IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO. 276/16

In the matter between:

EQUAL EDUCATION	First Applicant
AMATOLAVILLE PRIMARY SCHOOL	Second Applicant

and

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

and

BASIC EDUCATION FOR ALL	*Amicus curiae*

HEADS OF ARGUMENT OF THE *AMICUS CURIAE*

I INTRODUCTION

1. In this application, the applicants seek relief in relation to several provisions of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure ("Norms and Standards"). They seek an order, inter alia,

    1.1. Declaring that regulation 4(5)(a) of the Norms and Standards is inconsistent with the Constitution,[1] the South African Schools Act[2] and a court order dated 11 July 2013,[3] and accordingly unlawful and invalid;[4] and

    1.2. In the alternative, reviewing and setting aside regulation 4(5)(a) of the Norms and Standards.[5]

2. A notice of intention to oppose was filed on behalf of all of the respondents on 29 June 2016.[6] Subsequent to this, the fourth,[7] fifth[8] and sixth[9] respondents each filed

[1] Constitution of the Republic of South Africa, 1996 ("Constitution").
[2] Act 84 of 1996.
[3] Vol 3, pp 317 – 318.
[4] Notice of motion, vol 1, p 1A, para 1.
[5] Notice of motion, vol 1, p 1A, para 2.
[6] Notices bundle, p 2.
[7] Notices bundle, pp 9 – 11.
[8] Notices bundle, pp 12 – 13.
[9] Notices bundle, pp 4 – 6.

a notice to abide and the tenth respondent filed a separate notice of intention to oppose.[10]

3. The deponent to the answering affidavit is the Minister of Basic Education ("Minister").[11] Although she does not state so specifically, it appears that she deposes to the answering affidavit on behalf of all of the respondents.[12] None of the other respondents has filed an answering affidavit.

4. For the sake of completeness, therefore, we refer to the respondents collectively in these heads of argument, unless otherwise specified.

5. On 14 December 2016, Basic Education for All ("BEFA") was granted leave to intervene as *amicus curiae* in this matter, and to adduce evidence and make written and oral submissions to the Court.[13]

6. BEFA's evidence and submissions relate to the applicants' challenge to regulation 4(5)(a), and particularly the ways in which this regulation falls short of the constitutional standard that binds the respondents:

    6.1. The regulation subjects the implementation of the Norms and Standards to the standard of progressive realisation, based on the availability of resources and the co-operation of other government agencies responsible for infrastructure. This is inconsistent with the jurisprudence

[10] Notices bundle, pp 7 – 8.
[11] Answering affidavit, vol 12, p 1100 ff.
[12] See for example answering affidavit, vol 12, p 1101, para 1.3.
[13] Order of the Eastern Cape High Court: Bisho, vol 18, pp 2487 – 2488.

of our courts, which makes clear that the respondents are obliged to deliver on each component of the right to basic education in full and immediately, or to provide sound justification as to why it is not possible for them to do so. In this regard we deal with two arguments raised by the respondents:

6.1.1. First, their assertion that the right is progressively-realisable; and

6.1.2. Second, that the Norms and Standards constitute a limitation on the right to basic education, which limitation is reasonable and justifiable based on the test set out in section 36 of the Constitution.

6.2. In dealing with these arguments we seek to put forward a framework for the interpretation of the right to basic education that is in line with our courts' framing of the right as immediately realisable.

6.3. Regulation 4(5)(a), read with regulations 4(2) and 4(3), makes no provision for the needs of the most desperate in our society, and as such falls short of the standard of reasonableness. This is a standard that our courts have set for the progressively-realisable socio-economic rights. Although we assert that the framing of the right to basic education requires the stronger protection of immediate realisation, which exceeds the reasonableness review developed through jurisprudence on the

other socio-economic rights, the respondents have failed to comply even with the lower benchmark of reasonableness and are thus in breach of their obligations.

7. On this basis, BEFA's case is that regulation 4(5)(a) is inconsistent with the right to basic education enshrined in section 29 of the Constitution. It also violates several other rights in the Constitution, including the rights to dignity and equality, and the obligation on the state to hold paramount the best interests of the child.

8. None of the evidence introduced by BEFA has been placed in dispute. Although they had the opportunity to do so, none of the parties has filed an affidavit in response to BEFA's founding affidavit in the application for leave to intervene, which affidavit (and its annexures) included the evidence to be adduced.

9. Indeed, the respondents' heads of argument do not appear to engage with any of the submissions raised by BEFA, despite the respondents having consented to their admission as *amicus curiae* and therefore accepting the relevance of these submissions.

II THE NATURE OF THE RIGHT TO BASIC EDUCATION AND ITS EFFECTIVE ENFORCEMENT

<u>The respondents' understanding of the right to basic education</u>

10. Section 29(1) of the Constitution provides as follows:

(1) Everyone has the right –

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

11. Historically, the respondents have consistently treated the right as progressively realisable, within the state's available resources and subject to the standard of reasonableness. They have done so in legal argument dealing with the nature of their obligations,[14] in delineating and defining their obligations under international law,[15] and even in the previous drafts of the Norms and Standards.[16]

12. Legal scholars note this is inconsistent with how the right is framed and with the developing jurisprudence on the right to basic education.[17]

13. This incrementalistic interpretation is evident, too, throughout their answering affidavit, for example, in the following excerpt from their answering affidavit:[18]

At first glance and the mere reading of section 29(1)(a) as opposed to other relevant rights in the Bill of Rights in the Constitution, the right is unqualified, immediately realisable, and not subject to available resources. Of utmost importance is that the right to a basic education is not a stand-alone, absolute right and it is limited by the law of general application such as Regulations

[14] Annexure "MM6", vol 20, p 2651.
[15] Annexure "MM5", vol 20, p 2648.
[16] See annexure "MM3", vol 19, pp 2589 – 2591; annexure "MM4", vol 20, p 2613, para 21 ff.
[17] Faranaaz Veriava (2016) The Limpopo textbook litigation: a case study into the possibilities of transformative constitutionalism, *South African Journal on Human Rights* 32:2, 321 – 343 at 335.
[18] Answering affidavit, vol 12, p 1155, para 88.2.

Relating to Minimum Uniform Norms and Standards for Public School (Infrastructure Norms and Standards) (sic) like any of the right in the Bill of Rights. I submit that the enabling legislation giving effect to the right points that basic education is progressively realisable like any of the other relevant rights and this resonates with the Constitutional Court's dictum in the Ermelo case by indicating that this is important and must be understood:

> *'within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress' …*

14. The respondents therefore assert:

    14.1. That the right to basic education is subject to reasonable legislative and other measures to achieve its progressive realisation within the state's available resources; and

    14.2. That the right can be limited in terms of a law of general application that complies with the limitations clause in section 36 of the Constitution.

15. The decision on which the respondents rely in making this contention is the *Ermelo* case,[19] which was based on section 29(2) of the Constitution. This provision

[19] *Head of Department, Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 (2) SA 415 (CC).

confers on learners the right to receive basic education in the language of their choice *"where that education is reasonably practicable."* It is textually different to section 29(1), which contains no internal modifier of reasonable practicability.[20]

16. The nature of the entitlement created by section 29(2) is also distinct from the entitlements under section 29(1), which include the essential elements that every learner requires in order to exercise their right to basic education.[21]

17. We address the respondents' contentions regarding the nature of the right to basic education, and its purported limitation by the norms and standards, as follows:

    17.1. First, we trace the jurisprudence on the right to basic education which makes clear that the right is immediately realisable;

    17.2. We then turn to consider some of the practical concerns associated with immediate realisation in line with the standard set by our courts;

    17.3. Given these practical concerns, we consider a pragmatic approach to giving full effect to the content of the right to basic education, at the stage of limitations analysis and remedy; and

    17.4. Finally, we consider whether regulation 4(5)(a) meets the requirements of section 36 of the Constitution.

<u>The right to basic education is immediately realisable</u>

[20] The applicants deal with this at paragraph 64 of their heads of argument.
[21] See *Madzodzo and others v Minister of Basic Education and others* 2004 (3) SA 441 (ECM) paras 19 – 20.

18. A necessary starting point in determining the nature of the right to basic education is the way in which the right is framed in the Constitution:

18.1. Section 29(1)(a) of the Constitution confers on everyone *"the right to a basic education, including adult basic education".*

18.2. The other socio-economic rights in the Constitution confer the right to have access to adequate housing,[22] health care services, including reproductive health care,[23] sufficient food and water,[24] and social security.[25] These rights also contain an internal qualifier, which states that *"the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation"*[26] of these rights. (emphasis added)

19. The text of the right to basic education therefore sets it apart from the other socio-economic rights, and particularly from the way in which those rights have been qualified. The Constitutional Court confirmed this in its *Juma Musjid* decision:

> *It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal*

[22] Section 26(1) of the Constitution.
[23] Section 27(1)(a) of the Constitution.
[24] Section 27(1)(b) of the Constitution.
[25] Section 27(1)(c) of the Constitution.
[26] Sections 26(2) and 27(2) of the Constitution, emphasis added.

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'.[27]

20. Thus, the Court stated explicitly that –

20.1. The right to basic education is immediately realisable. It is therefore distinct from the other socio-economic rights in the Constitution.

20.2. While the other socio-economic rights are subject to the internal limitations of "progressive realisation" and "available resources", there are no such internal limitations applicable to section 29(1)(a).

20.3. The only way that the right can be limited is through a law of general application that complies with the requirements of section 36 of the Constitution.

21. The *Juma Musjid* case involved the eviction of a public school from private property, and the failure by the provincial education department concerned to

[27] *Governing Body of the Juma Musjid Primary School and others v Essay NO and others (Centre for Child Law and another,* amici curiae*)* 2011 (8) BCLR 761 (CC) para 37.

conclude an agreement with the owner of the property to set out the terms and conditions of their tenancy. These facts are admittedly distinguishable from the facts currently before this Court. The Constitutional Court's dicta have, however, been adopted in subsequent cases involving education provisioning.

22. In *Minister of Basic Education and others v Basic Education for All and others*[28] the Supreme Court of Appeal affirmed the immediate realisation principle in relation to the procurement and delivery of textbooks to learners in Limpopo, holding that the state's failure to meet this standard was in breach of its constitutional obligations.

23. Similarly, in *Madzodzo,*[29] the Eastern Cape High Court held that –

> *[T]he nature of the right requires that the state take all reasonable measures to realise the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to basic education be provided.* (emphasis added)

24. The Court continued:

> *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.*[30]

[28] 2016 (4) SA 63 (SCA) at para 44.
[29] *Madzodzo v Minister of Basic Education* 2004 (3) SA 441 (ECM) at para 17.
[30] Id at para 20.

25. The uniqueness of the right to basic education is therefore, we submit, beyond question. Any argument that it is subject to the same internal limitations as the other rights in the Bill of Rights would contradict decisions of the Constitutional Court, the Supreme Court of Appeal and the High Court.

26. These decisions also make clear that the right to basic education constitutes far more than a right to a place at school; it includes, among other things, an environment that is safe and facilitates effective teaching and learning.[31]

27. It follows that the state is under an obligation to take reasonable measures to provide safe and adequate school infrastructure – and all other components of the right to basic education – with immediate effect.

28. The respondents do not challenge these assertions. In their heads of argument, they do not engage any of the case law dealing with the nature of the right, relying instead on school governance cases that do not talk to the state's obligations to provide the essential components of the right to basic education. They do this despite their involvement as parties to these cases.

<u>Immediate realisation in practice</u>

[31] The right includes a right to an adequate number of educator and non-educator personnel [*Centre for Child Law and others v Minister of Basic Education and others* 2013 (3) SA 183 (ECG) and *Linkside and others v Minister of Basic Education and others* [2015] ZAECGHC (26 January 2015)]; adequate, age- and grade-appropriate school furniture [*Madzodzo and others v Minister of Basic Education and others* 2004 (3) SA (441) (ECM)]; prescribed learning and teaching support materials [*Minister of Basic Education and others v Basic Education for All and others* 2016 (4) SA 63 (SCA) ("BEFA")]; and the right to be transported to and from school at the expense of the state [*Tripartite Steering Committee and another v Minister of Basic Education ad others* 2015 (5) SA 107 (ECG)]. See also the decision of Kollapen J in *SECTION27 and others v Minister of Basic Education and another* 2013 (2) SA 40 (GNP) at para 22, in which he expressly states that infrastructure is included in the ambit of the right to basic education.

29. While the text of the Constitution and its judicial interpretation are clear that the right to basic education, including all components of the right to basic education, must be provided immediately, we acknowledge the reality that the overnight and full delivery of every component of the right to basic education to every learner in South Africa may not be possible in each and every scenario.

30. Both the applicants and the respondents refer to the dire state of school infrastructure across the country. The National Education Infrastructure Management System Reports ("NEIMS Report") relied on by the respondents establishes that at the time that the NEIMS Report was released:

    30.1. 3 544 schools had no electricity, while 804 schools had an unreliable electricity supply;[32]

    30.2. 2 402 schools had no water supply, while 2 611 schools had an unreliable water supply;[33] and

    30.3. 913 schools had no toilets, and 11 450 schools were using basic pit toilets.[34] Notably, regulation 12(4) of the norms and standards expressly prohibits plain pit toilets.

31. The respondents refer to these statistics in asserting that *"significant numbers of schools lack the most basic resources: water, sanitation and electricity. Large*

[32] NEIMS Report, annexure "AM5" to the answering affidavit, vol 15, p 2023.
[33] NEIMS Report, annexure "AM5" to the answering affidavit, vol 15, p 2024.
[34] NEIMS Report, annexure "AM5" to the answering affidavit, vol 15, p 2025.

numbers of schools face serious problems with class size, the quality of educators, and the availability of learning materials."[35]

32. We recognise on this basis that the full delivery of all aspects of safe and adequate school infrastructure is not immediately possible. In other words, *"the disruptive effect that an immediate order would have on the government's budgeting and planning and 'queue jumping' may militate against immediate relief."*[36]

33. This does not, however, mean that we should adopt an interpretation of the right to basic education that violates the integrity of the constitutional text and the jurisprudence discussed above. In other words, the essence of the right to basic education should not be diluted by the practicalities of immediate fulfilment.

34. We submit that it is possible to strike a balance between an immediately realisable right and the realities of practical constraints. This balance leaves intact the integrity of the content of section 29(1)(a) as defined by our courts, and locates the questions of practicality in the areas appropriate for an analysis of the circumstances, namely, limitation in terms of section 36 of the Constitution and remedy in terms of section 172(1)(a).

<u>A proposed framework for immediate realisation of the right to basic education</u>

35. Where full and immediate realisation of the right to basic education is impossible or impractical in the prevailing circumstances, we submit that the state – as the

[35] Respondents' answering affidavit, vol 12, p 1163, para 94.5.
[36] Cameron McConnachie and Chris McConnachie, 'Concretizing the right to a basic Education' (2012) 129 SALJ 554 at 588.

bearer of the obligation to deliver all components of the right to basic education – has two options available to it: [37]

35.1. If the denial of the full and immediate realisation of the right to basic education is through a law of general application, it is open to the state to argue that the limitation it relies on meets the requirements of section 36[38] of the Constitution and is therefore justifiable in the circumstances; or

35.2. If the state cannot justify its denial of rights under section 36 of the Constitution, it may nevertheless rely on section 172(1)(b) of the Constitution[39] to argue that the order sought by a litigant seeking to enforce its socio-economic rights would not be just and equitable in the circumstances.

36. The latter argument would be open to the state in each particular case dealing with the provision of an essential component of the right to basic education, such as the full and complete delivery of textbooks or the immediate provision of safe and

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[37] See McConnachie and McConnachie ibid at 564; Skelton 'How far will courts go in ensuring the right to basic education?' (2012) 27 *SAPL* 392 at 407; Faranaaz Veriava, "The contribution of the courts and of civil society to the development of a transformative constitutionalist narrative for the right to basic education", January 2018, LLD Thesis, University of Pretoria.

[38] Section 36 of the Constitution provides as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[39] In terms of section 172(1)(b) of the Constitution a court may make any order that is just and equitable.

adequate school infrastructure. In this case, the applicants do not seek direct relief of that nature, and it is therefore not necessary to consider any arguments under section 172(1)(a).

37. The former analysis has been articulated in legal scholarship as follows:

> *[W]here there is a violation of the right to basic education, government will be required to provide a particular educational input immediately, unless and to the extent that it is impossible under the circumstances.*
>
> *Thus, at the remedy stage, where government is unable to provide a particular input immediately, it will be required to establish this. Government must then provide details as to the precise nature and extent of the constraints, including budgetary constraints, that would make immediate provisioning impossible. A bald allegation of budgetary constraints is insufficient. Government must also provide a description of the concrete measures and the timeframes that will be adopted to overcome these constraints.*[40]

38. This approach is evident in the order granted in the *Madzodzo* case,[41] which, inter alia, directed the respondents in that case to deliver of all outstanding school furniture within a specified time period, or failing that to make formal application to the court requesting an extension of time. The order set out the information that would be required in such application for extension, which included –

[40] Veriava note 37 above at 148.
[41] Note 21 above at para 41.

38.1. All steps taken until the signing of the affidavit in the application for extension to comply with the terms of the court's order;

38.2. The nature and extent of non-compliance;

38.3. The reasons for the non-compliance;

38.4. The steps taken or proposed to be taken to remedy the envisaged non-compliance; and

38.5. The date on which full compliance would be achieved.

39. A limitations analysis, as we discuss below, will not be an opportunity for the state to make bald assertions of budgetary constraints and for the courts to accept that. This is so for two reasons. Firstly, because the courts do not accept mere assertions of budgetary constraints as adequate. Second, because if the state has, within its constrained budgeted, allocated its resources in a manner that is unfairly discriminatory, then it will fail the limitations analysis.[42]

40. In the case of progressively-realisable socio-economic rights, which have internal limitations built into their text, it is incumbent on the litigant asserting his or her rights to demonstrate a violation of the right through a failure by the state to take reasonable measures for its progressive realisation. Thus, our courts have been faced in the past with arguments of unreasonable housing policies, unreasonable

[42] Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 (5) SA (WCC).

water policies, and unreasonable policies regarding the provision of antiretroviral treatment to prevent mother-to-child transmission of HIV. [43]

41. Where there is an alleged breach of the right to basic education – which has no such internal limitations – it is for the state to justify its conduct through the general limitations clause or to argue that an order for the full and immediate realisation of the right would not be just and equitable in the circumstances. These arguments must be supported by satisfactory evidence.

42. It is necessary, therefore, to consider whether the Norms and Standards meet the standard for a reasonable and justifiable limitation of the right to basic education, properly understood. We turn to this issue next.

The Norms and Standards fall short of the requirements of section 36 of the Constitution

43. Section 36 of the Constitution provides as follows:

> *(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*
>
> *(a) the nature of the right;*

[43] See *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC); *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC); *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) 721 (CC), which deal with these respective arguments.

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

44. Skelton highlights that one of the hurdles that may arise for the state in this analysis is that its failure to discharge its obligation may not constitute a law of general application:

> *[A] question arises as to whether the failure in the field of education is likely to manifest itself through a law of general application. It seems more likely that the failure will come through government incompetence in delivering its mandate. In such situations it is questionable whether the government could take refuge in raising a reasonable and justifiable limitation.*[44]

45. In this case, the limitation before the Court is the Norms and Standards themselves, rather than the failure to implement the Norms and Standards and ensure the provision of safe and adequate school infrastructure. We accept that regulation 4(5)(a) is a law of general application.

46. The question of limitation, once it is established that the limitation is through a law of general application, is ultimately one of proportionality, which involves the

[44] Ann Skelton note 37 above at 407

balancing of different interests.[45] The Constitutional Court in *S v Manamela* described this exercise as follows:

> *In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, applying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.*[46] (footnotes omitted)

47. The respondents assert that the Norms and Standards are a law of general application and may thus limit the right to basic education.[47] They do not, however, seek to justify the limitation against the requirements set out in section 36 of the Constitution.

48. Indeed, in their heads of argument, they curiously assert that they are not compelled to provide "empirical proof" of the reasonableness of the justification. They rely on "common sense" that *"[i]t would have been irresponsible of the Minister to promulgate norms and standards that are not subject to the availability of resources and co-operation of government agencies."*[48]

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[45] *S v Makwanyane and another* 1995 (3) SA 391 (CC) para 104.
[46] *S v Manamela and another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC) para 32.
[47] Respondents' answering affidavit, vol 12, p 1156, para 88.2.
[48] Respondents' heads of argument, paras 58 – 59.

49. In making these assertions the respondents rely on the Constitutional Court's decision in *NICRO.*[49] A reading of the case – and indeed the relevant paragraph – as a whole makes clear that they have taken these statements out of context. Paragraph 35 in its entirety reads as follows:

> *This calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is a sufficient connection between means and ends, that may be enough to justify action taken to address them.*

50. Therefore, although the duty on the respondents differs from the duty on a litigant to prove facts in support of a claim, this does not mean that there is no duty on the respondents to establish a justifiable limitation on the right to basic education, particularly where – as in this case – the facts that would constitute this justification are within the respondents' particular knowledge. This was made clear in the Constitutional Court's *Moise* decision:

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[49] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders and others* 2005 (3) SA 280 (CC) para 35.

It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but placing before the court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.[50] (emphasis added)

51. Although the respondents bear the onus of establishing that the limitation of section 29(1)(a) through the Norms and Standards meets the test for a reasonable and justifiable limitation, and have failed to place information before the Court that

[50] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as amicus curiae*) 2001 (4) SA 491 (CC) para 19. This paragraph was applied in *Phillips and another v Director of Public Prosecutions (Witwatersrand Local Division) and others* 2003 (3) SA 345 (CC) and *NICRO* above n 49, among other decisions of the Constitutional Court.

discharges this obligation, we acknowledge that the Court is seized with the ultimate authority to determine whether the limitation complies with section 36.[51]

52. We therefore highlight several factors that we submit are relevant to this analysis. In doing so we are mindful of three factors relevant to the limitation of rights, namely: the nature of the entitlement and the practicability of immediate fulfilment; the consequences of the delay; and the possibility of interim measures to prevent the further possibility of harm.[52]

53. At the heart of the limitations analysis lies the right that is sought to be limited. As we have dealt with in detail above, the respondents' interpretation of the nature of the right to basic education is fundamentally inconsistent with well-established principles that confirm that the right is not subject to progressive realisation; it is realisable in full and immediately.

54. As BEFA has demonstrated through its evidence, the respondents have repeatedly made the argument that the standard of progressive realisation applies, and the argument has been repeatedly rejected. This includes the rejection of the argument of progressive realisation in the Supreme Court of Appeal's decision regarding the provision of textbooks in Limpopo, in which the respondents were represented by the same counsel.[53]

55. It follows that an analysis of any limitation of the right must be based on an immediately-realisable right.

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[51] *Phillips and another v Director of Public Prosecutions (Witwatersrand Local Division) and others* 2003 (3) SA 345 (CC) paras 19 – 20.
[52] Veriava note 37 above at 149.
[53] *BEFA* note 31 above at para 43.

56. This inquiry also involves a consideration of the importance of the right. In this regard our courts have made clear that while the right to basic education is a fundamental right in itself, it is also a so-called empowerment right, because of its role in facilitating the achievement of the other rights in the Bill of Rights.[54]

57. In *Juma Musjid*,[55] the Constitutional Court placed reliance on General Comment 13 to the International Covenant on Economic, Social and Cultural Rights:

> *Education is both a human right in itself and an indispensable means for realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.*

[54] See Faranaaz Veriava (2016) The Limpopo textbook litigation: a case study into the possibilities of transformative constitutionalism, *South African Journal on Human Rights* 32:2, 321 – 343 at 331 ff.
[55] *Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay NO* 2011 (8) BCLR 761 (CC) para 41.

58. The Supreme Court of Appeal has confirmed this, holding that *"It cannot be emphasised enough that basic education should be seen as a primary driver of transformation in South Africa."*[56]

59. Any limitation on the learners' right to basic education would therefore have an impact on their ability to lift themselves out of their circumstances and to achieve their full potential. It would also be a setback in transforming our society to bring it in line with the rights and values of the Constitution.

60. As we stated above, the respondents do not deal directly with the considerations set out in section 36 of the Constitution. They do, however, place heavy reliance on the current state of infrastructure at public schools across South Africa. They appear to make a bald assertion of budgetary constraints that preclude them from providing safe and adequate infrastructure in full and immediately.

61. We submit that what the respondents are trying to do is to create a legal loophole, which would effectively extinguish their obligation to provide this essential component of the right to basic education, on the basis that it is a substantial task. They therefore argue that they should be allowed to effect incremental improvements to school infrastructure, in line with their understanding of the right as progressively-realisable.

62. This is not, however, a justification for their attempts to delay the provision of safe and adequate infrastructure. The Constitutional Court has made clear that a plan

[56] *Minister of Basic Education and others v Basic Education for All and others* 2016 (4) SA 63 (SCA) para 42.

or policy for the discharge of the state's obligations must be based on a correct interpretation of the right:

> *The 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 that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.*[57]

63. In other words, the respondents are under an obligation to plan and budget for the provision of safe and adequate school infrastructure on the basis that they are obliged to provide this infrastructure in full and immediately. They have failed to do so, on the basis of a mistaken understanding of the nature of the right to basic education. The only assertion they have made in their justification is that the provision of safe and adequate school infrastructure would require significant resources. They have taken this no further.

64. While we recognise that the task the respondents must perform is substantial, the effect of their failure to do so (discussed in further detail in the section below) is devastating. The respondents are not asked to perform an obligation that is auxiliary to the right to basic education; school infrastructure is a necessary condition for the access of the right.

[57] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2012 (2) SA 104 (CC) para 74.

65. Moreover, the respondents have had the obligation, since at least the introduction of section 29(1)(a) in 1996, to plan and budget for the delivery of all of its duties in respect of the right to basic education. We acknowledge that the apartheid era left an enormous gap in education infrastructure, among other things. But part of the respondents' duty is to close that gap, and their failure to plan and budget appropriately to do so has resulted in this gap widening and the education infrastructure crisis growing.

66. They therefore cannot now use that as a justification for the legal loophole they seek to create.

67. We submit that the respondents have not established a justifiable limitation on the right to basic education and that the Norms and Standards, which fall short of the standard of immediate realisation, therefore unjustifiably limit section 29(1)(a) of the Constitution.

Conclusion

68. The nature of the respondents' obligations is clear: they must take reasonable steps to provide each component of the right to basic education in full and immediately. They must develop a plan and allocate their resources in accordance with these obligations. If it is alleged that they have failed to meet their obligations in this regard then it is incumbent on them to justify their failure, either under section 36 or under section 172(1)(a).

69. They seek, through regulation 4(5)(a), to establish a legal loophole that would excuse them from the discharge of these obligations. They seek to water down the right to basic education to render it progressively-realisable. They can only do this if they justify their limitation on the right. A proportionality analysis in terms of section 36 establishes that their limitation on the right through the Norms and Standards is not reasonable and justifiable. As such regulation 4(5)(a) is inconsistent with section 29(1)(a) of the Constitution and should be declared invalid.

III THE FAILURE TO MAKE PROVISION FOR URGENT NEED FALLS SHORT OF THE CONSTITUTIONAL STANDARD APPLICABLE TO THE RESPONDENTS

Introduction

70. The respondents rely heavily on the inequalities that they inherited from the apartheid era in arguing that they cannot be expected to provide safe and adequate infrastructure to all schools and all learners across South Africa overnight.[58]

71. They seem to assert that they are making significant improvements against this background, and are therefore meeting their constitutional obligations:

> *Since 1996, the number of schools with no running water dropped from approximately 9 000 to approximately 1 700. The number of schools without*

[58] See, for example, the respondents' answering affidavit, vol 12, p 1162, para 94.4 in which they rely on the dicta of the Constitutional Court in *Head of Department, Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 (2) SA 415 (CC) at para 45.

electricity has dropped from 15 000 to 2 800. Furthermore, since 2011 the DBE has become more directly involved in infrastructure development, largely through the new Accelerated Schools Infrastructure Delivery Initiative.[59]

72. We do not seek to dispute or to undermine these improvements, and submit that the respondents should continue to address the widespread need for services identified in the NEIMS Reports.[60]

73. However, what the respondents seek to demonstrate is that they have made statistical improvements in providing safe and adequate infrastructure to learners. This is not, however, the standard that they are required to meet.

A failure to provide for those in dire need is unreasonable

74. In *Grootboom*[61] the Constitutional Court considered whether, through its state housing programme, the state had met its constitutional obligations in the context of a deep and widespread shortage in housing.

75. The Court's backdrop was the right of access to adequate housing,[62] which, unlike the right to basic education, is subject to progressive realisation within the state's

[59] Respondents' answering affidavit, vol 12, p 1161, para 94.3.
[60] Annexure "AM5" of the respondents' answering affidavit, vol15, p 2005; see also respondents' answering affidavit, vol 12, p 1163, para 94.5.
[61] *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).
[62] Section 26 of the Constitution provides as follows:
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

available resources. The Court therefore assessed the reasonableness of the programme against a lower standard than would be the case with a programme to advance the right to basic education. Its comments in relation to the standard of reasonableness are, however, apposite:

> *In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.*
>
> *Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. 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*

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(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

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 successful, fail to respond to the needs of those most desperate, they may not pass the test.[63] (emphasis added)

76. In assessing the reasonableness of the state housing programme in that case, the Court held that although what the state had accomplished through its housing programme was "a major achievement", it had failed to meet its constitutional obligations.[64] The programme made no provision to ameliorate desperate need, even through temporary measures, and was therefore unreasonable. In this regard the Court held that given the scale of the housing crisis, the desperate people would remain in desperate need for the foreseeable future, unless provided with temporary relief in terms of the housing programme. [65]

77. In other words, what is required of the state in the context of reasonableness is that it makes provision for an incremental increase in both access to and the quality of services, thus working towards the full realisation of the right concerned for everyone, but that it cannot do so blind to the realities in which people live. Its plans and programmes must take account of those in most desperate need, and to meet these needs in a way that people are not forced to live intolerable lives while these incremental improvements are being made.

[63] Id at paras 43 – 44.
[64] Id at para 53.
[65] Id at paras 52 and 65.

78. The Constitutional Court developed this further in the *PE Municipality* case.[66] The case involved the possible eviction from municipal land of people occupying the land unlawfully. In determining whether granting the eviction order would be just and equitable, the Court was required[67] to consider whether the people occupying the land would have any suitable alternative accommodation. In considering this factor in the circumstances before it, the Court held as follows:

> *In this respect it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided.*[68] (emphasis added)

79. It follows that, in order for a plan or programme to meet the standard of reasonableness, it must make provision for those in most desperate need. The identification of who these people are and what needs must be addressed depends on the circumstances of each case, and cannot be predicted with absolute certainty years or even months in advance. But the fact that these needs cannot be foreseen

[66] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[67] In terms of section 6(3)(c) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[68] Id at para 29.

to the last detail does not mean that they can reasonably be ignored. On the contrary, the state is obliged to make specific provision for them.

Examples of dire need in relation to education infrastructure

80. BEFA has been granted leave to adduce evidence through its intervention as *amicus curiae* in these proceedings. Some of this evidence illustrates the dire circumstances of learners in Limpopo. These circumstances fall into two categories:

80.1. The first is where the state of school infrastructure poses a direct and imminent threat to the health and safety of learners, giving rise to the obligation to mitigate and eliminate this threat over and above the obligation to provide safe and adequate school infrastructure. These circumstances therefore constitute violations of learners' health and safety, as well as their rights under sections 9, 10, 29(1)(a) and 28(2) of the Constitution, discussed below; and

80.2. The second is where the state of the school infrastructure is such that teaching and learning cannot take place, or can only take place at certain times. This is an obvious denial of access to education, as well as a violation of sections 9, 10 and 28(2) of the Constitution, discussed below.

81. We deal below with the evidence that supports these submissions. We submit that in considering this evidence, the Court should have regard to the Indian case of

Avinash Mehrotra v Union of India and others.[69] That case involved a devastating fire, which started in the makeshift kitchen of a middle school and swept through the entire school. The learners were in an overcrowded thatched-roof building with a single entrance, narrow stairway and classrooms without windows. These features of the building made it impossible to rescue the children after the roof collapsed. 93 children tragically died in the fire.

82. The petitioner initiated a petition to the court in terms of the right to life and the right to education, both guaranteed in the Constitution of India, for improved school conditions. In particular, the petition was directed at developing minimum safety standards for schools and ensuring their implementation, given that the problem of unsafe schools was a systemic one.

83. On an analysis of evidence submitted by each state in India regarding school safety, the court found that most states did not comply with minimum standards. In making this finding the court held that *"we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety."*[70] The court then confirmed that the right to education must incorporate safe schools.[71]

Threats to learners' health and safety

[69] Writ petition (civil) no 483 of 2004, (2009) 6 SCC 398.
[70] Id at para 30.
[71] Id at para 32.

84. Perhaps the starkest example of poor infrastructure posing a threat to learners' safety is the tragic death of Michael Komape. He passed away at age 5, when he went to the toilet at his school and the dilapidated structure collapsed under his weight. He fell into the underlying pit filled with urine and faecal matter and drowned.[72]

85. But the evidence adduced by BEFA makes clear that the unsafe conditions in which Michael was forced to attend school were not unique. Every day learners at public schools' face threats of harm, including the following:

85.1. Letsoapele Sunnyboy Mokwana, the chairperson of the School Governing Body of Mareseleng Secondary School, states that because there is only one functioning pit toilet for teachers and female learners, male learners must walk long distances into the bushes or to their homes to relieve themselves. He expresses his concern that it is not safe for these learners to walk these distances on their own.[73] His concerns are echoed by Kgaugelo Moloko, a learner at the same school, who says that she relieves herself in the bushes, but has to walk for about half an hour to get the necessary privacy and does not feel safe walking such a distance on her own. She therefore sacrifices privacy for safety and walks into the bushes with other learners.[74]

[72] BEFA affidavit, vol 19. P 2521, para 73.8.
[73] Vol 22, p 2914, paras 10 – 12.
[74] Vol 22, p 2924, paras 6.1 – 6.2.

85.2. Ramalepe Prince states that because the learners' toilets at Segware Secondary School are inaccessible, learners walk into the bushes to relieve themselves. He says, *"I hate going to the bushes because there is a group of gangsters who loiter nearby. They call themselves 'Mabhokoharam' . . . If they see us, they force us to play dice with them. if we refuse to do so, they try to rob us. I tried to help my situation by not carrying money or anything valuable with me to the bushes, but if they find that we do not have anything, they beat us up."*[75]

85.3. Mmaphuti George Thokolo, the chairperson of the school governing body of Matsoukwane Secondary School, describes the severe damage caused to his school's infrastructure by a storm. The school is forced to use one of its damaged classrooms for teaching and learning, but Mr Thokolo expresses concern that *"we do so reluctantly because the building cannot support the shaky top structures very well. We are worried that they will collapse and cause injury to the learners."* He continues, *"[t]he corrugated iron roofs of the other two damaged classrooms are still hanging from the building walls, unfastened, and present a safety risk. They could fall at any time and cause serious injury to the learners."*[76]

86. The respondents have themselves acknowledged that inappropriate infrastructure may at times threaten learners' health and safety. In the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning

[75] Affidavit of Ramalepe Prince, vol 23, p 2992, para 8.
[76] Vol 22, p 2945, para 7 and p 2947, paras 15 – 16.

Environment, they acknowledge that *"[n]early 15 percent of learners were taught in environments that expose them to danger and to potential health hazards."*[77]

87. We submit that a failure to make provision for the removal of these threats is manifestly unreasonable. We deal with this in more detail below.

Barriers to access to education

88. The respondents recognise in their own policy documents the significance of the teaching and learning environment:

> *[T]here is a link between the physical environment learners are taught, and teaching and learning effectiveness, as well as learning outcomes. Poor learning environments have been found to contribute to learner irregular attendance and dropping out of school, teacher absenteeism and teacher and learners' ability to engage in the teaching and learning process. The physical appearance of school buildings are shown to influence learner achievement and teacher attitude toward school. Extreme thermal conditions of the environment are found to increase annoyance and reduce attention span and learner mental efficiency, increase the rate of learner errors, increase teacher fatigue and the deterioration of work patterns, and affect learning achievement. Good lighting improves learners' ability to perceive visual stimuli and their ability to concentrate on instructions. A colourful environment is found to improve learners' attitudes and behaviour, attention span, learner and teacher mood,*

[77] Vol 2, p 137, para 1.18.

feelings about school and reduces absenteeism. Good acoustics improves learner hearing and concentration, especially when considering the reality that at any one time, 15 percent of learners in an average classroom suffer some hearing impairment that is either genetically based, noise-induced or caused by infections. Outdoor facilities and activities have been found to improve learner formal and informal learning systems, social development, team work, and school-community relationships.[78]

89. We recognise that safe and adequate school infrastructure is a critical component of a quality basic education, and that there is a corresponding need to provide safe and adequate infrastructure to all learners. We submit, however, that there is a special category of cases in which the state of the infrastructure prevents teaching and learning from taking place. It is this category that includes the schools and learners in most desperate need:

89.1. In good weather, Cracouw Primary School conducts multi-grade learning in its four classrooms, with Grade R learners being taught in a storeroom. This means that in addition to overcrowding, the learners in grades 1 to 6 sit in classrooms with two teachers teaching two different curricula at the same time. In bad weather, especially when it is windy, the learners at this school do not attend lessons at all.[79]

[78] National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment, vol 2, p 126, para 1.2.
[79] Affidavit of Mothotse Phineas Mokwele, vol 22, p 2895, paras 26 – 27.

89.2. Similarly, because of storm damage, learners in grades 9 and 10 at Mashao Secondary School do not have lessons in windy, rainy or very cold weather.[80] Even when the weather is good, the learners in different streams take turns using the limited number of classrooms, and therefore forfeit lessons so that their peers in other streams have a chance to learn.[81] The learners at Matsoukwane Secondary School are forced to do the same thing.[82]

89.3. Learners studying Physical Science at Muthurwana Secondary School receive their lessons under a tree. These learners – and all other learners occupying severely damaged classrooms – are sent home on rainy days.[83]

89.4. If the learners at Bolotswi Secondary School wish to use the toilet during the school day, they must go into the bushes or walk home to do so. Learners making use of the bushes walk for up to half an hour to get the necessary privacy.[84] At best, this means that they miss an hour of teaching and learning time. However, the learners sometimes do not return to school after they have gone home to relieve themselves.[85]

89.5. Similarly, the learners at Mareseleng Primary School must walk for between 20 and 30 minutes into the bushes to relieve themselves, and then 20 to 30 minutes back to school.[86] Kgaugelo Moloko, a learner at

[80] Affidavit of Tabane Molate Lemmy, vol 22, p 2934, para 29.
[81] Affidavit of Mokgadi Raboroko, vol 22, p 2941, paras 5 – 8.
[82] Affidavit of Kamogelo Teffo, vol 22, p 2959, paras 5 – 6.
[83] Affidavit of Malisha Rendani, vol 23, p 2966, paras 17 – 19.
[84] Affidavit of Thabiso Selowa, vol 22, p 2909, paras 4 – 5.
[85] Affidavit of Tshepo Selowa, vol 22, p 2905, paras 9 – 10.
[86] Affidavit of Letsoalepe Sunnyboy Mokwana, vol 22, p 2914, para 11.

this school, says that *"[i]t takes almost an hour to relieve myself once because of the walk to and from the bushes. This means that every time that I relieve myself, I miss an entire lesson and will have to catch up on what was covered during class time."*[87] She therefore tries to use the toilet only once in the school day, but must make more trips into the bushes when she is menstruating.[88]

89.6. A report by the Water Research Commission emphasises the problem of inadequate sanitation facilities during menstruation: *"There is evidence that the pattern of girls staying home from school during menstruation is a widespread problem across Africa. The lack of affordable sanitary products and facilities for girls to change or dispose of pads safely and privately at school are key factors. UNICEF (2011) estimates that 10% of girls in Africa who have reached puberty miss classes or drop out completely during their period, with the numbers as high as 20% in countries where menstrual hygiene is taboo. The problem may be more severe in rural areas".*[89](references omitted)

89.7. Ramalepe Prince, a learner at Segware Secondary School, often finds a group of gangsters when he goes into the bushes to relieve himself. When he cannot get away from them, he resigns himself to missing lessons at school, even though he is worried about what this will do to his academic performance.[90]

[87] Affidavit of Kgaugelo Moloko, vol 22, p 2924, para 6.3.
[88] Id at para 6.4.
[89] Annexure "MM7", vol 20, p 2670.
[90] Affidavit of Ramelepe Prince, vol 23, p 2992, paras 8 – 11.

90. In essence, these learners are being denied their right to basic education in its most basic form because of the state of the infrastructure at their schools.

The Norms and Standards do not make provision for dire need

91. The norms and standards distinguish between different priority levels at existing schools and set out time frames for these priorities to be addressed as follows:

91.1. All schools built entirely from mud and materials such as asbestos, metal and wood must be replaced with suitable materials within three years of the date of publication of the Norms and Standards.[91] The cut-off date for implementation in respect of this category of schools was 28 November 2016.

91.2. All schools that do not have access to any form of power supply, water supply or sanitation must be provided with these amenities within three years of the publication of the Norms and Standards.[92] The cut-off date for implementation in respect of these schools was also 28 November 2016.

91.3. Within seven years of the date of publication of the Norms and Standards (i.e. by 28 November 2020), all schools must have sufficient classrooms, electricity, water, sanitation, electronic connectivity and perimeter security.[93]

[91] Regulation 4(1)(b)(i) read with regulation 4(3)(a), vol 1, pp 95 – 96.
[92] Regulation 4(1)(b)(i) read with regulation 4(3)(b), vol 1, pp 95 – 96.
[93] Regulation 4(1)(b)(ii) read with regulation 4(3)(c), vol 1, pp 95 – 96.

91.4. All schools must be provided with libraries and laboratories for science, technology and life sciences within ten years of the publication of the Norms and Standards, i.e. by 28 November 2023.[94]

91.5. All other aspects of the Norms and Standards are to be implemented by 31 December 2020.[95]

92. These time frames are all subject to the qualifications in regulation 4(5)(a) of availability of resources and co-operation of other government agencies and entities responsible for infrastructure. In other words, if the respondents do not have the necessary resources or co-operation to discharge their obligations, then they are discharged from doing so.

93. For the reasons we set out above, the way that the Norms and Standards are currently (albeit unconstitutionally) framed, the onus would be on a party seeking to assert its rights to show that the respondents had the necessary resources and co-operation from other agencies and entities. This dilutes significantly the very rights that the Norms and Standards are intended to protect.

94. We do not dispute that the respondents have identified important priority areas and have developed a plan to address these. We commend the respondents for this.

[94] Regulation 4(1)(b)(iii) read with regulation 4(3)(d), vol 1, pp 95 – 96.
[95] Regulation 4(1)(b)(iv), vol 1, p 95.

95. However, while these are being implemented, learners are faced with threats to their health and safety, and are denied access to any schooling at all. As such many of these learners' enjoyment of the right to basic education, as well as other rights (discussed below) are hindered. Despite this, many of the circumstances described above do not on the face of it fall within the priority categories established by the Norms and Standards. This would include learners in damaged classrooms – regardless of the extent of the damage – and unsafe toilets, regardless of the safety risks they present. As such, and in terms of the Norms and Standards, the respondents would have no obligation to provide relief to these learners until November 2020 at the earliest.

96. Even where the urgent cases do fall into the priority categories identified in the Norms and Standards, the affected learners still have to wait a significant period for any relief from their circumstances.

97. While the replacement of this infrastructure with safe infrastructure conducive to teaching and learning would of course be ideal, we recognise that such a demand is not practical. However, the respondents are obliged in terms of the Constitution to provide, at the very least, temporary relief to remove the threats to these learners, pending a more permanent form of relief.

98. If the state can establish that permanent relief to remove this dire need is not possible, then the temporary relief we argue for would still be required to remove the immediate threats to learners so that they are safe and their best interests promoted in this interim period as well. This would include, for example, mobile classrooms to be used pending the provision of safer and more stable personal

classrooms, or mobile toilets, similarly to be used as a short-term option pending permanent relief.

Conclusion

99. Without these measures to address urgent need, the Norms and Standards are ineffective in guaranteeing a safe and adequate learning environment. If they are indeed aimed at achieving the right to basic education for every learner, then the respondents must put a contingency plan in place to ensure that each and every learner can in fact access this education safely and in a conducive learning environment. The failure to do so is a failure to meet even the lower threshold of reasonableness, and will therefore be in breach of the right to basic education as well.

IV THE CONSTITUTIONAL RIGHTS AND OBLIGATIONS AT PLAY

100. While the focus of this case is on the right to basic education, several other provisions of the Constitution are relevant as well. In particular, regulation 4(5)(a) violates the rights to dignity[96] and equality,[97] and the obligation to hold paramount the best interests of the child.[98]

101. The Supreme Court of Appeal has specifically acknowledged the interdependence and indivisibility of the rights in the Bill of Rights. This interdependence is marked in the context of the right to basic education, because

[96] Section 10 of the Constitution.
[97] Section 9(2) of the Constitution.
[98] Section 28(2) of the Constitution.

of its empowering role, because of its potential to allow learners to achieve their fullest human potential and because it is a right that is necessarily held by children, who are among the most vulnerable in our society.

102. The respondents assert that the applicants have laid no factual basis to establish a violation of the rights entrenched in sections 10 and 28(2) of the Constitution.[99] We respectfully disagree with this. The respondents do not dispute the poor state of infrastructure across South African schools; indeed, they rely on this to some extent in justifying their failure to provide safe and adequate infrastructure to date. We submit that this is evidence enough to illustrate grave breaches of these rights.

103. Moreover, the respondents have not disputed any of the evidence adduced by BEFA, which evidence clearly demonstrates violations of these rights. We deal with each of these rights in brief below.

<u>The right to dignity</u>

104. The right to human dignity is hailed as a foundational value of South African constitutionalism, rooted not only through its position in the Constitution but also through assenting jurisprudence. In *S v Makwanyane* O'Regan J held that –

> *Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect*

[99] Respondents' answering affidavit, vol 12, p 1158, para 91.1.

and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights].[100]

105. The state has a particular obligation to uphold, sustain and promote the rights in our Constitution, including the right to dignity.[101]

106. Human dignity is an inherent make-up of the right to education properly realised. The structure in which learners learn, the way in which they are taught, their ability to make use of safe toilets, all have a great impact on their dignity and self-worth. Our courts have said so specifically in relation to sanitation,[102] and we submit that dilapidated and inadequate school infrastructure in general must necessarily have an impact on learners' self-worth and self-respect. Indeed, the respondents appear to recognise this in their own policy documents.[103]

107. Despite this, they adopt a course of action that lacks urgency and ignores their obligation to provide immediate relief to learners as they are obliged to do. They have framed the Norms and Standards in such a manner as to dilute the rights of those learners to whom they are duty-bound, with the effect that the learners continue to attend school in unsafe and inadequate structures, and will continue to do so for the foreseeable future.

108. We submit that the respondents' understanding of their legal obligations, as expressed in the Norms and Standards, is in violation of learners' right to dignity.

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[100] *S v Makwanyane and another* 1995 (3) SA 391 (CC) para 328.
[101] *S v Williams and others* 1995 (3) SA 632 (CC) para 52.
[102] *Beja v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC).
[103] See National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment, vol 2, p 126, para 1.2.

The right to equality.

109. It is common cause that the inequality in basic education that took hold during the apartheid era is still with us. Moseneke DCJ described the position as follows:

> *Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequality are still with us.*[104]

110. The respondents recognise this in relation to school infrastructure specifically:

> *At school level, infrastructure backlogs were immense. Some 59% of schools were without electricity, 34% without water, 12% without toilets, 61% without telephones and 82% without a library. Compounding this, 57% of schools had classrooms with 45 learners or more.*[105]

111. That the respondents inherited a system with vast disparities is not disputed. But they have an obligation to address these disparities. In this regard we note that in addition to the respondents' obligation to provide a quality basic education to

[104] *Head of Department, Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 (2) SA 415 (CC) para 45
[105] Answering affidavit, vol 12 p 1144, para 62.

everyone, our courts have also recognised the centrality of the right to basic education as we strive towards the goal of transformation. [106]

112. The evidence adduced by BEFA and discussed above highlights some basic distinctions: learners attending schools with safe and adequate infrastructure can do so in all weather conditions. Learners at the schools BEFA described cannot. Learners at schools with safe and operational toilets can attend all of their lessons and relieve themselves when they need to. Learners at the schools that BEFA described cannot. Female learners at privileged schools do not absent themselves from school for hours or days when they menstruate. Those at schools described by BEFA do.

113. The differentiation between different categories of learners having been highlighted, the test for unfair discrimination as set out in *Harksen v Lane*[107] becomes relevant:

113.1. Does the differentiation amount to discrimination? If it is on a ground specified in section 9(3) of the Constitution, then discrimination is established. If it is not on a specified ground, then the differentiation will constitute discrimination where 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.

[106] *Minister of Basic Education and others v Basic Education for All and others* 2016 (4) SA 63 (SCA) para 40.
[107] 1998 (1) SA 300 (CC) para 54.

113.2. If there is discrimination, is that discrimination unfair? If it is on a specified ground, then the unfairness is presumed. If it is not on a specified ground, then the onus is on the complainant to establish unfairness with reference to the impact of the discrimination on him or her and others in the same situation.

113.3. If there is unfair discrimination, is it justified in terms of the limitations clause in section 36 of the Constitution?

114. In the *BEFA* judgment the Supreme Court of Appeal noted that, on the evidence, approximately 3% of learners in Limpopo did not have access to textbooks, whereas 97% of learners across the province and learners in all other provinces did.[108] Applying the test for unfair discrimination set out above, the Court held as follows:

> *Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.*[109]

[108] BEFA above note 31 at para 48.
[109] Id at para 49.

115. The evidence adduced by BEFA establishes that the group of learners adversely affected by unsafe and inadequate school infrastructure are part of this cohort. The majority of these schools are quintile 1 schools, which means that they are classified among the poorest schools in the country. They cater to an overwhelming majority of African learners, in rural areas, whose families and communities do not have the means to mitigate the impact of the unsafe and inadequate infrastructure at their schools.

116. Moreover, in their reliance on the legacy of education resourcing in the apartheid era, the respondents acknowledge that this is a group of people that was already marginalised and disadvantaged during that era, and their disadvantage and marginalisation perpetuates the longer that they are denied their basic rights.

117. Were these learners of a different race or a different social origin, their fate would very likely be different. It is their race and social origin that has put them in this position, and is therefore the basis of the discrimination against them.

118. While the impact of unsafe and inadequate infrastructure is present among all learners at the schools that BEFA represents, the impact is intensified in relation to female learners. Female learners are particularly vulnerable when they walk long distances into the bushes to relieve themselves. Female learners' needs in respect of sanitation facilities are higher when they are menstruating. The impact of the poor infrastructure therefore affects them disproportionately. As such, the Norms and Standards as they stand discriminate unfairly on the basis of gender as well.

119. The respondents have not sought to justify this differentiation.[110] Nor can they do so. Their failure to meet their constitutional obligations in relation to safe and adequate school infrastructure constitutes unfair discrimination on the grounds of race, gender and ethnic and social origin.

The best interests of the child

120. Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. This provision confers dual protection on children: it serves as a guiding principle in each case that deals with a particular child, and it acts as a standard against which to test provisions or conduct which affect children in general.[111] This principle therefore applies –

> *[I]n circumstances where a statutory provision is shown to be against the best interests of children in general, for whatever reason. As a matter of logic what is bad for all children will be bad for one child in a particular case.*[112]

121. Sachs J outlined the wide ambit of this provision in *S v M:*

> *The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and*

[110] The test for unfair discrimination is set out in *Harksen v Lane* 1998 (1) SA 300 (CC).
[111] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2014 (2) SA 168 (CC) para 69.
[112] Id at para 71.

that courts must function in a manner which at all times shows due respect for children's rights.[113]

122. Legal scholars note the importance of interpreting the right to basic education in a child-centred manner, to give the fullest effect to section 28(2). She states that *"it is clear that this principle – which has been a self-standing right – is a central feature in litigation relating to children's right to education."*[114]

123. An example of this is evident from the *Juma Musjid* judgment,[115] which involved the eviction of a public school from private property. The Constitutional Court was tasked with evaluating whether the High Court was correct in granting the eviction order. One of the reasons that the Court set aside the order of the High Court was that the lower court had incorrectly given precedence to property rights over the rights entrenched in section 28(2) of the Constitution.

124. The evidence adduced by BEFA demonstrates clearly how children's interests are undermined through unsafe and inadequate school infrastructure. The respondents do not dispute this. It is also, we submit, a matter of common sense. The Norms and Standards delay the provision of safe and adequate school infrastructure. They also fail to provide relief for learners who face immediate risks and threats to their safety and education.

125. The respondents have not sought to justify the delay, other than to make broad references to capacity constraints. We submit that these broad references are not

[113] *S v M* 2008 (3) SA 232 (CC) para 15.
[114] A Skelton 'The role of the courts in ensuring the right to basic education in a democratic South Africa: A critical evaluation of recent education case law' (2013) 1 *De Jure* 1 at 7.
[115] Above note 27at para 71.

sufficient to dislodge the paramountcy of the best interests of the children concerned. We accordingly submit that regulation 4(5)(a) violates section 28(2).

126. The courts also have a role to play in safeguarding the interests of all children. In addition to being the upper guardian of all minors, in cases where children are concerned, the courts are required to go beyond simply settling the dispute between the parties on a purely legal basis. They must at all times safeguard the best interests of the children concerned.[116] It is for this reason that we submit that this Court is enjoined to declare regulation 4(5)(a) invalid on the ground that it fails to give paramountcy to the best interests of the child.

V CONCLUSION

127. In adjudicating the constitutional validity of regulation 4(5)(a) it is critical that the starting point is the correct understanding of the constitutional rights concerned. The jurisprudence on the right to basic education is clear that the right is subject to immediate realisation: the state – represented in this case by the respondents – must do everything in its power to realise the right in full and immediately and to the extent that it cannot do so it must justify its failure. It can do so through the mechanism of limitation provided for in section 36 of the Constitution. It can also argue that an order directing it to discharge its obligations in full and immediately would not be just and equitable.

128. The respondents in this case have done neither.

[116] See *AD and another v DW and others* 2008 (3) SA 183 (CC) para 55.

129. On this basis we submit that this Court should make an order declaring regulation 4(5)(a) inconsistent with sections 9, 10, 28(2) and 29(1)(a) of the Constitution, as well as falling short of the standard of reasonableness in that it fails to provide for those whose needs are most dire.

130. Without detracting from the constitutional invalidity of regulation 4(5)(a), we recognise that it may be necessary to suspend the order of invalidity to allow the constitutional defects to be remedied. We submit that a suspension period of six months would strike the appropriate balance between allowing for the amendment of the regulation and giving appropriate respect to learners' rights.

131. With regard to the question of costs, we note that none of the parties has sought costs against the amicus and the amicus has not sought any costs order in its favour. The application for admission as *amicus curiae* was unopposed. In addition, the respondents have not dealt with any of the arguments raised by the *amicus curiae* in their heads of argument. We therefore submit that it would be appropriate to make no order as to costs in respect of the *amicus curiae*.

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SANDTON

5 March 2018