

(4) *An implementation protocol must be-*

(a) *consistent with any provisions of the Constitution or national legislation applicable to the relevant policy, power, function or service; and*

(b) *in writing and signed by the parties.*

30 The order granted by the above Honourable Court on the 11th of July 2013 reads as follows:

- “1. The Minister must, by 12 September 2013, publish for comments, amended draft Regulations for Minimum Uniform Norms and Standards for school infrastructure in terms of Section 5A(1)(a) of the South African Schools Act, 84 of 1996, and in her sole discretion consult directly with stakeholders.*
- 2. The Minister must, by 30 November 2013, prescribe Minimum Uniform Norms and Standards, by the promulgation of Regulations, for school infrastructure, in terms of Section 5(1)(a) of the South African Schools Act, 84 of 1996, which provides for the availability of the school infrastructure referred to in Section 5A(2)(a) of the Act. The regulation shall prescribe Minimum Uniform Norms*



and Standards for School Infrastructure and the time-frames within which they must be complied with.”

31 It is clear from the quoted legislation and the order by Dukada J of 11 July 2013 that I complied with both the order and the legislation quoted. The Norms and Standards as published are within the framework of the Constitution and all relevant legislation. On this basis, the Applicants have failed to demonstrate to the above Honourable Court that regulation 4(5)(a) of the Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 are inconsistent with the Constitution, the South African Schools Act and the order granted on the 11th July 2013. Clearly they have failed to prove any facts that support the contention that this regulation is inconsistent with the Constitution.

32 Because the provision of services and infrastructure relating to water, sanitation, electricity, roads and the like are not within my competence, but within the other Ministers and their Departments, I had to and was compelled to insert regulation 4(5) to comply with Chapter 3 of the Constitution and the Framework Act.

33 It is therefore submitted that the Applicants cannot be granted the order they seek in terms of regulation 4(5)(a).

Relief sought as set out in paragraph 24.2 above



34 In terms of the alternative order sought by the Applicants in prayer 2, that is reviewing and setting aside regulation 4(5)(a) of the Regulations, the Applicants have failed to set out the reasons upon which they based their allegation that this regulation stand to be reviewed and set aside.

35 It is therefore submitted that the Applicants cannot be granted this relief.

Relief sought in paragraph 24.3 above

36 The further relief declaring that regulation 4 (3)(a) read with regulation 4(1)(b)(i) of the Regulations requires that all schools and classrooms built substantially from mud as well as those schools built from materials such as asbestos, metal and wood, must within a period of three (3) years from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and the Occupational Health and Safety 85 of 1993, is also incompetent.

36.1 Regulation 4(3)(a) reads as follows:

“(3) As far as schools contemplated in regulation (1)(b) are concerned –

(a) and for the purposes of sub-regulation 1(b)(i), all schools built entirely from mud as well as



those schools built entirely from materials such as asbestos, metal and wood must be prioritised;

36.2 Regulation 4(1)(b)(i) reads as follows:

“(1) Notwithstanding the provisions of these regulations, the norms and standards contained in the regulations-

(a) ...

(b) as far as schools are concerned which exist when this regulation are published must, subject to subregulation (5), and as far as reasonably practical-

(i) with reference to the norms and standards mentioned in subregulation (3)(a) and (b), be complied with within a period of three (3) years from the date of publication of this regulations;”

36.3 From a reading of regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations, it is clear that the Norms and

Standards make provision that the schools built entirely from mud or materials such as asbestos, metal and wood should be prioritised.

36.4 “Prioritise” means that designate or treat something as being very or most important. The other meaning for the verb prioritise is *“determine the order for dealing with (a series of items or tasks) according to their relative importance.”* It is clear that the group of schools that have been referred to in regulation 4(3)(a) have been given a priority and therefore they will be given first preference in that they are the first in line to be replaced.

36.5 Regulation 4(1)(b) (i) provides that schools which exist when the Regulations are published should then be brought into the realm of the Regulations. It therefore translates to the fact that those schools that have been planned for improvement or construction before these Regulations are published should be dealt with in terms of sub-Regulations 4(1)(b)(i) to (iv).

36.6 It is also submitted that the Norms and Standards make provision that the structures replacing these old schools should accord with the Regulations, the National Building Regulations and Building Standards Act 103 of 1977, SANS

10-400 and the Occupational Health and Safety 85 of 1993. It may be that there is no specific mention of the Occupational Health and Safety Act 85 of 1993 in the Regulations. In a press conference released by me on the 12th of September 2013 it was indicated in paragraph 4.6 that

“For this purpose, the following minimal universal design requirements are specifically provided for:

- (a) Clear flow area in passages, walkways and points of ingress for people using wheelchairs and other mobility devices and aids.*
- (b) Parking for persons with disabilities would be located as close as possible to entrance areas.*
- (c) Ramps and hand rails with regulated gradients, heights and spacing.*
- (d) Toilets for the disabled must meet the requirements of the National Building Regulations*
- (e) All schools must be provided with adequate notice boards which are accessible for all users in the school building and which contain signage that is visible and legible.*



- (f) *Tactile signage should be provided for learners and educators with impaired vision.*
- (g) *Visual aids should be provided for communication with learners and educators who are deaf or hearing impaired.*
- (h) *All other aspects of universal design must be compliant with the relevant requirements of the National Building Regulations and SANS 10-400.”*

36.7 In the same document at paragraph 4.9 it is stated that:

“The design considerations for education areas have also been adapted and extended in line with proposals made by some commentators. In the planning of all new schools and additions, alterations and improvement to schools, school design must comply with all relevant laws, including the National Building Regulations, SANS 10-400 and the Occupational Health and Safety Act of 1993. SANS 10-400 refers to the South African National Standards with that number issued by the South African Bureau of Standards in terms of the National Building Regulations.”



- 36.8 It is clear from the quoted passages that the issue of the building structures according with the Regulations, the National Building Regulations, SANS 10-400 and the Occupational Health and Safety Act 85 of 1993 are included in the Minimum Uniform and Standards for public school infrastructure.
- 36.9 It is therefore submitted that the Applicants are not entitled to the order that they seek in terms of this prayer as they have failed to show what it is specifically that they want the Regulations to address that has not already been addressed by the Regulations themselves. The Applicants' contention seems to be the use of the word "*entirely*" in the Minimum Norms and Standards as compared to their preferred word "*substantially*".
- 36.10 The Applicants fail to appreciate that the Uniform Norms and Standards for public school infrastructure prioritises those schools that have been built entirely from mud as well as those built entirely from materials such as asbestos, metal and wood. That does not exclude schools that are built substantially from mud as well as those that are built substantially from materials such as asbestos, metal and wood. The only difference is that for those that have been built entirely on the above mentioned materials will be given



priority and will be dealt with before any other schools can be considered for alterations, improvements and for the building of new schools. Furthermore, it is within my discretion and power to decide which schools should be given preference and the mere fact that the Applicants do not agree therewith does not entitle them to any relief.

36.11 Unless the Applicants can demonstrate that the exercise of my discretion flies in the face of the Constitution, SASA and/or is irrational, interference with my discretion is not permitted.

Relief sought as set out in paragraph 24.4 above

37 The Applicants further seek an order where the word “entirely” should be struck out wherever it appears in Regulation 4(3)(a) and alternatively striking out the phrase “*schools built entirely*” wherever it appears in regulation 4(3)(a) and replacing it with words “*classrooms built entirely or substantially*”.

38 It is submitted that the Applicants failed to appreciate the fact that the schools mentioned in Regulation 4(3)(a) are those that should be given priority. The Minimum Norms and Standards for public infrastructure recognises the painful legacy of apartheid in South Africa as can be seen from the preamble.

and .

39 The preamble of the Regulations relating to Minimum Uniform Norms and Standards for public school's infrastructure provides, in the first paragraph, as follows:

"WHEREAS, as a result of the painful legacy of apartheid, South Africa has suffered an uneven development with regard to the provisioning of basic school infrastructure to all public schools, and bearing in mind that social investment in education is a responsibility of the government, and requires education to be central to government policies as one of its key priorities;

AND WHEREAS the State continues to provide basic school infrastructure to all public schools, particularly those that were previously disadvantaged;"

40 The Regulations relating to Minimum Uniform Norms and Standards for public school's infrastructure recognises the inequalities as a result of the apartheid system that had prevailed in South Africa. It also recognises that there are schools which are in a dilapidated state of disrepair, which schools needs to be prioritised and attended to as soon as possible.

41 Regulation 4(3)(a) deals specifically with that category of schools. It would not be practical to prioritise the supply of new schools and refurbishment of old schools without categorising them into specific



categories wherein those that are in dire need for either re-building of new schools or refurbishing the old schools are identified. It is therefore submitted that the Applicants have failed to appreciate the importance of prioritising certain schools over others in terms of the condition and the state of disrepair of the particular schools.

Relief sought as set out in paragraph 24.5 above

42 The Applicants seek a prayer that regulation 4(3)(b) read with regulation 4(1)(b)(i) of the Regulations to be read as requiring that all schools that do not have access to any form of power supply, water supply or sanitation, must within a period of three (3) years from the date of publication of the Regulations, comply with the Norms and Standards described in regulations 10, 11 and 12 of the Regulations.

43 Regulation 4(3)(b) provides as follows:

“and for the purposes of subregulation 1(b)(i), all those schools that do not have access to any form of power supply, water supply or sanitation must be prioritised;”

44 Regulation 4(1)(b)(i) provides as follows:



“(b) as far as schools are concerned which exist when these regulations are published, must, subject to subregulation (5), and as far as reasonably practicable-

(i) with reference to the norms and standards mentioned in sub regulation (3)(a) and (b) be complied with within a period of three (3) years from the date of publication of these regulations;”

45 Regulation 10 provides as follows:

“(1) All schools must have some form of power supply which complies with all relevant laws.

(1) The choice of an appropriate power supply must be sufficient to serve the power requirements of each particular school and must be based on the most appropriate source of power supply available for that particular school.

(2) Forms of power supply could include one or more of the following:

(a) Grid electrical reticulation;

(b) generators;

(c) *solar power energy; or*

(d) *wind powered energy sources.”*

46 Regulation 11 provides as follows:

“(1) All schools must have a sufficient water supply which complies with all relevant laws and which is available at all times for drinking, personal hygiene and, where appropriate, for food preparation.

(2) Sufficient water-collection points and water-use facilities must be available at all schools to allow convenient access to, and use of, water for drinking, personal hygiene and, where appropriate, for food preparation.

(3) The choice of an appropriate water technology must be based on an assessment conducted on the most suitable water supply technology for each particular school and must be maintained in good working order.

(4) Sources of water supply could include one or more of the following:

(a) A municipal reticulation network;

- (b) *rain water harvesting and, when so required, tanker supply from municipalities;*
- (c) *mobile tankers;*
- (d) *boreholes and, when so required tanker supply from municipalities; or*
- (e) *local reservoirs and dams.”*

47 Section 12 provides for sanitation and it provides as follows:

- “(1) All schools must have a sufficient number of sanitation facilities, as contained in Annexure G that are easily accessible to all learners and educators, provide privacy and security, promote health and hygiene standards, comply with all relevant laws and are maintained in good working order.*
- (2) The choice of an appropriate sanitation technology must be based on an assessment conducted on the most suitable sanitation technology for each particular school.*
- (3) Sanitation facilities could include one or more of the following:*
 - (a) Water borne sanitation;*

- (b) *mall bore sewer reticulation;*
- (c) *septic or conservancy tank systems;*
- (d) *ventilated improved pit latrines; or*
- (e) *composting toilets.*

(4) *Plain pit and bucket latrines are not allowed at schools."*

48 The Norms and Standards makes provision that schools that do not have access to any form of power supply, water supply or sanitation must be prioritised in terms of Regulation 4(3)(b). It should also be borne in mind that services as required in terms of Regulation 4(3)(b) are not within my competence. The provisions of the Framework Act will then find application and therefore the other state departments that are involved should be consulted for the provision of such services.

49 It is respectfully submitted that it is therefore not competent for the above Honourable Court to grant prayer 5 as prayed for by the Applicants, wherein the period of three years, from the date of publication of the Regulations, is imposed on the Department of Energy, the Department of Public Enterprises, the Department of Water and Sanitation, and all other relevant departments including the Department of Public Works which is responsible for immovable property of the State when all those departments are not parties



before court. It is therefore submitted that this prayer cannot be granted.

Relief sought set out in paragraph 24.6 above

50 In prayer 6 the Applicants pray for a declaration that regulation 4(2)(b) of the Regulations 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. It is peculiar that Applicants would seek a declaratory when in fact Regulation 4(2)(b) already caters for what the Applicants purport to seek. Regulation 4(2)(b) reads as follows:

“The plans and prioritisations of the schools contemplated in paragraph (a) must, where possible and reasonable practicable, be revised and brought in line with these Regulations.”

51 The declaratory sought by the Applicants in prayer 6 has no basis. It is further submitted that the Regulations have set out the standards in terms of which the additions, alterations and improvements to schools should be done and therefore there can never be a position where the additions, alterations and improvements of the schools which have already been prioritised within the 2013-2014, 2014-2015 and 2015-2016 MTEF cycle would not conform with the Regulations. It therefore does not make sense that the Applicants

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would seek declaratory relief when there is no evidence of non-compliance with the Regulations or where there is no evidence of deviation from the Regulations.

Relief sought as set out in paragraph 24.7 above

52 The next prayer sought by the Applicants is that the above Honourable Court must declare that regulations 4(6)(a) and 4(7) are invalid to the extent that they do not provide for the plans and reports to be made available to the public. The Applicants seemed to overlook one important aspect in that within school governance, there is the school governing body which is made up of representatives from the teaching staff, the community, parents and learners. All these stakeholders are therefore involved and they would have sight of the plans and reports. The other fact that the Applicants seem to ignore is that regulations 4(6)(a) and 4(7) are as a result of Section 58C of the SASA. Section 58C of SASA does not make provision for the plans and reports to be made available to the public nor does it make provision for public participation in the plans and reports except to an extent of the involvement of the school governing body.

53 The Applicants do not attack the validity of Section 58C of SASA but they purport to do so by attacking regulations 4(6)(a) and 4(7). If the Applicants are not satisfied with Section 58C, they should openly



challenge the validity of the section as unconstitutional. Proper procedures must be followed where a party wants to challenge the validity of a section of an act of Parliament. It is therefore submitted that the above Honourable Court cannot grant this declaratory in the face of what the Applicants are putting before court.

54 It is also submitted that making available the plans to the public in terms of regulations 4(6)(a) and 4(7) would have a ripple effect in that it will extent the periods as provided for in Section 4(1)(b)(i) to (iv) of this Regulations.

55 Therefore, the relief sought by the Applicants is ill-conceived and should not be granted.

NON-JOINDER

56 It is furthermore respectfully submitted that the Applicants have failed to join parties that are necessary to these proceedings, and that have a direct and material interest in the relief sought.

57 The parties are:

57.1 The National Assembly. The National Assembly is responsible for the approval of the annual budget, out of which funds are allocated to the various Departments. The Applicants take issue that the Norms and Standards have



been qualified by making provision therefore that it will only be applicable insofar as reasonably practicable especially having regard to the available funds in order to give effect thereto;

- 57.2 The Minister of Public Works, and the Department of Public Works, namely the Minister and the Department responsible for infrastructure of the State in general;
- 57.3 The Minister of Finance and National Treasury, who are responsible for the preparation of the annual budget for the allocation of funds;
- 57.4 The Minister of Water and Sanitation and the Department of Water and Sanitation, responsible for infrastructure relating to water and sanitation;
- 57.5 The Minister of Energy and the Department of Energy, being responsible for the provision of electrical infrastructure;
- 57.6 Eskom SOC Limited, namely the sole provider of electricity and electrical infrastructure in South Africa;
- 57.7 The minister of Rural Development and Land Reform and its Department, responsible for all State land and the making available thereof.



58 Until such time as these necessary parties have been joined no relief can be granted in favour of the Applicants.

THE LEGACY OF APARTHEID

59 When South Africa became a democracy, it inherited a racially differentiated education system. The system was fragmented, comprising thirteen different departments organised along eight lines with vast inequalities throughout the system.

60 Funding was disproportionately allocated according to race. The major share was dedicated to the education of the White minority. At the height of apartheid, government was spending nine times more on White learners compared to that of African learners in homelands. Consequently, the education of Africans was characterised by low quality and limited resources evidenced in high teacher-learner ratios, inadequate infrastructure and ill-prepared teachers. The apartheid system's skewed funding meant that schools teaching Black learners had limited funding to spend on school infrastructure and the maintenance of existing buildings, science laboratories, and mathematics and science equipment.

61 In 1994 only 54% of the Black teachers were suitably qualified, compared to the 99% of White educators, 93% for Indians and 71% for Coloureds. In the higher education sector 80% of professional



staff was White. Only 12% was Black, 4% Coloured and 4% Indians. Women were generally under-represented and only constituted 34% of the staff.

62 At school level, infrastructure backlogs were immense. Some 59% of schools were without electricity, 34% without water, 12% without toilets, 61% without telephones and 82% without a library. Compounding this, 57% of schools had classrooms with 45 learners or more.

63 Consequently, the White minority enjoyed better education resources while the African education was under-resourced with limited access to quality education. In summary, in 1994 the democratic government inherited an unequal education and training system in terms of access, infrastructure, internal efficiency, input and output.

64 By 1994 the number of African learners sitting for matric was 410,784 with only 11% of them achieving university entrance qualifications. This is a graphic indication of the selectively-poor quality of the apartheid education system. In 1990 only a quarter of African matriculants participated in mathematics compared to 64% White and 70% Indian students.

65 Besides the fact that fewer African learners took mathematics as a matric subject, only 15% passed mathematics at either standard or



higher grade. Withholding mathematics from African people in South Africa was a tool designed by the apartheid government to implement the vision of Bantu education, designed to under-develop and exclude Black people. At university level very few Black students were graduating in mathematics and engineering fields. Only 2% of Blacks graduated in engineering compared to 92% Whites in 1991.

Improvements since 1994

- 66 At the dawn of democracy, the injustices wrought by the apartheid education system required immediate arrest and counteraction. This required an overhaul of the statutory and policy environment.
- 67 A most important legislative instrument enacted during this period is SASA. It provides for a uniform system for the organisation, governance and funding of schools. SASA gives effect to the constitutional right to education, ensuring that all learners have a right of access to education without discrimination. It makes schooling compulsory for all children from the year in which they turn 7 to the year in which they turn 15, or at the end of Grade 9.
- 68 An equally important legislative intervention of this period is NEPA. It provides for the determination of national education policy (including

