

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

Case No: 645/19

In the matter of:

**SCHOOL GOVERNING BODY OF DALAGUBA JUNIOR
SECONDARY SCHOOL** **First Applicant**

**SCHOOL GOVERNING BODY OF ZANEWONGA SENIOR
SECONDARY SCHOOL** **Second Applicant**

**SCHOOL GOVERNING BODY OF NGQWARA PRIMARY
SCHOOL** **Third Applicant**

And

MEC FOR EDUCATION: EASTERN CAPE **First Respondent**

SUPERINTENDENT, EASTERN CAPE EDUCATION **Second Respondent**

DEPARTMENT

MINISTER OF BASIC EDUCATION **Third Respondent**

**REPLYING AFFIDAVIT
ANSWERING AFFIDAVIT TO COUNTERCLAIM**

I the undersigned

TARRYN COLLEEN COOPER-BELL

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state under oath as follows:

1. I am a major female attorney, practicing at the Equal Education Law Centre (the "EELC") with its registered office at Isivivana Building, 8 Mzala Street, Khayelitsha.
2. The facts contained herein fall within my personal knowledge and belief unless otherwise stated, and are both true and correct. Where I rely on information provided by others and more especially the representatives of the applicants, this is borne out of necessity due to the nature of this application and the difficulty in having their representatives depose to affidavits timeously. I believe such information to be true and correct and have to the best of my ability attempted to verify such information.
3. I have read the answering affidavit of Mr Themba Kojana on behalf of the second and third respondents and respond thereto as follows.
4. I have been personally involved in the inspections at Dalaguba Junior Secondary School on 15 August 2019 and Zanewonga Senior Secondary School on 16 August 2019 in this matter and in the compilation of the information which formed the basis of this application. My colleague, Siphon Mzakwe ("Mzakwe") inspected Ngqwara Primary School on 16 August 2019 and has deposed to a confirmatory affidavit in that regard.
5. The photographs that were affixed to the Applicants founding papers were provided by the Applicants but Mzakwe and I confirmed what the photographs intended to convey when we inspected the schools.
6. In this affidavit I will address the following main issues:

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- 6.1. The timelines that relate to this matter;
- 6.2. The responsibilities of the SGBs vis-à-vis the Respondents with respect to school infrastructure
- 6.3. The counterclaim
- 6.4. Ad seriatum response

TIMELINES IN RELATION THIS MATTER

7. It is important that this Court appreciates that the Applicants made every effort to avoid launching these proceedings and had exhausted all avenues prior to resorting to this Court. Furthermore, the Respondents were made aware of the situation at the Applicant schools as early as the first week of June 2019.
8. In or about May 2019, the EELC was contacted by the chairpersons of the School Governing Bodies ("SGBs") of the three schools in question (the Chairpersons") who sought assistance with the issue of unsafe and inadequate learner toilets at their schools and in the case of Zanewonga Senior Secondary School, additionally, the poor condition of the classrooms. Whilst the condition of the classrooms do not form part of the relief in this application, they are a cause for concern and were included as part of the complaint on the school infrastructure as the temporary solution provided by the Respondents will not be sustainable in the medium to long term and it would be prudent to deal with this issue whilst simultaneously addressing the issue of the sanitation and water problems at that school.

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9. In consultation with the Chairpersons, the EELC requested further specific information from the Chairpersons in order to better understand the situation at their schools. This information included, for example, the total number of learners, number of existing toilets, description of the toilets, engagements with the Eastern Cape Department of Education ("ECDoE"), water supply, and photographic evidence of the existing learner toilets. Some of this information was not easily accessible and they requested time to peruse the schools' records. The EELC received this information towards the end of May 2019.
10. During and early in **June 2019**, the EELC contacted the circuit manager of Dalaguba Junior Secondary School - Mr Msweli to ascertain whether the ECDoE was aware of the school's predicament as well as the SGB's allegation of fraud by the previous principal in relation to the construction of toilets at the school. Mr Msweli confirmed telephonically that the ECDoE was aware of the lack of learner toilets at Dalaguba Primary School. Despite being aware, it was clear that a solution was not imminently forthcoming.
11. On **21 June 2019**, the EELC wrote to the ECDoE on behalf of the Schools, explaining the dire situation at the Schools and demanded a speedy solution, which included, as per our instructions mentioned above, *inter alia*, the provision of temporary safe and appropriate learner toilets. The ECDoE had until **Wednesday, 10 July 2019** to meet the demands which demands were not met. Save for acknowledging receipt of the letters, no meaningful response was received.
12. On **16 July 2019**, after having received instructions, a letter was directed to the ECDoE declaring a dispute and requesting that an alternative dispute resolution ("ADR") process be initiated. In this letter, the ECDoE had until **23 July 2019** to

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respond and until 2 August 2019 to institute an ADR process. Once again, despite acknowledging receipt thereof, the ECDoE failed to respond. It therefore became clear that litigation was inevitable.

13. The conditions at the Applicants' schools was therefore known to the Respondents as early as June 2019 and yet no action and not even an inspection of the Applicants' schools occurred until the Respondents were served with this application.

14. The Respondents' investigations as stated in Themba Kojana's affidavit commenced on 28 August 2018.

15. The allegation that the Respondents were not afforded a reasonable opportunity to investigate the situation at the schools is therefore strongly refuted.

THE RESPECTIVE RESPONSIBILITIES OF THE APPLICANTS AND THE RESPONDENTS

16. The Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, GR37081 29 November 2013 (the "Norms and Standards Regulations") state at Section 4 and under the heading "Implementation of Regulation" places the responsibility for the implementation of the Norms and Standards relating to infrastructure for schools such as those that the applicants represent with the Respondents.

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17. In particular, and in respect of schools categorised in terms of Section 3(1)(a) and 3(1)(b) which are what the Applicant's schools are, the Norms and Standards state that:

***4 (3)(c) a Member of the Executive Council must**, for the purposes of subregulation (1)(b)(ii), prioritise the norms and standards relating to the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter security, and their plans contemplated in subregulation (6) must reflect such prioritisation; and*

***4 (5)(b) The Department of Basic Education must**, as far as practicable, facilitate and coordinate the responsibilities of **the government agencies and entities** contemplated in paragraph (a). (my own emphasis)*

18. It is evident from the above, that the responsibility for the implementation of the Norms and Standards lie with the Respondents.

19. Section 5A of the South African Schools Act 84 of 1996 ("SASA") read together with section 58C of SASA which reads:

"58C. Compliance with norms and standards. —

(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 No. 13 of 2005), ensure compliance with—

(a) norms and standards determined in terms of sections 5A, 6 (1), 20 (11), 35 and 48 (1);

(2) ...

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(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.*

(4) ...

(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.”

20. Section 58C creates a mechanism for ensuring compliance by MECs and heads of departments with the minimum norms and standards, as well as providing for

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regular and accurate reporting as regards levels of infrastructure in accordance with the Intergovernmental Relations Framework Act, 13 of 2005, (hereinafter referred to as "IGRF Act").

21. The SASA further delineates the responsibilities of the respondents and the applicants where it states as follows:

12. Provision of public schools. —(1) *The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature. (own emphasis) and*

20. Functions of all governing bodies. —(1) *Subject to this Act, the governing body of a public school must—*

(a)...

(g) **administer and control** *the school's property, and buildings and grounds occupied by the school, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy; and*

21. Allocated functions of governing bodies.—(1) *Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions:*

(a) **To maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;**

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22. From the above, it is evident that the establishment of infrastructure in accordance with the Norms and Standards falls within the authority of the Respondents. Only upon application, will the maintenance and improvement of the school property be allocated to and/rest with the applicants.

23. Notwithstanding the above mentioned sections of the SASA, and in the instance that the circular no 3 of 2019 constitutes an allocation of functions to the SGB of ordinary schools and "no-fee schools", it is noted that the circular is intended as a "guideline" for the use of the resource target table (RTT) which serves as a guide for how resources ought to be allocated to various categories, including for purposes of maintenance.

24. More specifically, paragraph 5 of the circular deals with the allocation of fees or donations collected and the school allocation as per the RTT. This provides that the allocations are intended for:

"...non-personnel recurrent items and small capital that is required for the school, as well as *minor* repairs (their emphasis) and maintenance of the physical infrastructure of the school."

Annexure C then details the type of "minor repairs" that are to be covered by a recommended 25% of the allocation.

25. By implication, maintenance and repairs refer to the upkeep of infrastructure that is lawful and functional to begin with. It would be inconceivable that the SGB would be expected to maintain and repair infrastructure that does not meet the requirements of the Norms and Standards for public schools.

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26. Where I deal with the specific issues for each of the schools, I will demonstrate that the minimum requirements for the infrastructure at each of the schools has not been met. In each case, the Respondents have in fact conceded as much in certain respects of the issues that the Applicants have raised. It is therefore incredulous to expect that the Applicants are required to use the scarce and meagre allowance allocated to them through the cash allocation to “maintain” and “repair” what is at the outset unacceptable and unlawful school infrastructure.

THE COUNTERCLAIM

27. The Respondents bring a counterclaim on the basis that the Applicants, as SGBs of the respective schools have a duty to inter-alia, maintain, effect repairs, clean and make sanitary, and monitor and instruct learners on the proper use of toilet facilities.

28. I have in the above section detailed what the respective responsibilities of the Applicants and Respondents are. I further state in the strongest terms, that the departure point of the duties stated in paragraph 27 above, are premised on having in the first instance, lawful, functional and acceptable infrastructure, which the Applicants' schools do not.

29. The duty of maintenance and repairs of the Applicants is limited to the “governance” aspects, namely to ensure that the resources of the school gets allocated towards such activities. It is inconceivable, that a governance body is expected to physically perform the tasks of maintenance and repairs. Despite this, on the facts, the Applicants have, prior to instituting, engaged in patch repairs at the schools to salvage the crumbling and incomplete infrastructure.

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30. Section 16 of the SASA is explicit that the SGB of a school acts as a trustee of a school and may only perform functions as mandated by the SASA. The professional management of a school rests with the principal of a school, who acts under the authority of the first and second Respondents.

16. Governance and professional management of public schools.—

(1) Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act.

(2) A governing body stands in a position of trust towards the school.

(3) Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department.

31. It is further to be noted that in the instance that an SGB is found to be wanting in the performance of its duties and functions, then the remedial action against an SGB is prescribed in the SASA under section 22, as found below.

22. Withdrawal of functions from governing bodies.—

(1) The Head of Department may, on reasonable grounds, withdraw a function of a governing body.

(2) The Head of Department may not take action under subsection (1) unless he or she has—

(a) informed the governing body of his or her intention so to act and the reasons therefor;

(b) granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and

(c) given due consideration to any such representations received.

(3) In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter—

(a) furnishes the governing body with reasons for his or her actions;

(b) gives the governing body a reasonable opportunity to make representations relating to such actions; and

(c) duly considers any such representations received.

(4) The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3).

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(5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to the Member of the Executive Council.

32. The Respondents have failed to invoke the provisions of the SASA in respect of any grievance it has/may have against the Applicants. In the consequence, the counterclaim is fatally flawed and must fall.
33. With regards the Respondents' demands in respect of claims 1, there is no ground for this claim and the claim must fall.
34. With regards claim 2, any order in respect of maintenance and repair of facilities that are unlawful and/or unacceptable in terms of the Norms and Standards is an exercise in futility and cannot be sustained.
35. With regards claim 3, it is outside of the authority, purview and function of the Applicants to report on the aspects detailed in paragraphs 3.1 and 3.2 as these fall within the realm of the "professional management" of a school and must be directed to the principals of the respective schools.
36. With regards claim 3.2, namely the financial records of expenditure in respect of the cleaning, maintenance and repair of ablution facilities at the Respondents' schools, this is an activity in the ordinary course and ought not to be subsumed by this Honourable Court to avoid burdening this Court with what is in essence the executive function of the respondents.

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AD SERIATUM RESPONSE

37. AD PARAGRAPHS 1 to 2

The contents of these paragraphs are noted. The deponent admits that he relies on the information of others, without having furnished confirmatory affidavits to the Court at the time of filing. No explanation is offered as to why the investigators that were sent to the schools were unable to depose to an affidavit at the time of filing. Until relevant confirmatory affidavits are duly filed, the Applicants note that the deponent's averments and allegations are hearsay.

38. AD PARAGRAPH 3

The contents of this paragraph are admitted save to note that the Respondents, in fact, served and filed their notice of opposition, counterclaim and affidavit on 5 September 2019.

39. AD PARAGRAPH 3.1 TO 3.5

The contents of these paragraphs are noted save to note that the Respondents do not provide details of the investigators, their expertise, or the scope of their investigation. The Respondents have also not furnished a report of the investigation, nor confirmatory affidavits from the investigators.

40. AD PARAGRAPH 4, 4.1, and 4.2

Save to admit that the Applicant schools are located in rural areas, and that access to basic education is a core function of the department and should accordingly be prioritised, the balance of the contents of these paragraphs are denied. The

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Respondents neglect to mention the attempts made as early as 21 June 2019 to draw the attention of the Respondents to the conditions at the schools. The Respondents were afforded a reasonable opportunity to respond to invitations to investigate and address the concerns raised by the Applicants in their correspondence and in the Application.

41. AD PARAGRAPH 4.3

The contents of this paragraph are noted and attest to the Applicants' version that the Respondents have long been aware of the dire and undignified sanitation and the lack of water at the Applicant schools.

42. AD PARAGRAPH 4.4

The contents of this paragraph are denied. The Applicants have a duty to maintain and repair infrastructure that is lawful and functional in the first place. As will be shown later the Respondents concede that contractors who they employed did not complete projects. Major repairs that the Applicants notified the Respondents of, remained unaddressed until this present litigation.

Owing to the truncated timelines, it has been difficult to validate the claim that the funding provided to the Applicants' schools is sufficient to effect all the alleged repairs, maintenance and purchase of potable water expected of the schools. The Applicants reserve the right to address the Court further in this regard as the information becomes available.

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43. AD PARAGRAPH 5

The contents of this paragraph are noted. It is again emphasised that the issues were raised with the Respondents as early as June 2019 and yet the respondents waited for these proceedings to be launched to embark on its investigations.

44. AD PARAGRAPH 6

The contents of this paragraph are admitted. The Respondents are however required to be cognizant of the fact that school infrastructure has been held by our courts to form an essential component of basic education.

45. AD PARAGRAPH 6.1 to 6.4

The contents of these paragraphs are denied. The Applicants maintain that their version is factual and based on evidence of parents and guardians who are on the ground and whose children experience the sanitation and lack of water every day as explained in the founding papers. The Respondents own pictures and version prove the version of the Applicants. The Respondents make several major concessions that fall within their responsibilities. Where there are inconsistencies they are minor and immaterial.

46. AD PARAGRAPH 6.5, 6.5.1 to 6.5.5

Save for admitting that the role of the SGB is that of governance, the contents of these paragraphs are denied. The respective roles of the Applicants and the Respondent have been adequately expanded upon above and will not be repeated here, suffice to say that the Respondents completely neglect to acknowledge their responsibilities for implementing the norms and standards for school infrastructure

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and seek to conflate those responsibilities with that of the school governing bodies, namely to 'maintain' the school property, in instances where the infrastructure meets the requisite standards. The deficiencies highlighted by the Applicants in this application, relate to failures by the Respondents in the provision of their legislative obligations.

47. AD PARAGRAPH 7

The contents of this paragraph are denied. The Respondents misconstrue their obligations. The provision of sanitation is their responsibility. The provision of water is also their responsibility.

48. AD PARAGRAPH 8

That the schools are budgeted to receive an allocation is admitted. Whether such an allocation was indeed received by the schools and whether such allocation is sufficient for the purposes alleged by the respondents is unknown and the Respondents are put to the proof thereof.

49. AD PARAGRAPH 9

The contents of this paragraph are denied and further attest to the misunderstanding of the legislative responsibilities. The Respondents have legislative remedies that they can resort to to deal with perceived failures of governing bodies, as has been illustrated above and the use of a counterclaim to achieve this is inappropriate, misconceived and mischievous.

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50. AD PARAGRAPH 10

The contents of this paragraph are vehemently denied. Unlike the Respondents, the legal representatives for the Applicants personally visited the 3 Applicant schools, spoke to the principals and educators of the schools and the Applicant representatives.

51. AD PARAGRAPH 11

The content of this paragraph is noted.

DALAGUBA JUNIOR SECONDARY SCHOOL

52. AD PARAGRAPH 12

The contents of this paragraph in so far as it relates to the cited annexures reflecting photographs depicting the ablution facilities at Dalaguba Junior Secondary School are admitted. The balance of the contents of this paragraph are denied and the Respondents are put to the proof thereof. It is further to be noted, that no confirmatory affidavit of Mr Elliot Jara has been filed in this regard.

53. AD PARAGRAPH 12.1

The contents of this paragraph are noted. I emphasise that the only reason why a single water outlet is in fact available, is that a community member, at the behest of the first Applicant, repaired the single functioning tap on the premises.

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54. AD PARAGRAPH 12.2

That the water supply from the local authority is erratic, is admitted. The SGB removed the water tanks and placed them in safe keeping to avoid them being stolen as they were empty and are in the process of reinstalling them

55. AD PARAGRAPH 12.3 to 12.5

Save to admit that the school is forced to purchase water from a local service provider, it is denied that the first Applicant has sufficient funds to pay for this service or that the water is sufficient for the purpose of human consumption or food preparation and the Respondents are put to the proof thereof. The first Applicant is forced to pay money out of its' nutrition programme budget, in order to purchase water. This amounts to approximately R300.00 per month for the purchase of 3 medium sized water tanks as shown in annexure TK1-6 figure 35 of the Respondents' answering affidavit. An additional R80.00 is paid to refill each tank should the initial amount of water purchased be insufficient. The water collected by the service provider is river water, this water has therefore not passed through any purification systems or safety testing. The balance of the contents of this paragraph are denied and the deponent is put to the proof thereof.

56. AD PARAGRAPH 12.6 to 12.8

Save to admit that figures 5, 6, 8-10, and 11-17 at annexures TK1-1, TK1-2, and TK1-3 respectively are photographs depicting the old ablution facilities at the school, and that these facilities are dilapidated, the balance of the contents of these paragraphs are denied and the Respondent is put to the proof thereof. In addition to the figures cited by the Respondents and listed above, figures 4 and 7 of

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annexures TK1-1 and TK1-2 also depict the old ablution facilities at the school. It is clear from the photographs that these structures, which contain plain pit latrines, are in a state of disrepair with the buildings having no doors and the roofs either being partially or completely destroyed. Plain pit latrines are not acceptable in terms of the Norms and Standards Regulations. In addition to this, the old facilities are in such a state of disrepair that performing minor maintenance on an already unlawful structure, would serve no beneficial purpose and furthermore would not absolve the Respondents of their legal duties to replace these structures.

57. AD PARAGRAPH 12.9

The contents of this paragraph are admitted.

58. AD PARAGRAPH 12.10

The contents of this paragraph are noted.

59. AD PARAGRAPH 12.11

The contents of this paragraph are denied and the Respondent is put to the proof thereof. The captions of figures 21 and 22 of annexures TK1-4 themselves state that these structures are incomplete and there is no door.

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60. AD PARAGRAPHS 12.12 and 12.13

The contents of these paragraphs are denied and the Respondent is put to the proof thereof. There is no proof that the toilet structures present are presently functional especially considering that the pits attached to these toilets are not covered or secured in any way. Allowing the accumulation of urine and excrement into an uncovered pit would result in an already dangerous environment becoming even more hazardous to children. The installation of doors would have fallen within the ambit of the initial contract entered into between the ECDoE and the contractor to build these toilets. The effects of the failure of the contractor to honour this contract should not fall on to the school to rectify utilising the small maintenance budget allocated to them on an annual basis. In fact, by definition of the term maintenance, the First Applicant cannot be expected to maintain a structure that has never been provided.

61. AD PARAGRAPH 12.14

Save to admit that the roof sheeting was destroyed by wind and window panes broken, the balance of the contents of this paragraph are denied. There is no proof that the roof sheeting was properly secured initially which consideration is pertinent in light of the contractor's initial default.

62. AD PARAGRAPH 12.15

The contents of this paragraph are denied and the Respondents are put to the proof thereof.

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63. AD PARAGRAPH 12.16

The contents of these paragraphs are noted. What is however disappointing, is that despite the Respondents acknowledgement that a contractor is needed to complete the construction of ablution facilities, the Respondents stop short of stipulating timelines within which the work will be commenced and concluded and to which the Respondents can be held accountable. Until such time as functional and lawful latrines are installed, the constitutional rights of the learners at this school continue to be infringed.

ZANEWONGA SENIOR SECONDARY SCHOOL

64. AD PARAGRAPH 13

Save to admit that the annexures referred to in this paragraph are photographs depicting the facilities at Zanewonga Senior Secondary School, the balance of the contents of this paragraph are denied and the Respondents are put to the proof thereof. It is further to be noted that no confirmatory affidavit of head of department, Nomakozanana Patricia Ndabula, has been filed.

65. AD PARA 13.1

The contents of this paragraph are denied and the Respondent is put to the proof thereof as the Respondent submitted no proof of any renovations or maintenance conducted on these school buildings. The main school buildings currently in existence on the school property are mud structures. It is clear from the annexures submitted in the Applicant's founding papers that these mud structures are in a state of disrepair and some are currently being used as classrooms.

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66. AD PARA 13.2

The contents of this paragraph are noted. As was explained afore, the condition of the school buildings remain a concern for the second Applicant.

67. AD PARA 13.3

The contents of this paragraph are denied. The Respondent has misquoted the Applicant and is deliberately misleading the Court. In this regard the court is referred to paragraph 11 of the supporting affidavit of Ms Nolundi Bhubho. The Second Applicant was describing the state of sanitation in the school from 2017 when wind destroyed the roof of the ablution facilities. The destruction of the roof rendered the school with only 1 usable toilet. Despite knowing about the situation at the school, the ECDoE did not assist the school, who, a few months ago, were forced to temporarily fix the roof with their own funds. It is evident that despite the Respondents allegations, the schools are forced to utilise large shares of their budgets on individual projects such as this.

68. AD PARA 13.4 to 13.7

The contents of these paragraphs are noted and it is reiterated that the only reason why these facilities are available is due to the resourcefulness of the second Applicant and the school itself.

69. AD PARA 13.8 to 13.9

The contents of these paragraphs are admitted.

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70. AD PARA 13.10

The contents of this paragraph in so far as they relate to Mvula Trust are admitted. Despite the borehole being drilled, it has never produced water. The ECDoE has been informed of this numerous times by the school but no action was taken by the Respondents.

71. AD PARA 13.11

The contents of this paragraph are noted. It is however with concern that despite the undertaking by Mvula Trust, there is still no timeline regarding implementation and thus follow up and accountability will be difficult.

72. AD PARA 13.12

Save to admit that the school purchases water from a supplier, the balance of the paragraph is denied and the Respondents are put to the proof thereof. The school receives approximately 2500L of water per month from the supplier. This water is sourced from a nearby river and as such does not pass through any filtration, purification, or safety systems. The school utilises the water for drinking and food preparation but the amount purchased is not sufficient for the school. As such in order to supplement the demand for water, the learners together with the workers responsible for food preparation will at times walk to the river to fetch water.

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NGQWARA PRIMARY SCHOOL

73. AD PARAGRAPH 14

The contents of this paragraph are not properly before the court as no confirmatory affidavit is attached from either the investigators who took the pictures or the information provided by Mr Matiloshe and should be regarded as hearsay.

74. AD PARAGRAPH 14.1

The content of this paragraph is denied. The Applicants maintain that the supporting affidavit of Mr Mzingisi Doni makes clear reference to both old ablution facilities and the individual latrines which are used by the educators.

75. AD PARAGRAPH 14.2

The content of this paragraph is denied and the Respondents are put to proof. Although the Respondents are evasive about the reality, their own images and labeling of the old ablution facilities in TK3-3, TK3-4, TK3-5 and TK3-6 indicate their awareness that these old facilities are used by learners. That the standalone latrines meet the requirements of the Norms and Standards is unknown and the Respondents are put to the proof thereof.

76. AD PARAGRAPH 14.3

The contents of this paragraph are noted. However, it is unclear whether the Respondents approach is that its responsibility to ensure that schools have sufficient water supply in terms of Regulation 11 is somehow abdicated to the local authority.

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77.AD PARAGRAPH 14.4

The contents of this paragraph are noted. It is common cause that the presence of rain water tanks alone is not sufficient to ensure water supply to the school. The Applicants confirm that the school has 6 rain water tanks and all are currently empty as there has been no rain in the area since May 2019.

78.AD PARAGRAPH 14.5

The content of this paragraph is noted and confusing. It is unclear whether the Departments' implementing agent erected the reservoir and taps before first assessing whether a water source was available to support the infrastructure or if an existing water source ran dry.

79.AD PARAGRAPH 14.6

The contents of this paragraph are disputed and put the Respondents to proof. The Applicants maintain that they have been struggling to get municipal services funding for the current year. The school currently uses funding intended for other things to purchase water from the local service provider. In addition norms and standards for school funding which is meant to be used for minor repairs and maintenance is not enough as learners without documentation are not accounted for. When the money is released by the Respondents it is paid late towards the end of the school year.

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80. AD PARAGRAPH 14.7

The contents of this paragraph are denied. When the new standalone toilets were constructed they were to complement the existing structures. At no point did the school receive instructions to stop using the old toilets. It behoves logic that the department would construct 5 standalone toilets to replace the old block which additionally had a urinal for 206 learners and their educators. The images provided by the Respondents at TK3-3 provide a clear view that these toilets are not condemned as "out of bounds".

81. AD PARAGRAPH 14.8

The contents of this paragraph is noted. It remains unclear whether the view of the Respondents is that 2 toilets for 206 learners is compliant with the ratios prescribed in the norms and standards for school infrastructure. In terms of Annexure G of the Norms and Standards Regulations, 2 toilets for 206 is not acceptable. A school with enrolment of 135-310 learners should have up to 20 toilets.

82. AD PARAGRAPH 14.9

The content of this denied and noted as misleading. The Respondents' statement contradicts their own evidence at TK3-2 figure 14 which clearly provides the true reason that ablution number 5 is not functional nor in use. According to the Respondents own words "*Ablution cubicle 5 is not allocated to anyone as the structure is unstable and leaning towards the side with floor sagging. No foundations are visible.*"

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GENERAL

83. AD PARAGRAPH 15

The contents of this paragraph are noted and the Court is humbly directed to paragraphs 23 to 26 above where the purpose of the circular referred to is discussed and placed within the context of the SASA.

84. AD PARAGRAPHS 15.1, 15.1.1 to 15.1.6.

The contents of these paragraphs are noted suffice to say that it is unclear whether the Respondents are of the opinion that provision of sufficient water at Applicant Schools falls within the Respondents understanding of minor repairs and maintenance or whether the provision of water will fall under the 20% ring-fenced for services. In the case of Ngqwara the Applicants maintain that the department is not consistent in its provision of these funds and given the reliance on the private supplier the funds are simply not adequate to meet the basic daily needs of the school.

85. AD PARAGRAPH 15.2

The contents of this paragraph are denied and the Applicants put the Respondents to the proof thereof. The budget alone does not prove that the 3 Applicant schools received the funds mentioned in the circular.

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86. AD PARAGRAPH 15.3

The contents of this paragraph are noted. It remains unclear whether the Respondents are of the opinion that the provision of sufficient water and adequate and appropriate sanitation for Dalaguba Junior Secondary School can be classified as maintenance.

87. AD PARAGRAPH 15.4

The contents of this paragraph are noted and attention is drawn to the incorrect sum stated as having been allocated to this school. It remains unclear whether the Respondents are of the opinion that the provision of sufficient water for Zanewonga Senior Secondary School is classified as maintenance.

88. AD PARAGRAPH 15.5

The contents of this paragraph are noted suffice to say that the Respondents are not clear on whether they are of the opinion that the provision of adequate sanitation for Ngqwara Primary School classifies as maintenance including the repair of structurally unsound toilet that was not properly constructed by the Respondents' implementing agent.

89. AD PARAGRAPH 16

The contents of this paragraph are noted.

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90. AD PARAGRAPH 17, 17.1 - 17.3

As explained above, ablution facilities at Dalaguba Junior Secondary School are plain pit latrines, are unlawful and not safe to use and as such the learners and staff have no option but to utilise the bushes in order to relieve themselves. The Respondents concede that the new ablution facilities are incomplete. In addition to this the older ablution facilities consist of plain pit latrines with the buildings falling apart. The completion of the new sanitation facilities cannot be classified as minor maintenance and as such cannot now be the responsibility of the SGB to finalise. In having resolved to "complete the construction", the respondents acknowledge that they bear the responsibility for finalising what ought to have been replacement facilities for the old and unlawful ablution facilities.

That the Respondents appear to condone the "repair, cleaning and maintenance" of the old, plain pit latrines, I find totally unacceptable. These ablutions are unlawful in terms of the Norms and Standards and ought to be condemned and demolished. Any expenditure on the "restoration" of such facilities should be deemed to be wasteful expenditure.

91. AD PARAGRAPHS 24 - 28

The Respondents have misconstrued, and now misrepresent the version of the Second Applicant. Due to the school having effected temporary repairs to the ablution block, and the Respondents having stated under oath that the implementing agent will be attending to the borehole, which, if successful will ensure water supply to the school, what remains is for this Honourable Court to determine timelines by when the Respondents should ensure compliance with the Court Order.

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92. AD PARAGRAPHS 29 - 30

By the Respondent's admission at least one of the ablution structures constructed by the ECDoE is sinking due to either lack or or weak foundations. Thus the Respondents attempting to convince this court that there are five toilets at this school is a misrepresentation of fact. Non-compliance with the Norms and Standards with respect to the number of toilets per learner, is a grave concern and ought not be minimised by the respondents.

It is deeply concerning that the Respondents adopt such a callous and dismissive approach to their failure to respond to efforts at engagement by the Applicants. The only acknowledgement of this failure is to state that it is a "matter of regret" that the Respondents remained silent in the face of desperate pleas by the Applicants to ensure that the conditions at their schools are remedied.

93. AD PARAGRAPHS 31 - 34

The contents of these paragraphs are vehemently denied and is a matter for legal argument that the applicant's legal representatives will address this Court on at the hearing.

94. CONCLUSION

In the premise, the applicants:

94.1 persist in their claims as stated in the notice of motion; and

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94.2 seek an order dismissing the respondents counterclaim with costs.


TARRYN COOPER-BELL

I hereby certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at ...*Khayelitsha*... on this the *11* day of ...*09*... 2019 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

L. MHLONGO
Commissioner of Oaths
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FULL NAMES:

ADDRESS:

EX OFFICIO:

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

Case No. 65/19

In the matter of:

SCHOOL GOVERNING BODY OF DALAGUBA JUNIOR
SECONDARY SCHOOL First Applicant

SCHOOL GOVERNING BODY OF ZANEWONGA SENIOR
SECONDARY SCHOOL Second Applicant

SCHOOL GOVERNING BODY OF NGQWARA JUNIOR
SECONDARY SCHOOL Third Applicant

And

MEC FOR EDUCATION: EASTERN CAPE First Respondent
SUPERINTENDENT, EASTERN CAPE EDUCATION

DEPARTMENT Second Respondent

MINISTER OF BASIC EDUCATION Third Respondent

CONFIRMATORY AFFIDAVIT

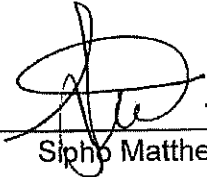
I the undersigned

SIPHO MATTHEWS MZAKWE

state under oath and say as follows:

LMF SM TCB
EPC

1. I am a major male candidate attorney, at the Equal Education Law Centre (the "EELC") with its registered office at Isivivana Building, 8 Mzala Street, Khayelitsha.
2. The facts deposed to below are within my own personal knowledge.
3. I confirm that I have been personally involved in the inspection of Nqwara Primary School.
4. I have read the replying affidavit of Tarryn Cooper-Bell and confirm the contents thereof as far as they relate to matters concerning me. I specifically confirm the correctness of the contents of paragraph 6 thereof.


Siphiso Matthews Mzakwe

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, that he does not have any objection to taking the oath, and that that he considers it to be binding on his conscience, and which was SWORN TO and SIGNED before me at Johannesburg on this the 11 day of September 2019 and that the administering oath complied with the regulations contained in Government Gazette No.R1258 of 21 July 1972, as amended.

ZAMANTUNGWA KHUMALO
COMMISSIONER OF OATHS
Practising Attorney (RSA)
6th Floor, Aspern House, 54 De Korte Street
Braamfontein, Johannesburg
2001

SM ZPK
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