IN THE EASTERN CAPE HIGH COURT, BHISHO
(REPUBLIC OF SOUTH AFRICA)

CASE NO. _____

In the matter between:

EQUAL EDUCATION	**First Applicant**
AMATOLAVILLE PRIMARY SCHOOL	**Second Applicant**

and

MINISTER OF BASIC EDUCATION	**First Respondent**
MEC FOR EDUCATION: LIMPOPO	**Second Respondent**
MEC FOR EDUCATION: EASTERN CAPE	**Third Respondent**
MEC FOR EUCATION: FREE STATE	**Fourth Respondent**
MEC FOR EDUCATION: GAUTENG	**Fifth Respondent**
MEC FOR EDUCATION: KWAZULU-NATAL	**Sixth Respondent**
MEC FOR EDUCATION: MPUMALANGA	**Seventh Respondent**
MEC FOR EDUCATION: NORTHERN CAPE	**Eight Respondent**
MEC FOR EDUCATION: NORTH WEST	**Ninth Respondent**
MEC FOR EDUCATION: WESTERN CAPE	**Tenth Respondent**

FOUNDING AFFIDAVIT

I, the undersigned,

TSHEPO MATSEPE

state under oath the following:

1. I am the General Secretary of Equal Education, the First Applicant.

2. I am duly authorised to bring this application on behalf of the First Applicant. A copy of a resolution of the National Council of Equal Education dated 9 October 2015 from which this appears is attached marked '**TM1**'.

3. The facts contained in this affidavit are both true and correct. Unless the context indicates otherwise, they fall within my personal knowledge.

4. Where I describe facts that are not within my personal knowledge, a confirmatory affidavit by the person able to confirm those facts will be filed together with this affidavit. I also refer in this affidavit to several supporting affidavits deposed to by teachers, learners and parents as well as others who are employed by or involved in school governing bodies of schools in the Eastern Cape and Gauteng.

5. This affidavit is structured as follows:

    5.1. In Part A, I describe the parties;

    5.2. In Part B, I outline the relief sought in this application;

    5.3. In Part C, I describe the right to a basic education and the duty on the First Respondent ('the Minister') to prescribe by regulation minimum

uniform norms and standards for school infrastructure in terms of section 5A of the South African Schools Act 84 of 1996 ('SASA');

5.4. In Part D, I discuss sections 5A and 58C of SASA;

5.5. In Part E, I briefly set out the background to this application;

5.6. In Part F, I describe the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure which the Minister prescribed on 29 November 2013 (Govt Notice R920 in Government Gazette 37081) which form the subject of this application ('the norms and standards' or 'the Regulations');

5.7. In Part G, I set out a chronological account of the First Applicant's engagement with the Minister and the provincial education departments ('PED's');

5.8. In Part H, I briefly discuss the first plans which the members of executive council for education ('the MEC's') submitted in 2013 in terms of Regulation 4(6)(a);

5.9. In Parts I to M, I summarise the challenges which the Applicants raise in this application and the bases upon which they seek relief;

5.10. In Part N, I deal with the fact that this application is instituted outside the 180 day period referred to in section 7(1)(b) of the Promotion of

Administrative Justice Act 3 of 2000 ('PAJA') for the bringing of a review of administrative action. I submit that if PAJA is applicable to this application, it is in the interests of justice for the court to extend this time period in terms of section 9 of PAJA.

PART A: THE PARTIES

6. The First Applicant is Equal Education ('EE').

7. EE is a membership based democratic movement of learners, teachers, parents and community members. It is a non-profit organisation registered under number 068-288-NPO.

8. EE has its headquarters in Khayelitsha, Western Cape, and also offices in the Eastern Cape and Gauteng.

9. EE's core objective is to work towards achieving quality and equality in education in South Africa. In order to achieve its objectives, EE conducts a broad range of activities. They include campaigns grounded in detailed research and policy analysis and supported, where necessary, by using the courts and legal process to advance the values of, and to contribute to, a strong civil society that holds government, private interests and individuals accountable.

10. Our core membership base is made up of high school learners, termed 'Equalisers', who actively advocate for quality education for all. EE has

approximately 3220 Equalisers across KwaZulu-Natal, Eastern Cape, Western Cape, Limpopo and Gauteng who participate on a weekly basis in the work of EE. EE also has a parent following, with six EE parent branches located in the Western Cape. EE has many other active supporters.

11. EE has conducted awareness programmes and campaigns for the improvement of education in the Western Cape, Eastern Cape, Gauteng, KwaZulu-Natal and Limpopo.

12. Since inception in 2008, EE has been concerned with learning conditions in poor and working class schools and communities. During the last five years we have actively focused on ensuring that all public schools in South Africa have adequate infrastructure including access to basic amenities like water, electricity and adequate sanitation, as well as infrastructure items like libraries and laboratories.

13. To this end, EE has engaged provincial and national departments through, amongst others, meetings, letters, petitions, pickets and marches. Our marches have taken place in Cape Town, Johannesburg, Tshwane, Polokwane North and Bhisho.

14. Our campaigns have been supported by numerous civil society organisations on both a national and international level. Nationally we have received support from organisations including the Congress of South African Trade Unions (COSATU), the South African Democratic Teachers' Union (SADTU) and the

Treatment Action Campaign (TAC). On the international front our work has been supported by the Students Solidarity Trust, Zimbabwe; the Human Rights Association, Zimbabwe; the Revolucion Democratica, Chile; MST (Landless Workers' Movement), Brazil; Journey for Justice, USA; and Palestinians for Dignity, Palestine.

15. Where necessary we have resorted to the courts in furtherance of our objectives and campaigns. Our approach has been to resort to legal action only when other avenues of democratic engagement have been exhausted.

16. We believe that the systemic crisis in education cannot be solved by government alone. However, government has a duty to lead society, and marshal all the resources available, both public and private, to achieve quality education for all.

17. EE brings this application:

    17.1. In its own interest, as an organisation which has as one of its objectives the improvement of infrastructure at schools in South Africa (section 38(a) of the Constitution);

    17.2. On behalf of the learners and teachers who have been, and continue to be affected by inadequate infrastructure at their schools, and who for lack of resources, lack of knowledge of their rights, lack of access to

legal services, and because of their number, cannot individually bring these proceedings (section 38(b) of the Constitution);

17.3. On behalf of the parents of such children who for similar reasons cannot individually bring these proceedings (section 38(b) of the Constitution); and

17.4. In the public interest (section 38(d) of the Constitution).

18. The Second Applicant is Amatolaville Primary School, a public school with juristic personality in terms of section 15 of SASA ('Amatolaville' or 'the school' and 'SASA'). As appears from the accompanying affidavit of Ivan Mentoor, the principal of the school, Amatolaville is a no-fee school located in Stutterheim, King William's Town Education District, Eastern Cape. The Second Applicant brings this application in its own interest.

19. The First Respondent is the national Minister of Basic Education. The Minister bears constitutional and statutory responsibility for the provision of basic education, as well as the administration and funding of public schools. These duties arise from the Constitution, SASA and the National Education Policy Act 27 of 1996 ('NEPA'). Among the Minister's duties is the obligation to prescribe by regulation minimum uniform norms and standards for school infrastructure. As I explain in more detail below, the Minister's obligation to promulgate such regulations arises also from an order which was granted on 11 July 2013 by Dukada J in the Eastern Cape High Court under case number

81/2012 (‘the July 2013 order’). The July 2013 order directed the Minister by 30 November 2013 to prescribe minimum uniform norms and standards by regulation in terms of sections 5A(1)(a) and 5A(2)(a) of SASA.

20. The relief sought in this application relates to the Regulations, which the Minister promulgated pursuant to these duties (Govt Notice R 920 of 29 November 2013).

21. The Minister is also sued as representative of the National Government of the Republic.

22. The Second to Tenth Respondents are the members of executive council for education of the nine provinces. They bear constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in the provinces arising from the Constitution, SASA, the Regulations and the statutes which the respective provincial legislatures have enacted in relation to public schools in terms of section 104(1)(b)(i) of the Constitution read with Part A of Schedule 4 of the Constitution.

23. The MEC’s are required to ensure compliance with the norms and standards in their respective provinces (section 58C(1)(a) of SASA); and to report to the Minister annually the extent to which they have been complied with or, if they have not been complied with, to indicate the measures that will be taken to comply (section 58C(3) of SASA). They also have planning and reporting obligations under the Regulations.

24. The MEC's are joined because the relief sought would, if granted, impact directly on the performance of their constitutional and statutory duties in relation to the provision of infrastructure in public schools. The MEC's are also cited as representatives of the nine provincial governments. No relief is sought against them, save for an order for costs in the event of their opposing this application**.**

PART B: THIS APPLICATION

25. In 2011 EE initiated a national campaign to compel the Minister to carry out her duty under section 5A of SASA read with the Constitution to prescribe by regulation minimum uniform norms and standards for school infrastructure.

26. The purpose of minimum uniform norms and standards is to create clear and binding legal requirements for the provision of school infrastructure. This purpose must be understood within the context of South Africa's legacy of Apartheid, and continuing inequalities in education. A binding legal framework is necessary to ensure proper planning and provision of infrastructure by PED's. Norms and standards ensure the accountability of the provincial sphere of government to the national sphere, and of government as a whole to the people it serves.

27. On 29 February 2012, EE brought an application against the Minister for an order directing her to exercise her power in terms of section 5A of SASA to make regulations prescribing minimum uniform norms and standards for

school infrastructure ('the previous application'). On 29 November 2013, after the application had been settled on the basis that the Minister undertook to make and promulgate regulations prescribing minimum uniform norms and standards for school infrastructure, and after further proceedings had been instituted by EE to compel the Minister to comply with that settlement agreement, the Minister finally promulgated the Regulations ('**TM2**').

28. The present application flows from the previous application, which was brought in this Court under case number 81/2012. Whereas EE welcomes the promulgation of the norms and standards, it contends that they do not give full effect to the Minister's obligations under the Constitution and SASA, and under the order of Court to which I refer below. EE has been constrained to bring this application after attempts at resolving these concerns have failed.

29. EE's concern about the Regulations relates primarily to regulation 4(5)(a). It provides that the duty to implement the norms and standards is subject to the resources and co-operation of other government agencies and entities responsible for infrastructure. But there are also problems with certain other of the regulations, which I describe below.

30. The Applicants seek relief which will address and rectify the defects in the Regulations. I deal with this further when I identify and address the specific defects.

PART C: THE RIGHT TO A BASIC EDUCATION AND THE DUTY TO PRESCRIBE MINIMUM UNIFORM NORMS AND STANDARDS FOR SCHOOL INFRASTRUCTURE

C.1 Outline

31. Section 29(1)(a) of the Constitution provides that everyone has the right to a basic education.

32. The purpose of the right to a basic education, as explained in domestic legislation and policies, and in international covenants and commentaries, is multi-fold. Education enables individuals to achieve their right to human dignity, and to lead fulfilling lives. It fosters an environment of active citizenry in which people are able to participate effectively in democratic processes. It enables learners to realise their ambitions and become productive members of society. It has enormous transformative potential, particularly in terms of correcting the racial inequalities which still exist in our society.

33. The Applicants submit that the right to a basic education necessarily implies the right to an education that is of a reasonable quality. The right to a basic education is an unqualified right: Unlike those rights which are subject to progressive realisation within available resources, the right to basic education is immediately realisable.

34. As I explain below, the Minister and her predecessors acknowledge that an adequate school infrastructure is a necessary precondition for a basic education. They also acknowledge that the infrastructure at many public schools in South Africa falls far short of this requirement, with the result that children who attend these schools do not receive a basic education which is of a reasonable quality. It is also common cause that infrastructure at public schools varies greatly in quality from excellent to wholly inadequate, and that the difference runs broadly along racial lines.

35. The right to education is informed by and gives content to the founding constitutional value of equality. Equality includes the full and equal enjoyment of all rights and freedoms.

36. The inadequate infrastructure in many South African public schools undermines the right of learners in terms of section 10 of the Constitution to have their dignity respected and protected. It is also in breach of section 28(2), which provides that a child's interests are of paramount importance in every matter concerning the child.

37. The state has a duty in terms of section 7(2) of the Constitution to promote and fulfil the right to a basic education.

38. Against this background, section 5A of SASA was enacted to ensure that adequate infrastructure is provided in all public schools.

39. Section 34(1) of SASA requires the state to fund public schools '*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*'.

C.2 Adequate school infrastructure as a necessary precondition for a basic education

40. In the previous application, Yoliswa Dwane, the Head of the Policy, Communication and Research Department of EE, alleged that an adequate school infrastructure is a necessary precondition for a basic education. The Minister did not dispute this in the answering affidavit which was filed on her behalf. In that affidavit, the Deputy Director-General for Planning, Information and Assessment in the Department of Basic Education made it clear that the Minister's case was that, notwithstanding the acknowledged imperative to improve physical infrastructure at schools, she was not legally obliged to act in terms of section 5A of SASA to achieve this objective.

41. Similar allegations as to the link between adequate school infrastructure and a basic education were made in the previous application by:

41.1. Modidima Mannya , a former Head of Department of the Department of Education in the Eastern Cape Provincial Government ('the former HOD Eastern Cape'), who made an affidavit in support of EE in which he commented on the defence raised by the Minister in her answering affidavit;

41.2. Abongile Nyumbeka, the General Secretary of the Social Justice Coalition ('the SJC'), which applied to be joined in the application, alternatively admitted as an *amicus curiae*; and

41.3. Ursula Hoadley, a Senior Lecturer at the School of Education, University of Cape Town, who deposed to an affidavit containing expert evidence on behalf of the SJC.

42. The Minister did not file answering affidavits in reply to these affidavits. She did not dispute what was said in them.

43. The undisputed allegations made by EE, the former HOD Eastern Cape and the SJC are repeated in this section, with reference to the relevant page number/s of the indexed and paginated papers in the previous application. As the Minister did not dispute those allegations in the previous application, I assume that she will not do so here. I have therefore not further burdened these papers by obtaining further affidavits from the persons mentioned. I shall if necessary do so in reply.

44. The undisputed allegations include the following.

45. The duty imposed by section 29(1)(a) of the Constitution includes the duty to ensure that public schools have adequate and safe infrastructure conducive to learning. (Dwane Volume 1 page 24, paragraph 43 and page 42, paragraph 81).

46. There is a direct relationship between adequate school infrastructure and learner performance. (Dwane Volume 1 page 48, paragraph 97).

47. The Minister and her Department have previously acknowledged this causal relationship, as set out below.

48. In the Minister's foreword to the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (published for comment on 21 November 2008 (Govt Notice 1438, *Government Gazette* 31616, 21 November 2008) and in final form on 11 June 2010 (*Government Gazette* 33283 of 11 June 2010)) (annexure '**TM3**') ('the Equitable Provision Policy') she highlighted the significance of school infrastructure as follows:

> '*School infrastructure remains a critical issue on the social agenda for South Africa for a number of reasons. In the first place, infrastructure differentials are so large in South Africa and some of the infrastructure available so inadequate that it is inconceivable that it DBEs [does] not impact on learner performance. Secondly, the highly unequal access to quality facilities remains critical in the light of our Constitution and the Bill of Rights which demand equity and equality.'* (page 4) (Dwane Volume 1 page 49, paragraph 99)

49. The Equitable Provision Policy states further:

'...as recent studies show, there is a link between the physical environment learners are taught [in], and teaching and learning effectiveness, as well as learning outcomes. Poor learning environments have been found to contribute to learner irregular attendance and dropping out of school, teacher absenteeism and the teacher and learners' ability to engage in the teaching and learning process. The physical appearance of school buildings are shown to influence learner achievement and teacher attitude toward school. Extreme thermal conditions of the environment are found to increase annoyance and reduce attention span and learner mental efficiency, increase the rate of learner errors, increase teacher fatigue and the deterioration of work patterns, and affect learning achievement....' (Page 7. See also pages 23-25). (Dwane Volume 1 pages 49-50, paragraph 100)

50. In a letter to EE dated 9 May 2010 (annexure '**TM4**'), the Minister said:

'*Research indicates that learners who achieve at higher levels have invariably come from a well-resourced school infrastructure which includes electricity, sanitation, playgrounds, equipment and access to books and resources*.' (page 1) (Dwane Volume 1 page 50, paragraph 101)

51. These statements are consistent with international and local research on school infrastructure and its relationship to learner performance. A review of

international research compiled by Specialist Researcher, Debbie Budlender, (which is annexed as '**TM5**' together with her affidavit and curriculum vitae) demonstrates that:

51.1. International research supports the finding that a causal relationship exists between the quality of school infrastructure and learner outcomes and performance.

51.2. The causal relationship is stronger in disadvantaged schools where the state of school infrastructure is poor and inadequate.

51.3. The causal relationship is stronger in developing countries.

51.4. There is a relationship between the lack of adequate school infrastructure and the negative impact this has on learners' self-esteem and the perceived importance of school. It ultimately increases absenteeism among other things. (Dwane Volume 1 pages 50-51, paragraph 102)

52. In draft National Minimum Norms and Standards, which the Minister's predecessor Naledi Pandor, published for comment on 21 November 2008 (Govt Notice 1439, *Government Gazette* 31616, 21 November 2008) (annexure '**TM6**') ('the 2008 draft Regulations') the Minister recorded that the physical and teaching and learning environment was '*inadequate to facilitate effective delivery of curricula, co-curricula activities, progressive pedagogy implied in*

national curriculum statement…, effective learning, and community needs' (paragraph 1.13) (Nyumbeka Volume 5 pages 23-24, paragraph 48.2)

53. The Former HOD Eastern Cape also referred to a natural relationship between the availability of proper and adequate infrastructure and the effective implementation of the curriculum. Infrastructure plays a critical role in creating a protective and enabling environment for the learning and development of children. Adequate infrastructure is a critical requirement for a proper education system. (Mannya Volume 3 page 741, paragraph 25).

54. The South African Human Rights Commission has found that the right to a basic education is undermined by inadequate infrastructure in South African public schools, as appears from relevant extracts from its 3rd, 5th and 7th Reports on Economic and Social Rights (annexures '**TM7**', '**TM8**' and '**TM9**' respectively). (Nyumbeka Volume 5 page 26, paragraph 51)

55. The negative effect of poor infrastructure on a learner's right to a basic education can be said to comprise three broad components:

    55.1. A temporal component: poor infrastructure diminishes time for learning, for example, if learners are forced to stand in long queues to make use of toilet facilities, or when lessons in poorly constructed classrooms must be suspended during bad weather;

55.2. An affective component: poor infrastructure undermines learners' self-esteem, their motivation to learn and signals that they are not cared for; and

55.3. A physical component: poor infrastructure may pose a threat to personal hygiene and affects a learner's ability to concentrate. (Hoadley Volume 5 pages 304-305, paragraph 12)

56. The level of infrastructure provided at many public schools in South Africa falls far short of that required to ensure an environment which is conducive to learning and undermines the right to a basic education. (Hoadley Volume 5 page 305, paragraph 13)

C.3 The infrastructure crisis in South African public schools

57. It is uncontroversial that there is a desperate lack of adequate physical infrastructure in many South African public schools.

58. In the previous application, EE described in detail the poor state of infrastructure in many public schools in South Africa. This was not disputed by the Minister or the MEC's. To the contrary, the Deputy Director-General made the following statements in the answering affidavit on behalf of the Minister:

58.1. '*The Minister and her Department acknowledge that there are still serious difficulties and problems relating to inadequate infrastructure,*

in its various forms, at many schools, and that these require urgent attention' (Padayachee Volume 3 page 587, paragraph 8 and page 588, paragraph 11); and

58.2. '*... the Minister does not dispute the fundamental reality that there are serious inadequacies and shortcomings in relation to infrastructure at many schools…across the country* ' (Padayachee Volume 3 page 589, paragraph 15)

59. The previous application contained many examples of the lack of adequate infrastructure in schools. Several affidavits have been collected in support of this application, which demonstrate that the problem persists. The lack of infrastructure is experienced at the most basic of levels. The following are extracts from affidavits filed in support of this application.

60. Nombulelo Barnes is a grade 2 teacher at Amatolaville school. She states:

'*My classroom is built on poles and old flooring. There are a number of holes in the floor. My heel broke through the floor and I fell in the middle of a teaching lesson. The principal took me to the doctor but fortunately I was not seriously injured.*

In May [2015] *a whole side of the class wall collapsed. I was inside the classroom with my learners when it fell down. I was so scared. I came to*

my principal to complain. I almost toy toyed asking when my classroom will be replaced. I asked where else I could teach for the day…

When it is windy you cannot talk and the learners cannot talk because you are competing with the wind outside. And when it is raining outside then you cannot talk because the rain is competing against you…

My teaching portfolios were already rained on when I left them in my classroom. My classroom is just not a safe space to store things in. My learners and I have to constantly shift around when it rains so that we can avoid getting wet.

It becomes almost impossible to complete the core business of teaching and learning.'

61. The principal of Amatolaville, Ivan Mentoor, says that the school has six classrooms which are made of zinc and that he has constant fears that one of the classes might collapse. He says that there are holes in the zinc sheets. It gets very cold in winter and very hot in summer, and when it rains it is difficult for learners to hear the teacher, and the classrooms leak badly. The teachers who have to teach in the zinc classrooms complain almost daily. There are a number of holes and broken planks in the classrooms. In the summer, the heat is stifling and learners and teachers cannot concentrate. In winter, the teachers and learners in the zinc classrooms suffer from illnesses due to the cold. There are learners that sometimes arrive at school wet as they live in wetland

townships such as Xologa. They are simply unable to learn in the cold classrooms.

62. Tobeka Toni, a grade 4, 5 and 6 teacher at Kalalo Junior Secondary in the Mthatha District, describes the state of classrooms in a predominantly mud structure:

> '*When the rain starts I know things are going to become terrible in the mud classrooms. There are holes in their ceilings so if the rain is very heavy it pours into the classroom. The learners will move from one corner to another corner trying to protect themselves and their books from getting wet. The moisture often destroys the books…*
>
> *In winter …[t]he windows are not enough to let the light in and there is no electricity…I have to teach my learners in the dark and my learners cannot see what I am writing on the board and they cannot see their books…*
>
> *When the wind blows…I fear for my children because it is dangerous for us to be inside the mud classrooms when the wind becomes strong. I also become very scared. The noise that picks up is shocking and it becomes impossible to teach anybody… sometimes it is so bad that we are forced to leave the classroom.*
>
> *There is a hole, almost like a ditch, in the floor in both my grade 4 and 5 classrooms. This makes it difficult to teach because in the one classroom*

the hole is situated right in front of where I have to walk…I once tramped into this hole and fell…My learners laughed when it happened and then went outside to collect some soil and mud to fill in the hole…

It is difficult to maintain this mud structure. We try our best. The community puts plaster over the cracks in the walls but it is not long before there are cracks again. There are broken rafters, exposed wires, large cracks in the walls that run in all directions, there are pieces of metal lodged into the entrance wall serving as a frame to keep the wall from falling in. The plaster that has been placed over the wall is falling apart. As you enter the one classroom there is a huge ditch at the entrance so you have to be careful when you are walking inside.'

63. Isaac Ramrock is the chairperson of the school governing body at Noordgesig Secondary School in Johannesburg, at which 24 of the 36 classrooms are made of asbestos. He says the following:

'*The asbestos classrooms have been in existence for around 70 years, since the school opened. Some of the asbestos classrooms have started to crumble and break, exposing the asbestos. The asbestos classrooms are small and have very bad ventilation. The air is heavy. A few of our learners have asthma…*

The ceilings of many of the classrooms have started to tear and collapse. Two years ago, a ceiling board fell and hit a learner and teacher during a lesson. The learner was rushed to hospital, but was not fatally injured…'

64. Gibe Zukhanye a learner at Vukile Tshwete Senior Secondary School in the Eastern Cape who attends class in a wooden structure, says '*…It also gets very cold inside when it becomes windy. You have to wear all of your warm clothes, and it's still cold. It feels terrible trying to learn when you feel that way. All you want to do is get warm. I lose my concentration even though I am trying my very best to concentrate on what my teacher is saying'.*

65. The National Education Infrastructure Management System Report ('NEIMS'), details in statistical terms the lack of resources at public schools in the country. Relevant parts of the most recent NEIMS Report, published by the Department of Basic Education in 2015, are attached marked '**TM10**'. The Report notes that of the 23 740 public ordinary schools in the country:

65.1. 913 schools still do not have any electricity supply, and a further 2 854 schools have an unreliable electricity source;

65.2. 452 schools have no water supply at all, and a further 4 773 schools have an unreliable water supply;

65.3. 128 schools do not have any ablution facilities at all, and 10 419 schools are still using pit latrine toilets;

65.4. 18 150 schools do not have access to any form of library;

65.5. 20 312 schools do not have laboratory facilities; and

65.6. 15 984 schools (68% of all total schools) do not have computer centres.

66. The NEIMS report reveals that the most dire school infrastructure conditions are still largely recorded in the former Bantustan areas.

PART D: SECTIONS 5A AND 58C OF SASA

67. Section 5A of SASA 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 . . .*
>
> *(2) The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following:*
>
> *(a) in respect of school infrastructure, the availability of –*
>
> *(i) classrooms;*
> *(ii) electricity;*
> *(iii) water;*
> *(iv) sanitation;*
> *(v) a library;*
> *(vi) laboratories for science, technology, mathematics and life sciences;*
> *(vii) sport and recreational facilities;*
> *(viii) electronic connectivity at a school; and*
> *(ix) perimeter security.*'

68. Section 5A was introduced into the Act by the Education Laws Amendment Act 31 of 2007, and amended by the Basic Education Laws Amendment Act 15 of 2011.

69. The Applicants submit that having regard to the content of the right to basic education, and the statement in the Preamble to SASA that '*it is necessary to set uniform norms and standards for the education of learners at schools …*', the Minister is obliged by section 5A of SASA to prescribe minimum uniforms norms and standards for school infrastructure.

70. The amendment to section 5A to require consultation with the Minister of Finance was introduced because the legislature recognised that the making of regulations would not be purely aspirational, but would have real financial implications.

71. In the previous application, EE sought an order declaring that the Minister is under a duty to prescribe minimum uniform norms and standards for school infrastructure. In the event, the Minister agreed to an order which was made in July 2013, obliging her to prescribe binding minimum uniform norms and standards for school infrastructure, and imposing time frames in that regard.

72. For all of these reasons, I submit that the Minister is under a legal obligation to prescribe binding minimum uniform norms and standards for school infrastructure.

73. Section 5A must be read with section 58C of SASA, which was inserted into the Act at the same time:

> '*(1) The Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005), ensure compliance with –*
>
> *(a) norms and standards determined in terms of sections 5A,...;*
>
> *(3) The Member of the Executive Council must, annually, report to the Minister the extent to which the norms and standards have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply....*
>
> *(5) The Head of Department must comply with all norms and standards contemplated in subsection (1) within a specific public school year by –*
>
> *(a) identifying resources with which to comply with such norms and standards;*
>
> *(b) identifying the risk areas for compliance;*
>
> *(c) developing a compliance plan for the province, in which all norms and standards and the extent of compliance must be reflected;*
>
> *(d) developing protocols with the schools on how to comply with norms and standards and manage the risk areas; and*
>
> *(e) reporting to the Member of the Executive Council on the state of compliance and on the measures contemplated in paragraphs (a) to (d), before 30 September of each year.*
>
> *(6) The Head of Department must –*

(a) in accordance with the norms and standards contemplated in section 5A determine the minimum and maximum capacity of a public school in relation to the availability of classrooms and educators, as well as the curriculum programme of such school; and

(b) in respect of each public school in the province, communicate such determination to the chairperson of the governing body and the principal, in writing, by not later than 30 September of each year.'

74. Section 58C creates a mechanism for ensuring compliance by MEC's and heads of department with the minimum norms and standards. It also provides for regular and accurate reporting as regards levels of infrastructure.

75. Section 58C(1) requires MEC's to ensure compliance with the norms and standards in accordance with an implementation protocol as contemplated in section 35 of the Intergovernmental Relations Framework Act 13 of 2005 ('the IGR Act').

76. Section 35(1) of the IGR Act provides that '*[w]here the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service* <u>*depends on the participation of 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 a an implementation protocol*</u>'.

77. When the legislature introduced section 58C(1), it thus recognised that the implementation of regulations in terms of section 5A would need to be co-

ordinated with organs of state in different governments. It did not make the regulations conditional on such co-ordination: rather, it required that such co-ordination take place in order to give effect to the regulations.

78. The making of minimum norms and standards does not only prescribe to government what must be provided. It also empowers affected communities to insist that unacceptable school infrastructure conditions be remedied, by informing them of their entitlement. For reasons which I explain below, the regulations as presently formulated do not achieve this purpose.

PART E: BACKGROUND

E.1 EE's national campaign

79. In 2011 EE initiated a national campaign to compel the Minister to promulgate minimum norms and standards for school infrastructure. The campaign was based on an awareness that thousands of schools in South Africa lack the infrastructure necessary to provide learners with a basic education. The decision to advocate for minimum norms was aimed at ensuring that a legally binding standard for the provision of infrastructure is put into place.

80. The campaign has been wide-ranging and sustained. EE learner and parent members, staff and many other concerned persons engaged in advocacy that included marching, picketing, petitioning, the writing of letters to the Minister, and the holding of night-vigils including outside Parliament. EE learners went

door-to-door in communities all over the country to garner support for the campaign.

81. In 2012 EE led a solidarity visit to certain Eastern Cape schools where prominent persons including Anglican Archbishop Thabo Makgoba witnessed first-hand the appalling conditions that learners and teachers endure.

82. The Minister and high ranking Department officials made numerous undertakings to enact the norms and standards. Those undertakings were not met. EE then decided to take the matter up through litigation.

E.2 The previous application

83. On 3 August 2011, the Legal Resources Centre ('LRC') wrote to the Minister and the Education MEC, Eastern Cape, on behalf of EE and the Infrastructure Crisis Committees of two Eastern Cape schools. The letter ('**TM11**') called on the Minister and the MEC to address the unsafe conditions at these schools. It also demanded that the Minister promulgate the minimum norms and standards without further delay, failing which legal proceedings would be instituted.

84. On 10 October 2011, the Minister replied ('**TM12**') that section 5A of SASA conferred on her a discretionary power, and that she was not obliged to promulgate the norms and standards. *In lieu* of regulations, the Minister referred to a set of guidelines which the Council of Education Ministers had agreed to adopt. In November 2011 the Minister declined to provide a copy of

the guidelines, saying that they were in draft form and required the approval of certain committees.

85. As I have stated, on 29 February 2012 EE and the Infrastructure Crises Committees of the two Eastern Cape schools made application to this Court under case number 81/2012. That application was the precursor to this application, and is one of the foundations of this application. The relief sought was aimed at remedying the infrastructure crisis in the two Eastern Cape schools, and also at obtaining:

85.1. a declaration that the failure of the Minister to make regulations prescribing minimum uniform norms and standards for school infrastructure constituted a breach of the rights to a basic education, equality and dignity and a breach of her duties under section 5A(1)(a) and 5A(2)(a) of SASA; and

85.2. an order directing the Minister to make such regulations within three months of the date of the order.

86. I do not attach a copy of the application as it is very lengthy. The Applicants will make a copy available to the respondents on request, and will also make it available to the court at the hearing of this matter.

87. In May 2012, while the application was pending, the Minister published on the Departmental website '*Guidelines Relating to Planning for Public School*

Infrastructure'. They lacked detail and coherence. They were not binding and enforceable, and did not provide a basis on which the state could be held to account in relation to the infrastructure conditions at schools.

88. I pause to note that the adoption of guidelines, instead of binding norms and standards, represented an about-turn:

88.1. On 21 November 2008, the then Minister Naledi Pandor had published the 2008 draft Regulations for comment. The 2008 draft Regulations, although not perfect, (for instance, the requisite ratio of toilets to learners was not specified), comprised a detailed framework for the progressive provision of infrastructure at all schools. It described three main levels of infrastructure provision – 'safe', 'functional' and 'effective' - and stated that the aim was for all schools to meet the 'functionality' level within the first 10 years of implementing the norms. It followed extensive consultation with curriculum and pedagogy specialists, national and provincial officials, physical planners and infrastructure technical experts.

88.2. The 2008 draft Regulations were envisaged by the Equitable Provision Policy. The Policy provided that with effect from the 2010/2011 financial year, norms and standards for the physical teaching and learning environment would be set at the national level. They would be expressed along a continuum, namely norms and standards required for basic safety, minimum functionality, optimum functionality and

enrichment. It provided that by the end of the 2010 to 2014 strategic plan period, all schools would be applying all the necessary norms and standards required for basic safety and minimum functionality.

89. On 5 July 2012, after EE had granted the Minister three extensions for the filing of her answering affidavit, she filed a short answering affidavit deposed to by the Deputy Director-General for Planning, Information and Assessment. The Minister contended that section 5A(1)(a) conferred a discretionary power, which she elected not to use.

90. The application was set down for hearing in this Court for 20 November 2012. Some days before the scheduled hearing, the Minister requested a meeting with representatives of EE. The outcome of the meeting was that on 19 November 2012, EE and the Minister signed a settlement agreement ('**TM13**') ('the settlement agreement'). In the settlement agreement, the Minister undertook:

90.1. to make and promulgate regulations which prescribe minimum uniform norms and standards for school infrastructure in terms of section 5A(1)(a) and 5A(2)(a) of SASA on or before 15 May 2013; and

90.2. to publish a draft of the regulations for public comment on or before 15 January 2013 and to consider any comments made pursuant to their publication before 31 March 2013.

91. In terms of clause 4 of the settlement agreement, the parties agreed that should there be non-compliance with any of the terms of the undertaking, the Applicants could approach the High Court on an expedited basis for appropriate relief, subject to notice requirements. It was recorded that appropriate relief may include making the settlement agreement an order of court, and an order of specific performance in terms of the agreement.

92. On 8 January 2013 the Minister published draft regulations (Notice No. 6, *Government Gazette* 36062, 8 January 2013) ('the first draft regulations'). I attach a copy ('**TM14**'). Interested parties had until 15 March 2013 to comment. The first draft regulations were a seven-page document, two of which are taken up by a preamble and definitions. The following appeared from the remaining five pages:

92.1. They were devoid of detail, containing only broad statements such as '*[a] school must be provided with adequate sanitation facilities that promote health and hygiene standards…*' (regulation 4(3)) or '*[a] school should be provided with some form of energy…*' (regulation 4(5)), without stipulating what would constitute adequate sanitation facilities, or the dates by which these broad outcomes must be achieved.

92.2. They provided in the broadest of terms for MEC's to develop plans for providing facilities to schools in their provinces, without specifying which facilities must be provided, or by when. Such plans were to be

made not with reference to any national norms, but with reference to such factors as learner numbers and the availability of resources.

92.3. They provided for the Minister within 18 months of commencement of the regulations to publish a framework document which was to contain '*technical information regarding the facilities*' and other '*information*' pertaining to '*school size*', '*planning norms*', '*lighting and electrical power outlets*', '*alternative architectural designs*' and '*norms for (i) educational spaces; (ii) educational support spaces; and (iii) …administration spaces*'.

93. The first draft regulations had little, if any, substantive value.

94. During the period for comment, EE organised five public hearings - in the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo and Western Cape. The hearings served as a platform for disseminating information on the first draft regulations to learners, parents and community members. They also provided an opportunity to collect testimony from learners and teachers on the infrastructural needs at their schools.

95. On 31 March 2013, EE submitted its comment to the Minster. Over 500 individual testimonies collected through the public hearings were included in the submission. EE was concerned by the failure of the first draft regulations to establish any real and binding norms and standards, as well as the failure to stipulate timeframes for delivery. EE also expressed serious concern about the

Minister's ability to exercise proper monitoring and oversight in respect of the implementation of any norms and standards which could be said to have been established by the first draft regulations.

96. On 9 May 2013, six days before the deadline set by the first settlement for promulgation of the norms, the Minister requested EE to agree to an extension of the promulgation date. Despite widespread dissatisfaction among our members, on 15 May 2013 we agreed to an extension until 15 June 2013. I attach a copy of the letter recording this ('**TM15**'). The Minister refused to agree to that deadline. EE then launched an application for the enforcement of the settlement agreement.

E.3 The enforcement application

97. In June 2013 EE applied under the same case number for an order declaring that the Minister was in breach of the settlement agreement, and ordering her to make the requisite Regulations within 45 calendar days of the order.

98. The matter was set down for hearing on 11 July 2013.

99. On 11 July 2013 EE and the Minister reached a further settlement agreement. It was made an order of court on that day ('the July 2013 order'). I attach a copy of the order ('**TM16**'). It directed the Minister:

99.1. to publish for comment by 12 September 2013, amended draft regulations in terms of section 5A(1)(a) of SASA; and

99.2. by 30 November 2013 to prescribe Minimum Uniform Norms and Standards, by the promulgation of Regulations in terms of section 5A(1)(a) of SASA which provide for the availability of the school infrastructure referred to in section 5A(2)(a), and which 'shall prescribe Minimum Uniform Norms and Standards for school infrastructure, and the time-frames within which they must be complied with'.

100. On 12 September 2013, the Minister published a second set of draft regulations (Govt Notice 932, *Government Gazette* 36837, 12 September 2013) ('the second draft regulations'). I attach a copy as '**TM17**'. These were an improvement on the first draft regulations. They contained greater detail, and time periods within which identified targets were to be met. There remained however several deficiencies. Many of them have been carried through into the Regulations which form the subject of this application.

101. EE then held another round of public hearings. On 11 October 2013 EE and its lawyers Equal Education Law Centre ('EELC') submitted a comment on the second draft regulations. I attach a copy as '**TM18**'. EE made the following comments, among others:

101.1. The second draft regulations did not provide any timeframes within which unsafe structures and other hazards were to be eliminated. In this regard EE called for a set of '*emergency*' or '*safety norms*' to cater for those situations requiring immediate or priority attention.

101.2. Regulation 3(3) made the implementation of the norms subject to '*the resources and co-operation of other government agencies and entities responsible for infrastructure in general …*'. EE opposed this on the basis that the norms would be rendered meaningless if PEDs could escape responsibility for complying with them by shifting the blame to other role players in the infrastructure delivery process.

101.3. It was imperative that the MEC's plans and annual reports should be made publicly available and contain sufficient detail for school communities to be able to plan properly. These plans should identify which schools are earmarked for the provision of infrastructure, and when. In this regard, EE described how one high school had raised donations and rearranged its budget to build four desperately needed classrooms only to abandon the project shortly before completion when the provincial department's contractors arrived to construct temporary classrooms.

101.4. The draft regulations failed to include within their ambit those schools already planned for but not yet in existence at the date of promulgation.

101.5. The draft regulations did not prohibit inappropriate building materials such as corrugated iron, mud or dangerous materials such as asbestos.

102. These concerns were also communicated by EE to the Department at a meeting on 8 October 2013.

103. On 29 November 2013, the Minister promulgated the Regulations.

PART F: THE REGULATIONS

104. EE welcomed the fact that on 29 November 2013 the Minister had finally promulgated the Regulations. However there remained material problems.

105. The Regulations provide for norms and standards relating to, among other things:

105.1. The size of classrooms (regulations 8(1)(a), 8(2) to 8(4) and Annexures A and D to F) (in relation to existing schools the size norms are a guideline only);

105.2. The number of learners that may be accommodated in a classroom (regulation 9(2));

105.3. A power supply which must be sufficient to serve the power requirements of each particular school (regulation 10);

105.4. A sufficient water supply for drinking and personal hygiene with water-collection points and water-use facilities to allow for convenient access to water (regulation 11);

105.5. Sanitation facilities, as specifically provided for in an annexure to the Regulations, that are easily accessible to learners and educators, provide privacy and security, promote health and hygiene standards and are

maintained in good working order – plain pit and bucket latrines are prohibited (regulation 12);

105.6. A school library or media centre (taking one of several possible forms) and a minimum, adequate and suitable library collection (regulation 13);

105.7. A laboratory with necessary apparatus and consumables in accordance with the specific curriculum needs of a particular school to make it possible to conduct experiments and scientific investigations (regulation 14) (this requirement is limited to schools which offer science subjects);

105.8. Areas where physical education, sporting and recreational activities may be practised which may include the sporting or recreational facilities of another school or of a local community (regulation 15);

105.9. Some form of wired or wireless connectivity for purposes of communication including telephone, fax, internet and intercom or public address system (regulation 16); and

105.10. Appropriate fencing to a minimum height of 1.8m and one of several possible security measures applied to school buildings (regulation 17).

106. In relation to public schools already in existence when the Regulations were published, although the Regulations are not entirely clear, they appear to require (subject to regulation 4(5) to which I return below):

106.1. that the norms and standards referred to in paragraphs 105.1 to 105.5 and 105.9 to 105.10 above be phased in over a period of seven years from the date of publication of the Regulations (regulation 4(1)(b)(ii) read with 4(3)(c)); and

106.2. that the norms and standards referred to in paragraphs 105.6 to 105.7 above be phased in over a period of ten years from that date (regulations 4(1)(b)(iii) read with 4(3)(d)).

107. The Regulations require further, in respect of public schools already in existence when the Regulations were published (but also subject to regulation 4(5)), that within a period of three years of the publication of the Regulations:

107.1. all schools built entirely from mud as well as those schools built entirely from materials such as asbestos, metal and wood '*must be prioritised*' (regulations 4(1)(b)(i) read with 4(3)(a)); and

107.2. all those schools that do not have access to any form of power supply, water supply or sanitation '*must be prioritised*' (regulations 4(1)(b)(i) read with 4(3)(b)) .

108. It thus appears that 'prioritisation' must be done within three years from the date of publication of the Regulations (regulation 4(1)(b)(i)). I return to these provisions below.

109. Turning to the position of schools built after the date of publication of the Regulations and additions, alterations and improvement to schools, the Regulations provide (subject again to regulation 4(5) and an exception to which I return below), that the norms and standards must be applied to such schools and additions, alterations or improvements (regulation 4(1)(a)). In other words, all planning and building of schools going forward must ensure that the requirements in paragraph 104 above are met.

110. The exception to which I refer in paragraph 109 above is contained in regulation 4(2). It provides that:

> '*(a) New schools and additions, alterations and improvements to schools excluded from subregulation 1(a) are those of which the planning and prioritisation within the current 2013-2014, 2014-2015 and 2015-2016 MTEF cycle have already been completed.*
>
> *(b) The plans and prioritisation of the schools contemplated in paragraph (a) must, where possible and reasonably practicable, be revised and brought in line with these regulations.*'

111. The problems which are immediately apparent from the provisions described above are:

111.1. Regulation 4(3)(a) (schools built entirely from mud and materials such as asbestos, metal and wood, and schools without access to any form of

power supply, water supply or sanitation): it is not at all clear what is meant by the phrase '*must be prioritised*'. It is not clear whether the regulation 4(1)(b)(i) requires that the existence of those conditions must be brought to an end within three years, or only that during three years a plan must be formulated for bringing those conditions to an end on a prioritised basis at some time in the future.

111.2. Regulation 4(3)(a) refers only to schools built entirely from mud and materials such as asbestos, metal and wood. No provision is made for addressing the problem of schools which contain only some inappropriate structures, or of schools which are built substantially, or almost entirely, of inappropriate materials. There are very many schools which fall into one of those categories.

111.3. Schools and additions, alterations and improvements to schools of which the planning and prioritisation within the 2013-2014, 2014-2015 and 2015-2016 MTEF cycle have already been completed, are effectively excluded from the ambit of the norms and standards.

112. But there is an even more fundamental problem with the Regulations. It is that the obligations in respect of both existing and new schools are subject to Regulation 4(5).

113. That regulation provides:

'*(a) The implementation of the norms and standards contained in these regulations is, where applicable, subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and the making available of such infrastructure.*

(b) The Department of Basic Education must, as far as practicable, facilitate and co-ordinate the responsibilities of the government agencies and entities contemplated in paragraph (a)'

114. The Applicants contend that the government bears the duty to respect, protect, promote and fulfil the right to basic education. That duty rests on the whole of government, which is not carrying out its duty. The Minister is under an obligation to make norms and standards which are legally binding and effective. Regulation 4(5)(a) fundamentally undermines the norms and standards because it makes the duty under the regulations subject to unspecified and indeterminate qualifications which may be superimposed by other (unspecified) organs of state – because they decline to co-operate, or because they choose not to make resources or infrastructure available for this purpose, or because they are not competent in providing it. The result is that the norms and standards are fatally flawed. They in fact weaken government's obligations under the Constitution and the Act, and they purport to enable government to avoid liability for its failure to comply with its obligations.

115. Finally, the Regulations are defective because they do not ensure that the plans and reports in terms of regulations 4(6)(a) and 4(7) are made publicly available.

116. The purpose of the power to prescribe minimum norms and standards is to ensure that learners receive the basic education to which they are entitled. To achieve this, it is necessary that teachers, parents and learners are informed of what will be done to give effect to the right to basic education, and what has been done, so that they can monitor and play their role in ensuring compliance with the right to basic education. This purpose is defeated if the plans and reports are known only to the MECs and the Minister.

117. This is necessary for public accountability, and to ensure that those affected are enabled to play their part in ensuring that the government carries out its obligations.

118. I submit that for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately. In particular, it must be communicated to the providers of education and to the beneficiaries of the programme

PART G: THE DEFICIENCIES IN THE REGULATIONS: EE's ENGAGEMENT WITH THE MINISTER AND PROVINCIAL DEPARTMENTS

119. In a letter dated 12 February 2014 ('**TM19**'), we thanked the Minister for promulgating the minimum norms and standards, and identified the defects in the Regulations to which I have referred above.

120. On 17 March 2014 the Minister responded to our comments ('**TM20**'). The Minister said, among other things, the following:

120.1. schools referred to in regulations 4(3)(a) and (b) (schools built entirely from mud or materials such as asbestos, metal and wood; and schools without access to any form of power supply, water supply or sanitation) '*must comply with the "norms and standards contained in the Regulations" within a period of three years*';

120.2. '*we will ensure that the Regulations are implemented on the basis of the above interpretation*';

120.3. this requirement was however subject to subregulation (5), and reasonable practicability in terms of regulation 4(1)(b);

120.4. '*individual classrooms built from inappropriate building materials will be subject to ongoing prioritization in the rehabilitation, replacement and eradication programs of provincial departments of education*' and '*[t]he process of addressing these schools will not wait for seven years but will commence concurrently and in parallel with the replacement of schools built entirely from an inappropriate material*';

120.5. although certain schools had already been planned and budgeted for within the three year MTEF period 2013 to 2016 in the form of User

Asset Management Plans ('U-AMP's') these '*will have been planned to all intents and purposes within the key prescripts of [the School Infrastructure Guidelines, upon which she said the Regulations are primarily based]*' and '*[w]here projects …are found not to be in accordance with the Regulations, they will be revised as provided for in regulation 4(2)(b), where possible and reasonably practicable*';

120.6. '*one specific focus area of engagements address the establishment of more effective Integrated Development Plans (IDPs) by local authorities. The need for local authorities in their IDPs to take into account education infrastructure considerations in terms of planning layouts and the provisioning and maintenance of infrastructure services such as water, sanitation and power supply (electricity) cannot be overemphasized*';

120.7. '*the Department has added specific focus and urgency to its engagements with its associated line function departments such as the Departments of Co-operative Governance, Human Settlements, Water Affairs and Energy with the specific intention to establish appropriately framed protocols aimed towards a collective achievement of the time-frames specified in the Regulations*';

120.8. as regards access to information, all U-AMP's and the project lists prioritised by each provincial education department are placed on the web-site of each provincial department';

120.9. '*[i]n the opinion of the Department amendments are not necessary at this stage*' - '*the application of the Regulations in practice should be given some time in order to accurately assess their effectiveness and efficiency before a review [of the regulations] is undertaken*';

120.10. EE was invited to discuss any of these issues with the responsible officials of the Department if it wished.

121. On 9 May 2014 EE wrote again to the Minister ('**TM21**'). In that letter we reiterated the concerns raised in our letter of 12 February 2014. We said, amongst other things:

121.1. In relation to regulation 4(3)(a) (schools constructed entirely of inappropriate materials): '*an appropriate amendment should be made so as to clarify what norms and standards are applicable to [this category] of schools*'. The regulation needed to be amended so as to ensure that it includes within its ambit the replacement of all inappropriate structures which pose a substantial risk to learner's safety;

121.2. In relation to regulations 4(2)(a) and (b) (schools falling within the MTEF framework): if these are to excluded, such exclusion should terminate by the end of the MTEF period;

121.3. In relation to regulation 4(5)(a) (implementation of the norms and standards being subject to resources and co-operation by other government agencies): the regulation deflects accountability for the delivery process and ought to be deleted in its entirety;

121.4. In relation to the right of access to information and the duty on the State to provide transparent, accountable and coherent government: it is imperative that the MEC's plans in terms of regulations 4(6)(a) and 4(7) and section 58C(3) of SASA be made publicly accessible and that a clear mechanism in this regard be inserted into the Regulations (EE noted that it had been unable to find U-AMP's or project lists on any of the provincial websites); and

121.5. EE looked forward to meeting with the responsible officials to discuss these matters and to find a non-litigious solution to its concerns, and requested potential meeting dates.

122. On 3 July 2014 a delegation from EE and EELC met with Department officials. During this meeting we elaborated on the concerns set out in the letters of 12 February and 9 May 2014. The Department officials listened, and in respect of all but one of our concerns agreed to convey this information to the Minister for consideration. The exception was in respect of regulation 4(5)(a). After being pressed on the issue, the officials accepted that government as a whole has a responsibility to realise the norms. But despite this acknowledgement, they made it very clear that the challenged regulation was a 'non-negotiable'.

At the end of the meeting we invited the Department to attend and make a presentation at the launch of our Minimum Norms and Standards for School Infrastructure Implementation Campaign later that month.

123. Our implementation campaign was launched on 14 and 15 July 2014 at a gathering of teachers, learners, parents, civil society organisations and experts in the field of infrastructure delivery. On the first day Mr Deon Rudman of the Department, who I understand is the principal drafter of the norms and standards, and who had been present at the meeting earlier that month, made a presentation on the reasoning behind and contents of the Regulations. At this session an EELC attorney again raised with Mr Rudman some of EE's concerns regarding the norms.

124. On 8 August 2014, EE wrote to the Minister ('**TM22**') requesting a formal response to our letter of 9 May 2014.

125. Two months later, on 9 October 2014, the Minister replied ('**TM23**') stating that she was under the impression that our concerns had already been fully addressed in her and the Department's previous engagements with us, including in the Department's presentation at the launch of our implementation campaign. The Minister again expressed the view that the regulations should '*be applied in practice for a while as this would make it possible to accurately assess their effectiveness and efficiency*'. She said that it would be prudent to evaluate the situation once all the MECs' plans required by regulation 4(6)(a) had been submitted, and that once that had been done '*we will also be in a*

better position to consider your concerns and to determine whether the enhancements discussed at the meeting of 3 July 2014 are indeed required' and that '*[i]f it is deemed necessary, you will be consulted during this process*'.

126. On 19 November 2014 we wrote to the Minister ('**TM24**') stating that EE persisted in its views that the Regulations do not comply with the Constitution and SASA. We said that we however would wait until 29 January 2015, two months after all the provincial plans were due, to provide her with an opportunity to remedy the defects. We said that in the spirit of public participation and accountable governance we would appreciate being given full access to the provincial plans.

127. In the period between December 2014 and June 2015, EE sought to obtain the MECs' implementation plans. These plans were due on 29 November 2014. According to comments by the Minister's spokesperson on 28 November 2014, the Minister was already in possession of all of the plans prior to this deadline. However, the provincial plans (except for the Limpopo plan) were only made public on 12 June 2015 after a lengthy battle by EE which I described below.

128. During this period, while we battled to obtain the provincial plans, the Minister did not respond to the issues that EE had raised in the 19 November 2014 letter regarding the deficiencies in the Regulations. On 30 September 2015 we sent yet another letter to the Minister ('**TM25**'). As appears from that letter:

128.1. We said that we had examined the provincial implementation plans (which we had now obtained), and that some of the shortcomings in these plans could be attributed to the defects in the regulations – for example, many of the provinces complained of an inability to comply with time frames as a result of limited resources or reliance on other entities and many of the plans failed to deal with substantially inappropriate school structures within the first time frame or at all.

128.2. We pointed out that the three year period stipulated in relation to schools built from inappropriate structures and without any water, electricity or sanitation would expire on 29 November 2016, and that it had become crucial that the Regulations be amended.

128.3. We enquired whether the Minister intended to amend the regulations to cure the deficiencies we had first brought to her attention more than a year and a half earlier, and if so, when she would do that and what the process would be.

128.4. We also requested, in the event that she did not intend to amend the regulations, what her reasons for that were; what steps she had taken to monitor the implementation of the norms and standards; what steps she intended to take in this regard; and how she proposed to ensure that monitoring would occur in a transparent and accountable manner that includes public participation.

128.5. We asked for a response by 30 October 2015, failing which we would have no other alternative but to consider the institution of legal proceedings.

129. On 24 February 2016, following a request by EE, representatives of EE and the EELC attended a meeting with officials from the Department in relation to issues which we needed to discuss more generally, and not the norms and standards specifically. At that meeting we requested a response to our letter of 30 September 2015 within two weeks. We were promised by Mr Sehlabelo that he would raise the issue with the Minister. On 25 February 2016 we followed this up with a letter ('**TM26**'). We have not received any response.

G.1 Obtaining the PED implementation plans

130. Regulation 4(6)(a) provides that the MECs are obliged within 12 months after the publication of the Regulations, and thereafter annually on a date and in the manner determined by the Minister, to provide the Minister with detailed plans on the manner in which the norms and standards are to be implemented. The deadline for the first set of plans was 29 November 2014.

131. As I have stated in paragraph 126 above, on 19 November 2014 EE wrote to the Minister and with this deadline in mind, requested access to the MECs' plans once they had been received.

132. On 28 November 2014, the day before the plans were due, the Department announced in a media release that they had received the plans from all of the MECs, and that the Minister would be considering the plans before making them available to the public. EE then attempted, for almost seven months, to obtain the provinces' plans.

133. On 9 December 2014, we wrote to the Minister requesting that the MECs' plans be shared with us without delay ('**TM27**'). We also said that we trusted that the Department would take all necessary steps to ensure that the provincial plans reached as wide an audience as possible.

134. Two days later we wrote to each of the MECs requesting copies of their plans. Copies of the letters are attached marked '**TM28**'.

135. On 15 December 2014, Ms Mbali Ndlovu from the Office of the Director General of Basic Education replied to our letter of 9 December 2014. She informed us that the letter was being brought to the attention of the Planning, Information, and Assessments branch, and that EE would be contacted by officials from the branch concerning our request for the plans. We were however never contacted.

136. In his budget speech on 25 February 2015, Finance Minister Mr Nhlanhla Nene said '*The school infrastructure backlogs programme is allocated R7.4 billion for the replacement of over 500 unsafe or poorly constructed schools, as well as to address water, sanitation and electricity needs. The education*

infrastructure grant of R29.6 billion over the medium term will enable all schools to meet the minimum norms and standards for school infrastructure by 2016'.

137. In the absence of provincial plans, there was however no way for schools and learners to know whether they would be the beneficiaries of the grant.

138. On 27 February 2015 EE again wrote to the Minister pointing out that we were still awaiting a response to our letter of 9 December 2014 and again asking that copies of the provincial plans be made available to us and to the public ('**TM29**').

139. When this still produced no response, on 19 March 2015 we submitted a Promotion of Access to Information Act 2 of 2000 (PAIA) request for copies of the plans. I attach a copy of the request ('**TM30**').

140. Meanwhile, EE members took action. We held National Days of Action in Pretoria, Cape Town and Zwelitsha (King William's Town), from 1 to 3 April 2015. In protest against the delay of the publication of the plans, learners camped outside Parliament in Cape Town, and slept outside the provincial Department of Education in the Eastern Cape.

141. On 17 April 2015 the Department's Deputy Information Officer responded to our PAIA request. I attach a copy of the response ('**TM31**'). He said that the Department needed an extension of the deadline because it had been decided at

the previous meeting of the Council of Education Ministers ('the CEM') that the provinces would have to resubmit the plans. He said that the matter would be finalised at the next CEM meeting, which was to be held on 21 May 2015.

142. On 29 May 2015, the EE Eastern Cape office held a protest march. By that time, the Minister had been in possession of the plans for at least 6 months. More than 2000 EE members and supporters from around the Eastern Cape marched to the provincial department of education demanding the immediate release of the plans. EE members chose this date to take action because it was the exact halfway mark in the State's first timeframe for implementation of the norms and standards, yet the provincial plans were yet to be released.

143. On 30 April 2015 we advised the Department that we read the email of 17 April 2015 as undertaking that the Department would provide EE with copies of the provincial plans. We said that on this basis alone, we agreed to an extension until 29 May 2015. I attach a copy of this letter ('**TM32**').

144. We received no response. We sent follow up letters to the Minister and Department on 20 and 25 May 2015 respectively ('**TM33**' and '**TM34**').

145. On 27 May 2015, our attorneys received a response from the Department to our letter of 25 May 2015 ('**TM35**'). The Department said that it would be unable to comply with the extended deadline of 29 May 2015, and required a further extension. The Department explained that due to an unexpected change in the Minister's schedule, the meeting of the CEM for 21 May 2015 had had to be

postponed until 4 June 2015. The Department undertook to make the revised plans available to us by 12 June 2015.

146. Finally, on 12 June 2015 (six months after they had been due), seven of the nine provincial plans were placed on the website of the national department. The plan for the Free State and what purported to be a plan for Limpopo were placed on their websites the following week. I attach copies of the Gauteng, KwaZulu-Natal, Western Cape, Eastern Cape, North West, Mpumalanga, Free State, Northern Cape and Limpopo plans as '**TM36**' to '**TM44**' respectively.

G.2 Attempts to secure the Limpopo Plan

147. On reviewing the provincial plans we discovered that the plan provided for Limpopo was not an implementation plan for norms and standards at all, but rather a User Asset Management Plan (U-AMP). I am advised that a U-AMP is produced in terms of different legislation (the Government Immoveable Asset Management Act 19 of 2007) and for a different purpose. The U-AMP is intended to ensure that State assets are managed effectively and efficiently.

148. Accordingly, on 30 July 2015 we wrote to the Limpopo MEC and the Minister ('**TM45**'). We requested that the correct Limpopo plan be uploaded onto the Departmental website by 31 July 2015. The letter went unacknowledged.

149. On 6 August 2015 our attorneys contacted the Minister's office and spoke to Mr Steve Mabua, her Private Secretary. He confirmed receipt of the 30 July letter, and said that it would be forwarded to the Minister for consideration.

150. On 1 September 2015 we sent a follow-up letter ('**TM46**') to the Limpopo MEC and the Minister repeating our request for the release of the Limpopo plan by 28 August 2015, failing which we would assume that no plan existed.

151. On 21 September 2015 we wrote again to the Limpopo MEC ('**TM47**'). We enclosed copies of our letters of 30 July 2015 and 1 September 2015. We requested the Limpopo MEC to ensure that the Limpopo plan was uploaded onto the Department's website by 30 September 2015.

152. On 30 September 2015 we wrote to the Minister as set out in paragraph 128 above. In that letter we highlighted the Limpopo MEC's continued failure to release the Limpopo plan.

153. On 7 October 2015 EE members in Limpopo picketed outside the Limpopo Department of Education, demanding the province's plan. EE handed a memorandum to the Department demanding this.

154. On 13 October 2015 an EELC representative and the Deputy General Secretary of EE, Mr Ntuthuzo Ndzomo, had a meeting with Limpopo MEC Kgetjepe to discuss, amongst others, whether the Limpopo plan in fact existed and if so, when would it be released. MEC Kgetjepe said that he was not yet in a

position to respond to our enquiries regarding the existence of the Limpopo plan, as he had not discussed the issue with his relevant officials. He undertook to make the necessary enquiries with the relevant officials and to respond to us shortly. I attach in this regard a confirmatory affidavit by Mr Ndzomo.

155. On 12 November 2015 we sent a follow up letter to MEC Kgetjepe ('**TM48**'). We copied the letter to the Minister. We referred to the MEC's undertaking to make the necessary enquiries with his officials, and again requested that the Limpopo plan be released immediately, but by no later than 16 November 2015.

156. Our letters of 30 July 2015, 1 September 2015, 21 September 2015, 30 September 2015 and 12 November 2015 have all gone unanswered.

157. On 27 January 2016 EE found the Limpopo Infrastructure Norms & Standards Implementation Plan on the Department website. We do not know when it was posted there, as despite our enquiries, no-one from the Department informed us that this had finally been done. I attach a copy of the Limpopo plan ('**TM49**').

158. I submit that the lengthy struggle that EE has had to wage in order to obtain the provincial plans demonstrates the need for the Regulations to make it mandatory for the Minister to release provincial implementation plans and progress reports to the public.

G. 3 Failure to release implementation reports

159. EE is continuing to struggle to obtain crucial information in terms of the Regulations. Regulations 4(6)(a) and 4(7) require the MECs to report annually to the Minister with updated implementation plans and reports on progress in terms of the previous year's plan. The reports and updated plans which were due on 29 November 2015 have not been made available to EE or the public.

160. EE has been unsuccessful in its attempts to obtain the reports which the MEC's were to make to the Minister in terms of regulation 4(7). On 22 January 2016 EE requested the reports from the Minister ('**TM50**'). We have not received any response to our request.

PART H: THE INADEQUACY OF THE PROVINCIAL PLANS

161. This application is not aimed at addressing shortcomings in the individual provincial plans. I do however wish to identify overarching patterns which emerge from them, and in particular the problems created by regulation 4(5)(a). I attach copies of letters written by EE to the MECs in respect of their plans ('**TM51**' to '**TM58**').

162. There is a total lack of consistency in the way in which the MECs have designed their plans and structured their project lists. This hinders any attempt to analyse and understand the contents of the plans. It undermines the ability of learners, educators, EE and society at large to use the plans as a means of

holding the provinces and the Minister to account. It also significantly impairs the Minister's ability to perform her national oversight role.

163. The Eastern Cape plan states that the backlogs are significant and that it is not '*feasible*' to address these backlogs within the target dates because the '*magnitude of funding*' is not available. (Eastern Cape Plan pages 17 – 18) Yet it also says that the backlog in school infrastructure in the Province is not known to the PED, with no up to date register of school infrastructure being available. This is despite the plan being released more than one and a half years after the adoption of the Regulations. (Eastern Cape Plan pages 14 - 15)

164. The lack of this crucial information, which Regulation 4(6)(b) requires for inclusion in the provincial implementation plans, demonstrates

164.1. An internal inconsistency: while the PED says that it does not know the details of the infrastructure backlogs, it makes assertions about what it would cost to comply with the Regulations, and its inability to meet that cost;

164.2. the lack of oversight and monitoring of provincial planning and implementation by the Minister who should have taken steps to ensure that each Province had comprehensively assessed the backlogs in order to provide the systematic implementation plan required by the Regulations.

165. The majority of provincial plans refer to a lack of internal or external capacity or both, that present a major obstacle to complying with the norms:

165.1. The Gauteng plan states that the Gauteng Department of Education may not timeously meet the requirements, as the building industry might not be able to accommodate the nation-wide demand;

165.2. The Mpumalanga plan states that its province has a shortage of qualified contractors to draw from, which reduces its capacity to implement;

165.3. The KwaZulu Natal plan states that '*The success of the KZN DoE's proposed infrastructure backlog elimination plan, if implemented, remains subject to the available funding and the capacity of implementing agents and contractors to implement.*' (KZN Plan page 12)

165.4. The Free State plan refers to a lack of skilled professionals in both the Free State Department of Education and the Free State Department of Public Works, as a hindrance to meeting the requirements of the norms; and

165.5. The North West and Mpumalanga plans refer to a lack of skilled personnel within their respective departments as a challenge to complying with the norms.

166. EE is aware of the realities of resource constraints and lack of capacity. These constraints are the reason that the national and provincial departments of education should provide the public with their plans on how they intend to address those constraints. Such constraints cannot provide a legal justification for wholesale non-compliance with the content of the norms. This is however what is brought about by regulation 4(5)(a). The consequence is that the regulations are not norms and standards as required by section 5A of SASA and by the July 2013 order.

167. In the section that follows I set out in greater detail the bases upon which EE relies for the relief which it seeks.

PART I: REGULATION 4(5): THE ESCAPE CLAUSE

168. Regulation 4(5)(a) makes the implementation of the norms and standards subject to the resources and co-operation of '*other government agencies and entities responsible for infrastructure in general*' and their making the infrastructure available.

169. It gives government, including MECs and heads of PEDs, a means of escaping the obligation to provide adequate school infrastructure in order to fulfil the right to basic education.

170. The Applicants seek to have regulation 4(5)(a) declared invalid, and to the extent necessary, reviewed and set aside. They do so on the following grounds.

I.1 The Minister has not complied with her obligation to make binding uniform norms and standards

171. I submit that the Minister is obliged by the Constitution, by SASA, by her undertaking, and by the order of Court in the previous application to make norms and standards which are legally binding and effective.

172. The effect of regulation 4(5)(a) is to render the norms and standards ineffective, because it makes the duty under the regulations subject to unspecified and indeterminate qualifications which may be superimposed by other (unspecified) organs of state – because they decline to co-operate, or because they choose not to make resources or infrastructure available for this purpose, or because they are not competent in providing it. The result is that these are not uniform norms and standards as required by the Act,

173. There are currently two national education grants which are intended for spending by provinces on school infrastructure. One of the grants is the Education Infrastructure Grant ('the EIG'). In 2014/15, R1 177 914 000 was allocated to the Eastern Cape through the EIG. R273 324 000 of this amount went unspent. The National Treasury has since stopped the allocation of the EIG to the Eastern Cape in terms of section 19 of the Division of Revenue Act 1 of 2015 ('the Division of Revenue Act') (as appears from annexure '**TM59**'). Section 19(1) of the Division of Revenue Act provides that that may be done (a) on the grounds of persistent and material non-compliance with the Act; (b) if the National Treasury anticipates that a province or municipality will

substantially underspend on the allocation, or any programme, partially or fully funded by the allocation, in the 2015/16 financial year; (c) for purposes of the assignment of a function from a province to a municipality, as envisaged in section 10 of the Municipal Systems Act; or (d) if a province implementing an infrastructure project does not comply with construction industry best practise standards and guidelines, as identified and approved by the National Treasury. EE's assumption is that the reason that the grant was stopped in this case is because it was anticipated that the Eastern Cape would again substantially underspend on its allocation.

174. This demonstrates that proper planning and implementation in co-operation with other departments and entities is not taking place. It is reasonable to anticipate that when the complaint is raised that the norms and standards have not been complied with, the answer will be that there has been no breach because of the provisions of regulation 4(5)(a).

I.2 Regulation 4(5)(a) is an unjustified limitation on the right to a basic education

175. The norms and standards purport to limit the state's obligation to fulfil the right to basic education, by limiting the state's obligation to provide adequate infrastructure at schools.

176. Regulation 4(5)(a) makes all of the norms and standards subject to the resources and co-operation of government agencies responsible for infrastructure in general.

177. The Applicants submit that this limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. We say this particularly in light of the fundamental importance of the right to basic education which I have described above, the virtually unqualified nature and extent of the limitation, and the possibility of less restrictive means to achieve the purpose. If the Respondents attempt to justify the limitation in answer, we will address this further in reply.

178. Regulation 4(5)(a) impermissibly limits the right to a basic education by allowing government to remain legally unaccountable for its obligations in terms of SASA and the Constitution even after the target dates in the norms and standards have come and gone.

I.3 Regulation 4(5)(a) is not rationally connected to the purpose of sections 5A and 58C of SASA

179. The purpose of sections 5A and 58C read with the Constitution is to ensure that legally binding norms and standards relating to physical infrastructure in schools are prescribed, by which government may be held to account. Such norms and standards are required in order to ensure that the right to a basic education is realised.

180. For the reasons already given, regulation 4(5)(a) fundamentally undermines the achievement of that purpose. It is not rationally connected to the purpose for which the power is conferred upon the Minister to make regulations.

I.4 Regulation 4(5)(a) offends the constitutional value of accountability

181. The principle of accountability is entrenched in section 1 of the Constitution as a founding democratic value. Section 195(1)(f) of the Constitution provides that public administration must be accountable. Section 41(1)(c) of the Constitution imposes an obligation '*on all spheres of government and all organs of state within each sphere*' to '*provide effective, transparent, accountable and coherent government for the Republic as a whole.*'

182. Accountability is a pillar-stone of our democracy, which must be observed scrupulously. It has to be observed and carried out conscientiously.

183. Section 7(2) of the Constitution obliges the State to realise the right to basic education. It has to do so in an accountable manner. The provision of adequate school infrastructure is a necessary ingredient for the realisation of the right to a basic education. Accountability in respect of the provision of school infrastructure delivery is therefore a constitutional necessity.

184. Regulation 4(5)(a) has the effect of rendering government unaccountable for the proper provision of school infrastructure. Where there is a failure to provide adequate infrastructure, government will seek to justify its failure to comply with the norms and standards by contending that they are subject to regulation 4(5)(a).

185. The highly qualified nature of the obligation to provide adequate school infrastructure will have the result that the public will not be able to hold the government accountable for failures in this regard.

I.5 Regulation 4(5)(a) subverts the constitutional requirement of co-operative governance

186. Section 41(1)(c) of the Constitution imposes an obligation on all spheres of government and all organs of state within each sphere to '*provide effective, transparent, accountable and coherent government for the Republic as a whole*'. Section 41(1)(h)(iv) of the Constitution requires that they co-operate with one another in mutual trust and good faith by co-ordinating their actions. Governmental co-operation is thus constitutionally mandated as a means to ensure accountable and coherent governance.

187. I am advised that the co-operative governance chapter of the Constitution is designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. Co-operation is of particular importance in the field of concurrent law-making and implementation of laws. It is desirable where possible to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made in the budgets of the different governments.

188. Regulation 4(5)(a) deals with government as if it may permissibly operate in separate components with mutually exclusive functions. This is inconsistent with co-operative governance. All the spheres of government are interdependent and interrelated, in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. The same must apply to departments which are organs of state.

189. Regulation 4(5)(a) permits and in fact facilitates the failure of co-operative governance. In her letter of 17 March 2014, the Minister said that co-operative governance will take place. Yet she has made a regulation which explicitly does not require co-operative governance, and which ensures that a failure of co-operative governance will not have any legal consequences.

190. Regulation 4(5)(a) is invalid because it is inconsistent with and undermines the co-operative governance imperative in the Constitution.

I.6 Regulation 4(5)(a) results in a breach of the July 2013 order of this Court

191. As noted in paragraph 99 above, the July 2013 order required the Minister to '*prescribe Minimum Uniform Norms and Standards for school infrastructure, and the time-frames within which they must be complied with*' (emphasis added). The result of regulation 4(5)(a) is that the Regulations do not contain time-frames within which the norms and standards must be complied with. Regulation 4(5)(a) permits an indefinite pushing back of the time-frames contained in the regulations.

I.7 Conclusion of this part

192. I submit that regulation 4(5)(a) is inconsistent with the Constitution, SASA and the July 2013 order, and is accordingly unlawful and invalid.

193. I am advised that the making of the regulations may comprise '*administrative action*' in terms of section 1 of PAJA. I am advised further that if this is the case, regulation 4(5)(a) is liable to be reviewed and set aside on one or more of the following grounds in PAJA:

193.1. The Minister was not authorised to make the regulation by the empowering provision (section 6(2)(a)(i));

193.2. The regulation was not authorised by an empowering provision (section 6(2)(f)(i));

193.3. The regulation is not rationally connected to the purpose of the empowering provision (section 6(2)(f)(ii)(bb);

193.4. The regulation is otherwise unconstitutional and unlawful (section 6(2)(i)).

PART J: REGULATION 4(3)(a) READ WITH REGULATION 4(1)(b)(i) (UNSAFE STRUCTURES)

194. As I have pointed out in paragraphs 111.1 and 111.2 above, regulation 4(3)(a):

194.1. does not state what is meant by the 'prioritisation' of schools built entirely from mud or materials such as asbestos, metal and wood – in particular, whether these conditions have to be eradicated within the three-year timeframe;

194.2. omits to deal with schools which are built partly from mud, asbestos, metal and wood, or which otherwise do not comply with the National Building Regulations, SANS 10-400 or the Occupational Health and Safety Act 85 of 1993 ('OHSA');.

195. The regulation undermines the rights to a basic education, equality and dignity. It is also arbitrary. There is no rational basis for excluding an unsafe school or classroom from the ambit of the regulation, merely because part of the school is safe.

196. I point out that regulation 18(14) requires that the design of all new schools and additions, alterations and improvements to schools must comply with all relevant laws including the National Building Regulations, SANS 10-400 and the Occupation Health and Safety Act 85 of 1993 ('the OHSA').

197. The Applicants seek the following relief in this regard:

197.1. A declaratory order that regulation 4(3)(a) read with regulation 4(1)(b)(i) requires that all schools and classrooms built from mud or built from materials such as asbestos, metal and wood must within a period of three 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 OHSA; and

197.2. An order striking out the word ‘entirely’ wherever it appears in regulation 4(3)(a); alternatively, an order 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’.

198. This relief is consistent with the Minister’s responses when EE first raised these problems (described in paragraphs 120.1 to 120.3 above), namely that:

198.1. Schools described in regulation 4(3)(a) must comply with the norms and standards contained in the Regulations within a period of three years;

198.2. The Minister would ensure that the Regulations would be implemented on the basis of this interpretation; and

198.3. Individual classrooms built from inappropriate building materials would be subject to ongoing prioritisation in the rehabilitation, replacement and eradication programs of provincial departments of education, and that the process of addressing these schools would not wait for seven years

but would commence concurrently and in parallel with the replacement of schools built entirely from an inappropriate material.

J.1 The importance of the replacement of unsafe and inappropriate structures

199. The need for unsafe schools to be dealt with on an expedited basis has been in the forefront of the development of norms and standards.

200. As I stated in paragraph 88.1, on 21 November 2008 the Minister published the 2008 draft Regulations. These were never made into law. However, they provide a useful insight into the reasoning underpinning the need for minimum norms and standards. The 2008 draft Regulations categorised norms and standards into safety, functionality and effectiveness levels.

201. Safety norms were described as being:

> '*the bare minimal allowable for a school to remain open . . .* [which] *is basically a 'negative list' of what an operating school should not have like: caving structures that pose danger to learners, structures without roofing, temporary structures that do not meet South Africa's health standards . . .*'

202. The 2008 draft Regulations recognised the urgency with which government must ensure that schools are brought into compliance with safety norms.

> '*schools that do not meet safety norms will not be tolerated and will be closed with immediate effect. Safety norms and standards are therefore*

regarded as emergency norms and all effort will be made to not have any school at this level beyond the current sector strategy plan period (2012)'

'*. . . safety norms are the bare minimal allowable for a school to remain open, and this level of provision is not meant to be sustained beyond the current strategic plan period.*'

203. On the same day that the 2008 draft Regulations were published for comment, the Minister published for comment the proposed Equitable Provision Policy. Unlike the 2008 draft Regulations, the Equitable Provision Policy was eventually finalised. The Equitable Provision Policy envisages a four tiered continuum of minimum norms beginning with '*basic safety*':

'*basic safety entails the bare minimum of safety requirements below which a school will be deemed inoperable and immediately closed. For example . . . if learners are exposed to intolerable elements such as intolerably bad weather . . . extremely unsafe <u>building structures</u> that could crumble onto learners*'

204. In addition, the Schools Infrastructure Guidelines stated that:

'*6.3 A school environment does not meet the basic safety requirements if learners are exposed to conditions such as*

6.3.3 extremely unsafe <u>building structures</u> that could `collapse on top of learners'.

205. Significantly, the 2008 draft Regulations, Equitable Provision Policy and School Infrastructure Guidelines all make reference to unsafe '*structures*' (as opposed to entirely unsafe schools) that pose a danger to learners, and recognise the urgency of attending to these situations.

206. The extracts from supporting affidavits quoted in part C.3 above demonstrate the importance of replacing unsafe structures.

J.2 The right of learners to a basic education, equality and dignity and of teachers to a safe working environment

207. Regulations 4(3)(a) and 4(1)(b)(i) undermine the right to a basic education, equality and dignity.

208. They are arbitrary in that they operate only in relation to schools which are built entirely of unsuitable and unsafe structures and are not aimed at replacing unsafe structures wherever they are found to exist. There is no reason, let alone a justifiable or sufficient reason, for the failure to address unsafe structures which are found at schools.

209. Regulations 4(3)(a) and 4(1)(b)(i) are also inconsistent with the State's duty towards the teachers whom it employs.

210. Section 8(1) of the OHSA places a duty on employers to provide and maintain a safe working environment. Section 8(1) provides '*Every employer shall*

provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'.

211. The Public Service Regulations promulgated in terms of section 41 of the Public Service Act 103 of 1994 (Govt Gazette 21951) provide in Part vi of section D that: '*A head of department shall establish and maintain a safe and healthy work environment for employees of the department.*'

212. The State, in its capacity as an employer, has an obligation to ensure that teachers are able to work under safe conditions that do not pose a substantial risk to their safety.

213. I submit that the relief sought in relation to regulations 4(3)(a) and 4(1)(b)(i) is appropriate and necessary in the circumstances.

PART K: REGULATION 4(3)(b) READ WITH REGULATION 4(1)(b)(i) (SCHOOLS WITH NO POWER, WATER OR SANITATION)

214. As I pointed out in paragraph 111.1 above, regulations 4(3)(b) and 4(1)(b)(i) do not make it clear how schools that do not have access to any form of power supply, water supply or sanitation are to be "prioritised", and what is meant by that term – in particular, whether these defects have to be eradicated within the seven-year timeframe.

215. As I have stated above, the Minister has said that what is intended is that these schools should be brought into compliance with the norms and standards

(presumably as regards power supply, water supply and sanitation) within three years of the date of publication of the Regulations.

216. That is not however clear from the Regulations as they stand. Regulations 4(3)(b) and 4(1)(b)(i) undermine the right to a basic education, equality and dignity in that they do not provide clearly for the material deficiencies in such schools to be addressed within three years or at all.

217. The Applicants therefore seek an order declaring that regulation 4(3)(b) read with regulation 4(1)(b)(i) 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 years from the date of publication of the Regulations, comply with the norms and standards described in regulations 10, 11 and 12.

PART L: REGULATIONS 4(1)(a) READ WITH 4(2) (SCHOOLS AND IMPROVEMENTS WHICH ARE EXCLUDED)

218. Regulation 3 of the norms and standards entitled '*Scope and application*' states that, '*[t]hese regulations apply to all schools*'.

219. Regulation 4(1)(a) provides however:

> '*4(1) Notwithstanding the provisions of these regulations, the norms and standards contained in the regulations— (a) must, subject to subregulation (5) and as far as reasonably practicable, be applied to all new schools and*

additions, alterations and improvements to schools, with the exception of schools contemplated in subregulation (2)'

220. Sub-regulation 4(2) provides that:

'(a) New schools and additions, alterations and improvements to schools excluded from subregulation 1(a) are those of which the planning and prioritisation within the current 2013-2014, 2014-2015 and 2015-2016 MTEF cycle have already been completed.

(b) The plans and prioritisation of the schools contemplated in paragraph (a) must, where possible and reasonably practicable, be revised and brought in line with these regulations'

221. As appears from paragraph 120.3 above, the Minister has explained that certain schools have already been planned and budgeted for within the three year MTEF period 2013 to 2016 in the form of U-AMP's.

222. As I have stated, the Immovable Asset Management Act requires national and provincial departments which use or intend to use immovable assets in support of their service delivery objectives, to prepare U-AMP's (section 6(1)(b) read with the definition of 'user' in section 1). These plans must (in the case of provincial departments) be submitted to provincial treasuries on a date determined by such treasuries.

223. Section 26(4)(a)(ii) of the Division of Revenue Act 2 of 2013 provides that for purposes of the EIG in the 2015/16 financial year, the accounting officer of the provincial department must submit to the National Treasury by 26 July 2013 a user management plan for all infrastructure programmes for the financial, next financial and 2015/16 financial years. Section 26(4)(b) provides that the National Treasury must, by 6 December 2013, notify the affected provincial departments which infrastructure programmes and projects it will propose for full or partial funding through the grant in the financial years in question.

224. EE understands therefore that at the time of promulgation of the Regulations, there were school infrastructure projects which had already been planned and budgeted for. The purpose of the exclusion appears to be to avoid a situation in which new schools and improvements are required to be built in accordance with the norms and standards, which do not necessarily coincide with existing plans. In other words, the intention seems to be to allow infrastructure delivery to take place in accordance with existing and budgeted for plans.

225. The problem is that regulation 4(2) entirely excludes from the norms and standards, all new schools and additions, alterations and improvements which are the subject of the MTEF plans. These schools are not subject to the timeframes for infrastructure delivery stipulated in regulation 4(1)(b). The norms do not apply at all to schools referred to in the MTEF plan. If the state plans for a school in an MTEF period, and that plan is not fulfilled, the school

remains totally excluded from the ambit of the Regulations. I submit that this is arbitrary and irrational.

226. Regulation 4(2)(b), which requires that where possible and reasonably practicable the plans and prioritisation of the schools contemplated in paragraph (a) be revised and brought in line with the Regulations, does not address this concern. That is so because it does not say clearly enough what must happen in relation to future planning. There is no obligation on the State to ensure that these schools are in future appropriately dealt with in accordance with the norms and standards.

227. The Applicants therefore seek relief which will ensure that that the regulation 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.

PART M: AN EXPRESS REQUIREMENT THAT PLANS BE MADE PUBLICLY AVAILABLE

228. Improving transparency and accountability in the provision of school infrastructure has always been at the heart of EE's campaign for minimum norms and standards.

229. The norms and standards ought to facilitate participatory democracy and grassroots accountability by enabling communities, learners, educators, civil society organisations and the public at large to know what their rights are, and what they are entitled to require of government. This is a necessary element of a reasonable programme.

230. Regulations 4(6)(a) and 4(7) provide:

> '*4(6)(a) A Member of the Executive Council must, within a period of 12 months after the publication of the regulations and thereafter annually on a date and in the manner determined by the Minister, provide the Minister with detailed plans on the manner in which the norms and standards are to be implemented as far as schools referred to in regulation (1) are concerned*'
>
> '*4(7) In addition to the requirements contained in 58C of [SASA], a Member of the Executive Council must, in the manner determined by the Minister, report annually to the Minister on the implementation of the plans required in terms of subregulation (6)*'.

231. The Minister and the MECs seem to take the view that they are not obliged to make the plans publicly available. As I have pointed out, the provincial plans which had to be provided to the Minister by 29 November 2014 were (with the exception of the Limpopo plan) made publicly available almost seven months later, in June 2015. The Limpopo plan was made available long after that. The

provincial plans were only made publicly available after sustained requests and activism by EE.

232. To date, the provincial implementation reports and updated plans have not been made available, despite requests by EE.

233. Denying the public access to these plans and reports has the result that school governing bodies, educators, parents and learners are prevented from knowing what their rights are, knowing what progress has been made, and knowing what will be done in future and when it will be done. They are unable to monitor whether the state is complying with its commitments. They are prevented from engaging effectively with the state in this regard.

234. The State's recalcitrance in this regard highlights the need to ensure that provincial plans and reports in terms of regulations 4(6)(a) and 4(7) are made available to the public – and in particular to school governing bodies, educators, parents and learners - without delay.

235. For this reason and the reasons given above, the Applicants seek relief aimed at redressing this defect.

PART N: SECTION 7 OF PAJA

236. I have noted above that it may be contended that the making of the Regulations constitutes administrative action in terms of PAJA. The Applicants contend

that having regard to their nature and purpose, the making of the Regulations is action of a legislative rather than an administrative nature.

237. If it is found that the making of the Regulations was administrative action, then the Applicants respectfully submit that it is in the interests of justice that the period referred to in section 7(1) of PAJA should be extended to the date when this application is instituted. This is so for the following reasons.

238. First, the chronology of events set out above demonstrates a sustained effort by EE to engage with the Minister in an attempt to resolve the problems without the need for litigation. I submit that the Applicants should not be penalised and non-suited because they have made a good faith attempt to resolve the matter without recourse to litigation.

239. Second, this matter relates to what is still to be done in the future. The relief sought is forward-looking, rather than attempting (like most reviews) to undo what has been done in the past. It deals with how the government should comply with its constitutional and statutory obligations in the future. I respectfully submit that this makes much of the rationale for the section 7 time limits inapplicable to this application.

240. Third, this application deals with an issue of the greatest importance for the achievement of the rights of literally millions of children, and for the future of those children and those who follow them in public schools. If the Regulations are indeed defective as the Applicants contend, it cannot be in the interests of

justice for that situation to be perpetuated because the Applicants did not immediately bring review proceedings.

241. The Applicants therefore seek an order, to the extent necessary, extending the period in section 7 of PAJA to the time when this application is instituted.

CONCLUSION

242. For the reasons given in this affidavit EE prays for an order as set out in the Notice of Motion.

243. The Regulations prescribe time periods for the provision of school infrastructure. Those time periods run from the date when the Regulations were published. EE appreciates that depending on when this application is determined, it may be necessary to limit the retrospective effect of certain of the orders which it seeks.

244. I would add that the matter is inherently urgent. It is urgent because the breach of the Constitution and the SASA continues on a daily basis, with consequences for learners which are deep and irremediable. The Applicants will therefore seek an early hearing of this application so that the matter can be determined as soon as possible.

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TSHEPO MATSEPE

I certify that the Deponent acknowledged to me that he knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience. The Deponent thereafter uttered the words: '*I swear that the contents of this declaration are true, so help me God*'.The Deponent signed this declaration in my presence at CAPE TOWN on this the _____ day of May 2016.

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COMMISSIONER OF OATHS