IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 22588/2020

In the matter between:

Equal Education and two others **Applicants**

and

Minister of Basic Education and nine others **Respondents**

HEADS OF ARGUMENT FOR RESPONDENTS

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1. In this matter the Applicants (two of whom are Organs of State litigating against other Organs of State) seek declaratory, mandatory and supervisory relief on an urgent basis.

2. The only cause of action relied upon in the founding affidavit, and the case which the Respondents are called upon to meet, is that the constitutional rights of learners[1] were breached and/or infringed because of a refusal on the part of the Minister and/or the various other Respondents to roll out the National Schools Nutrition Programme to all qualifying learners once the schools reopened with effect from 8 June 2020, and not only to those grades which have returned.

See: Record p. 006-14 (para 6 of the founding affidavit);
Record p. 006-22 (para 25.2 of the founding affidavit);
Record p. 006-24 (para 30 of the founding affidavit);
Record p. 006-25 (para 33 of the founding affidavit);
Record p. 006-47 (para 89 of the founding affidavit);

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[1] to equality in terms of section 9, to basic nutrition in terms of section 28(1)(c), to basic education in terms of section 29(1)(a) and to a particular quality of public administration in terms of section 195 of the Constitution: see Record p. 006-15 to 006-16 (para 9 of the founding affidavit).

Record p. 006-49 (para 95 of the founding affidavit);
Record p. 006-67 (para 145-146 of the founding affidavit);
Record p. 006-68 (para 147 of the founding affidavit);
Record p. 006-75 (para 170 of the founding affidavit).

3. The crux for the case of the Applicants appears from the following concluding paragraph of the founding affidavit (own underlining added):[2]

> "*170. The refusal of the respondents to resume the NSNP for all qualifying learners, and to carry out their constitutional obligations effectively, diligently and without delay, constitutes a continuing violation of the rights of learners across the country. It requires urgent intervention.*"

4. There was and is no such refusal, as has been demonstrated in the answering affidavit for the Respondents, and therefore the factual basis for the whole application has fallen away.

See: Record p. 011-12 (para 11 of the answering affidavit);
Record p. 011-31 (para 31-36 of the answering affidavit);
Record p. 011-40 (para 38.4 of the answering affidavit);
Record p. 011-42 (para 41.3-41.5 of the answering affidavit);
Record p. 011-43 (para 43 the answering affidavit);
Record p. 011-44 (para 45 of the answering affidavit);
Record p. 011-47 (para 49 of the answering affidavit);
Record p. 011-70 (para 51 of the answering affidavit);
Record p. 011-78 (para 77 of the answering affidavit);
Record p. 011-91 (para 123 the answering affidavit);
Record p. 011-95 (para 136 of the answering affidavit);
Record p. 011-97 (para 141-142 of the answering affidavit).

5. At the heart of the case for the Applicants lies the false allegation of an alleged retraction of an undertaking by the Minister on 1 June 2020, which not even the Applicants thought was a clear "*retraction*" because they sought clarity which

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[2] See Record p. 006-75 (para 170 of the founding affidavit).

clarity was immediately provided: the Minister stated clearly on 6 June 2020 in writing that, when schools reopen, meals will be provided not only for the learners who are returning to school (but, for some reason, this fact is ignored by the Applicants in their Heads of Argument when they discuss only the core facts which suits their argument).

See: Record p. 006-14 (para 6 of the founding affidavit);
Record p. 006-49 (para 95 of the founding affidavit);
Record p. 011-43 (para 43 of the answering affidavit);
Record p. 006-50 (para 97 of the founding affidavit);
Record p. 052-13 (para 24-25 of the Heads of Argument);
Record p. 006-316 (the Minister's letter of 6 June 2020).

6. In the replying affidavit there is now a salvage attempt, by shifting the case from the factual foundation of an alleged refusal to a new factual foundation, namely that all the qualifying learners are not yet receiving daily meals:[3]

6.1 This is not the case made out in the founding affidavit.

6.1.1 In motion proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led in a trial.[4]

6.1.2 The Respondents were called upon to answer the case as set out in the founding affidavit and it is not permissible for the Applicants

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3 See Record p. 12-9 (para 24.1-24,2 of the replying affidavit); p. 12-2 (para 30 of the replying affidavit); p. 12-13 (para 54-75 of the replying affidavit).

4 See *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) 469C-E.

to now argue a new case.

6.2 In fact, in the founding affidavit the Applicants mentioned that there were learners in the Western Cape who were not currently receiving a daily meal, but given the public commitment and directive in this regard the Applicants did not seek any relief: from the outset the case was therefore about the alleged refusal to provide daily meals to all qualifying learners and not the actual receipt of daily meals.[5]

6.3 In *Administrator, Transvaal v Theletsane*[6] the Appellate Division (as it was then known) held that this kind of litigation by ambush was impermissible:

> "*With respect, I am wholly unable to subscribe to this manner of approaching the appellants' affidavits. It was not for the appellants to show that the respondents were given a proper hearing; they were called upon only to meet the specific allegations put forward by the respondents in support of the relief claimed. The appellants were required to answer a case founded on the allegation of fact that the respondents were not given a hearing; they were not called upon in any other way to raise a valid defence to the relief sought. In particular, for instance, the question whether the hearing given was unduly limited in its scope was not an issue to which the appellants' deponents were required to address their minds. It is not permissible to consider the appellants' affidavits in isolation, divorced from the context of the case which they were answering.*
> *To the extent that the appellants' deponents went further*

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5 See Record p. 006-21 (para 24 of the founding affidavit); p. 006-34 (para 61 of the founding affidavit); p. 006-35 (para 62 of the founding affidavit); p. 006-35 (para 63 of the founding affidavit); p. 006-37 (para 68 of the founding affidavit).

6 [1991] 4 All SA 132 (AD) 133-134, per Botha JA for the majority.

than may have been necessary to answer the case as presented, it cannot be postulated a priori that they will not be prejudiced if their affidavits are relied upon to determine the nature and ambit of the hearing that took place. To do so may be unfair to the appellants and in effect is tantamount to reversing the onus."[7]

6.4 Furthermore the general rule in any litigation is that a respondent has the right to know what case he or she has to meet and to respond thereto, with the applicant not permitted to make or supplement his or her case in the replying affidavit.[8]

7. In the result the answering affidavit did not address those isolated incidents where the National Schools Nutrition Programme is not yet fully operational and some learners are not yet receiving meals, or the causes thereof: Covid-19 disrupted the whole country, including the economy, and especially the private sector suppliers upon which the delivery of meals to learners rely, but this is being attended to on an ongoing basis.

See: Record p. 011-70 (para 51 of answering affidavit);
Record p. 012-42 (para 129 of replying affidavit)

8. Accordingly there is no proper factual basis for any of the declaratory, mandatory or supervisory relief pursued by the Applicants, and furthermore there is nothing on the papers to suggest that the Respondents will not be rolling out the benefits

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7 of which the Constitutional Court, in *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC), endorsed the principles of this case but differed in the application thereof to that particular case.

8 See *Mostert v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) par [13].

of the National Schools Nutrition Programme to all qualifying learners in terms of any order that the Court may make.[9]

9. In the result the application should be dismissed.

Adv MM Oosthuizen SC
Adv V Mashele
Counsel for 1st to 9th Respondents
29 June 2020

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9 See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) par [109]