IN THE EASTERN CAPE HIGH COURT, BHISHO

CASE NO. 276/16

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**

REPLYING AFFIDAVIT

I, the undersigned,

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state under oath the following:

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1. I am the General Secretary of the first applicant and deposed to the founding affidavit in this application on 16 May 2016.

2. In this affidavit I reply on behalf of the first and second applicants to the answering affidavit deposed to by the Minister of Basic Education ('the Minister') on 10 October 2016 ('the Minister's answer').

3. The fourth, fifth and sixth respondents have filed notices of intention to abide on the 10 August, 5 August and 2 August 2016 respectively. The tenth respondent has filed a notice of intention to oppose on 20 July 2016 and apparently aligns itself with the Minister's answering affidavit. The Equal Education Law Centre ('EELC') has been unable to establish whether the remaining respondents oppose the application, despite directing an enquiry on 25 October 2016 to the Office of the State Attorney in Pretoria (which office filed a notice of intention to oppose on behalf of all of the respondents on 29 June 2016).

4. A good deal of the Minister's answer consists of legal submissions. I have been advised that it is not necessary to traverse all of these in this affidavit, and that they will be addressed in argument to the extent necessary. Further, I stand by what I said in the founding affidavit. I deny the content of the Minister's answer to the extent that it is inconsistent with what I said in the founding affidavit.

5. The Minister's answer contains several broad themes or arguments, each of which I intend to address before responding *seriatim* to those remaining

paragraphs which call for a reply. In doing so, I use the same abbreviations as in the founding affidavit.

COMPETENCE OF THE RELIEF SOUGHT

6. The Minister asserts that the regulations comprise administrative action and that insofar as the Applicants' relief is not aimed at reviewing and setting them aside in terms of PAJA, but instead at obtaining declaratory orders, it is incompetent (answering affidavit paras 3.1; 3.2; 4 to 11). I understand this point to be directed at the relief sought in paragraphs 3 to 7 of the notice of motion in which various declaratory orders are sought.

7. I am advised that the question of whether the making of regulations comprises '*administrative action*' as defined in section 1 of PAJA, has not been answered definitively by the Constitutional Court. This will be addressed in argument.

8. Having said that, I am advised that nothing turns on whether the regulations in this case constitute administrative action.

9. Section 8(1) of PAJA provides that '*[t]he court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders - ...(d) declaring the rights of the parties in respect of any matter to which the administrative action relates*'.

10. It is therefore competent for the applicants to seek the declaratory relief which they do. It is clear from the founding affidavit that they seek the declaratory

relief because the regulations as presently formulated are unlawful as being inconsistent with the Constitution, SASA and the order of 11 July 2013.

11. I am advised however that the notice of motion ought to be amended to seek an explicit declaration that the regulations in respect of which declaratory relief is sought are inconsistent with the Constitution and invalid. I am advised that a notice in terms of Rule 28(1) will be filed shortly.

NON-JOINDER, AND THE RESPONSIBILITY OF THE MINISTER

12. The Minister alleges that the applicants have failed to join parties that are necessary to the proceedings and that have a direct and material interest in the relief sought. These include the National Assembly; the Ministers of Public Works, Finance, Water and Sanitation, Energy, and Rural Development and Land Reform; each of those Departments; and Eskom Holdings SOC Limited. The Minister contends that until such time as these parties are joined, no relief may be granted in favour of the applicants.

13. The National Government bears the Constitutional obligations on which the Applicants rely. The Minister is cited as the representative of the National Government, and the person required by SASA to prescribe the minimum norms and standards for school infrastructure in order to give effect to the Constitution. It is for the Minister, as the bearer of those duties and the representative of the National Government of which they are part, to engage them in this litigation to the extent that this may be necessary. This will be addressed in argument.

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14. It is the Minister who bears overall constitutional responsibility, on behalf of the National Government, for the realisation of the right to a basic education. 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.

15. I point out that the Minister has been cited expressly in her role as representative of the National Government of the Republic (founding affidavit para 21). The Minister has noted that fact (answering affidavit para 80). The National Government is therefore properly before the Court.

16. The Minister lays great emphasis on the importance of implementation protocols in terms of the Intergovernmental Relations Framework Act. I submit that to the extent that an implementation protocol is appropriate (and the Minister appears to suggest that it is), she must engage with the relevant institutions and enter into an implementation protocol before she prescribes the norms and standards. An implementation protocol will inter alia '*describe the roles and responsibilities of each organ of state in ... performing the statutory function or providing the service*'.

17. What the Minister may not do is prescribe norms and standards, and leave it entirely to chance as to whether they will be effective, because the co-operation of other entities is necessary, and she has done nothing to ensure their co-operation, including through entering into an implementation protocol.

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18. The Provincial Governments, too, bear Constitutional duties. The MECs are cited as representatives of their respective Provincial Governments. The MECs bear specific 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. They are required to ensure compliance with the norms and standards in their respective provinces; 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.

19. I point out that section 58C(1) requires the provincial governments to ensure compliance though an implementation protocol.

THE CONTENT OF THE RIGHT TO A BASIC EDUCATION

20. A theme which runs through the Minister's answer is that the right to a basic education in terms of section 29(1)(a) of the Constitution is not an immediately realisable right, but one which is progressively realisable (answering affidavit paras 88.2; 132.1; and 136.1). The Minister relies for this contention on three things (answering affidavit para 88.2):

20.1. The right may be limited in terms of section 36 of the Constitution (in this case the regulations);

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20.2. SASA '*points (sic) that basic education is progressively realisable*'; and

20.3. This '*resonates with the Constitutional Court's dictum in the Ermelo case by indicating that this is important and must be understood: "within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress"*'.

21. As to the argument in paragraph 20.1 above, I submit that the fact that a right may be limited by the limitations clause in section 36 of the Constitution has nothing to do with the content of the right. The Constitutional Court has held expressly that the right to a basic education in terms of section 29(1)(a) is an immediately realisable right. In *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) ([2011] ZACC 13), the Court said:

> '*It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.*' (para 37)

22. As to whether the regulations may constitute a valid section 36 limitation of the right, I am advised that the promulgation of a law of general application in and of itself is not sufficient to constitute a reasonable and justifiable limitation of a fundamental right. I submit that the Minister has not attempted to discharge the burden of demonstrating that the limitation satisfies the requirements of section 36 for a valid limitation. She is inconsistent as to whether she contends that they are a limitation at all.

23. As to the argument in paragraph 20.2 above, I submit that an enabling statute cannot alter the content of the constitutional right to which it gives effect. If SASA were to purport to do so, it would be unconstitutional and invalid. An enabling statute can also not be used to interpret the content of a right contained in the Bill of Rights. The applicants in any event deny that anything contained in SASA purports to render the right progressively realisable or points to the progressive realisation interpretation contended for by the Minister.

24. As to the argument in paragraph 20.3 above, the statement in *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC)* ('Ermelo') to which the Minister refers was made in context of a school language policy. What was implicated in *Ermelo* was section 29(2) of the Constitution which is not an immediately realisable right. Section 29(1)(b) states that everyone has a right to receive education in a language of their choice where *"reasonably practicable"*. Section 29(2) specifically requires that equity (fairness), practicability and historical

redress be taken into account. These are precisely the factors to which the Constitutional Court refers in this passage.

25. I respectfully submit that the Minister's assertions demonstrate that she has misunderstood her Constitutional obligations. This may well explain why she has acted as she has.

'REGULATION 4(5)(a) IS A JUSTIFIABLE LIMITATION OF THE RIGHT TO A BASIC EDUCATION'

26. The Minister's contentions in respect of the relief sought by the Applicants in relation to regulation 4(5)(a) are the following:

26.1. The Minister is not the competent authority when it comes to the provision of services and infrastructure relating to water, sanitation, electricity, roads and the like; these areas fall within the competence of other ministers and their departments; and she was therefore '*compelled to insert regulation 4(5) to comply with Chapter 3 of the Constitution and the Framework Act*' (paragraphs 32; 85; 98; 133.3; 134.2 to 134.4; 136.1; 139; 140; 141; 144; 145; 146; 147; 152.3; 153.2; 154.2; 156; 166.2 and 166.3; 170.5); and

26.2. Regulation 4(5) is a law of general application in terms of section 36 of the Constitution (paragraphs 133.1 to 133.3).

27. The Minister's argument, in short, appears to be that it would be unconstitutional and unlawful for her to make regulations which create a binding obligation on the national government. I submit that this argument is fundamentally flawed and reflects an incorrect understanding of the Constitution and section 5A of SASA. This will be addressed in argument.

28. Regulation 4(5)(a) was, far from being a necessary addition to the regulations, an unlawful one for the reasons given in the founding affidavit.

29. As to whether regulation 4(5)(a) constitutes a reasonable and justifiable limitation in accordance with the requirements of section 36 of the Constitution, I am advised that the *onus* is on the Minister to put up the relevant policy and factual material which justifies such a conclusion. The Minister has failed to do so. She refers instead in broad terms to the fact that the implementation of the norms and standards requires the co-operation of other organs of state. This cannot constitute a reasonable and justifiable ground for limiting the right to a basic education.

REGULATION 4(3)(a) READ WITH REGULATION 4(1)(b)(i)

30. The Minister's answer as regards the applicants' contentions under this head is most usefully analysed in relation to each of two separate points made by the applicants as regards this regulation.

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31. The first point which the applicants make is that regulation 4(3)(a) read with regulation 4(1)(b)(i) of the regulations is inconsistent with the Constitution and invalid insofar as it 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 (founding affidavit para 194.1).

32. The relief which the applicants seek in this regard is a declaratory order which makes it clear that by 'prioritise' what is meant is that such schools 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 Occupational Health and Safety Act 85 of 1993 ('OHSA').

33. The Minister contends that regulation 4(3)(a) read with regulation 4(1)(b)(i) of the regulations was intended to, and does in fact say that (answering affidavit paras 36.1 to 36.9 (first sentence)). There is therefore no dispute between the parties about what the regulation should say. The dispute lies in the fact that the applicants assert that the regulation, as presently formulated, does not say this clearly, whereas the Minister contends that it does.

34. I am advised that this is a matter for argument.

35. The second point which the applicants make is that regulation 4(3)(a) read with regulation 4(1)(b)(i) of the regulations is inconsistent with the Constitution and

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invalid insofar as it 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'). It is instead aimed only at schools built entirely from such materials (answering affidavit paras 194.2; 195). In other words, there is no requirement to replace individual classrooms or structures which are built from those materials which are found in school where there are some safe structures.

36. In answer the Minister agrees with the applicants' interpretation of the regulation, namely that only schools built entirely of these materials will be prioritised, but asserts that this was a matter which lay within her discretion to decide when she made the regulations (answering affidavit paras 36.10 to 41).

37. The Minister does not however put up a rational basis for drawing a distinction between schools which comprise entirely of unsafe structures and schools which have some safe structures but others which are not. The unsafe structures in schools which have some safe structures presumably pose just as much risk to learners as those which are found at schools comprising entirely unsafe structures.

38. The Minister's confirmation that regulation 4(3)(a) read with regulation 4(1)(b)(i) must be understood in this way justifies the declaratory relief which the applicants seek.

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REGULATION 4(3)(b) READ WITH REGULATION 4(1)(b)(i)

39. The applicants contend that regulation 4(3)(b) read with regulation 4(1)(b)(i) is inconsistent with the Constitution and invalid insofar as it does 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.

40. The Minister does not contend that regulation 4(3)(b) read with regulation 4(1)(b)(i) in fact means what the applicants request that the Court make clear (namely that it is intended 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 of the regulations).

41. Instead the Minister contends that the relief sought is incompetent because the services listed in regulations 10 to 12 are not within her competence, and the Departments of Energy, Public Enterprises, Water and Sanitation, Public Works and other relevant departments are not parties before the Court (paragraphs 48 to 49).

42. I submit that for the reasons given in the founding affidavit and above, this is not a defensible answer. This will be addressed in argument.

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REGULATION 4(1)(a) READ WITH REGULATION 4(2)

43. The applicants contend that this regulation entirely excludes from the norms and standards, all new schools and additions, alterations and improvements which are the subject of MTEF plans within the current cycle (founding affidavit para 225) ('currently budgeted for schools'). They seek an order declaring that regulation 4(2)(b) requires that all such plans 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.

44. The Minister takes issue with this because, she says, regulation 4(2)(b) already provides that the plans and prioritisation of currently budgeted for schools must, where possible and reasonably practicable be revised and brought in line with the norms and standards (answering affidavit paras 50 to 51). However, it is the future planning of such schools with which the applicants are concerned.

45. The applicants recognise the need for the exclusion insofar as it allows for infrastructure delivery to take place in accordance with existing and budgeted for plans. But the effect of regulation 4(1)(a) read with regulation 4(2) is to exclude currently budgeted for schools from the norms and standards indefinitely. In other words, the infrastructure requirements which are intended to be met in seven or ten years or by 31 December 2030 simply do not apply.

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REGULATIONS 4(6)(a) AND 4(7)

46. The applicants contend that these 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. They therefore seek relief aimed at directing the Minister to amend the regulations to provide that such plans and reports must be made publicly available within a stipulated reasonable period of their having been submitted to the Minister.

47. The Minister in answer asserts that:

47.1. The applicants seem 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*' and '*[a]ll these stakeholders are therefore involved and they would have sight of the plans and reports*' (answering affidavit para 52);

47.2. Regulations 4(6)(a) and 4(7) '*are as a result of Section 58C of the SASA*'; section 58C '*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*'; and the appropriate course for the applicants to have adopted would therefore have been to attack section 58C of SASA which they have not done (answering affidavit para 53); and

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47.3. the making of the plans and reports available to the public '*would have a ripple effect in that it will extent the periods as provided for in Section 4(1)(b)(i) to (iv) of the regulations*' (answering affidavit para 54).

48. As to the answer in paragraph 47.1, the Minister does not explain why it is to be assumed that school governing bodies will have sight of the regulation 4(6)(a) and 4(7) plans and reports. There is nothing in SASA to support such an assumption, and no facts are alleged to justify such an assumption. As a matter of fact, school governing bodies have historically not been furnished with such plans and reports without sustained pressure being applied by EE on the Minister. That is one of the reasons why EE has launched this application.

49. As to the answer in paragraph 47.2 above:

49.1. Section 58C does not prohibit the public disclosure of the reports. It is not necessary to attack it as inconsistent with the Constitution.

49.2. The only duty to report which is placed on an MEC in terms of section 58C of SASA is in section 58C(3) which provides that '*[t]he 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*' ('the section 58C(3) requirement') (emphasis provided).

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49.3. Regulation 4(6)(a) provides that an MEC 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 subregulation (1) are concerned*' ('the regulation 4(6) requirement')) (emphasis provided);

49.4. Regulation 4(7) provides '*[i]n addition to the requirements contained in section 58C of the Act, [an MEC] 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)*' ('the regulation 4(7) requirement') (emphasis provided);

49.5. The regulation 4(6)(a) requirement, namely to provide the Minister with detailed plans on the manner in which the norms and standards are to be implemented, is clearly different from the section 58C(3) requirement which requires reporting on the extent to which the norms and standards have been complied with.

49.6. By contrast, the section 58C(3) and regulation 4(7) requirements are both concerned with reporting on past compliance (with the norms and standards in the case of section 58C(3) of SASA, and with regulation 4(6) plans in the case of regulation 4(7)). Regulation 4(7) however makes it clear that it constitutes an additional requirement to that contained in section 58C(3) of SASA.

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49.7. It is therefore incorrect to equate the regulation 4(6)(a) and 4(7) requirements with the section 58C(3) requirement. They are separate requirements. The contention that the only appropriate course would have been to attack the constitutionality of section 58C(3) of SASA is therefore without any foundation.

50. As to the answer in paragraph 47.347.3, the Minister provides no factual or evidential basis for her assertion that making the plans and reports public would result in the regulation 4(1)(b) timeframes not being met. There is no reason why this should be the case. I am advised that the Constitutional Court has repeatedly espoused the importance of public information and public participation.

'THE APPLICATION HAS BEEN BROUGHT OUT OF TIME'

51. The Minister asserts that insofar as the application constitutes a review application in terms of PAJA, it is out of time (answering affidavit paras 3.3; 12 to 19; 71; 118.2).

52. The applicants made a case in Part N of the founding affidavit, and the parts of the founding affidavit referred to in Part N, for why it would be in the interests of justice for the Court, to the extent necessary, to extend the 180-day period stipulated in section 7(1) of PAJA in terms of section 9(2) of PAJA. The Minister has provided no answer at all in this regard. All she does is assert that the application is out of time.

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53. The Minister also does not dispute that:

53.1. EE wrote to the Minister as early as 12 February 2014 (after the norms and standards were promulgated on 29 November 2013) detailing concerns with the norms and standards and stating that these were '*necessary to correct in order to ensure that the norms and standards are legally and constitutionally valid*' (founding affidavit para 119, Annexure 'TM19');

53.2. The Minister's stance as regards EE's concerns has always been that she needed more time to assess the efficacy of the norms and standards in practice and also an opportunity to engage with the MECs implementation plans before considering EE's objections.

53.3. In her letter of 17 March 2014 the Minister said that '*the application of the regulations in practice should be given some time in order to accurately assess their effectiveness and efficiency*' (founding affidavit paras 120 to 120.10; Annexure 'TM20'). The same sentiment was echoed by DBE officials in the meeting held between EE and the DBE on 3 July 2014 (see the letter referred to in the founding affidavit para 125; Annexure 'TM23').

53.4. The next letter which the Minister addressed to EE was almost seven months later on 9 October 2014 (received by EE on 29 October 2014)

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(founding affidavit para 125; Annexure 'TM23'). The Minister said in this letter:

> *'In my letter of 17 March 2014, I 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. I still hold this view. . .*
>
> *The officials who attended the meeting* [of 3 July 2014] *informed me that they had argued that it was prudent to evaluate the situation once all of the plans of the* [MECs] *for Education had been submitted to me, as required by regulation 4(5)(a) of the regulations. . ., and had been studied and evaluated. I agree with this view. When this has 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 are indeed required."*

53.5. The last meeting EE had with DBE officials in which the norms and standards were raised was a meeting on 24 February 2016. The DBE officials in attendance promised to take up with the Minister EE's concerns regarding the outstanding regulation 4(6)(a) and 4(7) plans and reports and particularly, EE's unanswered letters calling for the deficiencies to be addressed. EE recorded this promise in a letter sent to

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the Minister the following day. There was however no response. (founding affidavit para 129; Annexure 'TM26')

53.6. In short, for over two years EE reiterated its request that the deficiencies in the regulations be addressed and provided the Minister with ample time within which to do so. The Minister consistently said that the regulations should be applied in practice for a while, to make it possible accurately to assess their effectiveness and efficiency. EE's attempts at constructive engagement were aimed at having the deficiencies in the regulations resolved without becoming embroiled in legal proceedings. The Minister now asks this Court to penalise EE for the indulgences granted and the good faith displayed towards her. I submit that her attitude is regrettably cynical.

54. As to the period between the taking by EE of the resolution on 9 October 2015 to institute litigation, and the launch of the application on 19 May 2016, I point out the following:

54.1. Shortly after 9 October 2015, EELC visited the Eastern Cape to meet with principals, teachers and learners who endure poor infrastructure conditions at their schools in order to obtain further feedback which could inform the ambit of the application.

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54.2. EELC stayed in the Eastern Cape between 18 October 2015 and 22 October 2015 to gather evidence from school staff and learners to support its challenge to the regulations.

54.3. On 21 October 2015, during this visit, EELC first encountered the principal of the second applicant, Mr Mentoor of Amatolaville Primary. Mr Mentoor expressed an interest in the school joining in the matter but was required to discuss this with the school governing body. As it happened, Amatolaville's school governing body only resolved to join in the matter on 11 February 2016.

54.4. In January 2016 EELC also visited Gauteng to obtain evidence from schools in that province, although only one affidavit was ultimately obtained from Gauteng.

54.5. The EELC is based in the Western Cape. Securing affidavits which needed to be drafted by EELC and settled by counsel, presented logistical difficulties. The last of the supporting affidavits from the Eastern Cape were attested to on 17 May 2016, two days before EE and Amatolaville launched this application.

55. Section 172(1)(a) of the Constitution requires that a court when seized with a constitutional matter *must* declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency. No time bar is placed on this obligation. It is not only mandatory but also of the utmost importance that

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a High Court pronounce upon a constitutional challenge to a law before it. This is because a failure to do so may result in further unlawful consequences through the continued operation of the impugned law in practice. The section 180-day review period in PAJA can never be used to hamstring the Court in fulfilling its constitutionally mandated duty.

56. While the Minister repeatedly asserts that the applicants are time barred under PAJA from instituting this application, she does not say that the Respondents or anyone else would suffer prejudice if this Court were to hear the matter. She does not provide any reasons why refusing an extension of the section 7 period would be in the interests of justice, or would further the policy considerations which underlie section 7. I submit that there plainly are no such reasons.

SERIATIM RESPONSE

AD PARAGRAPH 81:

57. The Minister deals in this paragraph for the first of several times with the status of the previous application and the affidavits filed in that application (see also, among others, answering affidavit paras 93, 103, 105 and 107).

58. The point which the applicants make in the founding affidavit at paragraphs 40 to 58 is simply that the Minister did not dispute several allegations upon which the first applicant relied in that application. To the extent that these allegations are relied upon in this application they are set out in detail in the founding

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affidavit. There can therefore be no complaint that the applicants have somehow sought to incorporate allegations by reference. The Minister seeks to evade answering those allegations, when she has previously admitted them.

59. For the avoidance of any doubt as regards the Minister's previous admission of the allegations, I attach as annexure '**TM61** the paragraphs from affidavits used in support of the previous application which are repeated in this application, and the Minister's answers thereto. In the light of the Minister's failure to deny the explicit allegation that she previously made these admissions, I have been advised that it is not necessary to obtain further affidavits from the people in question.

60. I also point out that the Minister in any event admits (answering affidavit paragraph 150) that 'the provision of adequate school infrastructure is a necessary ingredient for the realisation of the right to a basic education' (founding affidavit paragraph 183).

AD PARAGRAPH 91.1:

61. The Minister denies that 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 and that it breaches section 28(2) of the Constitution. The Minister does so '*on the basis of the social and historical context of the right to a basic education*' which is presumably a reference to the legacy of Apartheid. But that can never serve as a basis upon

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which to deny that inadequate school infrastructure violates learners' rights to have their dignity respected and protected and their best interests preserved. Past violations of the right to education of black learners cannot be used to refute the existence of current rights violations suffered by this same marginalised group of learners.

62. I deny the second sentence of this paragraph. In amplification of this denial, but without derogating from the generality thereof, I refer to the allegations contained in several affidavits which were filed in support of this application which demonstrate violations of the dignity of learners and their rights in terms of section 28(2) of the Constitution.

AD PARAGRAPH 94.3:

63. The DBE presented its 2015/16 fourth quarter results and Treasury presented its 2016/17 first quarter results to the Portfolio Committee on Basic Education and the Standing Committee on Appropriations respectively on 23 August 2016.

64. These results reveal that there has once again been severe underspending of the ASIDI grant, despite the then impending November 2016 norms and standards deadline. I refer in this regard to the DBE Fourth Quarter expenditure report presentation at 65 (**'TM62'**), and the Treasury 2015/2016 Preliminary Expenditure Outcomes & 2016/2017 Q1 spending presentation at 7 (**'TM63'**).

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65. The DBE's slow pace in spending this grant, and the subsequent decrease in funds allocated to the grant by national Treasury, do not bode well for successful implementation of the norms and standards.

66. In its presentation to Parliament, Treasury conceded that underspending of this grant has been a problem since its inception in 2011/12 ('TM63' at 20). As a result, budget allocations have been decreased to align them with spending. The ASIDI programme receives R582 million less over the medium term, as revealed by then Finance Minister Nhlanhla Nene in his 2015/16 budget speech.

67. In his speech, Minister Nene indicated that only R7.4 billion had been allocated to ASIDI over the medium term. (Minister Nene's budget speech of 25 February 2015 at 12: **'TM64'**). The allocation of R7.4 billion is reflected in the 2015/16 Division of Revenue Bill (Division of Revenue Bill 5 of 2015, GG 38458 of 13 February 2015, Schedule 6 Part A at 51: **'TM65'**.) In comparison, in the 2014/15 Division of Revenue Bill, ASIDI was allocated R7.982 billion (Division of Revenue Bill 5 of 2014 GG 37337 of 21 February 2014, Schedule 6 Part A at 51: **'TM66'**.)

68. The DBE underspent on ASIDI by a further R423.766 million last year ('TM62' at 68). This amounts to a collective 'loss' of over R1 billion to this grant. That is a loss of over R1 billion for the purpose of eradicating dangerous, dysfunctional school infrastructure.

69. The problems associated with the ASIDI grant show no signs of abating: Treasury also reported that in the first quarter of 2016/17, the DBE only spent R176 million against a projected amount of R929 million for this grant. This means that more underspending is likely for 2016/17 (Annexure 'TM63' at 20.)

AD PARAGRAPH 94.5 TO 94.8:

70. I acknowledge that progress has been made by government in the delivery of physical infrastructure.

71. I point out however that the three year deadline imposed by regulation 4(1)(b)(i) and 4(3)(b), by which all schools were to comply with regulations 10 to 12 as regards power supply, water supply and sanitation was reached on 29 November 2016. Despite that being so, in June 2016 there were still 171 schools without any water supply; 569 schools without any electricity supply; and 62 schools without any sanitation facilities. This appears from the 2016 NEIMS report, a copy of which is attached marked '**TM67**'. Whereas regulation 12(4) prohibits plain pit latrines after the three year deadline, in June 2016, 9 203 schools still had pit latrines.

72. Furthermore, on 29 November 2016, the DBE published regulation 4(7) reports apparently prepared by the PEDs in November 2016 ('the November 2016 regulation 4(7) reports'). Copies of the reports are attached marked '**TM68A-I**'. These reports confirm the failure by the majority of provinces to comply with the first three-year deadline.

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AD PARAGRAPH 129:

73. I submit that no such obligation flows from the regulations.

AD PARAGRAPH 135:

74. I admit the third sentence of this paragraph but deny that this is any reason for not making provision in the regulations for the regulation 4(6)(a) and 4(7) plans and reports to be made available, as a matter of course, to the public. Information pertaining to what is planned for a particular school in a particular year is vital to enable schools to manage their own resources. The provision of this information is necessary in order to give effect to the right to basic education. School governing bodies ought not to be compelled to bring an application in terms of the Promotion of Access to Information Act 2 of 2000 in order to obtain, on a routine basis, the plans for their schools. The same applies to members of the public.

75. I admit the contents of the fourth sentence of this paragraph insofar as the regulation 4(6)(a) plans for 2015 are concerned. But I repeat the contents of paragraphs 130 to 146 of the founding affidavit in which I describe the lengths to which Equal Education had to go in order to have those reports published. Save as aforesaid I deny the contents of the fourth sentence of this paragraph.

76. I deny that the fifth sentence of this paragraph provides any cogent reason why the regulations ought not to provide for the publication of regulation 4(6)(a) and 4(7) plans and reports.

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AD PARAGRAPH 136.4:

77. I deny that this Court may not have regard to the contents of paragraphs 159 and 160 of the founding affidavit because it '*does not have jurisdiction over other provincial divisions where such cause of action arose*'. The fact that EE, at the time that I deposed to the founding affidavit, continued to struggle to obtain regulation 4(6) and 4(7) plans and reports (in particular, at that stage, updated implementation plans and reports on progress in terms of the previous year's plans which were due on 29 November 2015) and that the plans and reports for this particular period are yet to materialise is evidence which this Court may take into account in deciding this application: it is evidence which is relevant to the matters which this Court is required to determine.

78. As noted above, the November 2016 regulation 4(7) reports have since been published.

AD PARAGRAPH 137:

79. The Minister is obliged to prescribe norms and standards for school infrastructure which are uniform across the country.

AD PARAGRAPH 157.6:

80. I deny the first and third sentences of this paragraph.

MB

81. In amplification of this denial but without limiting its generality, I point out the following:

81.1. What was stated by the Minister in the letter dated 17 March 2014 was that individual classrooms built from inappropriate building materials would '*not wait for seven years but will commence concurrently and in parallel with the replacements of schools built entirely from an inappropriate material*'.

81.2. That is inconsistent with the approach which the Minister takes in this affidavit, namely that it lay within her discretion to give priority, as she duly did, to schools built entirely of inappropriate materials.

81.3. That inconsistency demonstrates that the declaratory relief sought is not merely of academic importance and that the applicants were justified in bringing the application as far as this regulation is concerned.

AD PARAGRAPH 158:

82. I deny the second sentence of this paragraph.

83. I point out that on 7 June 2016 the supporting affidavits of Ivan Mentoor, Nombelelo Barnes, Lunathi Mahobe, Isaac Ramrock, Tobeka Toni, Aphelele Mgidi, Nomathuse Daniel, Mntundini Saphepha, Gibe Zukhanye and Zubakazi Njemla were served together with the notice of motion and founding affidavit at each of the offices of the State Attorney listed in the notice of motion. This is

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confirmed by Lisa Draga of EELC in the accompanying confirmatory affidavit. That the State Attorney in Pretoria received all of these affidavits is further confirmed in a letter dated 22 November 2016 which is attached marked '**TM71**'.

AD PARAGRAPH 161.3:

84. In this paragraph, the Minister says (in the context of schools built from inadequate materials, and having referred to the legacy of apartheid): '*[i]t is therefore not practicable that the DBE will be able to eradicate the substantial back log in a matter of a few years without proper planning and proper cooperation from the different organs of state, and more specifically from a sizeable allocation of revenue from the National Treasury*'.

85. The Minister deposed to her answer on 10 October 2016. The plans were released on 29 November 2016. The statement appears in that context to anticipate the failure by the provinces to meet the 3 year deadline. The reasons given for why such a failure may have occurred are a lack of proper planning and proper cooperation from the different organs of state, and the lack of a sizeable allocation of revenue from National Treasury.

86. The first reason justifies the applicants' concerns about the consequences of regulation 4(5)(a).

TM MB

87. The applicants accept that it is not possible to address the entire backlog overnight. That however misses the point. The purpose of the Minister's power and duty under section 5A of SASA is to prescribe norms and standards for school infrastructure which ensure that the right to a basic education is fulfilled. The norms and standards prescribed by the Minister are so qualified that they do not have binding effect, and do not achieve the result which is required. They are, in truth, purely aspirational. That is inconsistent with the Constitution and SASA.

AD PARAGRAPH 162:

88. I deny the second sentence of this paragraph.

89. The applicants do not require the Court to direct the Minister to prescribe a detailed plan for each province. The applicants seek a declaratory order as regards what is meant in regulation 4(3)(b) by schools without access to any form of power supply, water supply or sanitation being 'prioritised'. The applicants contend that this means (when read with regulation 4(1)(b)(i)) that all such schools 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 of the regulations.

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AD PARAGRAPHS 168.2 TO 168.4:

90. None of these paragraphs addresses the problem with the way in which regulation 4(1)(a) and 4(2) are presently formulated, namely as excluding such schools from *future* planning in accordance with the norms and standards.

T.M. MB

AD PARAGRAPH 172.2:

91. I deny that U-AMP's in terms of the Government Immoveable Asset Management Act 19 of 2007 are the same as regulation 4(6) plans.

AD PARAGRAPH 175.2:

92. I have searched the websites of the Northern Cape, Eastern Cape, Limpopo, Free State, North-West, and KwaZulu-Natal provincial governments. It is not true that the regulation 4(6)(a) and 4(7) plans and reports may be found on those websites.

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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 19 day of December 2016.

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
DIEP RIVER
19 DEC 2016
STATION COMMANDER
SOUTH AFRICAN POLICE SERVICE