IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARTIZBURG

CASE: 3662/17P

In the matter between:

EQUAL EDUCATION Applicant

And

MEC FOR EDUCATION: KWAZULU-NATAL First to 33rd Respondents

AND 32 OTHERS

And

SIPHILISA ISIZWE *Amicus Curiae*

WRITTEN SUBMISSIONS ON BEHALF OF *AMICUS CURIAE*

A INTRODUCTION

1. Siphilisa Isizwe was admitted as an *amicus curiae* in these proceedings by this Honourable Court on 26 July 2016, and was granted leave to:

1.1 Adduce the evidence contained in the founding affidavit and the annexures and supporting affidavit thereto; and

1.2 To make written and oral submissions in these proceedings.

2. Siphilisa Isizwe is a Disabled People's Organisation located in Manguzi, a town in the Umkhanyakude District of KwaZulu-Natal. It seeks to promote the rights of people with physical, sensory and/or intellectual disabilities, and to promote the development of people with disabilities in all spheres of life.[1] This includes the protection of disabled people from unfair discrimination. Members of Siphilisa Isizwe want to ensure that people with disabilities are given equal enjoyment of all of the rights under our Constitution.[2]

3. Siphilisa Isizwe supports the relief sought by the applicants to compel the provincial departments of education and transport to formulate a joint plan for the provision of scholar transport to the 12 schools that are part of this case, as well as for the KwaZulu-Natal Province (the "Province") more generally.

4. Specifically, Siphilisa Isizwe supports the claim that there is a "*painful failure of interdepartmental planning and budgeting for scholar transport for needy scholars*" in the Province.[3]

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[1] *Amicus* Bundle at page 8 at para 15 (*Amicus* founding affidavit).
[2] Ibid, p 15, paras 15 – 16 (*Amicus* founding affidavit).
[3] Ibid, p 12 para 7 (*Amicus* founding affidavit).

5. As such, Siphilisa Isizwe intends to argue that there is an obligation on the respondents to develop a comprehensive plan for scholar transport that is capable of implementation. Furthermore, Siphilisa Isizwe asserts that such a comprehensive plan must make provision for the diverse range of scholar transport needs of learners with disabilities in the Province.

6. Siphilisa Isizwe will therefore address the following key issues in these written submissions:

6.1 The approach to interpreting the right to basic education as outlined by the jurisprudence in respect of the right.

6.2 In accordance with the approach outlined in 6.1 above, whether or not budgetary constraints constitute a legitimate defence for the respondents' failure to provide scholar transport.

6.3 The duty of government to develop a comprehensive scholar transport plan that is capable of implementation, and which makes provision for the diverse transport needs of learners with disabilities

6.4 The failure of government to make appropriate provisioning for the diverse scholar transport needs of learners with disabilities constitutes unfair discrimination in terms of section 9(3) of the Constitution.

7. Before addressing each of these issues, Siphilisa Isizwe will first provide an overview of the context in which learners with disabilities in Umkhanyakhude struggle to access their right to a basic education.

B BACKGROUND TO LEARNERS WITH DISABILITIES IN UMKHANYAKHUDE

8. Siphilisa Isizwe is based in and services the Umkhanyakude District, which is the northernmost district in KwaZulu-Natal. It is also one of the poorest districts in South Africa.[4] The district has an almost 60% unemployment rate.[5] Social grants are the main source of income for most people.

9. Umkhanyakude is a largely rural area, approximately 13 855 square kilometres in size, with a hilly topography and a population of about 625 846. Umkhanyakude consists of five local municipalities: Jozini, The Big Five False Bay, Hlabisa, Mtubatuba and Umhlabuyalingana.[6]

10. People in the region generally travel long distances to access education, health and social services. They rely primarily on public transport, including buses and to a greater extent, minibus taxis and minivans ("bakkies").[7]

11. It is estimated that the Province has 182 153 children (aged between five and

[4] *Amicus* bundle, p 69 (*Amicus* Annexure G: "Too Many Children Left Behind: Exclusion in the South African Inclusive Education System").
[5] Ibid.
[6] Ibid.
[7] *Amicus* bundle, p 13 (*Amicus* founding affidavit).

18 – "school-going age") with disabilities.[8] This estimate includes learners with physical and intellectual disabilities, which makes up 5.8% of the KwaZulu-Natal population.[9]

12. Like many children living with disabilities around the country, the children in the district face considerable difficulties accessing education. This is further amplified by an education system that isolates children with disabilities to poorly funded special schools that often treat them as incapable of being educated. This has a particularly dire effect on poor black children (with disabilities), who often have no opportunity to attend school at all.

13. The Constitutional Court has recognized the long-lasting effects of apartheid on the public education system. Thus, it notes: [10]

> "Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."

14. The Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System (the "White Paper 6") published by the Department of Basic Education in 2001 outlines the Government's strategy in respect of the education of learners with disabilities.[11] It seeks to redress

[8] Ibid p 6.
[9] *Amicus* Bundle, p 183 (*Amicus* Annexure J "Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System").
[10] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC) at para 42.
[11] White Paper 6 was the post-apartheid response to meeting the needs of learners with disabilities. Under apartheid, predominantly white learners benefitted from special needs education and support. The education

this and accommodate all children with disabilities in appropriate schools.

15. Learners with disabilities are still excluded from meaningfully accessing to education for a variety of reasons. Chief among these is the availability of appropriate schools for disabled children. The Department of Basic Education (DBE), in a report released in November 2015, found that there could be as many as 182 153 children with disabilities in the Province between the ages of 5 and 18, of which as many as 137 889 (76%) may not be receiving any schooling. [12]

16. The White Paper 6 divides schools in South Africa into three types: special schools, full-service schools, and ordinary ("mainstream") schools.[13] In order to cater to their needs, learners with the most profound and severe disabilities are placed at special schools. According to the "Screening, Identification, Assessment and Support Policy" (SIAS), learners are categorised as having high, moderate or low support needs in terms of learning.[14] Generally, because of the way the system has been structured by the DBE, children with disabilities are defined as having high or moderate support needs, and are required to attend special schools or full-service schools.[15]

17. Numerous studies have found gaps in access to quality education for learners

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system during this time also failed to provide for the diverse learning needs of learners. The White Paper therefore sought to rectify these shortcomings in the education system.

[12] Too Many Children Left Behind (note 4 above) p 69.

[13] White paper 6 (note 9 above).

[14] Department of Basic Education "Policy on Screening, Identification, Assessment and Support" (2014).

[15] Special Schools are public primary or high schools that caters exclusively for children with high barriers to learning, including disabilities, and requiring continuous, highly intensive educational support. Full-Service School are specially-designated, converted and resourced public mainstream primary or high school that caters for a majority of learners with low support needs, and a smaller percentage of learners with disabilities who have moderate or high support needs.

living with disabilities. The 2011 special-schools Survey Report in KwaZulu-Natal lists a variety of serious problems in the majority of special schools in the province: insufficient assessment support, inadequate co-curricular, suitability of curriculum, lack of training for teachers and principals, inadequate support staff, low levels of support from the district Department, inappropriate infrastructure, and little or no access to transport, assistive devices, and other resources.[16]

18. In 2015, Human Rights Watch (HRW) released a Report[17] that evaluated South Africa's prioritisation of children with disabilities and its commitment to implementing an inclusive education policy. This was a review of 5 provinces including KwaZulu-Natal. The overall finding being that the White Paper 6 has been poorly implemented at all levels to the detriment of children with disabilities.

19. In relation to transport for learners with disabilities, the Report found that parents often pay burdensome transport and boarding costs if special schools are far from families and communities, and, in some cases, they must also pay for special food and diapers. The HRW Report found that the government has not reached "universal" education because it has left over half a million children with disabilities out of school, and hundreds of thousands of children with disabilities, who are presently in school, without adequate education.

[16] KwaZulu-Natal Department of Education & Miet Africa, 'Special Schools as Resource Centres Pilot Project: Special School Audit Report' (March 2011).
[17] *Amicus* Bundle, p 180 (*Amicus* Annexure I: "Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities").

20. These findings were echoed by the *Too Many Children Left Behind: Exclusion in the South African Inclusive Education System* report ("the Left Behind Report") – released by SECTION27 in 2006.[18] The Report identified specific barriers to education for learners with disabilities in the Umkhanyakude District, and concluded that core elements of the education system are completely dysfunctional and inhibit equal, dignified and safe access to the education system for learners with disabilities.

21. In relation to transport, the Report found that learners face considerable difficulties accessing transport. Challenges range from no transport at all to transport that does not adhere to universal design principles.

22. Both reports highlight the impact of the general failure to deliver education for learners living with disabilities. For those living in poor, rural provinces such as KwaZulu-Natal, this is amplified by their socio-economic conditions. Resultantly, learners with disabilities continue to be one of the most vulnerable populations in the South African education system.

<u>The range of transport needs for learners with disabilities</u>

23. The Province has been gripped by a crisis in the education sector for many years, one aspect of which lies in the chronic failure to provide adequate and proper scholar transport to a significant portion of the schools in the province[19],

[18] Too Many Children Left Behind (note 4 above).
[19] Main bundle, pp 473 – 476, paras 15-17 (First respondent's answering affidavit).

and specifically for learners with disabilities.[20] Learners living with disabilities in the Province do not have access to proper transportation to-and-from school regularly or to a hostel every term.

24. Both the HRW Report and the Left Behind Report identify the lack of adequate and appropriate scholar transport, and in severe cases the lack of any transport, as one barrier to education. Below we set out the challenges specific to different categories of learners in need of scholar transport.

Transport for learners boarding in special schools

25. The special schools in Umkhanyakude cater almost exclusively to children with severe intellectual disabilities. The majority of learners at these schools board in the hostels. The Department does not provide transport for this category of learners.[21]

26. As a result, parents are forced to arrange private transport that comes at a great financial cost and that is often not suitable to transport learners with disabilities. As stated by Ms Jobe: [22]

> "The school does not provide transport for learners to travel during weekend or term break. I must therefore arrange Sandile's long-distance transport privately. I used to use ordinary public transport, and I would spend R300 for

[20] *Amicus* Bundle, pp 27 – 28, paras 44 – 46 (*Amicus* founding affidavit).
[21] *Amicus* Bundle, p 21, para 35; p 190, para 9 (Supporting Affidavit of Hlengiwe Nakuluna Jobe); p 204, para 12 (Ntombi Zandile Nzimande).
[22] *Amicus* Bundle, p 190, paras 10 – 11 (Supporting Affidavit of Hlengiwe Nakuluna Jobe).

a trip to and from Khulani.

…

The special transport is a normal mini-bus taxi, and it has no features for accommodating disabled children."

27. The implications, as evidenced by the supporting affidavits, are infrequent visits home, and learners suffering neglect due to the poor conditions in the hostels thus affecting their health and wellbeing.[23]

Transport for day scholars

28. There are two categories of learners – The first category of learners are those who use daily transport provided by the Department. While they have transport in principle, in reality the buses are unreliable, bus routes are limited and structurally inappropriately designed. This results in learners missing school, using unsafe transport and in extreme cases, dropping out of school.

29. The Left Behind Report explains that the buses often break down for long periods, and parents are forced to make contingency plans to get their children to school.[24] The rigid bus routes also do not take into account the difficulties for learners with disabilities to get to centrally designated pick-up and drop off spots. They are often far from learners' homes. Further the buses provided do not adhere to requirements and principles of universal design – resulting in access and safety issues for these learners.

[23] *Amicus* Bundle, p 191, para 12 (Supporting Affidavit of Hlengiwe Nakuluna Jobe); pp 205 – 206, paras 16 – 18 (Ntombi Zandile Nzimande).
[24] Too Many Children Left Behind (note 4 above) p 76.

30. As Ms Tembe explains, her son's use of public transport is a source of great anxiety.

> "My fear is that the taxi drivers do not know how to deal with and talk to people with disabilities. Some of them are rude and that discourages Mxolisi from wanting to go to school."

31. The second category of day learners are those who do not have access to department-provided buses and have to use public or private transport. The transport most available is the "malume transport" – essentially a van/bakkie. The malume transport is unreliable and often costly. Additionally, it is unregulated and not suitable to transport learners living with disabilities.

32. The supporting affidavit of Maria Dumazile Posega attests to the harsh consequences of using this service. Her daughter had to drop out of school.

> "When she was in Grade 9, we found that this transport would often arrive late at school and as a result, the teachers used to shout at Bongiwe and on many occasions told her to go home because she was late. This meant that sometimes she would miss the classes early in the morning or even an entire day of schooling. This affected Bongiwe and she told me she could not bear to go to school anymore."[25]

[25] *Amicus* Bundle, p 220 – 222, paras 9-15 (Supporting Affidavit of Maria Dumazile Posega).

Learners who are out of school due to transport issues

33. The final category of learners are those who simply do not attend school because the daily transport is too complicated (unreliable and unaccommodating) and costly. The supporting affidavit by Ms Posega details how her daughter dropped out of school when she became too old for her mother to carry her on her back, and to bear the discomfort and humiliation of not having appropriate transport to travel to school.

> "Other children used to laugh at Bongiwe because they said she is too old to be carried on my back. This used to make Bongiwe feel bad but she accepted it and ignored the other children when they teased her."[26]

34. The evidence from the aforementioned reports, together with the uncontested evidence in our papers, beg for a provincial transport policy that is truly inclusive in order to safeguard disabled learners' right to a basic education.

C THE APPROACH TO INTERPRETING THE RIGHT TO BASIC EDUCATION

35. Section 29(1)(a) states that: "Everyone has the right to a basic education, including adult basic education."

36. Unlike the other socio-economic rights in the Constitution such as the right to further education [section 29(1)(b)], the right to housing (section 26) and the

[26] Ibid.

rights to health care services, sufficient food, water and social security (section 27), the right to a basic education is not qualified by the terms "progressive realization" and "within the state's available resources".

37. Thus, many legal scholars have suggested that the framing of the right to basic education as an unqualified right is suggestive of a higher level of protection being accorded to this right compared to the qualified socio-economic rights.[27]

38. That this is indeed the case was confirmed in the foundational case of *Juma Musjid Primary School and Another v Ahmed Asruff Essay NO and Others ('Juma Musjid').*[28] A seminal passage from the judgment has laid a firm foundation for the approach to the right and has significantly shaped the jurisprudence in respect of the right that has accrued subsequent to the judgment.

39. Thus, *Juma Musjid* confirmed that the right as an unqualified socio-economic right is distinguishable from the other qualified socio-economic rights. It also went further by establishing the "immediate realisation" principle as being applicable in respect of the right. The Court held: [29]

> "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

[27] See for example F Veriava and F Coomans 'The right to education' in D Brand and C Heyns (eds) Socio-economic rights in South Africa (2005) at pp 64-65; M Seleoane 'The Right to Education: Lessons from Grootboom'(2003) 7 Law, Democracy and Development 137 and S Liebenberg 'Socio-Economic Rights – adjudication under a transformative constitution' (2010) 244.
[28] *Juma Musjid* (note 10 above).
[29] Ibid, para 37.

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'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'." (Own emphasis.)

The immediate realisation principle

40. The immediate realisation principle has subsequently been affirmed in cases dealing with education provisioning.

41. The famous *Juma Musjid* passage was applied by the Supreme Court of Appeal in *Minister of Basic Education and Others v Basic Education for All and Others ("BEFA")*[30] that dealt with the provision of textbooks to learners in the Limpopo Province. The Court held:

"The Constitutional Court stated emphatically that the right to a basic education entrenched in s 29(1)*(a)* is 'immediately realisable' and may only, in terms of s 36(1) of the Constitution, be limited in terms of a law of general

[30] [2016] 1 All SA 369 (SCA) para 36.

application that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'"

42. The immediate realisation principle was further affirmed in *Madzodzo and Others v Minister of Basic Education and Others ("Madzodzo")*[31] which dealt with the systemic failure of government to provide desks and chairs to schools in the Eastern Cape. The Court held that flowing from the right to basic education, government was required to take "all reasonable measures to realise the right to basic education with *immediate effect*." (Own emphasis.)[32]

43. One implication of the immediate realisation principle is that the right to basic education is directly enforceable in respect of each rights bearer save in circumstances where the right is limited in terms of section 36 of the Constitution. The circumstances under which right may be limited is discussed below.

44. Another implication is that the right is not subject to the standard of reasonableness review which is the approach adopted in respect of an evaluation of whether or not there has been a violation of one of the qualified socio-economic rights.

Reasonableness review

45. Thus, where there is a challenge in respect of these qualified socio-economic

[31] 2014 (3) SA 441 (ECM).
[32] Ibid, para 17.

rights, a court merely evaluates whether or not the government programme under review is reasonable in progressively facilitating the fulfilment of the right. The jurisprudence in respect of the qualified socio-economic rights has established a list of criteria for evaluating whether or not government programmes may be considered to be reasonable.

46. The main cases in which reasonableness review has been developed include*: Government of the Republic of South and Others v Grootboom and Others ('Grootboom')*[33]*; Minister of Health v Treatment Action Campaign ('TAC')*[34], *Khosa v Minister of Social Development ('Khosa')*[35] and *Mazibuko v City of Johannesburg* ('*Mazibuko'*).[36]

47. This jurisprudence has identified the essential elements that government programmes must exhibit for them to be reasonable. Legal scholars have summarised the criteria to include: [37]

- It must be capable of facilitating the realisation of the right;
- It must be comprehensive, coherent and co-ordinated;
- Appropriate financial and human resources must be made available for the programme;
- It must be balanced and flexible and make appropriate provision for short, medium and long-term needs;
- It must be reasonably conceived and implemented; and

[33] 2001 (1) SA 46 (CC).
[34] 2002 (5) SA 721(CC).
[35]2004 (6) SA 505 (CC).
[36] 2010 (4) SA 1 (CC).
[37] See S Liebenberg (note 27 above) pp 152 – 153.

- It must be transparent and its contents must be made known effectively to the public and it must make short-term provision for those whose needs are urgent and who are living in intolerable conditions.

48. As noted, adoption of the immediate realisation principle as opposed to reasonableness review is indicative of the affirmation of a higher standard of protection to be accorded to the right to basic education. It is submitted nevertheless, that the well-established jurisprudence in respect of reasonableness review provides a useful yardstick with which to measure the respondents' provisioning in respect of basic education, including, in respect of scholar transport. Thus, to the extent, that the respondents are failing to comply with even the lower benchmark of reasonableness review, they are failing to comply with their obligations in respect of the right.

49. The significance of the reasonableness review criteria in respect of the measures adopted by the Province for the provisioning for scholar transport to learners is therefore discussed in further detail below.

Scholar transport as an important component of the right to basic education

50. The Constitutional Court in *Juma Musjid* not only established the immediate realisation principle and distinguished the unqualified right to basic education from the qualified socio-economic rights, it further adopted a content-based approach to the right by recognising "access" as an "important component of

the right to basic education".[38] Subsequent to this, our courts have identified several other important components of the right. Very significant within the context of this case is the necessity of adequate transport.

51. Thus, in *BEFA*[39] it was held that every learner is entitled to a textbook in every subject at the commencement of the academic year. The judgment further explicitly noted that the corollary to this entitlement is the duty of the state to provide these textbooks to each and every learner.

52. In *Madzodzo*, the Court held that there is an obligation on government to provide desks and chairs to learners in schools. Thus, it held:[40]

> "The state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners. It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right to basic education."

53. Through a string of post provisioning cases in the Eastern Cape, the courts have also suggested that teaching and non-teaching posts in schools are further entitlements in respect of the right to basic education. Thus, in *Centre*

[38] *Juma Musjid* (note 10 above) para 43.
[39] *BEFA* (note 30 above) para 53.
[40] *Madzodzo* (note 31 above) para 20.

for Child Law and Others v Minister of Basic Education and Others ("Centre for Child Law"), the Court held: [41]

> "[SASA] requires both teacher and non-teacher establishments to be known by governing bodies before their budgets can be approved and to allow them to determine how many additional posts are needed at their schools. The only interpretation of the legislation that is consistent with the obligation on the respondents to respect protect, promote and fulfil the fundamental right to basic education is that the MEC is empowered and obliged to determine the establishment for both teaching staff and non-teaching staff at public schools in the province."

54. In addition, in *Linkside and Others v Minister of Basic Education and Others ("Linkside II")*[42] the Court held that the "ongoing failure" to appoint teachers to vacant posts at public schools throughout the province was a violation of the right to basic education.

55. Most significantly, in the context of this case, in *Tripartite Steering Committee and another v Minister of Basic Education and Others ("Tripartite Steering Committee")*[43] the Court held that the right includes a direct entitlement to be provided with transport to-and-from school at government's expense for those learners who live a distance from school and who cannot afford the cost of transport. In particular, the Court noted:[44]

[41] [2012] 4 All SA 35 (ECG) para 32.
[42] [2015] ZAECGHC (26 January 2015) para 2.
[43] 2015 (5) SA 107 (ECG).
[44] Ibid, paras 18-19.

"The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, text books from which to learn and *transport to and from school at State expense in appropriate cases*.

Put differently, in instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, government is obliged to provide transport to them in order to meet its obligations, in terms of section 7(2) of the Constitution, to promote and fulfil the right to basic education." (Own emphasis.)

56. The respondents in the current matter do not appear to deny that learners have a right to scholar transport under particular circumstances and that there is a concomitant obligation on the respondents to provide such transport. In fact, the respondents note "that learners have a constitutional right to a basic education" and "that access to schools is an essential component of the right to basic education."[45] To that end they note that in implementing a provincial scholar transport policy, the Department is guided by the rationale to improve access "by providing safe, decent, effective integrated and sustainable learner transport".[46] The respondents claim however that there are financial constraints that prevent the fulfilment of its obligations. This is dealt with in more detail below.

[45] Main Bundle, p 471, para 14.4 (First Respondent's answering affidavit).
[46] Ibid, p 472, para 14.7.

The right to basic education includes learners with disabilities

57. The courts have also unequivocally established that the right to basic education includes learners with disabilities. *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another ("Western Cape Forum for Intellectual Disability")*[47] dealt with the right to basic education for learners with disabilities. The case was brought by a coalition of non-governmental organisations that provide schooling for profoundly and severely intellectually disabled children who would otherwise not have access to an education.

58. The applicants in the case argued that that government provisioning for profoundly and severely intellectually disabled children was less than that allocated to other children, including children with mild to moderate disabilities. Government responded with a resource allocation argument, contending that given the many competing demands in South Africa, it had to make difficult policy choices and was unable to afford further expenditure on education, and that its failure to provide for this particular category of children served a rational connection to a legitimate government purpose. The Court rejected government's arguments. It held:[48]

> "A government purpose, which imposes a differential treatment on the affected children, cannot in my view be said to be rational. It must be remembered that the applicants did not ask that the needs of the affected

[47] 2011 (5) SA 87 (WCC).
[48] Ibid, para 26.

children be met by the provision of extra funds. What they ask of the respondents is to spread the available funds fairly between all children. *I am accordingly of the view that the appellant has established that the rights of the affected children to receive a basic education are being infringed*." (Own emphasis.)

59. In summary, the jurisprudence of our courts that has been developed since the landmark case of *Juma Musjid* is the following: The right to basic education is an immediately realisable right that may only be limited in terms of section 36 of the Constitution. The right is distinguishable from the qualified socio-economic rights that are subject to the standard of reasonableness review. Thus, the right is a directly enforceable right wherein all the necessary components of the right must be provided to each and every learner, including learners with disabilities. The right to scholar transport, where appropriate, constitutes an important component of the right.

D WHETHER OR NOT BUDGETARY CONSTRAINTS CONSTITUTES A LEGITIMATE DEFENCE FOR THE FAILURE TO PROVIDE SCHOLAR TRANSPORT

60. As noted in para 56 above, the respondents acknowledge the obligation to provide scholar transport. The lack of provisioning of such "safe, decent, effective integrated and sustainable learner transport" is attributed to "the

constant hurdle of financial constraints thereby seriously hampering its ability to roll out the learner transport for all those entitled to it".[49]

61. The respondents go on to note that while the Province "focuses on providing learner transport to learners living in deeply rural areas who have to travel long distances and over difficult terrain to access their schools .. [T]he Department has to consider other compelling facts and circumstances thereby adopting,… a flexible approach in the implementation of its policy. When this happens it has a ripple effect on the availability of resources for other learners who also deserve learner transport."[50]

62. Thus, while acknowledging the obligation to provide such scholar transport, the respondents raise as a defence to their failure to meet this acknowledged obligation, the defence of insufficient funds.

63. It is submitted that in terms of the approach to the interpretation of the right to basic education that has been applied by the courts, and which has been elucidated herein, to the extent that the respondents rely on a budgetary constraints argument, this can only occur in terms of section 36 of the Constitution. This was stated unequivocally in the famous passage in *Juma Musjid* [51] and which has been quoted above. The respondents have not asserted section 36 of the Constitution. In any event, the jurisprudence in respect of the right would suggest that section 36 is not applicable in the context of the facts of this particular case. This is discussed below.

[49] Main Bundle page 471 para 14.4 (First Respondent's answering affidavit).
[50] Main Bundle, p 472 – 473, paras 14.9 – 14.10 (First Respondent's answering affidavit).
[51] *Juma Musjid,* (note 10 above) para 37.

64. It is submitted further that there is a duty on government to plan and budget in accordance with its obligations in respect of the right to basic education that includes the duty to plan for scholar transport. This is also discussed below.

The non-applicability of section 36 of the Constitution

65. In terms of section 36(1) a limitation may only occur in terms of a relevant legislative provision in a law of general application. There is in this instance no legislative provision within the legal framework for basic education that provides for such a limitation in respect of scholar transport provisioning.

66. In the *Western Cape Forum for Intellectual Disability* case, the Court noted:[52]

> "It is clear that none of the three Acts referred to contain any provision which authorises an infringement of the rights of the affected children and in my view the fact that they are laws of general application does not have the result, as respondents' counsel will have it, that s 36 kicks in. For this to happen, the Acts must limit the rights of the affected children to be treated equally. Were this not so, any law of general application could be relied upon as a source for the limitation referred to in s 36 , even though no such limitation is contained in the Act. That the limitation is to be contained in the law of general application itself was made clear in *August and Another v Electoral Commission and Others."*

[52] *Western Cape Forum for Intellectual Disability* (note 47) para 3. See too the case *of August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) at para 23.

67. As such, it is asserted the respondents in this case have relied on a budgetary constraints argument as a justification for their failure to make adequate provision for scholar transport without identifying any provision in any Act authorising such a limitation of the rights of learners to scholar transport.

68. Noteworthy too from *Western Cape Forum for Intellectual Disability* is that while the Court found there was no law of general application, it noted nevertheless, that even and to the extent that section 36 would have been applicable, the respondents had failed establish that such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. One of the key considerations the Court relied on was one of the criteria in respect of reasonableness review: that a program that excludes a significant segment of society cannot be said to be reasonable.[53] Thus the Court applied the following passage from *Grootboom*:[54]

> "To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. *Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.* It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically

[53] Ibid, para 43.
[54] Ibid, para 44.

successful, fail to respond to the needs of those most desperate, they may not pass the test."(Own emphasis.)

69. Accordingly, to the extent that a limitation analysis would apply, which it is asserted it does not, the limitation cannot be said to be reasonable. This is because, excluding the neediest learners from deep rural KwaZulu-Natal despite their acknowledged urgent needs would be unreasonable.[55]

The respondents' duty to budget appropriately for scholar transport in the Province

70. Furthermore, the established jurisprudence in respect of socio-economic rights and which has been developed and applied in the right to basic education jurisprudence is that there is a duty on government to plan and budget in accordance with its obligations in respect of the right to basic education that includes the obligation to provide scholar transport where appropriate. Thus, it is not sufficient to merely assert that there is no budget for this.

71. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd) and Another,* the Constitutional Court held:[56]

"This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. *In other words, it is not good enough for the City to state*

[55] Main Bundle, p 479, para 17.12 (First Respondent's answering affidavit).
[56] 2012 (2) SA 104 (CC) at para 74.

that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations." (Own emphasis.)

72. In the *BEFA* case where government relied on a budgetary constraints argument in respect of the provision of textbooks in the Limpopo Province, the SCA rejected the argument and was critical of government's management plan for textbook delivery in its planning, budgeting and implementation of the plan. It noted:[57]

"The DBE also had a three-year implementation period during which it could have conducted proper budgetary planning, perfected its database, and ensured accuracy in procurement and efficiency in delivery."

73. The SCA therefore held:[58]

"The DBE's reliance on budgetary constraints and its complaint that the order granted by the court below violated the doctrine of the separation of powers is fallacious and appears contrived."

74. Similarly, in *Madzodzo,* the Court dismissed the argument that there were insufficient funds budgeted to meet all the furniture needs immediately. Rather than allowing government to rely on this argument as a justification for not complying with previous court orders, the Court found that government had failed to budget proactively for furniture shortages even though it ought to have

[57] *BEFA,* (note 30 above) at para 43.
[58] Ibid.

based its budget on relevant information that was available at the time the budget was decided. Thus, the Court stated:[59]

"As already indicated the respondents have been aware since at least May 2011 that there is a very serious shortage of furniture in public schools and that this lack of furniture constitutes a serious impediment to the enjoyment of the right to basic education that the Constitution guarantees. Accordingly, the respondents have been well aware for a considerable time that proactive steps need to be taken to address this shortage and to fulfil the right to basic education as required by sections 7 and 29 of the Constitution. In these circumstances it is not good enough to state that inadequate funds have been budgeted to meet the needs and that the respondents therefore cannot be placed on terms to deliver the identified needs of schools within a fixed period of time. Nor is it good enough to state that the full extent of the needs is unknown. The information available to the respondents from 2011 was such that reasonable estimates of the funding required could be made and reasonable steps taken to plan for such expenditure."

75. The applicants note that while the 2 811 418 learners in the Province represent 23% of South Africa's learners, only 7,87% of the National Department's of Transport's budget is allocated to scholar transport in the Province.[60]

76. The applicants note further that in a meeting with the Provincial Department of Education on 30 August 2016, they questioned why the budget for scholar

[59] *Madzodzo,* (note 31 above) para 35.
[60] Main Bundle, p 45, para 75 (Applicant's founding affidavit).

transport had decreased from R 201 million in 2015/2016 to R 185 million in 2016/2017. They note further that the response was that the provincial department of transport had underspent about R15 million in the 2014/2015 financial year despite the provincial department of education submitting their scholar transport needs to them. In the result this underspent R15 million was rolled over into the following financial year.[61]

77. The argument of the applicants in respect of budget appears to be that neither the Provincial Department of Education, nor the Provincial Department of Treasury had adequately motivated for a scholar transport budget from the Provincial Treasury based on scholar transport needs in the Province.[62]

78. The respondents do not address this, instead they state that "it is not within the domain of this court to adjudicate on the budget allocations."[63]

79. Nor do the respondents set out any other inter-departmental processes around the assessment of scholar transport needs in Province for the purpose of budget allocations. Instead budgetary cuts are presented as a *fait accompli* that occurred without any consideration of the scholar transport needs in the Province.[64]

80. Thus, rather than legitimate budgetary constraints being evident in the papers in this matter, what is apparent is that there appears to be an absence of

[61] Main Bundle, p 77, para 169 (Applicant's founding affidavit).
[62] Main Bundle, p 78 – 80, paras 170-179 (Applicant's founding affidavit).
[63] Main Bundle, p 484 para 20.1 (First Respondent's answering affidavit).
[64] Main Bundle, p at 484 – 487, paras 20.1 – 20.12 (First Respondent's answering affidavit).

planning and budgeting for scholar transport based on the actual scholar transport needs in the Province. The respondents ought to be precluded from relying on a budgetary constraints argument in circumstances where they have failed to accurately and thoughtfully budget for scholar transport in the Province. This is because the jurisprudence in socio-economic rights cases, including the right to basic education cases, requires government to budget effectively so as to meet its socio-economic rights obligations.

82. In summary, to the extent that the respondents have raised budgetary constraints as a defence to the failure to meet the obligation to provide scholar transport to eligible learners, this is not a legitimate defence. Such a defence may only be raised in terms of section 36 of the Constitution and in terms of the relevant legislative provision in a law of general application that does not exist in this instance. Furthermore, our courts have consistently held in respect of government socio-economic rights obligations that a bald allegation of budgetary constraints on its own is insufficient. The Province must be able to show that it planned and budgeted in respect of scholar transport, which, it is asserted, it has failed to do.

E THE OBLIGATION TO DEVELOP A COMPREHENSIVE SCHOLAR TRANSPORT PLAN THAT IS CAPABLE OF IMPLEMENTATION AND WHICH MAKES ADEQUATE PROVISIONING FOR LEARNERS WITH DISABILITIES

83. Siphilisa Isizwe asserts that there is an obligation on government to formulate a comprehensive scholar transport plan that is capable of implementation. Such a plan must also include learners with disabilities. The current provisioning in respect of scholar transport in the Province may be described as *ad hoc* and fails to provide for learners with disabilities. Siphilisa Isizwe therefore asserts further that government is failing to meets its obligations in respect of scholar transport provisioning.

84. Such an obligation to develop an appropriate scholar transport plan arises primarily from section 7(2) of the Constitution read with section 125(2)(d) of the Constitution, from the relevant case law, and from the nature of the scholar transport needs in the Province.

<u>The obligation to develop a comprehensive plan that is capable of implementation</u>

85. Section 7(2) of the Constitution places a duty on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." In other words, not only does the government have the duty not the interfere with the right to basic education, it also has the duty to take positive measures to ensure that the right is fulfilled where it is not already being enjoyed.

86. Legal scholars have described the obligation "to fulfill" to include "providing a framework of laws and policies that assist individuals and groups to enjoy their rights"[65] and as requiring government to act to "adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures."[66]

87. In *Glenister v President of the Republic of South Africa*, where the Constitutional Court held that where constitutional rights are threatened or infringed, section 7(2) of the Constitution gives rise to an obligation to take specific positive measures. Thus, the Court stated: [67]

"Section 7(2) casts an special duty upon the state. It requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an *integrated and comprehensive response*. The state's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create *efficient* anti-corruption mechanisms." (Own emphasis.)

88. As noted, the obligation to develop scholar transport in the Province further arises from section 125(2)(d) of the Constitution in terms of which the Premier and Members of the Executive Council exercise the executive powers of the provinces 'by developing and implementing provincial policy'. There is

[65] S Liebenberg (note 27) p 85.
[66] D Brand (note 27 above) p 10.
[67] 2011 (3) SA 347 (CC) para 171.

therefore an obligation to develop policy coupled with the practical component to deliver on matters of policy.

89. Noteworthy too is the following dicta in respect of effective and proper planning that also arises from the courts affirmative action jurisprudence.[68]

> "In order to honour constitutional ideals and values, and to strive to truly move towards the achievement of substantive equality, proper plans and programs must be designed and put into place. Mere random and haphazard discrimination would achieve very little, if anything, and might be counter-productive."

90. Siphlisa Isizwe submits that the affirmative action jurisprudence in this regard may be extended to socio-economic rights adjudication. Both are recognised as manifestations of a substantive conception of equality, and the transformative imperative of the constitutional project.[69] As such what is required is an effective planning effort that includes a needs assessments, together with appropriate planning and budgeting.

<u>The duty to develop a plan that includes provisioning for the diverse scholar transport needs for learners with disabilities</u>

The rights-based provisions

[68] *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) 480A-D.
[69] P Langa 'Transformative constitutionalism' (2006) 3 Stell LR 351; D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 SAJHR 309.

91. The case of *Western Cape Forum for Intellectual Disability* was noted above as affirming that the right to basic education in section 29(1)(a) of the Constitution includes the right of learners with disabilities.

92. Section 9 of the Constitution entrenches the right to equality. Section 9(2) requires the state to take positive measures to protect or advance the rights of particularly vulnerable groups. Section 9(3) prohibits the state from unfairly discriminating against any person on various listed grounds, including disability. Section 9(4) requires that the state enact national legislation to prevent unfair discrimination.

International Law

93. Section 39(1)(b) of the Constitution requires that when interpreting the Bill of Rights, our courts must have regard to international law. South Africa ratified the Convention on the Rights of Persons with Disabilities (the "CRPD") and its Optional Protocol without reservation in 2007. The South African government is therefore obliged to respect and implement the rights of persons with disabilities as set out in the CRPD. Article 24, in particular sets out state party obligations in respect of the right to education for persons with disabilities. To realise the right to education for learners with disabilities, Article 1 of the CPRD requires that State parties:

"[…]

(b) take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes."

94. These provisions have been interpreted in General Comment 5 of the United Nations Committee on Economic, Social and Cultural Rights. It states that the CRPD:[70]

"[…]requires governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take a positive action to reduce structural disadvantages and give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required."

95. This suggests that in terms of South Africa's international law obligations, there is an obligation to take active steps and put in place mechanisms for learners with disabilities. The lack of provisioning of such learners from a scholar transport policy is therefore at odds with these obligations.

[70] Para 9.

White Paper 6

96. The philosophy underpinning White Paper 6 is the notion that the provision of education is based on the level of support that the learner needs to overcome the learning barriers that she or he is experiencing. Thus, learners requiring low level support would attend ordinary schools where teachers are trained to meet their needs; learners in need of moderate support would attend full-service schools that are equipped and supported to provide for a greater range of learning tools than could be accommodated at ordinary schools; and learners who require high levels of support would attend special schools. As such the policy embodies the principles of inclusive education outlined in Article 24(2)(b) of the CRPD.

97. Thus, White Paper 6 advocates an ultimate move away from the reliance on special schools, as mainstream and full-service schools become more inclusive. A significant component of such practice is premised on the existence or at least creation of suitable scholar transport for learners with disabilities: "transport policies and practices will be reviewed on the understanding that the neighbourhood or full-service school should be promoted as the first choice." [71]

[71] White Paper 6 (note 9 above) p 27, para 2.2.1.2.

The legal framework

98. Section 3(1) of the South African Schools Act 84 of 1996 (the "Schools Act") provides for compulsory education for children between the ages of 7 and 15 or until a learner reaches Grade 9, whichever occurs first. Section 3(3) of the Schools Act requires that the Member of the Executive Council (the "MEC") responsible for education in each province must ensure that there are enough school places for every learner of compulsory school-going age in the province for which that MEC is responsible.

99. Section 12 (4) of the Schools Act further obliges MECs in a province to ensure that education for learners with special needs be provided, where reasonably practicable, at ordinary public schools, and to provide relevant educational support for such learners. In addition, in terms of section 12(5), the infrastructure at public schools must be accessible to learners with physical disabilities.

100. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the "PEPUDA") was enacted to give effect to section 9(4) of the Constitution. Section 9 of PEPUDA provides that "no person may unfairly discriminate against any person on the ground of disability". Such discrimination includes the failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

101. Thus, in *Lettie Hazel Oortman v St Thomas Aquinas Private School and Bernard Langton*[72], a learner with physical disabilities attended an ordinary school in the town of Witbank as there was no other school in the area for learners with disabilities. While some changes had been made to the school to accommodate the learner, these were insufficient to her needs and she eventually left the school. The complainant then made an application to the Equality Court alleging that by not providing all the necessary facilities, the school had discriminated against her. The Equality Court held that the school was obliged to take all reasonable steps to remove all obstacles that the learner faced. This included the building of ramps to facilitate access to classrooms and the toilet allocated to the learner.

Scholar transport policies

102. In 2105 Government published the National Learner Transport Policy, 2015 ("NLTP").[73] The primary objective of the NTLP is to "prescribe national principles, requirements, guidelines, frameworks and national norms" on the transportation of learners, which must be uniformly applied in the provinces[74]. The NTPL requires a needs-based approach to the provision of scholar transport, and it envisages a "joint planning committee" which would determine the transport needs of learners and would use the information collected by the committee to inform the "development of provincial learner transport strategies"[75]. The NLTP states:[76]

[72] Equality Court Case 1/2010 (December 2010).
[73] Department of Basic Education, National Learner Transport Policy (2015) (GG 39314 of 23 October 2015).
[74] Ibid, para 1.2.6.
[75] Ibid, para 3.1.2.

"Planning is fundamental to the success of learner transport provision. Inadequate planning could result in problems such as insufficient allocation of resources, wastage of resources and ultimately ineffective implementation of learner transport services. While there is evidence of planning and coordination of learner transport provision in some provinces, the practice has not been uniform across the country. *Therefore there is a need for adequate learner transport planning and coordination across all spheres of government."* (Own emphasis.)

103. The NLTP discusses specifically the scholar transport needs of learners with disabilities. The NLTP defines learners with disabilities as "all persons whose mobility is restricted by temporary or permanent physical or mental disability, and includes the very young, the blind or partially sighted and the deaf or hard of hearing".[77]

104. It acknowledges that the "current learner transport system does not make sufficient provision for the transportation of learners with physical disabilities."[78]

105. The NLTP states that adherence to principles of 'universal design' is a requirement for vehicles used in the learner transport system, and generally the policy requires that "all processes involved, from planning to implementation

[76] Ibid, para 3.1.
[77] Ibid, p 5 (Definitions).
[78] Ibid, para 3.9. The NTLP further highlights the challenges and dangers faced by learners in rural areas in accessing transport to schools and acknowledges the long distances they must walk to and from school – including before and after accessing vehicles for transport.

must take cognisance of the needs of learners with disabilities, and meet the required support needs".[79]

106. Finally, the NLTP notes, "Provincial departments of education will be responsible for selecting learners who will benefit from subsidized transport services". It then establishes a list of criteria for doing this. In terms of which "priority must be given to learners with disabilities, taking into consideration the nature of their disability".[80]

107. The applicants note that in 2013, that is, prior to the publication of the NLTP, the Province published a "Policy on Learner Transport for Public Schools" (the "Provincial Transport Policy").[81] The applicants papers detail a degree of uncertainty as to the applicability of the Provincial Transport Policy in that it was published prior to the NLTP and because of the applicant being advised by provincial departmental officials as to the existence of a subsequent "draft policy."[82] The respondents however appear to clarify this and state that "irrespective of the ongoing process of finalizing a revised policy for the Province", the Provincial Transport Policy has been consistently applied since 2013.[83] Thus the 2013 Provincial Transport Policy is the provincial transport policy that is currently in place.

108. This Provincial Transport Policy defines "accessible transport" as a transport that "can easily be used by a person who has some form of physical and/or

[79] Ibid para 3.9.1 - 3.9.2.
[80] Ibid para 3.3.1.
[81] Main Bundle, p 70, para 143 (Applicant's founding affidavit).
[82] Main Bundle, p 72 – 75, paras 151 – 157 (Applicant's founding affidavit).
[83] Main Bundle, p 470, para 13.6 (First Respondent's answering affidavit).

mental disability or temporary movement disabilities thereby requiring transport facilities that are equipped for their special needs."[84]

109. Save for these cursory references to the needs of learners with disabilities, the 2013 Provincial Transport Policy does not identify the diverse range of needs for learners with disabilities.[85] Moreover, unlike with the NLTP, the criteria for which learners will benefit from scholar transport policies does not appear to make any provisioning for learners with disabilities.[86]

110. As such, there appears to be no planning or provisioning for the diverse range of needs for learners with disabilities in the Provincial Transport Policy.

<u>The absence of a comprehensive scholar transport plan in the Province</u>

111. The respondents submit that the efforts to meet their scholar transport obligations in the Province include the 2013 Provincial Transport Policy,[87] the related waiting lists for scholar transport,[88] and transport pilot projects.[89] Siphilisa Isizwe submits that these measures are inadequate and *ad hoc* in approach and design. As such, these measures are not capable of immediately realising the scholar transport needs of all eligible learners. Moreover, the respondents' efforts do not even meet the criteria established in

[84] Main Bundle, p 299 (Annexure NN11: Provincial Transport Policy, Section 3. Section 3 further contains a definition of persons with disabilities).
[85] Ibid, p 305, para 12.4 (The Provisioning of Learner Transport Processes).
[86] Ibid, p 303, para 12.2 (Criteria for Learners On Dedicated Transport).
[87] Main Bundle p 470, para 13.3 (First Respondent's answering affidavit).
[88] Ibid, p 475, para 16.
[89] Ibid, p 476, para 17.5.

respect of the lower threshold of reasonableness review. This is illustrated below:

111.1 The 2013 Provincial Transport Policy as it is currently being implemented is not sufficiently flexible to cater for needs of learners in emergency situations, or those in urgent or dire need. This is evidenced by the ever-growing waiting list to which potential beneficiaries' names are added. There are still 54,000 learners who will require transport,[90] including in particularly egregious cases, such as where learners walk approximately 40 kilometres to and from school or where a learner drowned while crossing a river on the way to school.[91] The absence of planning for the diverse transport needs of learners with disabilities was also detailed above. The effect of this is that there are learners with disabilities who have been unable to complete school because of a lack of transport.[92] The need for flexibility does not obviate the need for a plan.[93] Rather it is submitted that an appropriate plan would for example, establish a contingency fund for emergencies. In any event, the respondents', on their own evidence are not able to address learners in dire need.

111.2 Appropriate financial resources are also required for effective planning. The waiting lists appears to exist separately from the budget and is only

[90] Ibid, p 474 at para 15.6.
[91] Ibid, p 479 at para 17.12.
[92] *Amicus* Bundle, p 21 at para 35 (*Amicus* founding affidavit); p 216 (Supporting affidavit of Maria Posega).
[93] *Grootboom* (note 33 above) at para 43.

fulfilled to the extent that a budget is available as opposed to budgeting occurring based on need.[94]

111.3 The ferry pilot project is also insufficiently comprehensive. Out of 181 schools, where learners must cross rivers or dams on their way to school, only learners at four schools are benefiting from the ferry pilot project.[95] There is also no indication that the pilot project will be expanded to the other 177 schools where learners are crossing dams or rivers to reach school. [96]

112. In summary, government is constitutionally obliged to develop an appropriate provincial plan to provide scholar transport for eligible learners. Such a plan must accommodate the diverse range of transport needs of learners with disabilities in the Province. The current 2013 Provincial Transport Policy fails to meet government's obligations in this regard. It fails to provide for contingency or to cater for the needs of learners that are the most dire and urgent, including learners with disabilities. Finally, insufficient resources have been made available to ensure that the Provincial Transport Policy is capable of implementation.

[94] Main Bundle, p 476 – 477, paras 17.1- 17.7 (First Respondent's answering affidavit).
[95] Main Bundle p 494 (First respondent's answering affidavit, annexure "EVN2").
[96] See *TAC,* (note 34 above) para 68, where it was held that the government unreasonably prohibited the administration of Nevirapine at public hospitals and clinics outside a limited number of pilot sites.

F THE FAILURE TO MAKE PROVISIONING FOR THE DIVERSE TRANSPORT NEEDS OF LEARNERS WITH DISABILITIES CONSTITUTES DSCRIMINATION IN TERMS OF SECTION 9(3) OF THE CONSTITUTION

113. Siphilisa Isizwe submits that government's failure to put in place a scholar transport policy that makes appropriate provision for learners with disabilities breaches the right to equality. As noted above, White Paper 6 recognises the effect of past injustices on learners living with disabilities. It notes the continued legacy of apartheid on Black learners with disabilities.[97]

"Special needs education is a sector where the ravages of apartheid remain most evident. Here, the segregation of learners on the basis of race was extended to incorporate segregation on the basis of disability. Apartheid special schools were thus organised according to two segregating criteria, race and disability. In accordance with apartheid policy, schools that accommodated white disabled learners were extremely well-resourced, whilst the few schools for black disabled learners were systematically underresourced. "

114. We submit that the question of educating Black learners with disabilities is also a question of equality and of transformation. This is so because the majority of Black learners with disabilities are poor and include learners residing in rural areas. They struggle to afford private (parent) transport to nearby schools, and instead have to rely on expensive public transport, which in the absence of a

[97] White Paper 6 (note 9 above) p 6.

state-subsidised or state-funded bus system involves minibus taxis or malume transport and commuting over long distances.[98]

115. The struggle to pay for transport and the long commutes to and from school is shared by many families as the supporting affidavits have indicated. As Maria Posega states:[99]

"We found another transport service – also a van. This transport service was very costly. It would cost R300 per month because Bongiwe had to be picked up from the house and not the tar road like other children. This was very expensive for me but I wanted Bongiwe to get an education, so I tried. Our household income is R1600 which is derived entirely from the care dependency grant I receive for Bongiwe. Bongiwe has another sibling and the three of us survive from this money."

116. Section 9 of the Constitution guarantees the right to equality. Section 9(3) of the Constitution prohibits unfair discrimination by government, and sets out a list of grounds in terms of which discrimination will be presumed to be unfair. Discrimination against a person or persons on the grounds of disability is presumed to be unfair.[100]

117. The PEPUDA was also highlighted earlier as having been passed to give effect to section 9 (4) of the Constitution. It states that denying or taking away from any person with a disability any supporting or enabling facility to function in

[98] See: Department of Basic Education, Snap Survey (2003).
[99] Amicus Bundle, p 221, paras 13; p 216 – 222, (Supporting Affidavit of Maria Dumazile Posega).
[100] Section 9(3) read with 9(5) of the Constitution.

society amounts to unfair discrimination. It also considers a failure to eliminate obstacles that limit or restrict people with disabilities from enjoying equal opportunities as unfair discrimination.

118. Furthermore, under section 9 of the PEPUDA, unfair discrimination on the ground of disability is prohibited. According to sections 13(1) and (2) respectively, conduct based on one of the prohibited grounds, such as disability, is *prima facie* discrimination and is unfair unless the respondent proves that the discrimination is fair. In expanding what is meant by unfair discrimination based on disability, section 9(c) provides that it would include "failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons".

119. Additionally, further to section 29 of the PEPUDA which sets out an illustrative list of unfair practices in certain sectors, the Schedule provides that "the failure to reasonably and practicably accommodate diversity in education" is an unfair practice is the education sector".

120. The test for unfair discrimination was set out by the Constitutional Court in *Harksen v Lane NO and others ("Harksen").*[101] The test is as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government

[101] 1998 (1) SA 300 (CC).

purpose? If it does not then there is a violation of section 8(1). If it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).[102]

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).

121. Thus, in the apposite case of the *Western Cape Disability Forum*, in applying the *Harksen* test, in determining whether or not the exclusion of learners with

[102] This reference is to the Interim Constitution, 1993. Its corresponding provision in the 1996 Constitution is section 9(3).

disabilities from an education was connected to a rational government purpose, the Court held that a government purpose that imposes a differential treatment on disabled children cannot be said to be rational.[103]

122. In determining whether or not the discrimination is unfair in respect of a listed ground, there is an assessment of the impact of the deprivation. Thus, in the *BEFA* judgment the Court noted that the learners affected by the non delivery of textbooks, are from poor communities, attending "no-fee" schools, which are the poorest schools, "and are mostly, if not exclusively", black learners, living in rural areas.[104] The judgment then makes a point of noting the problems attendant on learning without textbooks under these circumstances.[105] The SCA therefore held that the failure to deliver textbooks constituted a violation of those learners' rights to equality. [106]

123. Similarly, in an assessment of the impact of the failure to provide scholar transport for learners with disabilities from poor households, such learners have their access to education impeded by missing school or dropping out of school completely as evidenced in the supporting affidavits to Siphilisa Isizwe's application and which has been summarised above.

124. The failure to provide school transport for such learners is accordingly a violation of their right to equality.

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[103] See note 47 above.
[104] *BEFA* (note 30 above) at para 3.
[105] For example, where learners do not have textbooks, they cannot complete their homework or prepare for lessons or study. Ibid at para19.
[106] *BEFA* (note 30 above) at para 49.

G CONCLUSION

125. For the reasons set out above Siphilisa Isizwe supports the relief sought by the applicants, to compel government formulate an appropriate scholar transport plan for learners in the Province.

FARANAAZ VERIAVA

Counsel for the amicus curiae

BHAVNA RAMJI

Attorney with higher appearance rights

9 October 2017

Johannesburg