 195, the obligations that arise under those provisions were foreshadowed in the papers.

[126] The amicus curiae bases its submissions on the right to education.[111] It posits that the applicant acquired a legitimate expectation which is alleged to have been sufficiently pleaded. The respondents deny this and argue that the applicant belatedly seeks to change the case made and considered by the High Court, thus effectively making this Court a court of first instance.

Issues

[127] The issues for determination are whether the 2008 notice constituted a promise to pay the allocated funds and whether the promise or the Norms and Standards constituted

[110] Provincial Gazette 5387, Provincial Notice 287, 28 October 1999.

[111] Above n 99.

enforceable obligations. The answers to these questions lie in the interpretation of the 2008 notice and the extent of the pleaded causal action. It is important to delineate at the outset, the principles applicable when interpreting written documents.

Interpretive principles

[128] The principles applicable to interpreting written documents are now settled. The notice must be read as a whole,[112] having regard to its context and background facts to determine its meaning and purpose.[113] The point of departure is to focus on the words used in the 2008 notice. The words should be given their ordinary meaning unless the context in which they are used indicates that a different meaning was contemplated.

[129] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[114] the Supreme Court of Appeal cautioned against substitution of the actual words in a document for what is considered to be reasonable, sensible or businesslike. The Court remarked:

> "Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling

[112] See *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*) at paras 54-9.

[113] In *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 662-4, Schreiner JA drew attention to two schools of thought on interpretation, one maintaining that the context, in the large sense in which he defined it, must be taken into account as part of the process of ascertaining the grammatical and ordinary meaning of the words, the other maintaining that the grammatical and ordinary meaning should first be ascertained and recourse had to the context only in order to decide whether some other meaning ought to be preferred. See also *Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 21 and *List v Jungers* 1979 (3) SA 106 (A) at 118D.

[114] 2012 (4) SA 593 (SCA) (*Endumeni Municipality*).

> through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[115] (Footnotes omitted.)

Does the 2008 notice constitute a promise?

[130] Keeping the above interpretive principles in mind, I now consider the words employed in the 2008 notice to determine whether it constitutes a promise to pay the amounts allocated. The notice provides a table as a guide to determine the level at which each school subsidy will be based in comparison with January 2004 school fees. Below

[115] Id at para 18.

the table the following words appear: "[t]he above figures are based on 2005/2006 state per capita expenditure of R5057 for primary level and R5396 for secondary level."

[131] It is important to note that so far the notice does not promise anything, let alone payment of subsidies. Instead, it tells us that the purpose of the table is to determine the level at which subsidy allocations per school will be based and that such level is in comparison with the school fees payable in January 2004.

[132] The notice further states: "[i]n order for schools to prepare budgets for 2009 **approximate** funding levels will therefore be as follows". (Emphasis in original.) A second table is set out illustrating the approximate funding levels in various percentages and sums of money for primary and secondary levels. The second table is followed by this explanation: "[t]he above figures are based on the 2009/10 state per capita expenditure of Primary: R7 583 [and] Secondary: R7 935".

[133] The notice concludes by stating that "[i]t should be noted that subsidy allocations will be reviewed annually". Once more, no promise to pay is made. The apparent purpose of the second table was to provide approximate funding levels to help schools in preparing their budgets. The words used in the notice are clear and cannot be construed to mean that the Department has promised to pay, without reading into the notice words which are not used in it. According to *Endumeni Municipality* such an approach is impermissible because it falls outside the scope of interpretation.

[134] For these reasons I am of the view that, properly construed, the 2008 notice does not constitute a promise to pay.

[135] Even if one were to assume that the 2008 notice amounts to a promise to pay, the use of the word "approximate" evidently shows that the allocations in that notice were mere projected figures and not exact amounts. The remarks by the High Court in this regard[116] therefore cannot be faulted. In any event, the applicant correctly admitted that the amounts referred to in the 2008 notice are approximations and that the respondents cannot be held to those exact amounts.

[136] The applicant expressed doubt that a 30% reduction of the subsidies indicated in the 2008 notice constitutes an "approximate" payment of those amounts. It invited this Court to give content to the "approximate" qualification in the notice or determine the correct percentage by which the subsidies could have been decreased, despite the paucity of cogent evidence with regard to the respondents' ability to pay. Relevant evidence in this regard might have proved helpful. At the hearing the applicant was put to an election to have the matter remitted for further evidence. It declined to have the matter remitted for that purpose. The applicant must be held to its election.

[116] High Court judgment at para 11.

[137] The fact that the applicant construed the notice as amounting to a promise is immaterial. This is so because interpretation is a question of law and not of fact. Consequently, the import of the 2008 notice falls to be determined by the Court, independent of whatever interpretation is placed on the notice by the parties. In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*,[117] the Supreme Court of Appeal summarised the rules relating to the admissibility of parol evidence. The Court said:

> "First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . . Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses . . . . Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent . . . . Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' . . . . The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice."[118]

[138] The applicant contended further that the announcement of a 30% cut in May 2009 was made too late for independent schools to rearrange their affairs. This might well be

[117] 2009 (4) SA 399 (SCA).

[118] Id at para 39.

the case. However, the delay in payment was explained by the Department to the applicant and representatives of member schools at the meeting of 19 May 2009. In any event the lateness of the announcement and the delay in effecting payment does not, without more, render the promise enforceable.

[139] For these reasons I conclude that the 2008 notice does not constitute a promise to pay either the full extent of the allocated funds or any percentage thereof.

Enforceability

[140] As mentioned earlier, the applicant relied steadfastly on the 2008 notice which it said constituted a promise to pay the allocated funds and that the promise is enforceable. However, in further written submissions filed pursuant to the Directions,[119] it is contended that the Norms and Standards (item 195 and Regulation 4(3)) created an enforceable obligation to pay.[120] The submissions do not withstand close scrutiny. I acknowledged earlier that section 29 of the Constitution, section 48 of the Schools Act and the Norms and Standards comprise an important legislative framework. However, they are not dispositive of the issues before us.

[141] Reliance on the said Regulations as a basis for creating an enforceable obligation is a departure from the case as pleaded in the High Court. That much was readily accepted

[119] Dated 30 January 2013.

[120] See also the main judgment at [59] above.

by the applicant and the main judgment correctly bears that out.[121] In substance, the applicant's case did not concern whether the funds allocated to the individual schools were determined in accordance with the Norms and Standards. The case was about payment of the funds determined and allegedly promised to be paid by the respondents.

[142] In any event, item 195 and Regulation 4(3) cannot be read in isolation.[122] Items 191 and 192(b) of the Norms and Standards, referred to below, are also relevant. They deal with subsidies in relation to PED budgets. Items 191 and 192(b) provide:

> "191. The Ministry of Education is sensitive to the connection between the total cost of independent school subsidies and the overall budgetary position of a Provincial Education Department [PED]. Recent reductions in the overall funds available for independent school subsidies because of urgent budgetary expediency should not become de facto policy by default. At the same time, PEDs must have latitude to vary budgetary allocations between programme areas, in relation to the total funds at their disposal, and the priorities established in terms of national and provincial policies.
>
> 192. A PED may, therefore, alter the fee levels and/or corresponding percentage subsidies levels except for the 0% subsidy level applicable to school fee level 5 in figure 4 after consultation with the [Department], *if the application of these norms would*—
>
> . . .
>
> (b) contribute to over-expenditure on the PED's budget in the year they are applied". (Emphasis added.)

[121] Id at [58] above.

[122] *Sebola* above n 112.

[143] The respondents explained in the circular of 18 May 2009 that because of the "cash crisis", Cabinet agreed on a reduction equivalent to 7.5% of their allocation for 2009/10 MTEF.[123] As a result, the Department had to effect a reduction in its equitable share. It was explained further that funds had to be distributed to cater for additional new schools that became eligible for a subsidy in the same financial year. All of this was not refuted by the applicant. It follows that the Department was entitled, under item 192(b), to make a reduction to avert over-expenditure.

[144] Everyone has a right to a basic education. It is indeed so that the right to a basic education may be accessed through independent schools.[124] Therefore the state has a concomitant obligation to ensure that the right to a basic education can be enjoyed by everyone. In this context, the Schools Act requires the state to "fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision."[125] The state is also required to provide public schools with an annual indication of funding to enable them to prepare their budget for the next financial year.[126] In contrast, independent schools may be established and maintained by anyone at their own cost.[127] It follows that the payment of a subsidy is not a right under the Bill of Rights. The

[123] Medium Term Expenditure Framework, as provided by the National Treasury on an annual basis.

[124] Above n 99.

[125] Section 34(1) of the Schools Act.

[126] Id section 34(2).

[127] Above n 99.

applicant accepted this. The MEC may grant a subsidy to a registered independent school that complies with prescribed standards,[128] from funds appropriated by the provincial legislature for that purpose.[129] At best, the applicant was entitled to claim the subsidy.

[145] The form of the applicant's case is important. The first time the applicant mentioned a contract was in its replying affidavit when it made an assumption that the promise is a contract. In its words "[w]hether that promise or undertaking is characterised as being of an administrative nature or something akin to a contractual obligation is neither here or there. . . . If it is contractual, then applicant is entitled to claim specific performance." Ordinarily, a litigant who relies on a contract has the onus to establish its existence and must show, on balance, the breach of an undertaking.[130] The main judgment holds:

> "The applicant relied in its founding and subsequent papers on what it simply and persistently described as an enforceable undertaking to pay the entire year's subsidy without any reduction. This casts the claim in contractual, or ostensibly contractual, terms. In my view the undertaking is indeed enforceable, but on broader public law and regulatory grounds than a bilateral agreement."[131]

[128] Section 48(1) of the Schools Act.

[129] Id section 48(2).

[130] See *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Department van Handel & Nywerheid* 1992 (4) SA 1 (AD); [1992] 2 All SA 209 (A).

[131] Main judgment at [58].

[146] I do not agree that the alleged promise constituted an enforceable obligation, nor do I agree that the applicant's claim can be classified in contractual terms. In the pleadings a quo, the applicant persistently relied on the 2008 notice which, it said, constituted an enforceable promise. I do not think that reliance on the alleged promise for payment of the full extent of the subsidy was, by itself, a sufficient ground for concluding that a contract or quasi-contract came into being.

[147] The purpose of pleadings, as dealt with by the Supreme Court of Appeal in *Minister of Safety and Security v Slabbert*,[132] albeit in action proceedings, is apposite. The Court remarked:

> "The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.
>
> There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial."[133] (Footnote omitted.)

Notably, in casu, the existence of a contract or quasi-contract was neither pleaded nor agreed upon by the parties nor was the broader public law ground pleaded.

[132] [2010] 2 All SA 474 (SCA) (*Slabbert*). See also *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) at para 7 and *South British Insurance Co. Ltd. v Unicorn Shipping Lines (Pty.) Ltd.* 1976 (1) SA 708 (AD) at 714G.

[133] *Slabbert* above n 132 at paras 11-2.

[148] For these reasons, I conclude that neither the alleged promise nor the Norms and Standards created an enforceable obligation.

[149] In the result, I would have granted leave to appeal, condoned the late filing of the respondents' written submissions in response to the amicus' submissions, disallowed the appeal and confirmed the order of the High Court dismissing the application.

ZONDO J (Mogoeng CJ and Jafta J concurring):

Introduction

[150] I have had the opportunity of reading the judgments prepared by my Colleagues, the Chief Justice and Jafta J, Cameron J, Nkabinde J and Froneman J. I agree with the judgment prepared by Cameron J (main judgment) that there is a constitutional issue in this matter but I am unable to agree that the appeal should succeed. In fact I do not even agree that the applicant should be granted leave to appeal. In my view, on the case that the applicant brought the respondents to Court to answer, which is the only case that we are entitled to decide, the applicant has no case whatsoever and its application for leave to appeal should be dismissed. I agree with Nkabinde J's judgment in so far as it is consistent with this judgment but would conclude, even on that judgment, that leave to appeal should be refused. I am in full agreement with the joint judgment of the Chief Justice and Jafta J.

What is the applicant's case?

[151] The applicant's case as set out in its founding affidavit was simple. It was that the Provincial Department of Education, KwaZulu-Natal (Department) promised to pay approximate amounts of subsidies to certain independent schools which the applicant represents in this matter but that, when the Department paid subsidies to the schools, it paid amounts that were substantially lower than the "indications" or "approximations" of amounts it had promised to pay to the schools. The applicant contended that the independent schools were entitled to be paid the indications or approximations of the amounts of the subsidies that the Department had promised.

[152] Mr Ebrahim Ansur deposed to the applicant's founding affidavit in the High Court. In the applicant's founding affidavit he inter alia said:

> "I am advised that it has been held that an independent school has no right to be paid a subsidy. Against that, I am advised that an independent school has a right to claim a subsidy where a Department or any other organ of State has promised to pay such a subsidy." (Emphasis omitted.)

In the same affidavit Mr Ansur submitted that "the notices from the Department, to the independent schools, setting out the subsidies that would be paid in the following years, constituted such promises". He went on to say:

> "Importantly, I do not think that it would necessarily be correct to say that the Department promised to pay the exact amounts that they indicated they would pay.

> Rather, it is clear that the Department promised to pay *an amount approximate to the indications* in the annual letters. *Applicant, on behalf of its members, seeks to enforce that promise*." (Emphasis added.)

The first emphasised portion of this quotation reveals that, as support for the promise upon which the applicant's case is based, the applicant relies on a statement that, on the applicant's own understanding, is double-vague. I say this because the fact that the amounts were indications or approximations is vague enough to be fatal to the applicant's case but in this quotation the applicant says that "it is clear that the Department promised to pay an amount approximate to the indications in the annual letters." This means that, on the applicant's own understanding, this was not an approximation to a specific amount, but an approximation to another indication or approximation. In the applicant's founding affidavit Mr Ansur inter alia said:

> "From the aforegoing I submit that it is clear that the Department has materially deviated from the subsidies that it indicated that it would pay."

In the next paragraph, Mr Ansur also said:

> "In saying this, I am acutely mindful that the notices from the Department emphasise that the projected subsidies are only 'indications' or are 'approximate'".

[153] One of the defences put up by the respondents in their answering affidavit was that the applicant wanted the Court to force the Department to pay the schools amounts that were approximations. The respondents contended that the Department could not be held

to approximations. In the applicant's replying affidavit Mr Ansur had the following to say in this regard:

> "I admit that these amounts are approximations. *Respondents are quite correct that they cannot be held to exactly these amounts.* I sincerely doubt that respondents will seek to contend that a 30% reduction in promised amounts still constitutes an 'approximate' payment. Applicant has made provision for this Court to determine the latitude to be allowed to respondents regarding the 'approximate' qualification in the promise. Importantly, in the previous payments what was promised was paid." (Emphasis added.)

What the applicant was saying in this passage is: we accept that, since the amounts indicated by the Department to the schools were approximations, the Court cannot order the payment of those amounts to the schools but we are asking the Court to determine what the amounts are that they must pay to the schools which are approximate amounts. In this quotation the applicant says it is quite correct that the respondents cannot be held to these exact amounts. The question that arises then is: if the Department cannot be held to exactly these amounts, to exactly what amounts can it be held if it can be held to any amounts at all? In my view the obvious answer is: none. The Department cannot be held to any amounts because it never committed itself to any exact amounts.

[154] Mr Ansur further submitted that "there is no reason why this Court should not order [the Department] to honour its 'indications' for 2009 in the same fashion" as it did in 2008 when, according to Mr Ansur, "the [Department] paid exactly what it had promised". In the same affidavit he says that the other option (to enforce the

Department's promise to pay amounts approximate to the indications given in its letters), "is for this Court to decide what it considers (as a percentage) to be approximate." Mr Ansur goes on to say in the same paragraph:

> "Approximate is defined as 'almost exact' or 'very close'. If this court is of the view that approximate should mean, for example, within 2% of the given indications then the third order in the notice of motion (in the alternative to the order in the second order) allows for this Court to order the Department to pay such an approximate amount. If, following the example, this Court decided that approximate could reasonably mean within 2% of the given indications, then this Court could order the Department to pay 98% of the amounts in column 8."

Then soon after the above passage, Mr Ansur says: "All that the [applicant] seeks to do in this application is to enforce those promises." In other words, the promises that the applicant sought to enforce are the promises of the indications or approximations of the amounts. In my view the passages I have quoted above from Mr Ansur's affidavits reveal quite clearly that the applicant wanted the Court to decide what the amount is which the Department should pay to the schools since the Department never promised the schools any exact amount. In other words, the Court was being asked to hold the Department to an amount that the Department never undertook to pay. If ever there was a case in which a Court was asked to make a contract for the parties, clearly this is such a case.

Deviation by the main judgment from the applicant's case

[155] What I have set out above represents the only case that the applicant set out in its founding affidavit. There is no other case foreshadowed in the founding affidavit. That is also the case that Koen J decided in the High Court which he dismissed. In my view Koen J was, without any doubt, correct in dismissing the applicant's application. That is also the case in respect of which the Supreme Court of Appeal refused a petition for leave to appeal. That Court was absolutely correct in refusing leave to appeal. In fact that is also the case which counsel for the applicant argued before us in this Court.

[156] It is necessary to point out that during the hearing of argument in this matter in this Court, various questions from the Bench were put to counsel for the applicant that were aimed at clarifying what his case was. One of these was whether he was relying on the doctrine of legitimate expectation. His answer was: No! He was asked whether he was relying upon public law. His answer was: No! He was asked whether the matter should be remitted to the High Court to give the parties an opportunity to place more evidence before the court and his answer was yet another: No. He said that this matter had been going on for too long and the applicant wanted finality. He made it clear that the applicant's case was that the Department was contractually bound to pay the relevant schools the approximate amounts indicated in the papers. He presented the applicant's case on the basis that the Department had a contractual obligation to pay the approximate amounts. He said that the applicant stood or fell by that case.

[157] The main judgment concludes that the "undertaking" or "promise" is not enforceable "because of an agreement".[134] It continues and points out that—

> "[a] contract is an agreement between parties, entered into with the intention of creating binding obligations, to perform according to its terms agreed . . . . But here there was no contract. The undertaking was not extended as part of a bilaterally binding agreement, which is the hallmark of contractually enforceable obligations."[135]

In the next paragraph the main judgment continues: "Nor was there any intention on the part of the Department, or indeed the schools, to be contractually bound by a private agreement."[136] This should have been the end of the applicant's case in the main judgment because that is the only case foreshadowed in the applicant's founding affidavit.

[158] Notwithstanding the conclusion that the applicant's case based on a contract must fail, the main judgment proceeds to find for the applicant on a basis not included in the case by which the applicant's counsel said he stood or fell. This is a matter in which the applicant was represented by senior counsel and not a case where it was unrepresented or represented by some inexperienced legal practitioner. Once we have found that the applicant has no contractual case, the applicant must be allowed to fall. The Court should not seek to pick the applicant up and make it stand upon a different case.

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[134] Main judgment at [35] above.

[135] Id.

[136] Id at [36] above.

[159] The main judgment finds that the respondents were obliged under the Amended National Norms and Standards for School Funding[137] (Norms) and the South African Schools Act[138] (Schools Act) to pay the approximate amounts of subsidy in regard to the first term. The main judgment then points out that, when the Department issued its letter signed on 18 May 2009 in which it informed the schools that they should expect a cut "not exceeding 30% in your current allocation for the financial year 2009/10", the first term's subsidy as promised in the 2008 notice had already fallen due.[139] The main judgment also expresses the view that the Department's delay in making payment for the first term "constituted a breach of its obligations under the Norms and the Schools Act."[140]

[160] In the next paragraph the main judgment concedes that this was not the case which the applicant had brought to Court. It says:

> "It is true that this was not the clasp on which the applicant originally pegged its hopes. The applicant relied in its founding affidavit and subsequent papers on what it simply and persistently described as an enforceable undertaking to pay the entire year's subsidy without any reduction. This cast the claim in contractual or quasi-contractual terms. In my view the undertaking is indeed enforceable, but on broader public law and regulatory grounds rather than bilateral agreement."[141]

[137] Government Gazette 29179, Government Notice 869, 31 August 2006.

[138] 84 of 1996.

[139] Main judgment at [57] above.

[140] Id.

[141] Id at [58] above.

With regard to the last part of this sentence I can only say again that, when counsel for the applicant was asked at the hearing whether his case included any reliance on public law, he disavowed any reliance on public law. That being the case, it is not permissible for the main judgment to rely on public law to support its finding in favour of the applicant. In the "applicant's supplementary replying affidavit" Mr Ansur put the applicant's case thus: "The crisp legal issue is whether the letter (annexure 'E' to the founding affidavit) constitutes an enforceable promise." He did not base the applicant's cause of action on the Norms and Regulations. He based it simply on the indications and approximations in annexure "E". This Court has repeatedly said that in motion proceedings a party must make its case in its papers.[142] That is the rule of practice that the courts in this country follow and have followed for a very long time which this Court is also obliged to follow in adjudicating cases brought to Court by way of motion proceedings. When this Court deviates from such established practices for the adjudication of cases which other courts are obliged to follow, it may cause uncertainty and confusion whether other courts must still follow such practices. There is no warrant for the creation of such a situation.

[142] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39; *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 39 and 43; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at paras 115-9; *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 31; and *Prince v President, Cape Law Society, and Others* [2000] ZACC 1; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

The order for the payment of approximated amounts

[161] Another reason why I am unable to agree with the main judgment is that it holds that the Department made an enforceable promise or undertaking in this matter and makes an order that the Department pay to the relevant schools approximate amounts. Assuming that there was a promise made by the Department, that promise could only be a promise to pay the schools concerned approximately the amounts it indicated in the relevant circular. That would be a promise to pay approximate amounts. In law that does not give rise to a legal obligation or an enforceable obligation. Indeed, the deponent to the respondents' answering affidavit said: "In any event the amounts listed in annexure E to the applicant's founding affidavit are mere approximations and the respondents cannot be held to them." It is a basic tenet that a legal obligation must be clear and certain. The rationale for this is that the person who bears the obligation may have no uncertainty about what he or she is required to do in order to discharge the obligation because a failure to discharge the obligation may have serious and far-reaching consequences for him or her and, maybe, others. He, therefore, must be clear about what he needs to do in order to avoid a breach of the obligation and the consequences that would flow from such a breach. If a document is vague or uncertain or if a statement which is said to give rise to an obligation is vague or uncertain, there can be no legal obligation that arises from it or from the document.

[162] An order of court must also be clear and unequivocal so that the person against whom it is made knows exactly what he or she must do to comply with it if it orders him

or her to do something or what he or she must not do if it orders him or her not to do something. One of the orders made in the main judgment reads as follows:

> "The [Department] is directed to pay to the schools affiliated with the applicant on 22 September 2008 the approximate amounts specified in the notice of that date as had fallen due for payment on 1 April 2009."

If I promise to pay you approximately R100, you cannot successfully sue me to pay you approximately R100 because no legal obligation arises from such a promise. If you say I have a legal obligation arising out of making such a statement, the question that would arise is: exactly how much do I owe you in terms of that obligation? Do I owe you R99,50 or R99 or R98 or R95 or R80? How much exactly would I have to pay you in order to discharge my obligation to you? There can be no answer to this question.

[163] It is precisely because the statement that I will pay you approximately R100 is unclear, vague and uncertain that it does not give rise to a legal obligation. That is part of my difficulty with the proposition that the Department's circular, which gave "indications" or "approximations" (even by the applicant's own admission) of amounts, gave rise to a legal and enforceable obligation on the part of the Department to pay those "indications" or "approximations" of subsidies to the relevant schools. Those "indications" or "approximations" are no different from the example I have given above of a promise to pay someone approximately R100. It is as simple as that. In law such a statement or promise does not give rise to an enforceable obligation. Let me give one

more example to show the unenforceability of the approximations or indications made by the Department to the relevant schools. Let us say Mr Smith offers to buy Mr Swart's second hand car and Mr Swart asks him: for how much do you offer to buy my car? Mr Smith says: approximately R30 000. At that stage and before Mr Swart accepts or rejects the "offer", has Mr Smith made a valid and enforceable offer to Mr Swart? The clear answer is: No! There is no valid and enforceable offer because the price is uncertain. Exactly the same principle applies to this case. I accept that the main judgment finds that no contract has been shown in this case but finds that, viewed from a public law perspective, the word "approximate" or "approximations" or the phrase "approximate amounts" is enforceable. This means that, in the example of Mr Smith and Mr Swart that I have just given above, if Mr Smith made the "offer" in his capacity as a state functionary, the reasoning of the main judgment would be that that "offer" or indication by Mr Smith is enforceable. I cannot agree.

[164] A court can certainly not order someone to pay another person approximately a certain amount. The order proposed in the main judgment orders the Department to pay indications or approximations of subsidies in respect of the first school term of 2009 less the amounts already paid. In my view such an order is not competent in law. The Department will rightly be uncertain about exactly how much it should pay the schools.

[165] The main judgment says that "it is usual that amounts of money payable by court order are precise" but it also says "there is no reason why a court order must be 'totally

precise'".[143] I beg to differ. An order of court must be certain. The reason for this is obvious. If it is not certain, it cannot be carried out. For the reasons that I have given above it is a principle of our law that an order of court must be clear and certain. An order that someone pay another approximately R100 is uncertain and vague and, therefore, it does not meet a basic requirement for an order of court.

[166] In support of the proposition that the word "approximate" is not vague and that an order may be made requiring payment of an "approximate" amount, the main judgment relies upon *Fluxman v Brittain*.[144]

[167] In *Fluxman* a submission was made that a condition in an agreement that an employee could draw "moderate amounts" from the share of his profit in the business over a certain period was void for vagueness. Four of the five Judges of Appeal who heard the matter wrote separate judgments. Only Tindall JA made a finding to the effect that the phrase "moderate amounts" was not vague. His motivation was contained in a single sentence. He said:

> "Though it might not be easy to determine what is a moderate amount at a particular time, such determination would be possible on evidence of the various relevant facts such as, for example, the financial position and requirements of the business at such time."[145]

[143] Main judgment at [74].

[144] 1941 AD 273. See the discussion in the main judgment above n 46.

[145] *Fluxman* at 293.

[168] In the relevant footnote the main judgment says that in *Fluxman*:

> ". . . the Appellate Division had to interpret the meaning of 'moderate amounts' in an agreement in which the employee had agreed to leave his undrawn share in profits in the business. Tindall JA found the condition not void for vagueness. On the contrary, he stated that a determination of what 'moderate amounts' would mean 'would be possible on evidence of the various relevant facts, such as, for example, the financial position and requirements of the business at such time.' The reasoning by the other members of the court made it unnecessary to address Tindall JA's view regarding the enforceability of 'moderate amounts'. However, none of the other judges explicitly disagreed with his conclusion on this."[146]

[169] There are some important points to bear in mind about *Fluxman* in considering the main judgment's attempt to draw support from that case. They are that:

(a) it was not the Court which found the phrase "moderate amounts" not void for vagueness but it was only one out of five Judges of Appeal, namely Tindall JA;

(b) Tindall JA conceded in his judgment that it "might not be easy to determine" what constituted "moderate amounts";

(c) the only reason Tindall JA advanced for his conclusion that the phrase "moderate amounts" is not vague is that determining "moderate amounts" "would be possible on evidence of the various relevant facts" and he went on to give examples of such facts. In the present case it cannot be said that the determination of "approximate" amounts would be possible on

[146] Main judgment above n 46.

evidence. No evidence is required to determine what amount is approximate to a specific amount. Accordingly, the reason advanced by Tindall JA in support of his finding in *Fluxman* cannot apply to the word "approximate" or "approximations" with which we have to deal in the present matter; and

(d) the main judgment makes the point that, although the other Judges of Appeal did not concur in Tindall JA's judgment, they also did not explicitly disagree with his conclusion. That the other Judges of Appeal did not explicitly disagree with Tindall JA's conclusion cannot be used to draw any favourable inference supportive of Tindall JA's conclusion. In any event, the main judgment points out that the reasoning of the other Judges of Appeal made it unnecessary to make a finding on the vagueness or otherwise of the phrase in question.

[170] If Tindall JA intended to suggest that a court may order a party to pay "moderate amounts" to another party, that is, in my view, not the correct legal position. Such an order is not competent in law. It is vague and uncertain and the party to whom it is directed will not know exactly how much he or she should pay the judgment creditor in order to comply with the order. It is also not clear what amount would have to be inserted in the writ of execution if the Sheriff had to be instructed to execute such an order. One cannot ask the Sheriff to execute an approximate amount. This criticism

applies with equal force to the order in the main judgment ordering the Department to pay approximate amounts to the relevant schools.

[171] There is implied acknowledgement in the main judgment that the Department may have difficulties in complying with the order that it pay approximate amounts to the relevant schools. Three sentences in the main judgment support this. They read thus:

> "The 2008 notice specified exact sums, and undertook to pay them approximately. That is an obligation that is coherent and legally enforceable. And the Department is obliged to engage with the schools to find finality in complying."[147]

If the order that is made is "coherent and legally enforceable", why is there a need for the main judgment to seek to compel the Department to engage with the schools to find finality in complying? If the obligation on which this order is based is clear and certain, why does the main judgment seek to get the Department and the applicant to engage with each other?

[172] In my view the statement in the preceding quotation that "the Department is obliged to engage with the schools to find finality in complying" is included in the main judgment because the order is vague. Where an order is clear and the person against whom it has been made cannot legitimately claim to be unsure what it requires him to do or not to do, no need arises for engagement if the person required to comply fails or

[147] Main judgment at [75] above.

refuses to comply. It is only when an order is not clear that engagement may be required. Furthermore, the applicant never asked for any engagement in its founding papers.

[173] The main judgment continues and says:

> "The Department will tender performance in terms of the Court's order. If the recipient schools consider its tender inadequately 'approximate' to the rand amounts specified, they can apply to the High Court for appropriate relief."[148]

In this passage the main judgment reveals, once again, an implied acceptance that difficulties may arise with the implementation or execution of the order. It says that the Department will tender performance in terms of the Court's order. If the order that the main judgment makes against the Department is clear and certain, the main judgment should not expect the Department to tender performance. It should expect it to comply with the order. The main judgment does not explain why it says that the Department is obliged to engage with the schools to find finality in complying nor does it explain what the basis is for this obligation to engage in order to find finality in compliance with an obligation that it says is clear and enforceable. It must be pointed out that, if an order of court is clear and enforceable, as all orders made by courts should be, and the party against whom such an order has been made does not comply with it, what is supposed to follow is the enforcement of the order and not engagement between the parties about how

[148] Id.

much the party who has failed to comply was required by the order to pay. How much that party was required to pay is supposed to have been determined by the order of court.

[174] In my view this obligation to engage with the schools which the main judgment now places upon the Department, which was never part of the applicant's case and which the applicant never asked to be placed upon the Department, is introduced to cater for the eventuality that the Department may offer to pay the schools amounts that the schools might not regard as approximate enough to the approximations that the Department had given. In other words, it is introduced to address the possibility that there may be a dispute between the parties as to what amount would constitute compliance with the order. That is precisely one of the difficulties I have with the main judgment and the order it seeks to make.

[175] The main judgment seeks to make up for the uncertainty and vagueness of the order it makes by introducing an inexplicable obligation to engage. That is precisely because there is a realisation that, without such obligation to engage, the schools may not be able to enforce the order proposed in the main judgment. Obviously, the main judgment hopes that during the engagement an agreement will be reached between the Department and the schools as to the amount that the Department will pay. That, however, should have happened before the applicant took the Department to court and, precisely because that did not happen before, the applicant has no case and should not have come to court. The main judgment talks about the Department tendering

performance because it does contemplate that the Department may not be certain as to the amount that it must pay each school if it is to give effect to the order.

[176] In the passage quoted above the main judgment goes on to say in effect that, if a recipient considers that the amount tendered by the Department is inadequately "approximate" to the Rand amounts that were indicated, then "[the recipient] can apply to the High Court for appropriate relief." I am completely in the dark as to what the main judgment contemplates that the recipient can go to the High Court about at that stage. When a litigant has been granted an order sounding in money, which the order of the main judgment is supposed to be, and the judgment debtor does not satisfy that order, the judgment creditor's next step is not to approach a court "for appropriate relief" but to set in motion the process of execution by having a writ of execution issued so as to recover the amount specified in the order. Such judgment creditor would already have been granted appropriate relief by the Court. So, why and on what basis can or should the recipient go to Court for other relief in the present case? Furthermore, the main judgment's suggestion that at that stage a recipient school may approach the High Court for appropriate relief is contrary to the clear stance taken by the applicant through its counsel at the hearing that it wanted finality in this litigation. Of course, the implication of this suggestion by the main judgment is that any decision by the High Court at that stage may give rise to further appeals up to even this Court.

[177] I have said earlier that part of the difficulty with the order of the main judgment is that it is not enforceable because, if you want to enforce it and have reached the stage where you must have a writ of execution issued, you would not know what amount to insert in the appropriate space in the writ of execution. This is because in the writ you cannot, for example, insert "approximately R100 000". The Registrar will not issue such a writ and if, by mistake, the Registrar issues it, the Sheriff will refuse to execute such a writ because he or she will not know what the value of the goods are which he or she must attach in terms of the writ. So, there is a real problem with how the order proposed in the main judgment can be enforced or executed.

[178] The dispute which this Court is called upon to resolve finally is exactly how much the Department is obliged to pay the schools concerned if it is obliged at all. Earlier on I quoted a passage from one of Mr Ansur's affidavits where he said that the applicant was asking the Court to make a determination of the approximate amounts which the Department must be ordered to pay.[149] That is asking a court to make a contract for the parties. The main judgment conspicuously refrains from doing this despite the fact that this is what the applicant has wanted since it initiated this litigation in the High Court a few years ago and this is the relief that it sought in this Court. This is the relief that the applicant's counsel must have had in mind also when he said that the applicant stood or fell by its case.

[149] See [153] above.

[179] The main judgment says that the applicant has a case but does not give it the order it has sought in three courts including this one. In my view the reason why the main judgment does not make such an order is that it appreciates that it cannot order the Department to pay an amount it never specified it would pay. If that is the case and if the main judgment is justified in not making an order specifying the approximate amount that the Department must pay to each school concerned, what is the legal basis for the suggestion that a recipient school which considers the amount tendered by the Department inadequately approximate may approach the High Court for appropriate relief? What relief would be appropriate?

[180] It seems clear that the relief that the main judgment contemplates that the recipient school may seek from the High Court is an order specifying the approximate amount that the Department should pay to it. I have immense difficulties with the proposition that at that stage a recipient school can approach the High Court for such an order. This is the relief that, through the applicant, the relevant schools sought in the High Court, Supreme Court of Appeal and in this Court. If this Court does not grant that order in the present proceedings, the issue will be res judicata and no school will have a cause of action to approach the High Court for that relief. If a school were to approach the High Court for such relief, the Department would be entitled to say to the High Court: "That is relief that through its association the school asked for in previous litigation and we successfully showed that it was not entitled to that relief. All the courts were not prepared to grant that order. The school cannot restart the whole litigation afresh on the same issue." If

the issue will be res judicata between the parties, this Court cannot make an order that in effect takes away the defence of res judicata that the respondents would, otherwise, have and effectively help the applicant or the schools to have a second bite at the cherry. In my view the main judgment unduly leans over to make a case for the applicant which the applicant neither made in its papers nor asked for and I find this extremely unfair to the respondents.

[181] The respondents also pointed out that one reason for the payment of subsidies that were approximately 30% less than the indications of amounts of subsidies that the Department had given to the schools was that its budgetary allocation was substantially reduced by the provincial Treasury. Another reason that the respondents gave was that 28 new independent schools were included in the subsidies at the applicant's request even though they were not part of the schools to which the indications of subsidy payments had been given in 2008. One of the points made by the deponent to the respondents' answering affidavit is that, when it gave the indications or approximations of subsidies, the Department gave them in respect of 97 schools. However, continues the deponent, it was subsequently requested by the applicant to include 28 other schools. The Department says it agreed to this at the insistence of the applicant. The Department says that, after the inclusion of the 28 schools, the applicant could not have legitimately expected that payments of subsidies would be in accordance with Annexure "E" or in accordance with the approximations or indications made earlier by the Department in respect of 97 schools. The inclusion of the 28 schools meant that in effect an

approximated budget which would have been divided among 97 schools was now to be divided among 125 schools. The Department's point is that 28 schools is about 28,9% of 97 schools and that, therefore, this meant that whatever the 125 schools could legitimately expect to be paid as subsidies had to be at least about 28,9% less than what would have been received by the 97 schools had the 28 schools not been included.

[182] For the above reasons I would refuse leave to appeal.

MOGOENG CJ AND JAFTA J (Zondo J concurring):

[183] We have read the judgments prepared by our Colleagues Cameron J (main judgment), Froneman J, Nkabinde J and Zondo J. For reasons articulated in the judgments of Nkabinde J and Zondo J, we do not agree with the main judgment and also the judgment of Froneman J. However, we do not agree with Nkabinde J that leave to appeal should be granted. But we agree with the rest of her judgment.

[184] In our view the prospects of success, though not a decisive factor, assumes significance in the present circumstances. This is the position because the determination of this case does not depend on the interpretation of the Constitution or statutory provisions regulating access to basic education. The case concerns the question whether the 2008 notice issued by Provincial Department of Education, KwaZulu-Natal and which applied for one year to independent schools in the province of KwaZulu-Natal,

gave rise to an enforceable claim for payment of subsidies. That narrow question does not extend to the whole country and is unlikely to arise again. If ever it does arise, it would be in respect of a different notice which is likely to be worded differently.

[185] In our view, two additional obstacles stand in the way of the remedy granted by the main judgment. The first obstacle is that in its founding affidavit in the High Court, the applicant explained that the subsidies were granted to individual learners but payable to schools and did not cover the entire fee charged per learner. Instead, the subsidy constituted 25% of the fees charged by a particular school. These fees varied from school to school.

[186] In this regard the applicant's chairperson said:

> "The subsidy granted to an independent school per learner depends on the school fees charged by the independent school. For example, if the school fees for a learner at an independent school are between 1.0 and up to 1.5 times the PAEPL,[150] then that school receives a subsidy, for that learner, of 25% of the PAEPL. In order to make this clearer, I give an example. Let us assume that an independent school charges school fees, for one learner, for a year, of R10 000.00. Further, let us assume that, the PAEPL is R8 000.00. Accordingly, the school fees of R10 000.00 fall into the category above, namely, they are more than the PAEPL but less than 1.5 times the PAEPL. Accordingly, that school would receive a subsidy of 25% of the PAEPL of R8 000.00. That subsidy would, then, accordingly be 25% of R8 000.00 which is R2 000.00." (Footnote added.)

[150] Provincial Average Estimate Per Learner.

[187] This statement indicates that the number of learners qualifying for subsidy is crucial to quantifying the amounts of subsidies payable to each school. This accords with the tables set out in the 2008 notice, which reflects different amounts for primary and secondary schools. Without the information on the number of learners in each grade who qualify for a subsidy, it will be impossible for the second respondent to calculate an approximate amount payable to each school.

[188] The second obstacle is that according to the main judgment, the independent schools were entitled to be paid the undiminished amounts approximate to what was contained in the 2008 notice for the first term only, hence the order that they be paid approximate amounts which had fallen due on 1 April 2009. The main judgment finds that the subsidies already paid to independent schools for 2009 were, "on average, 30% less than those set out in the 2008 notice".[151] This illustrates, in our view, that the schools were paid 70% of the total annual subsidies.

[189] But the facts on record do not show how much was due to each school for the first term. Nor does the evidence indicate the amount of fees charged by each school per learner in each term. In fact there is no evidence establishing that any of the schools represented by the applicant charge fees per term. In short, on the present facts the applicant has failed to establish that the second respondent owed the schools any amount

[151] Main judgment at [7] above.

for the first term. In these circumstances there is no justification, in our view, to order the second respondent to make further payments.

[190] For these reasons and the reasons set out fully in the judgments of Nkabinde J and Zondo J, we would dismiss the application for leave.

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For the Amicus Curiae:	Advocate J Brickhill and Advocate Z Gumede instructed by the Legal Resources Centre.