

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case No: 276/16

In the matter between:

EQUAL EDUCATION

1st Applicant

AMATOLAVILLE PRIMARY SCHOOL

2nd Applicant

and

MINISTER OF BASIC EDUCATION

1st Respondent

MEC FOR EDUCATION: LIMPOPO

2nd Respondent

MEC FOR EDUCATION: EASTERN CAPE

3rd Respondent

MEC FOR EDUCATION: FREE STATE

4th Respondent

MEC FOR EDUCATION: GAUTENG

5th Respondent

MEC FOR EDUCATION: KWAZULU-NATAL

6th Respondent

MEC FOR EDUCATION: MPUMALANGA

7th Respondent

MEC FOR EDUCATION: NORTHERN CAPE

8th Respondent

MEC FOR EDUCATION: NORTH WEST

9th Respondent

MEC FOR EDUCATION: WESTERN CAPE

10th Respondent

RESPONDENTS' OPPOSING AFFIDAVIT

I, the undersigned,


MATSIE ANGELINA MOTSHEKGA

declare under oath as follows:

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1.1 I am a member of the Cabinet of the Republic of South Africa, as contemplated in Section 91 of the Constitution of the Republic of South Africa, 1996 (*“the Constitution”*) and the Minister who has been assigned the powers and functions relating to basic education.

1.2 My main office is situated at Sol Plaatjie House, 222 Struben Street, Pretoria, Gauteng.

1.3 The facts deposed to herein, are within my personal knowledge, save where expressly or by way of implication otherwise stated. Insofar as I make allegations of a legal nature in this Affidavit, I have done so on the advice of the legal representatives of the Respondents, which legal advice I have accepted to be correct.

2 Before I commence to answer to the Founding Affidavit filed on behalf of the Applicants, I wish to deal with the matters *in limine* more set out in detail hereinafter.

3 The structure of this Affidavit will therefore be as follows:

3.1 The promulgation of the Regulations prescribing minimum uniform Norms and Standards (*“Norms and Standards”*) constitutes administrative action and the application is

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therefore subject to the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”);

- 3.2 Therefore, the relief sought by the Applicants, insofar as it is not based on a Review Application in terms of PAJA, is incompetent;
- 3.3 Furthermore, the Application insofar as it constitutes a Review Application in terms of PAJA is out of time and the Applicants have failed to make out a case that an extension should be granted for the time period within which to bring the Review Application;
- 3.4 In the alternative, and only in the event of a finding that the promulgation of the Regulations prescribing the Norms and Standards does not constitute administrative action, that the Applicants then had to make out the case that the promulgation of the Regulations does not comply with the requirements of legality and rationality which the Applicants failed to do;
- 3.5 Thereafter, an overview of the relief sought by the Applicants will be given, and at the outset, abbreviated reasons why the relief sought is incompetent;

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3.6 Thereafter, a background relating to the provision of basic education in the Constitutional era will be given to the above Honourable Court;

3.7 Thereafter, I will deal with the allegations as contained in the Founding Affidavit.

THE PROMULGATION OF THE REGULATIONS PRESCRIBING NORMS AND STANDARDS CONSTITUTES ADMINISTRATIVE ACTION AND THEREFORE IS SUBJECT TO THE PROVISIONS OF PAJA

4 Administrative action has been defined in Section 1 of PAJA to mean any decision taken by an Organ of State, when exercising a power in terms of the Constitution or performing a public function in terms of any legislation, which adversely affects the rights of any person and which has direct, external legal effect. The exclusions as contained in Section 1(aa) to (ii) of PAJA are not relevant for the purposes hereof.

5 It is respectfully submitted that when I promulgated the Regulations describing the Norms and Standards in Regulation Gazette 10067, dated 29 November 2013 (annexure "TM2" to the Founding Affidavit) I was exercising a power in terms of the Constitution, namely a power relating to the provision of basic education as provided for in Section 29(1)(a) of the Constitution as well as performing a public

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function in terms of legislation, namely Section 5A of the South African Schools Act, 84 of 1986 (*“the SASA”*).

6 I have furthermore been advised, that in terms of the ruling case law, the promulgation of Regulations by a Minister of Cabinet constitutes administrative action, and further argument will be advanced on behalf of the Respondents in this regard at the hearing of the Application.

7 Once a finding is made that the promulgation of the Regulations prescribing Norms and Standards for school infrastructure is administrative action, then the Application brought by the Applicants is subject to and has to be adjudicated in terms of the provisions of PAJA.

8 For the reasons set out in more detail hereinafter, it is respectfully submitted that it is of importance that a decision be made whether the promulgation of the Regulations R920 setting out the minimum uniform norms and standards for public school infrastructure constitutes administrative action, because it materially impacts upon the approach to the matter. In this regard argument will be advanced on behalf of the Respondents at the hearing of the Application.

A handwritten signature in black ink, appearing to be 'A. J. ...' with some illegible text below it.

**THE PROPER APPROACH TO THE DECLARATORY ORDERS SOUGHT
BY THE APPLICANTS**

- 9 The Applicants seek declaratory orders (prayers 1, 3, 5, 6 and 7) of a wide ranging nature.
- 10 The Respondents have been advised that the law relating to just administrative action as enshrined in Section 33 of the Constitution has been codified by the promulgation of PAJA. Therefore, once a finding is made that the promulgation of Regulations constitutes administrative action, the Applicants have to bring their case within the four corners of PAJA.
- 11 The remedies which a Court may grant in proceedings for judicial review under PAJA are set out in Section 8, which provides that the Court may grant any order that is just and equitable, including an order declaring the rights of the parties in respect of any matter to which the administrative action relates (Section 8(1)(d) of PAJA). Therefore, the Applicants may not seek declaratory orders, but first have to satisfy the above Honourable Court that the promulgation of the Regulations under attack should be reviewed and set aside on one of the grounds for review set out in Section 6(2) of PAJA, absent which no relief can be granted in terms of Section 8 of PAJA. In this

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regard further argument will be advanced on behalf of the Respondents at the hearing of the Application.

THE APPLICATION FOR REVIEW IS OUT OF TIME AND NO CASE HAS BEEN MADE OUT FOR AN EXTENSION OF THE TIME PERIOD WITHIN WHICH TO BRING THE APPLICATION

- 12 In terms of Section 7(1) of PAJA, proceedings for judicial review must be instituted without unreasonable delay, but in any event not later than 180 days after the Applicants became aware of the promulgation of the Regulations.
- 13 It is common cause that the Regulations prescribing the minimum uniform Norms and Standards were promulgated on 29 November 2013.
- 14 The Application for Review was only issued by the Respondents on/or about 19 May 2016, approximately two and a half years later.
- 15 The Applicants did not seek an extension of the time period within which to bring the Review Application, which extension may be granted in terms of Section 9 of PAJA, outright, but tentatively alleged that it may be contended that the making of the Regulations may constitute administrative action, and in that regard if it is found to be administrative action, an extension is sought in the interest of

justice. In this regard the above Honourable Court is referred to paragraphs 236 – 241 of the Founding Affidavit.

16 Over and above the allegations that the First Applicant "*engaged*" me and some of the other Respondents and/or officials of the Department of Basic Education and/or the Provincial Education Departments, and to make the vague, bald and unsubstantiated allegation that it is in the interest of justice to grant an extension of the time period, no further allegations are made.

17 The Respondents have therefore been advised by their legal representatives that the Applicants have failed to make out any case that it is in the interest of justice that an extension of the time period be granted and in this regard reference will be made to decided case law.

18 It is furthermore instructive to note that the First Applicant ("*Equal Education*") already resolved on 9 October 2015 to launch this Application. No explanation has been given why Equal Education then waited from October 2015 until May 2016 (more than 7 months) before this Application was brought.

19 It is therefore respectfully submitted that the Application should be dismissed for this reason alone.



ALTERNATIVELY: SHOULD THE PROMULGATION OF THE REGULATIONS NOT CONSTITUTE ADMINISTRATIVE ACTION


20 In the event of a finding that the promulgation of the Regulations prescribing Norms and Standards does not constitute administrative action (which is denied), and in that event only, it does not mean that the promulgation of the Regulations is not subject to judicial scrutiny.

21 The exercise of any public power is of course subject to legal scrutiny, in order to determine whether the exercise of the public power complies with the requirements of legality and rationality.

22 In this regard:

22.1 No argument can be advanced that the promulgation of the Regulations does not comply with the requirement of legality. In terms of Section 5A of SASA as well as the Order of the above Honourable Court, I was entitled and in fact compelled to prescribe the Norms and Standards; and

22.2 The Applicants have failed to make out a case that the Regulations under attack do not comply with the requirements of rationality, i.e. that the exercise of the power was not rationality related or connected to the purpose for



which the power was given. If so required further argument will be advanced in this regard at the hearing of the Application.

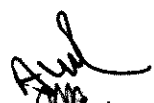
- 23 Therefore, even on an alternative interpretation, namely that the promulgation of the Regulations prescribing Norms and Standards does not constitute administrative action, it is still respectfully submitted that the Applicants failed to make out a case.

OVERVIEW OF THE RELIEF SOUGHT AND A SYNOPSIS WHY IT IS INCOMPETENT

- 24 Applicants seek the following relief:

24.1 Declaring that regulation 4(5)(a) of the Regulations relating to minimum uniform norms and standards for public school infrastructure, 2013 (number R920 in Government Gazette 37081 of 29 November 2013) ("the Regulations") is inconsistent with the Constitution, SASA and the order granted on 11th July 2013 by the above Honourable Court (DUKADA J) under case number 81/2012, and is accordingly unlawful and invalid.

24.2 In the alternative to paragraph 24.1 above, reviewing and setting aside regulation 4(5)(a) of the Regulations.



- 24.3 Declaring that regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations requires that all schools and classrooms built substantially from mud as well as those schools and classrooms built substantially from materials such as asbestos, metal and wood must within a period of three (3) years from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and the Occupational Health and Safety Act 85 of 1993.
- 24.4 Striking out the word “entirely” wherever it appears in Regulation 4(3)(a); alternatively, striking out the phrase “schools built entirely” wherever it appears in Regulation 4(3)(a), and replacing it with the words “classrooms built entirely or substantially”.
- 24.5 Declaring that regulation 4(3)(b) read with Regulation 4(1)(b)(i) of the Regulations is to be read as requiring that all schools that do not have access to any form of power supply, water supply or sanitation, must within a period of three (3) years from date of publication of the Regulations, comply with the Norms and Standards described in Regulations 10, 11 and 12 of the Regulations;



- 24.6 Declaring that regulation 4(2)(b) of the Regulations requires that all current plans in relation to the schools and projects contemplated in paragraph (a) must, as far as reasonably practicable, be implemented in a manner which is consistent with the Regulations, and that all future planning and prioritisation in respect of these schools must be consistent with the Regulations;
- 24.7 Declaring that regulations 4(6)(a) and 4(7) are invalid to the extent that they do not provide for the plans and reports to be made available to the public;
- 24.8 Directing the Minister to amend the Regulations to provide that the plans and reports submitted in terms of regulations 4(6)(a) and 4(7) of the Regulations must be made publicly available within a stipulated period of it having been submitted to the Minister, which period must be reasonable;
- 24.9 If it is found that the promulgation of the Regulations was administrative action, then in respect of the relief sought in prayer 2, varying the hundred and eighty (180) day time limit contained in section 7(1)(b) of PAJA, and extending it to the date of institution of this application.
- 24.10 Directing the First Respondent to pay the costs of this application;



24.11 Directing that any of the Second to 10th Respondents who oppose this application is to pay the cost, jointly and severally with the First Respondent;

24.12 Granting the Applicants such further and/or alternative relief as this court may deem fit.

25 I will now proceed to deal with the orders as sought by the Applicants and why the relief sought is incompetent.

Relief sought as set out in paragraph 24.1 above

26 Regulation 4 (5)(a) provides as follows:

“The implementation of the Norms and Standards contained in this Regulations is, where applicable, subject to the resources and cooperation of other government agencies and entities responsible for infrastructure in general and the making available of such infrastructure”.

27 It is apposite to firstly refer to the relevant canons of legislation that govern South Africa as a country, and also the delivery of services, including the right to basic education, to all citizens of South Africa:

27.1 The above Honourable Court is referred to the Constitution. In terms of chapter 3 of the Constitution and in particular

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section 40 that deals with co-operative government, provides that:

“(2) All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides.”

27.2 Section 41 of the Constitution goes further and lists principles that need to be followed by all spheres of government and all organs of state within each particular sphere. Amongst those listed are:

27.2.1 Section 41 (1) provides that all spheres of government and all organs of state within each sphere must:

“(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

- (e) *respect the constitutional status, institution, powers and functions of government in the other spheres;*
- (f) *not assume any power or function except those conferred on them in terms of the Constitution;*
- (g) *exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and*
- (h) *co-operate with one another in mutual trust and good faith by:*
 - (i) *fostering friendly relations;*
 - (ii) *assisting and supporting one another;*
 - (iii) *informing one another of, and consulting one another on, matters of common interests;*
 - (iv) *coordinating their actions and legislation with one another;*
 - (v) *adhering to agreed procedures; and*
 - (vi) *avoiding legal proceedings against one another."*

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27.3 Section 197 of the Constitution provides for a public service. The Public Service Act of 1994 as published in Proclamation 103 published in Government Gazette 15791 of the 3rd of June 1994, in section 7(2) provides as follows:

"For the purposes of the administration of the public service there shall be:

(a) National departments and offices of the premier mentioned in column 1 of Schedule 1;

(b) Provincial departments mentioned in column 1 of Schedule 2;

(c) National government components mentioned in column 1 of part A of Schedule 3; and

(d) Provincial government components mentioned in column 1 of part B of Schedule 3."

27.4 The latest update of Schedule 1 of the Public Service Act, done in terms of section 7(2) (updated on the 19th of August 2016) lists all the government departments that are established in terms of the laws of South Africa and its Constitution. Amongst the government departments listed the following should be mentioned, are:



- 27.4.1 the Department of Basic Education,
 - 27.4.2 the Department of Energy,
 - 27.4.3 the Department of Mineral Resources,
 - 27.4.4 the Department of Public Enterprises,
 - 27.4.5 the Department of Public Works,
 - 27.4.6 the Department of Rural Development and Land Reform,
 - 27.4.7 the Department of Water and Sanitation, and
 - 27.4.8 National Treasury.
- 27.5 The National Education Policy Act 27 of 1996("NEPA") provides, in section 2 under the heading *Objectives of the Act*, as follows:

"The objectives of the Act are to provide for-

- (a) the determination of national education policy by the Minister in accordance with certain principles;*



- (b) *the consultations to be undertaken prior to the determination of policy, and establishment of certain bodies for the purpose of consultation;*
- (c) *the publication and implementation of national education policy;*
- (d) *the monitoring and evaluation of education."*

28 Section 3 of NEPA provides as follows in sub-section (1):

"The Minister shall determine national education policy in accordance with the provisions of the Constitution and this Act."

29 Section 3(4) provides as follows:

"Subject to the provisions of subsections (1) to (3), the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system and, without derogating from the generality of this section, may determine national policy for-

- (a) ... - (o)...
- (p) *co-operation between the Department and-*
 - (i) *other state departments;*

(ii) *provincial education departments;*

(ii) *local government; and*

(iv) *non-government organisations,*

with a view to advancing the national education policy contemplated in this section and the Reconstruction and Development Programme.”

29.1 In the definitions section of SASA (section 1), education department is defined to mean the department established by section 7(2) of the Public Service Act of 1994 (proclamation 103 of 1994) which is responsible for education in a province.

29.2 Section 5A of SASA provides for Norms and Standards for infrastructure and capacity in public schools. It provides as follows:

“(1) The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for:

(a) school infrastructure;

- (b) *In respect of a capacity of a school-*
- (i) *the number of teachers and the class size;*
 - (ii) *quality of performance of a school;*
 - (iii) *curriculum and extra-curricular choices;*
 - (iv) *classroom sizes; and*
 - (v) *utilization of available classrooms of a school;"*

29.3 Section 58C of SASA provides for compliance with Norms and Standards. It provides as follows:

"(1) The Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Framework Act 2005 (Act 13 of 2005), ensure compliance with –

- (a) Norms and Standards determined in sections 5A, 6(1), 20(11), 35 and 48(1);"*

29.4 The implementation protocol as referred to in section 58C of SASA is section 35 of the Framework Act, which provides as follows:



“35. Implementation protocols

- (1) *Where the implementation of a policy, the exercise of the statutory power, the performance of a statutory function or the provision of a service depends on the participation of the organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.*

- (2) *An implementation protocol must be considered when-*
 - (a) *the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service has been identified as a national priority;*

 - (b) *an implementation protocol will materially assist the national government or a provincial government in complying with its constitutional obligations to support the local*

sphere of the government or to build capacity in that sphere;

(c) an implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to coordinate their actions in that area; or

(d) an organ of state to which primary responsibility for the implementation of the policy, the exercise of the statutory power, or the provision of the service has been assigned lacks the necessary capacity.

(3) An implementation protocol must-

(a) identify any challenges facing the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service and state how this challenges are to be addressed;

(b) describe the roles and responsibilities of each organ of state in implementing the policy,

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exercising the statutory power, performing the statutory function or providing the service;

- (c) give an outline of the priorities, aims, and desired outcomes;*
- (d) determine indicators to measure effective implementation of the protocol;*
- (e) provide for oversight mechanisms and procedures for monitoring the effective implementation of the protocol;*
- (f) determine the required and available resources to implement the protocol and the resources to be contributed by each organ of state with respect to the role and responsibilities allocated to it;*
- (g) provide for dispute-settlement procedures and mechanisms should disputes arise in the implementation of the protocol,*
- (h) determine the duration of the protocol; and*
- (i) include any other matters on which the parties may agree.*

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