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*

SUPPLEMENTARY HEADS OF ARGUMENT

OF THE *AMICUS CURIAE*

I INTRODUCTION

1. The *amicus curiae* delivered its heads of argument on 6 March 2018. On the same day, the *amicus curiae* received an answering affidavit ("the answering affidavit") deposed to by the Minister of Basic Education on behalf of the respondents, which purports to be a response to the affidavit filed on behalf of the *amicus curiae* on 7 October 2016.

2. It appears from the answering affidavit that the respondents now seek to oppose the application filed on behalf of Basic Education for All ("BEFA") for admission as *amicus curiae* in these proceedings. They do this despite having given consent for BEFA's admission as *amicus curiae*,[1] and despite a court order granting BEFA leave to intervene.[2]

3. The respondents also do not explain why they have filed an answering affidavit almost seventeen months after the affidavit to which they seek to respond was filed. Uniform Rule 16A (7) prescribes that, if they wished to oppose BEFA's

[1] Annexure "MM28", vol 22, p 2878. The respondents state at paragraph 91.2 of the answering affidavit that their consent was conditional upon BEFA not seeking to introduce expert evidence. This condition is not apparent from their letter consenting to BEFA's admission. In any event, BEFA has not relied on any expert evidence and the question of the conditional consent therefore does not arise.
[2] Vol 18, pp 2487 – 2488.

application for leave to intervene as *amicus curiae*, they were obliged to file an answering affidavit within five days of receipt of the application for leave to intervene.

4. While it was open to the respondents to file an affidavit to respond to the evidence adduced by BEFA, none of this evidence has been placed in dispute. The answering affidavit contains only legal argument, which appears to be directed at the dismissal of BEFA's application for leave to intervene as amicus curiae.[3]

5. Moreover, they do not seek condonation for the late filing of the answering affidavit.

6. On 8 March 2018, the respondents delivered three supporting affidavits in support of the answering affidavit ("the supporting affidavits"). There is no mention of these supporting affidavits in the answering affidavit, nor is there any explanation as to why they were not filed with the answering affidavit. Similarly, there is no explanation as to why they were filed late.

7. For these reasons we submit that the Court should have no regard to the answering affidavit and the supporting affidavits. We submit further that the respondents should bear the costs associated with the answering affidavit and the supporting affidavits on a punitive scale, given their disregard for the procedures of this Court and for the events that have occurred in this case. We deal with this in further detail below.

[3] The prayer at the end of this affidavit is one for the Court to *"dismiss BEFA's with costs, inclusive of costs of three counsel".* See page 71 of the answering affidavit. It appears from this that they seek an order dismissing BEFA's application for leave to intervene as *amicus curiae*.

8. The respondents have, however, joined issue with BEFA on several points of law, and we therefore file these supplementary heads of argument to address those points of law. We do not repeat any of the arguments made in our main heads of argument filed on 6 March 2018, nor do we repeat the submissions made by the applicants.

9. Our supplementary heads of argument will address the following arguments raised by the respondents:

    9.1. Whether the challenge to the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure ("Norms and Standards") should have been brought under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

    9.2. The correct interpretation of the co-operative governance provisions;

    9.3. The contents of the supporting affidavits, to the extent that these are relevant; and

    9.4. Costs.

II THE APPLICABILITY OF PAJA

10. The respondents argue that the promulgation of the Norms and Standards constitutes administrative action and can therefore be challenged only under PAJA, alternatively the principles of rationality and legality.

11. Our courts have on several occasions debated the question of whether the promulgation of regulations constitutes administrative action, and they have yet to come up with a definitive answer. As the respondents have pointed out, in *New Clicks*, Chaskalson CJ (in a minority judgment) held that the making of regulations falls within the definition of administrative action under PAJA.[4] This was not, however, the unanimous view of the Court:

    11.1. Ngcobo J (as he then was) held that the specific power exercised in that case did constitute administrative action, but he specifically indicated his decision to refrain from determining whether regulation-making in general constitutes administrative action.[5] Langa DCJ[6] (as he then was) and Van der Westhuizen J[7] concurred in this approach.

    11.2. Sachs J held that while PAJA applied to the specific regulations prescribing a dispensing fee, it did not apply generally to the regulatory scheme at issue in the case;[8]

[4] New Clicks para 135. O'Regan J expressed her agreement with this. See para 846.
[5] Id at paras 422 and 470.
[6] Id at para 843.
[7] Id at para 851.
[8] Id at para 579.

11.3. Moseneke J (as he then was) held that it was unnecessary to determine whether PAJA applied to the regulations in issue. He assumed, however, that the administrative justice principles of lawfulness, reasonableness and procedural fairness as articulated in the Constitution applied.[9] Yacoob J concurred in this approach.[10]

12. Subsequent cases have failed to provide further clarity:

12.1. In MacDonald *v Minister of Minerals and Energy* the Court, in establishing the merits of an argument of *delegatus delegare non potest,* held that the applicability of PAJA to a decision to make regulations *"is still an open question."*[11]The Court cited *New Clicks* to substantiate this.

12.2. In *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* the Supreme Court of Appeal similarly cited *New Clicks*, but to substantiate a different conclusion: that making regulations constitutes administrative action, and that an argument that the Minister of Finance had acted *ultra vires* in promulgating regulations.[12]

12.3. Most recently, in *Mostert*[13]*,* the Supreme Court of Appeal was called upon to adjudicate a claim that a regulation was *ultra vires* and unenforceable.

[9] Id at para 724.
[10] Id at para 793.
[11] 2007 (5) SA 642 (C) para 25.
[12] 2010 (3) SA 589 (SCA) para 10.
[13] *Mostert NO v The Registrar of Pension Funds* (986/2016) ZASCA 108 (15 September 2017).

> The founding affidavit, which was broader than this, alleged that the regulation constituted administrative action and that it should be reviewed and set aside because it was not authorised by the empowering provision, and was not rationally connected to the purpose of the empowering provision. The Court held that the final word on regulation-making and the applicability of PAJA *"may therefore not have been spoken"* and that not all of the provisions of PAJA are tailored for the review of a regulation[14].

13. It follows that, contrary to what the respondents assert, there is no certainty as to whether PAJA applies to regulation-making. The above cases – all of which involved challenges to the manner in which the decision-maker had taken a decision – all reached different conclusions as to the applicability of PAJA.

14. We submit that it is not necessary for this Court to determine this question definitively. The challenge to regulation 4(5)(a) is not to the manner in which the Minister exercised her powers to promulgate the Norms and Standards. Rather, the challenge is to the substance of this regulation and the manner in which it limits the right to basic education.

15. The respondents concede that the Norms and Standards are a law of general application. We submit that they have not demonstrated that regulation 4(5)(a) constitutes a reasonable and justifiable limitation on the right to basic education properly understood. Regulation 4(5)(a) is therefore an unjustifiable limitation on the right to basic education.

[14] Id at para 10.

16. BEFA does not rely on PAJA, or on the right to just administrative action entrenched in section 33 of the Constitution. Its case is based in the substance of regulation 4(5)(a) and its compliance with section 36 of the Constitution.

17. For these reasons, we assert that the Court need not decide on the applicability of PAJA in relation to regulation 4(5)(a), because the manner in which the Minister exercised her powers is not under scrutiny.

III CO-OPERATIVE GOVERNANCE AND SHARED RESPONSIBILITY

18. Both the applicants and the *amicus curiae* argue that regulation 4(5)(a) is inconsistent with the constitution and therefore invalid. BEFA's challenge is to the respondents' interpretation of the right to basic education, imposing the standard of progressive realisation rather than the standard of immediate realisation, which is apparent from the text of section 29(1)(a) of the Constitution as well as the jurisprudence of our courts.

19. Regulation 4(5)(a) also makes realisation of the right subject to the co-operation of other government agencies. In defending this, the respondents rely on the provisions of co-operative governance in the Constitution and assert that they were compelled to insert this qualification into regulation 4(5)(a),[15] based on their understanding of a clear separation between the different spheres of government and organs of state.

[15] Answering affidavit, p 26, para 32.

20. In making this argument, the respondents, and particularly the Minister, seek to create a loophole to escape accountability for the failure to discharge her constitutional obligations. In other words, they attempt to use the co-operative governance provisions as a protective shield rather than as a platform to facilitate the discharge of their constitutional obligations.

21. In its *Certification* decision, the Constitutional Court confirmed that the co-operative governance provisions are consistent with the constitutional principle that national unity be protected and promoted.[16]

22. This is clear from the text of section 41(1) of the Constitution, which provides that all spheres of government and all organs of state within each sphere must, inter alia –

    22.1. Preserve the peace, national unity and indivisibility of the Republic;[17]

    22.2. Secure the well-being of the people of the Republic;[18]

    22.3. Provide effective, transparent, accountable and coherent government for the Republic as a whole;[19]

[16] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 290.
[17] Section 41(1)(a) of the Constitution.
[18] Section 41(1)(b) of the Constitution.
[19] Section 41(1)(c) of the Constitution.

22.4. Co-operate with one another in mutual trust and good faith by –

22.4.1. Fostering friendly relations;

22.4.2. Assisting and supporting one another;

22.4.3. Informing one another of, and consulting one another on, matters of common interest;

22.4.4. Co-ordinating their actions and legislation with one another;

22.4.5. Adhering to agreed procedures; and

22.4.6. Avoiding legal proceedings against one another.[20]

23. In other words, the obligation on the respondents is not to realise the right to basic education should they happen to get the co-operation from the other relevant organs of state; the obligation is on the respondents to secure the co-operation of the other organs of state through compliance with section 41(1) of the Constitution to achieve the full and immediate realisation of the right to basic education.

24. The Constitutional Court confirmed this in its *Grootboom* decision:

[20] Section 41(1)(h) of the Constitution.

The Constitution allocates powers and functions amongst [the different spheres of government] emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. . . . A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. . . . Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis.[21] (Emphasis added; footnotes omitted).

25. This is echoed, too, in the Preamble to the Intergovernmental Relations Framework Act 13 of 2005 ("Framework Act"):

. . .

AND WHEREAS one of the most pervasive challenges facing our country as a developmental state is the need for government to redress poverty, underdevelopment, marginalisation of people and communities and other legacies of apartheid and discrimination;

[21] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 39 – 40.

AND WHEREAS the challenge is best addressed through a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country;

AND WHEREAS co-operation and the integration of actions in government depends on a stable and effective system of governance for regulating the conduct of relations and the settlement of disputes between the national government, provincial governments and local governments;

. . .

26. To give effect to these principles, section 4 of the Framework Act sets out its object, which is to provide a framework to facilitate co-ordination in the implementation of policy and legislation, including –

    26.1. Coherent government;

    26.2. Effective provision of services;

    26.3. Monitoring implementation of policy and legislation; and

    26.4. Realisation of national priorities.

27. One of the mechanisms to achieve these objects is an implementation protocol in terms of section 35 of the Framework Act. In terms of section 35(1) –

Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.

28. Section 35(2) sets out when the entry into an implementation protocol must be considered, and section 35(3) sets out the requirements of an implementation protocol. This includes a description of the roles and responsibilities of each organ of state in implementing policy or providing a service,[22] determining the required and available resources to implement the protocol and the resources to be contributed by each organ of state with respect to the roles and responsibilities allocated to it,[23] and dispute resolution mechanisms.[24]

29. Section 58C of the South African Schools Act 84 of 1996 ("Schools Act") requires the member of the executive council in each provincial education department to enter into such an implementation protocol to ensure compliance with the Norms and Standards.

30. The respondents cannot define the obligations arising from the right to basic education by the extent to which they may or may not receive co-operation from other organs of state. Rather, their obligations arising from the right to basic

[22] Section 35(3)(b) of the Framework Act.
[23] Section 35(3)(f) of the Framework Act.
[24] Section 35(3)(g) of the Framework Act.

education must inform the terms of their implementation protocols and other measures to ensure co-operative governance.

31. To the extent that these implementation protocols are breached by other organs of state, the result would be the invocation of the applicable dispute resolution procedures to restore co-operation, rather than diluting the entitlements under section 29(1)(a) to the detriment of learners.

V THE SUPPORTING AFFIDAVITS

32. The respondents have filed three supporting affidavits in response to the evidence adduced by BEFA as to the dire circumstances at a sample of schools. While they do not state what the purpose is of these affidavits, it appears that they have been introduced to demonstrate an improvement at the infrastructure of these schools. We submit that these affidavits evidence the respondents' continued misunderstanding of BEFA's arguments in relation to dire need.

33. The improvements highlighted in the supporting affidavits, while commendable, must be seen in context:

33.1. The improvements have been effected many years after the respondents became aware of them:

33.1.1. The Limpopo Department of Education ("LDoE") appointed a service provider to construct toilets at Sekgware Secondary

School in December 2017,[25] three and a half years after they became aware of the dire situation at this school.[26] There is also no indication in the affidavit of Mrs Malatji as to when the construction of the toilets will be complete and when the learners can start to use them.

33.1.2. A storm destroyed a block of five classrooms at Serare Junior Secondary School in October 2010. The LDoE delivered mobile classrooms, intended for temporary use pending the construction of permanent classrooms in January 2011. Until at least 6 October 2016, the school was forced to use these temporary mobile classrooms as permanent classrooms. [27] The affidavit of Mrs Ratopola states that the damaged building has now been replaced.[28] She does not state when this happened, or whether the work on these classrooms is complete.

33.2. Until the renovations at these schools were effected – and indeed until these renovations are completed at an undefined time in the future, the LDoE has failed to provide relief for the learners' desperate needs through appropriate interim measures. For many years, the learners have been forced to continue to learn in environments that threaten their health and safety, and the exercise of the right to basic education. Although we

[25] Affidavit of Maite Agnes Malatji, p 3, para 6.
[26] The school informed the LDoE of the sanitation crisis in a letter dated 12 June 2014. See vol 23, p 2982.
[27] Affidavit of Moses Nkoane Phalane, vol 23, pp 2994 – 3003.
[28] Affidavit of Mankwana Elizabeth Ratopola, p 3, para 7.

acknowledge that the LDoE provided mobile classrooms to Serare Junior Secondary School in January 2011, the evidence establishes that they are not fit for permanent use, despite the fact that they became a permanent solution through the passage of time.[29]

33.3. The respondents admit that the improvements they have effected may not be safe for use by learners,[30] and so the immediate threat may not have been removed.

34. BEFA's challenge to regulation 4(5)(a) remains: that there is no contingency plan for immediate – and possibly interim – relief to be provided to those in most desperate need and that learners sustain threats to their health, safety and basic education for many years before they see an intervention. In this regard we note that the respondents have not responded to the evidence of six other schools in dire need, and that the evidence before the Court establishes that they remain in dire need.

35. What the supporting affidavits do establish is that the respondents consider themselves bound only to intervene on an ad hoc basis that complies with their own interpretation of the right. This falls far short of the constitutional standard expected of them.

[29] Affidavit of Moses Nkoane Phalane, vol 23, pp 2994 – 3003.
[30] Affidavit of Maite Agnes Malatji, p 4, para 11.

V COSTS

36. The respondents have sought a dismissal of BEFA's application for leave to intervene with costs. We have dealt above with the reasons why this relief is not competent. It follows that a costs order against BEFA would, with respect, be misplaced.

37. Although BEFA does not seek any award of costs in its favour in respect of its intervention, we submit that the respondents should be ordered to pay the costs associated with its answering affidavit and the supporting affidavits on a punitive scale. We say this for the following reasons:

    37.1. BEFA filed its application for leave to intervene on 7 October 2016. The respondents consented to this intervention. Had they decided to oppose, they should have filed their answering affidavit within five days of receipt of the founding affidavit. They did not do so. They delivered an affidavit on 6 March 2018, almost seventeen months later and six court days before the hearing of this matter.

    37.2. On 8 March 2018, they responded to part of the evidence adduced by BEFA for the first time, with no explanation for this delay. They have also done so four court days before the hearing, which limits the ability to take instructions on the contents of these supporting affidavits.

37.3. In addition to an attempt to retract their consent for BEFA's admission as *amicus* curiae, the respondents ignore the fact that there is a court order granting BEFA leave to intervene as *amicus curiae*.[31]

37.4. The bulk of the answering affidavit, when compared to the answering affidavit filed in response to the applicants' founding affidavit ("the main answering affidavit") is identical to the main answering affidavit, save for a substitution of the word "BEFA" for the words "the applicants" where they appear. As a result, the answering affidavit makes little sense, for example:

37.4.1. Referring to BEFA's launching of the main application,[32] although it was in fact the applicants who filed this application;

37.4.2. Referring[33] to the relief sought in BEFA's notice of motion, and particularly to paragraphs that do not exist in the notice of motion in BEFA's application for leave to intervene in these proceedings;[34]

37.4.3. Referring to BEFA's allegations of engagements with the respondents prior to the main application being launched. BEFA did not make these allegations; the applicants did.[35]

[31] Vol 18, pp 2487 – 2488.
[32] Answering affidavit, p 7, para 14 ff.
[33] Answering affidavit, p 6, para 9.
[34] Vol 18, pp 2489 – 2492.
[35] Answering affidavit, p 8, para 16.

37.5. The answering affidavit does not directly engage any of BEFA's submissions in this case.

38. For these reasons we submit that the respondents' conduct in relation to the answering affidavit is an abuse of the court process and should be met with an order for costs on a punitive scale.

VI CONCLUSION

39. We stand by the submissions in our heads of argument filed on 6 March 2018. To the extent that the Court accepts the contents of the answering affidavit and the supporting affidavits, we submit that they do not address the issues before the Court, for the reasons set out above.

NIKKI STEIN

Counsel for the *amicus curiae*

Thulamela Chambers

SANDTON

8 March 2018

LIST OF AUTHORITIES

LEGISLATION

1. Constitution of the Republic of South Africa, 108 of 1996

2. Intergovernmental Relations Framework Act ,13 of 2005

3. South African Schools Act, 84 of 1996

CASE LAW

1. *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)

2. *MacDonald v Minister of Minerals and Energy* 2007 (5) SA 642 (C)

3. *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA)

4. *Mostert NO v The Registrar of Pension Funds* (986/2016) ZASCA 108 (15 September 2017).

5. *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC)

6. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)