IN THE CONSTITUTIONAL COURT OF REPUBLIC OF SOUTH AFRICA

Constitutional Court Case No: _____
Eastern Cape Local Division, Bhisho Court Case No: 276/16

In the matter between:

MINISTER OF BASIC EDUCATION	1st Applicant (1st Respondent in Court *a quo*)
MEC FOR EDUCATION: LIMPOPO	2nd Applicant (2nd Respondent in Court *a quo*)
MEC FOR EDUCATION: EASTERN CAPE	3rd Applicant (3rd Respondent in Court *a quo*)
MEC FOR EDUCATION: FREE STATE	4th Applicant (4th Respondent in Court *a quo*)
MEC FOR EDUCATION: GAUTENG	5th Applicant (5th Respondent in Court *a quo*)
MEC FOR EDUCATION: KWAZULU-NATAL	6th Applicant (6th Respondent in Court *a quo*)
MEC FOR EDUCATION: MPUMALANGA	7th Applicant (7th Respondent in Court *a quo*)
MEC FOR EDUCATION: NORTHERN CAPE	8th Applicant (8th Respondent in Court *a quo*)
MEC FOR EDUCATION: NORTH WEST	9th Applicant (9th Respondent in Court *a quo*)
MEC FOR EDUCATION: WESTERN CAPE	10th Applicant (10th Respondent in Court *a quo*)

and

EQUAL EDUCATION 1st Respondent
(1st Applicant in Court *a quo*)

AMATOLAVILLE PRIMARY SCHOOL 2nd Respondent
(2nd Applicant in Court *a quo*)

and

BASIC EDUCATION FOR ALL *Amicus Curiae*

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL IN TERMS OF RULE 19

I, the undersigned,

CHRISTOPHER ANTHONY LEUKES

declare under oath as follows:

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1.1 I am a major male, the Acting Chief Director: Legal and Legislative Services of the Department of Basic Education, of address Sol Plaatje House, 222 Struben Street, Pretoria, Gauteng.

1.2 The facts deposed to herein, are within my personal knowledge, and are true and correct. In order to substantiate my personal knowledge:

1.2.1 I have been involved, as the Acting Chief Director of Legal and Legislative Services, on behalf of the Minister since the inception of the issue relating to the promulgation of norms and standards, to which further reference will be made to hereinafter;

1.2.2 I was also intimately involved in the previous application brought by the First Respondent (*"Equal Education"*), brought in the Court *a quo* under case number 81/2012;

1.2.3 I was also intimately involved when the Minister promulgated the norms and standards;

1.2.4 I was also intimately involved with the current Application brought by Equal Education and also attended the Court proceedings when the matter was argued in the Court *a quo* from 12 March 2018;

1.3 I have been duly authorised by the First Applicant (*"the Minister"*) and the Members of the Executive Committees,

namely the Second to the Tenth Applicants, to represent them in this Application, and to bring this Application on their behalf;

1.4 Insofar as I make allegations pertaining to legal principles I have done so:

1.4.1 out of my own knowledge, holding a Masters of Law (LLM) degree and being an admitted, but non-practising attorney;

1.4.2 on the advice of the Applicants' attorney (the State Attorney) and counsel.

A. THE PARTIES

2 First Applicant is **MINISTER OF BASIC EDUCATION**, appointed by the President of the Republic of South Africa in terms of Section 91(2) of the **Constitution of the Republic of South Africa,** 1996 responsible for basic education in South Africa.

3 Second to Tenth Applicants are the **MEMBERS OF THE EXECUTIVE COUNCILS** of the nine provinces of the Republic of South Africa, responsible for basic education in the respective provinces, appointed in terms of Section 125(2) of the Constitution.

4 First to Tenth Applicants were cited as First to Tenth Respondents in the High Court of South Africa, Eastern Cape Local Division, Bhisho, under case number 276/16.

5 First Respondent is **EQUAL EDUCATION**, a non-profit organisation with a membership based democratic movement of learners, teachers, parents and community members. Equal Education is represented in this matter by the Equal Education Law Centre with offices situated at 6 Spin Street, First Floor, Cape Town (Ref: Ms Lisa Draga) with email address lisae@eelawcentre.org.za.

6 Second Respondent is **AMATOLAVILLE PRIMARY SCHOOL**, a public school in Stutterheim King Williams Town's district.

7 Although Second Respondent withdrew its support to the Application and did not pursue the application in the Couty *a* quo, it is still cited herein for any interest it may have in the matter.

8 First and Second Respondents were the First and Second Applicants in the matter in the Court *a quo*.

9 The *Amicus Curiae* is **BASIC EDUCATION FOR ALL (*"BEFA"*)**, a voluntary association consisting of learners, parents, teachers and members of School Governing Bodies, Principals and community members concerned with improving access to and the quality of basic education in South Africa. BEFA is represented in this matter

by Section27, being the attorneys for BEFA, of address First Floor, Heerengracht Building, 87 De Korte Street, Braamfontein (email address: ramji@section27.org.za and its correspondent attorneys Gordon Mccune Attorney, 140 Alexandra Road, King Williams Town (email address: gordon@gmattorney.co.za).

10 BEFA intervened as *Amicus Curiae* in the Court *a quo*.

B. THE APPLICATION

11 This is an Application for Leave to Appeal, in terms of Rule 19 of the Rules of the above Honourable Court, against the whole of the Judgment and Order given by the Court *a quo* under case number 276/16 which Judgment was given on 19 July 2018. A copy of the Judgment is annexed hereunto as annexure **"FA1"**.

12 Because the judgment is voluminous the following guide is furnished in reading the judgment:

12.1 Introduction and the points *in limine*: Paragraphs 1 to 34;

12.2 Background: paragraphs 35 to 58;

12.3 The Regulations (the norms and standards): Paragraphs 59 to 161. In this section the Court repeated the submissions made by the parties to the Court;

12.4 The law applied to the facts: Paragraphs 162 to 202. In this section the Court gave reasons for the order;

12.5 Costs: Paragraphs 203 to 208;

12.6 The order: Pages 76 to 78.

13 It is respectfully submitted that the appeal deals with constitutional matter of importance, and it also raises arguable points of law of general public and executive importance, which ought to be considered by the above Honourable Court.

14 Motivation for the Application to Appeal directly to the above Honourable Court is dealt with hereinafter.

C. FACTUAL MATRIX

(i) The Norms and Standards

15 Section 5A of the South African Schools Act, 84 of 1996 (*"the SASA"*) provides that the Minister of Basic Education may, after consultation with the Minister of Finance and the Council of Education Ministers, by Regulation prescribe minimum norms and standards for *inter alia* school infrastructure.

16 In terms of Section 58C of the SASA the MEC responsible for education must, in accordance with an implication protocol

contemplated in Section 35 of the Intergovernmental Relations Framework Act, 13 of 2005 (*"IRFA"*) ensure compliance with *inter alia* the norms and standards determined in Section 5A.

17 Pursuant to an Order granted by the Court *a quo* granted on 11 July 2013 under case number 81/2012 the Minister, after extensive public consultation promulgated norms and standards relating to infrastructure by promulgating Regulations R920 of 29 November 2013.

18 Approximately two and a half years later Equal Education brought the Application against the following provisions contained in the Regulations:

18.1 Regulation 4(5)(a) in seeking a Declarator Order that the provisions are inconsistent with the Constitution, the SASA and the 2012 Court Order, alternatively reviewing and setting aside Regulation 4(5)(a);

18.2 Regulation 4(5)(a) reads as follows:

> *"The implementation of the norms and standards contained in these regulations, is where applicable, subject to the resources and co-operation of other government agencies and entities responsible for*

infrastructure in general and the making available of such infrastructure."

18.3 A further Declarator Order that Regulation 4(3)(a) requires that all schools and classrooms built substantially from mud and other inappropriate materials must, within a period of three years from the date of publication of the Regulations be replaced with acceptable structures in accordance to the National Building Regulations and South African National Specifications;

18.4 Regulation 4(3)(a) provides that all schools built entirely from mud and inappropriate materials must be prioritised within the ambit of Regulation 4(b)(i) which requires that existing schools must, as far as reasonably practicable comply with the norms and standards within a period of three years of publication of the Regulations;

18.5 Equal Education further sought to strike out the word *"entirely"* in Regulation 4(3)(a) and to replace it with the requirement that all classrooms built entirely or substantially from inappropriate material must be prioritised;

18.6 A further Declarator Order that Regulation 4(3)(b) read with Regulation 4(1)(b)(i) require that all schools that have not any form of electricity supply, water or sanitation supply,

must within a period of three years of date of publication of the Regulations comply with the norms and standards;

18.7 Regulation 4(3)(b) provides that all existing schools that do not have access to any form of electricity supply, water supply or sanitation must be prioritised;

18.8 It furthermore sought a Declarator Order that Regulation 4(2)(b) requires that all current plans in relation to schools must, as far as reasonably practicable, be implemented in a manner consistent with the Regulations and that all future planning and prioritisation in respect of these schools must be consistent with the Regulations;

18.9 Regulation 4(2)(b) provides that the plans and prioritisation of schools in the planning of the medium terms expenditure framework must, where possible and reasonably practicable, be revised and brought in line with the Regulations;

18.10 It also sought a Declarator Order that Regulation 4(6)(a) and 4(7) are invalid to the extent that it does not provide for the plans and reports to be made available to the public, and seeking further relief directing the Minister to amend the Regulations to provide that the plans and reports must be made publically available;

18.11 Regulation 4(6)(a) and 4(7) provides that all MEC's must within a period of twelve months after publication of the Regulations and thereafter annually provide the Minister with detailed plans on the manner in which the norms and standards are to be implemented with specific reference to Regulation 4(1).

20 The Minister opposed the Application, filed a comprehensive Affidavit supported by annexures and also consented that BEFA be admitted as *Amicus Curiae*.

21 Against this background the Court *a quo* granted the Judgment on 19 July 2018.

D. THE CONSTITUTIONAL MATTER RAISED IN THE DECISION OF TH COURT *A QUO*

22 The constitutional matter that will form the subject of the appeal, should leave to appeal be granted, may be summarised as follows:

22.1 The extent of the power of the Judiciary to interfere in the exercise of a discretion by a Member of the Executive in promulgating Regulations;

22.2 The principle of the separation of powers between the Judiciary and the Executive;

22.3 In the context of the principle of the separation of powers, the interpretation and the implementation of the relevant provisions of section 41 of the Constitution, read with the **Intergovernmental Relations Framework Act,** 13 of 2005 (IRFA);

22.4 With reference to IRFA, how the Judiciary should deal with the different fields of competence and responsibilities of the different Organs of State;

22.5 The application of Section 41 of the Constitution read with the provisions of IRFA in the realisation of the rights contained in the Bill of Rights; and

22.6 The extent of the right to basic education and what such right entails.

23 Therefore, the following provisions of the Constitution are directly implicated in this matter:

23.1 Section 29(1)(a) namely that everyone has the right to a basic education;

23.2 Section 9, namely that everyone is equal, in the context of the backlog of infrastructure that still exist in previously disadvantaged areas;

23.3 Section 10, that everyone has an inherent dignity and the right to have their dignity respected and protected;

23.4 Section 41 namely the principles of co-operative government and intergovernmental relations; and

23.5 Section 195, the basic values and principles governing public administration.

E. IS IT IN THE INTEREST OF JUSTICE TO GRANT LEAVE TO APPEAL

24 To fully motivate why it is in the interest of justice that leave to appeal be granted it is necessary to briefly summarise the nature of the disputes between the parties, namely:

24.1 Whether the Minister was entitled to make the implementation of the norms and standards subject to the resources and co-operation of other government agencies and entities responsible for infrastructure and making it available to the DBE **(Regulation 4(5)(a))**;

24.2 Whether the discretion exercised by the Minister in giving preference or prioritisation to certain schools should have been overturned by the Court **(Regulations 4(3)(a), 4(3)(b) and 4(2)(a))**; and

24.3 The setting aside of the Regulations as invalid because the reports by the MECs were not stated in the Regulations to be made available publically **(Regulations 4(6)(a) and 4(7)).**

25 Over and above that, there is the further dispute, namely the point raised by the Minister that the promulgation of the norms and standards constitutes administrative action and therefore relief could only be granted in accordance to the provisions of the **Promotion of Administrative Justice Act,** 3 of 2000 (*"the PAJA"*).

26 Against the following classification of the disputes, the interest of justice underlying this Application for Leave to Appeal is as follows:

26.1 The constitutional matter raised is one of great substance and certainly matter on which a ruling by the above Honourable Court is desirable;

26.2 The provisions of IRFA, and specifically Section 35 dealing with implementation protocols between various Organs of State and exactly what the obligation is of the Minister to provide basic education, but where the responsibility for infrastructure rest with various other Organs of State such as:

26.2.1 The Department of Public Works for the acquisition of land and construction of schools;

26.2.2 the Department of Transport for the provision of roads and access of schools,

26.2.3 The Department of Water and Sanitation, for the provision of water and sanitation services;

26.2.4 The Department of Energy and Eskom Limited for the provision of electricity;

26.3 The issue of to what extent the Judiciary may overrule the Executive in relation to taking measures to fulfil a right contained in the Bill of Rights;

26.4 Exactly what is contained in the right to basic education, and whether the Minister of Basic Education can be held liable unqualifiedly with reference to fields of competence resting within other ministries, to provide the right to basic education;

26.5 The evidence in the proceedings is sufficient to enable the above Honourable Court to deal and dispose of the matter. It will not be necessary to refer the case back to the Court *a quo* to receive any further evidence. All parties filed comprehensive Affidavits and the record in the Court *a quo* ran to several thousand pages;

26.6 It is also respectfully submitted that there is a reasonable prospect that the above Honourable Court will reverse or

materially alter the judgment if permission is granted to appeal against the decision. In this regard reference is also made to the reasons furnished hereinafter, why the Judgment of the Court *a quo* is (with respect) wrong;

26.7 The appeal will only deal with constitutional issues;

26.8 Furthermore, a great saving of time and costs will be effected should leave to appeal be granted directly to the above Honourable Court, thereby allowing the parties not to have recourse to the Full Bench of the Eastern Cape Division of the High Court, or the Supreme Court of Appeal;

26.9 The matter is furthermore also of public importance, and also specifically of importance to the Executive in general. Various other ministries such as Health, Correctional Services and the like also have the power to issue norms and standards in respect of facilities falling under their fields of competence. Therefore, the appeal will not only be relevant and of importance to the parties concerned, but also to the Executive and the general public;

26.10 The appeal involves a life controversy and any Judgment that the above Honourable Court may give will have a practical and far-reaching effect;

26.11 Should leave to appeal be granted it will not lead thereto that the matter will be conducted on a piecemeal basis, but a Judgment on these disputes will be given once and for all by the Highest Court in South Africa regarding these disputes.

F. GROUNDS UPON WHICH THE DECISION OF THE COURT *A QUO* ARE DISPUTED

27 It is respectfully submitted that the Court *a quo*, with respect, erred in granting the relief sought by Equal Education, because:

27.1 The Court misdirected itself in reading Section 29(1) of the Constitution, which is immediately realisable, to include the provision of school infrastructure, water, sanitation, electricity, roads and other infrastructure;

27.2 The Court failed to take into account, alternatively sufficiently into account, the provisions of Section 41 of the Constitution, that provides for the principles of co-operative governance and intergovernmental relations;

27.3 The Court should have found that it was rational and justifiable for the Minister to make the implimentation of the norms and standards subject to the co-operation and resources being made available by other Organs of State

and entities being responsible for the provision of these aspects of infrastructure;

27.4 The Court misdirected itself in not considering the core function of the Department of Basic Education, namely the provision of basic education in accordance to Section 29(1) of the Constitution;

27.5 The Minister proceeded from the premise that basic education is immediately realisable, but the Court failed to give a proper interpretation to the right of basic education and exactly what it entails;

27.6 The Court therefore erred in lumping other rights contained in the Bill of Rights, together with Section 29(1) without considering the rationale behind the crafting of a Bill of Rights with different provisions for which different ministries and departments that are responsible for the provision of these services guaranteed in the Bill of Rights;

27.7 The Court erred in not properly considering the provisions of IRFA, and specifically the different fields of competence and responsibility of the various State Department specifically with reference to the provision of certain basic rights and/or services;

27.8 The Court erred in its interpretation of Sections 40 and 41 of the Constitution by finding it not to co-exist with the values enunciated in the Constitution, with specific reference to section 29(1)(a) of the Constitution;

27.9 The Court erred in holding, that because the Department of Basic Education relies on the co-operation of other State Departments and public entities, in line with Section 41 of the Constitution and the relevant provisions of IRFA, that it renders the Department *"paralysed"* and *"helpless"*;

27.10 In fact, the Court should have found that Section 35 of IRFA, (Implementation Protocols) properly interpreted, actually assists in the accountability of the State in the provision of basic education as it provides for a process of participation of different government departments each with its own different expertise;

27.11 Furthermore, the Court failed to take into consideration that sections 41 to 44 of IRFA provide for a mechanism to resolve any dispute in the event of one arising between the DBE and another organ of state;

27.12 The Court should have upheld the point *in limine* raised by the Minister of non-joinder that the other State Departments or Organs of State should have been cited and brought

before the Court. Although it was raised as a point *in limine*, it permeates the whole of the case and informs the disputes between the parties, because the other Organs of State would have been in a position to, through the filing of affidavits, assist the Court regarding the provision of the other services that fall outside the core function of the Department of Basic Education;

27.13 The Court erred in interpreting the principle enunciated by the above Honourable Court in ***Grootboom***[1] narrowly and transposing the total extent of the responsibility of the State to the Department of Basic Education;

27.14 The Court furthermore misdirected itself in finding that the Minister relied solely on budgetary constraints as justification for the qualification of the norms and standards;

27.15 The Court erred by not attaching sufficient weight to the facts set out by the Minister in the opposing papers, and in the process failed to apply a purposive an interpretative approach;

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[1] ***Government of the Republic of South Africa & Others v Grootboom & Others*** 2001 (1) SA 46 (CC), para's 94 and 95 of the Judgment

27.16 The Judgment of the Court is therefore irreconcilable with the Judgment of the above Honourable Court in ***Ermelo*** [2] which expressly holds that the State, in discharging its constitutional obligations may *"… take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practises …"*;

27.17 The Court therefore wrongly failed to accept the reasonable or practicable solution provided for in the norms and standards;

27.18 The Court therefore also erred by not following the *dictum* of the above Honourable Court in ***Ermelo*** which states that education litigation *"… 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 historic redress"*;[3]

27.19 The Court therefore is at odds with the above Honourable Court in ***Ermelo*** which provides that *"(t)he measures the State is required to take must evaluate what is reasonably*

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[2] ***Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*** 2010 (2) SA 415 (CC), para 53

[3] Para 61

achievable and must keep in mind the obvious need for historical redress";[4]

27.20 In the context of the prioritisation by the Minister of certain schools, the Court erred in not following the dictum of the above Honourable Court in ***Rivonia***[5] which states that although Section 29 of the Constitution guarantees everyone the right to a basic education: *"That is the promise. In reality, a radically and unequal distribution of resources – related to a history of systematic discrimination – still makes this constitutional guarantee inaccessible for large numbers of South Africans;*

27.21 In the alternative and in the event of a finding that the Regulations referred to herein should be impugned, the Court erred in not suspending its finding of invalidity so as to allow the Minister to cure the defects in the Regulations, notwithstanding a request thereto in the Heads of Argument filed on behalf of the Minister;

27.22 The Court furthermore erred in grating an order for costs to the *Amicus Curiae* in relation to the Opposing Affidavit filed,

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4 Para 78

5 ***Governing Body of the Rivonia Primary School (Equal Education as amici curiae) v Member of Executive Committee for Education in Gauteng Province*** 2013 (6) SA 582 (CC), para 1

out of time, by the Minister in answer to the Affidavit filed by *Amicus Curiae*, BEFA;

27.23 The Court therefore should have dismissed the Application.

G. IS LEAVE SOUGHT TO ANY OTHER COURT

28 Simultaneously herewith the Applicants will file a notice of application for leave to a Court in the Court *a quo* seeking leave to appeal to the Supreme Court of Appeal. That application is conditional and is subject thereto that the Applicants are not granted leave to appeal directly to the above Honourable Court.

H. CONCLUSION

29 In view of the aforegoing the above Honourable Court is respectfully begged to grant the First to Tenth Applicants leave to appeal against the whole of the Judgment and Order made by the Court *a quo* on 19 July 2018.

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DEPONENT

SIGNED and sworn to before me at _____ on the _____ day of _____2018, the deponent having acknowledged that he/she knows and understands the contents of this affidavit and all the provisions of Act 16 of 1963 and the Regulations promulgated in terms thereof concerning the taking of the oath having been

complied with in my presence and within the area for which I have been appointed as Commissioner of Oaths.

_____

COMMISSIONER OF OATHS

Capacity:

Full names:

Physical address: