IN THE EASTERN CAPE LOCAL DIVISION, BHISHO

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 276/16

In the matter between:

EQUAL EDUCATION	1ST APPLICANT
AMATOLAVILLE PRIMARY SCHOOL	2ND APPLICANT
and	
MINISTER OF BASIC EDUCATION	1ST RESPONDENT
MEC FOR EDUCATION: LIMPOPO	2ND RESPONDENT
MEC FOR EDUCATION: EASTERN CAPE	3RD RESPONDENT
MEC FOR EDUCATION: FREE STATE	4TH RESPONDENT
MEC FOR EDUCATION: GAUTENG	5TH RESPONDENT
MEC FOR EDUCATION: KWAZULU NATAL	6TH RESPONDENT
MEC FOR EDUCATION: MPUMALANGA	7TH RESPONDENT
MEC FOR EDUCATION: NORTHERN CAPE	8TH RESPONDENT
MEC FOR EDUCATION: NORTH WEST	9TH RESPONDENT
MEC FOR EDUCATION: WESTERN CAPE	10TH RESPONDENT

NOTICE OF FILING

KINDLY TAKE NOTICE that the **Respondent's** herein files herewith its Heads of Argument as well as its list of Authorities.

DATED AT EAST LONDON ON THIS 26th DAY OF FEBRUARY 2018.

RESPONDENTS' ATTORNEY
THE STATE ATTORNEY
SALU BUILDING GROUND FLOOR
316 THABO SEHUME STREET
PRETORIA
REF: EP/SM 3693/2016/Z54
TEL: (012) 309-1510/1500
ENQ: MR E PRINSLOO
FAX: (012) 309 1649/50
086 431 8823
E-MAIL: EtPrinsloo@justice.gov.za

C/O STATE ATTORNEY –EAST LONDON
OLD SPOORNET BUILDING
17 FLEET STREET
PRIVATE BAG X 9082
EAST LONDON
TEL: (043) 706 5100
FAX: (043) 722 0926/ 742 4748
EMAIL: LiPillay@justice.gov.za

TO: THE REGISTRAR OF THE EASTERN CAPE HIGH COURT - BHISHO

AND TO: FIRST APPLICANT
THE EQUAL EDUCATION LAW CENTRE
C/O GORDON McCUNE ATTORNEYS
140 Alexandra Road
KING WILLIAMS TOWN
REF: G McCUNE/af

AND : SECOND APPLICANT
AMATOLAVILLE PRIMARY
ZONNEBLOEM STREET
STUTTERHEIM
EASTERN CAPE

GORDON McCUNE ATTORNEY
DATE 28/2/18
TIME 2:41
SIGNATURE

AND: SECTION 27
Attorneys for Amicus Curiae
C/O GORDON McCUNE ATTORNEYS
140 Alexandra Road
KING WILLIAMS TOWN
REF: G McCUNE/af

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Case No: 276/16

In the matter between:

EQUAL EDUCATION	1st Applicant
AMATOLAVILLE PRIMARY SCHOOL	2nd Applicant

and

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

RESPONDENT'S HEADS OF ARGUMENT

A. INTRODUCTION

1 This is an application by the Applicants concerning the validity of various parts of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (*"the Regulations"*).[1]

2 Section 5A (1) of the South African Schools Act, 84 of 1996 ("SASA") endows the Minister with a discretion to, by Regulation, prescribe minimum uniform norms and standards for, inter alia, school infrastructure.

3 Following the settlement agreement concluded on the 19th of November 2012 that was made an Order of Court granted on the 11th of July 2013 as per Dukada J in the above Honourable Court under case number 81/2012, the First Respondent promulgated Regulations prescribing Minimum Uniform Norms and Standards for Public School Infrastructure. The Regulations are in the papers.[2]

4 Applicants seek the following relief:

4.1 Declaring that regulation 4(5)(a) of the Regulations relating to minimum uniform norms and standards for public school infrastructure, 2013 (number R920 in Government Gazette 37081 of 29 November 2013) ("the Regulations") is inconsistent with the Constitution, SASA and the order granted

---

1 GN R920/2013. Government Gazette 37081. These Regulations were signed off by the Minister of Basic Education on 26 November 2013 and gazetted into law on 29 November 2013.

2 Applicants' Founding Affidavit, Annexure 'TM2'

on 11th July 2013 by the above Honourable Court (DUKADA J) under case number 81/2012, and is accordingly unlawful and invalid;[3]

4.2 In the alternative to paragraph 4.1 above, reviewing and setting aside regulation 4(5)(a) of the Regulations;[4]

4.3 Declaring that regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations requires that all schools and classrooms built substantially from mud as well as those schools and classrooms built substantially from materials such as asbestos, metal and wood must within a period of three (3) years from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and the Occupational Health and Safety Act 85 of 1993;[5]

4.4 Striking out the word "entirely" wherever it appears in Regulation 4(3)(a); alternatively, striking out the phrase "schools built entirely" wherever it appears in Regulation 4(3)(a), and replacing it with the words "classrooms built entirely or substantially";[6]

---

3 Applicants' Notice of Motion (*"NOM"*), Prayer 1.
4 NOM, Prayer 2.
5 NOM, Prayer 3
6 NOM, Prayer 4

4.5 Declaring that regulation 4(3)(b) read with Regulation 4(1)(b)(i) of the Regulations is to be read as requiring that all schools that do not have access to any form of power supply, water supply or sanitation, must within a period of three (3) years from date of publication of the Regulations, comply with the Norms and Standards described in Regulations 10, 11 and 12 of the Regulations;[7]

4.6 Declaring that regulation 4(2)(b) of the Regulations requires that all current plans in relation to the schools and projects contemplated in paragraph (a) must, as far as reasonably practicable, be implemented in a manner which is consistent with the Regulations, and that all future planning and prioritisation in respect of these schools must be consistent with the Regulations;[8]

4.7 Declaring that regulations 4(6)(a) and 4(7) are invalid to the extent that they do not provide for the plans and reports to be made available to the public;[9]

4.8 Directing the Minister to amend the Regulations to provide that the plans and reports submitted in terms of regulations 4(6)(a) and 4(7) of the Regulations must be made publicly available

---

7 NOM, Prayer 5
8 NOM, Prayer 6
9 NoM, Prayer 7

within a stipulated period of it having been submitted to the Minister, which period must be reasonable;[10]

4.9 If it is found that the promulgation of the Regulations was administrative action, then in respect of the relief sought in prayer 2, varying the hundred and eighty (180) day time limit contained in section 7(1)(b) of PAJA, and extending it to the date of institution of this application;[11]

4.10 Directing the First Respondent to pay the costs of this application;[12]

4.11 Directing that any of the Second to 10th Respondents who oppose this application is to pay the cost, jointly and severally with the First Respondent;[13]

4.12 Granting the Applicants such further and/or alternative relief as this court may deem fit.[14]

5 The issue at this stage of the proceedings is that the Applicants seek relief that regulation 4(5)(a) of the Regulations is inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution"), SASA and the order granted on 11 July 2013 by Dukada J in the above

---

10 NOM, Prayer 8
11 NOM, Prayer 9
12 NOM, Prayer 10
13 NOM, Prayer 11
14 NOM, Prayer 12

Honourable Court under case number 81/2012, and is accordingly unlawful and invalid. In the alternative to this relief, the Applicants seek an order reviewing and setting aside regulation 4(5)(a) of the Regulations.

6 The Applicants also purport to seek a declaratory order to remedy serious defects in regulations 4(3)(a) and (b); 4(2)(b); 4(6)(a) and 4(7).

7 The order sought include a request for an order for costs.

B. THE STRUCTURE OF THESE HEADS OF ARGUMENT

8 We have structured these heads of argument as follows:

8.1 First, we address the issue of points in *limine;*

8.2 We then proceed to the sequence of the relief sought by the Applicants concerning Regulations. In each relief sought we analyze the legislation relevant to the present dispute and show, on a proper interpretation of the Constitution and SASA, how the structure of the relief sought by Applicants is not competent; and

8.3 Finally, we then set out the Respondents' closing submissions.

C. POINTS IN LIMINE

(i) The Promulgation of the Regulations prescribing norms and standards constitute administrative action and therefore is subject to the provision of PAJA

9 The term, "administrative action" in terms of section 1 of Promotion of Administrative Justice Act 3 of 2000 ('PAJA') is defined to mean 'any decision taken, or any failure to take a decision by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person and which has a direct, external legal effect.

10 It is submitted that in promulgating the Regulations on the 29th of November 2013, the first Respondent was exercising her power in terms of the Constitution and as well as performing her public function in terms of section 5A of the SASA.

11 The Constitutional Court in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)***[15] held that:

> *"One of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premier and*

[15] 2000 (1) SA 1 (CC) at para 142

members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s 33."

12 It is further submitted that promulgating the Regulations constitute administrative action as prescribed under PAJA. In ***Minister of Health v New Clicks SA (Pty) Ltd and Others***[16], the Court held that:

"It is true that making of regulations is not referred to in subparas (a)-(f). But the reference in the main part of the definition to 'any decision of an administrative nature' and in the general provision of subpara (g) to 'doing or refusing to do any other act or thing of an administrative nature' brings the making of regulations within the scope of the definition. . . But if there is any doubt on this score, the definition of 'administrative action' must be construed consistently with s 33 the Constitution."

(ii) <u>The proper approach to the declaratory order sought by the Applicants</u>

13 In terms of section 6(2) of PAJA a Court or tribunal has the power to judicially review an administrative action. It is submitted that the

[16] 2006 (2) SA 311 at para 128

Applicants have failed to institute proceedings for the judicial review under section 6(1) of PAJA.

14 The remedies in proceedings for judicial review provided under section 8 of PAJA do not include declaratory order sought by the Applicants.

(iii) **The Application for Review is out of time and no case has been made for an extention of the time period within which to bring the application**

15 In terms of section 7(1) of PAJA any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days.

16 The Applicants only brought the application on or about the 19th of May 2016 which is more than 2(two) and half years after the promulgation of the Regulations.

17 It is submitted that the Applicants have failed to bring an application for extension of a fixed period as prescribed under section 9 of PAJA. It is submitted that this Court, is enjoined by the judgment of the Supreme Court of Appeal in ***Gqwetha v Transkei Development***

Corporation Ltd and Others[17] dealing with the purpose and function of the delay rule under section 7(1) of PAJA. Nugent JA explained that:

> *"[22] It is important for the efficient functioning of public bodies . . . that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule . . . is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by* ***Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad***[18] *(my translation):*
>
> > *'t is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapse – interest reipublicae ut sit finis litium . . . Considerations of this kind undoubtedly constitute*

---

[17] 2006 (2) SA 603 (SCA) at paras 22-23
[18] 1978 (1) SA 13 (A) at 41E-F

part of the underlying reasons for the existence of this rule.'

[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (Woegroeiers Afslaere,about, at 42C)."

(iv) <u>Non-joinder</u>

18 It is common cause that this application concerns about the Regulations relates primarily to regulation 4(5)(a). Regulation 4(5)(a) provides that duty to implement the norms and standards is subject to the resources and co-operation of other government agencies and entities responsible for infrastructure. For instance, this will include some of the departments such the Minister of Public Works being responsible for infrastructure of the State in general, the Minister of Water and Sanitation being responsible for infrastructure relating to

water and sanitation and the Minister of Energy being responsible for the provision of electrical infrastructure. None of these entities have been cited as respondents, despite list of other respondents having been identified as necessary parties.

19 This defect is not merely one of non-joinder. It permeates the entire application and manifest also as a violation of the principle of subsidiarity. It also violates the constitutional division of powers between different spheres of government and organs of state. For instance, the Department of Public Works is responsible for all immovable property of the state and therefore the Applicants seek relief exclusively against the first respondent as stated in paragraph 10 of their Founding Affidavit. This simultaneously short-circuits the Constitution and SASA; ignores the principle of co-operative and intergovernmental and results in the wrong relief being sought against the wrong party, to the exclusion of necessary but absent party which constitutes a non-joinder.

20 The reliefs sought are matters within the statutory and constitutional competence of *inter alios* the Department of Energy, the Department of Public Works, the Department of Water and Sanitation and the Department of Finance. These departments are accordingly necessary parties, but have not been cited.

21 As to the relevant principles of law, it has by now become well-established that, in the exercise of its inherent power, a Court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both subject matter and the outcomes of the litigation, have been joined as parties.[19]

22 In ***Judicial Service Commission v Cape Bar Council***[20] Brand JA dealt with the question of non-joinder in the following terms:

> *"It has now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceeding concerned (see e.g. Bowring No v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) par 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."*

---

[19] See ***Amalgamated Engineering Union v Minister of Labour*** 1949 (3) SA 637 (A) at 657 and 659; ***Gordon v Department of Health, KwaZulu-Natal 2008(6)*** SA 522 (SCA) at para 9.

[20] 2013(1) SA 170 (SCA) at para 7

23 In ***Burger v Rand Water Board***[21] Brand JA summarized the principles applicable to joinder as follows:

> *"The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the court might make."*

24 **THE SEQUENCE OF THE RELIEF SOUGHT CONCERNING REGULATIONS**

(i) **Decaratory Order: Prayer 1 of the Notice of Motion**

25 Applicants are asking for a declaratory order that regulation 4(5) (a) of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 is inconsistent with the Constitution, the SASA, and the order granted on 11 July 2013 by Dukada J in the above Honourable Court under case number 81/2012, and is accordingly unlawful and invalid.

26 In their founding affidavit and heads of argument, the Applicants repeatedly contend as follows:

---

[21] 2007(1) SA 30 (SCA) at para 7

26.1 The Minister has failed to comply with the obligation imposed by the Constitution, SASA, and the July 2013 order to make norms and standards which are legally binding and effective, in that regulation 4(5)(a) renders the norms and standards ineffective;[22]

26.2 Regulation 4(5)(a) is not rationally connected to the purpose of sections 5(A) and 58C of SASA, which is to ensure that legally binding and effective norms and standards apply to physical infrastructure in schools;[23]

26.3 Regulation 4(5)(a) is an unjustified limitation on the right to a basic education;[24]

26.4 Regulation 4(5)(a) offends the constitutional value of accountability, because it qualifies the state's obligation to provide adequate school infrastructure in such a way as to prevent the public from being able to hold the government accountable for failures in this regard;[25]

26.5 Regulation 4(5)(a) subverts the constitutional requirement of co-operative governance;[26]

---

22 FA p 44-45:Para 114-118, FA p 64-65, Para 171-174 & Applicants' Heads of Argument (HoA), p 34, Para 78.1
23 FA p 66-67, Para 179-180 & Applicants' (HoA), p 34, Para 78.2
24 FA p 65-66, Para 175-178 & Applicants' (HoA), p 34, Para 78.3
25 FA p 67-68, Para 181-185 & Applicants' (HoA), p 34, Para 78.4
26 FA p 68-69, Para 186-190 & Applicants' (HoA), p 35, Para 78.5

27 Regulation 4(5)(a) results in a breach of the July 2013 order, which required the Minister to "*prescribe Minimum Uniform Norms and Standards for school infrastructure, and the time-frames within which they must be complied with*".[27]

28 The heavy weather made of this issue by the Applicants is entirely unjustified.

29 Regulation 4(5)(a) provides that *"the implementation of the Norms and Standards contained in this Regulations is, where applicable, subject to the resources and cooperation of other government agencies and entities responsible for infrastructure in general and making available of such infrastructure".*

30 Section 40(2) of the Constitution provides that *"all spheres of government must observe and adhere to the principles on this chapter and must conduct their activities within the parameters that the chapter provide".*

31 Section 41 (1) of the Constitution set out principles that need to be followed by all spheres of governments and all organs of state when exercising co-operative government and intergovernmental relations.[28]

---

[27] FA p 69-70, Para 191 & Applicants' (HoA), p 35, Para 78.6

[28] Section 41(1) provides that all spheres of government and all organs of state within each sphere must:
(a) Preserve the peace, national unity and the indivisibility of the Republic;

32 The above section does not diminish the autonomy of any given sphere of government since subsection 1(e), (g) and (h) re-inforce the notion that each sphere of government is distinct.

33 The regulations were enacted in terms of Section 5A (1) of SASA which provides that the Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribes minimum uniform norms and standards for:

33.1 School infrastructure;

33.2 Capacity of a school in respect of the number of leaners a school can admit; and

33.3 The provision of learning and teaching support material.

(b) Secure the well-being of the people of the Republic;
(c) Provide effective, transparent, accountable and coherent government for the Republic as a whole
(d) Be loyal to the Constitution, the Republic and its people;
(e) Respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) Not assume any power or function except those conferred on them in terms of the Constitution;
(g) Exercise their power and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) Co-operate with one another in mutual trust and good faith by:
   i. Fostering friendly relations;
   ii. Assisting and supporting one another
   iii. Informing one another of, and consulting one another on, matters of common interest;
   iv. Co-ordinating their actions and legislation with one another;
   v. Adhering to agreed procedures; and
   vi. Avoiding legal proceedings against one another.

34 Subsection 2 of the above section make a provision that the norms and standards contemplated in subsection 1 must provide for, but not be limited to the following:

34.1 In respect of school infrastructure, the availability of –

34.1.1 Classrooms;

34.1.2 Electricity;

34.1.3 Water;

34.1.4 Sanitation;

34.1.5 A library;

34.1.6 Laboratories for science, technology, mathematic and life sciences;

34.1.7 Sports and recreational facilities

34.1.8 Connectivity at a school; and

34.1.9 Perimeter security;

34.2 In respect of capacity of a school-

34.2.1 The number of teachers and the class size;

34.2.2 Quality of performance of a school;

34.2.3 Curriculum and extra-curricular choices;

34.2.4 Classroom sizes; and

34.2.5 Utilization of available classrooms of a school;

34.3 In terms of section 58C of SASA 'the Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Framework Act 2005 (Act 13 of 2005), ensures compliance with –

34.3.1 Norms and Standards determined in sections 5A, 6(1), 20(11), 35 and 48(1).

34.4 Section 35 of the Intergovernmental Framework Act referred above provides, among others, that:

34.4.1 Where the implementation of a policy, the exercise of the statutory power, the performance of a statutory function or the provision of a services depends on the participation of the 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.

34.5 An implementation protocol must be considered when –

34.5.1 The implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service has been identified as a national priority;

34.5.2 An implementation protocol will materially assist the national government or a provincial government in complying with its constitutional obligations to support the sphere of the government or to build capacity in that sphere;

34.5.3 An implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to coordinate their actions in that area; or

34.5.4 An organ of state to which primary responsibility for the implementation of the policy, the exercise of the statutory power, or the provision of the service has been assigned lacks the necessary capacity.

34.6 An implementation protocol must –

34.6.1 Identify any challenges facing the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service and state how these challenges are to be addressed;

34.6.2 Describe the roles and responsibilities of each organ of state in implementing the policy, exercising the statutory power, performing the statutory function or providing the service;

34.6.3 Give an outline of the priorities, aims, and desired outcomes;

34.6.4 . . .

34.6.5 . . .

34.6.6 Determine the required and available resources to implement the protocol and the resources to be contributed by each organ of state with respect to the role and responsibilities to it;

34.6.7 . . .

34.6.8 Determine the duration of the protocol; and

34.6.9 Include any other natters on which the parties may agree.

34.7 An implementation protocol must be –

34.7.1 Consistent with any provisions of the Constitution or national legislation applicable to the relevant policy, power, function or service; and

34.7.2 In writing and signed by the parties.

35 It is submitted that the provision of services and infrastructure relating to classrooms, water, sanitation, electricity, roads and the like are not within the competency of the first Respondent and as such it requires co-operative government and intergovernmental relations amongst various government departments.

36 In ***Independent Electoral Commission v Langeberg Municipality***[29] the Constitutional Court said that:

> *"We conclude that the national sphere of government comprises at least Parliament and national executive including the President. The national sphere of government is distinct in the sense that it is separate from the other spheres. It is allocated limited functional areas in terms of the Constitution. The*

[29] 2001 (3) SA 925 (CC) at para [26]

provincial and national spheres of government have concurrent powers in relation to those functional areas described in Schedule 4 of the Constitution. All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Section 40 and 41 were designed in an effort to achieve this result."

37 In ***Government of the Republic of South Africa and Others v Grootboom and Others***[30] the Constitutional Court noted that:

> *"[39] What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The last of these may, as it does in this case, comprise two tiers. The Constitution allocates powers and functions amongst these different spheres emphasizing*

[30] 2001 (1) SA 46 (CC) at paras 39-40

their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable program therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

[40] Thus, a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chap 3 of the Constitution. It may also require framework legislation at national level, a matter we need not to consider further in this case as there is national legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the program but the national sphere of government must assume responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasized 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. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met."

38 It is submitted that the order by Dukada J was to the effect that:

"[1] The Minister must by 12 September 2013, publish for comments, amended draft Regulations for Minimum Uniform Norms and Standards for school infrastructure in terms of Section 5A(1)(a) of the South African Schools Act, 84 of 1996, and in her sole discretion consult directly with stakeholders.

[2] The Minister must, by 30 November 2013, prescribe Minimum Uniform Norms and Standards, by promulgation of Regulations, for school infrastructure, in terms of Section 5 (1) (a) of the South African Schools Act, 84 of 1996, which provides for the availability of the school infrastructure referred to in Section 5A(2)(a) of the Act. The regulation shall prescribe Minimum Uniform Norms and Standards for School Infrastructure and the timeframe within which they must be complied with."

39 It is submitted that the first Respondent has complied with the order of the above Honourable Court thereby promulgating the provisions of the Constitution and the provisions of SASA and the relief sought by the Applicants of non-compliance with the Court Order has no basis. The approach adopted by the Applicants is simply not correct.

40 The Court Order granted by the above Honourable Court as per Dukada J was as a result of the Settlement Agreement reached between the first Respondent and the Applicants that was then made an Order of Court which brought the matter into finality.

41 In ***Eke v Parsons***[31] the Court held that:

> *"The effect of a settlement order is to change the status of the right and obligation between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, "a matter judged"). It changes the term of a settlement agreement to an enforcement court order. . ."*

42 It is submitted that the promulgation of the Regulations and the insertion of regulation 4(5) was in compliance with Chapter 3 of the Constitution, SASA, the Court Order as per Dukada J and generally with section 35 of the Framework Act.

---

[31] 2016 (3) SA 37 (CC) at para 31

43 The Applicants also contend that Regulation 4(5)(a) is not rationally connected to the purpose of sections 5(A) and 58C of SASA, which is to ensure that legally binding and effective norms and standards apply to physical infrastructure in schools.

44 The Minister's decision to enact the regulations probably amounted to administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[32] The decision thus had to be rational[33] and reasonable.[34] Regulation 19.(1) also says that *"[t]he Department of Basic Education must periodically review the norms and standards in these regulations in order to ensure that the norms and standards remain current and serve the needs of learning and teaching process"*.

45 We deal with the rationality attack, to the extent necessary, when dealing with the individual regulations that are attacked.

46 However, it is important at the outset to emphasize the limits of rationality review. This is because Applicants seems to proceed from the premise that any provision with which they disagree is for that reason irrational or unjustifiable.

47 This betrays a fundamental misunderstanding of what rationality review requires in the context of a challenge to legislation. The

---

[32] **City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd** 2010 (3) SA 589 (SCA) para 10
[33] Section 6 (2)(f)(ii) of PAJA
[34] Section 6(2)(h) of PAJA

Constitutional Court has repeatedly explained the limits of rationality review. As was made clear in *Law Society*:

> *"[T]he requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise..."*[35]

48 Even reasonableness review requires only a qualitative assessment of a decision to determine whether it is one that a decision-maker could reasonably and fairly make.[36]

49 The Minister's decision may or may not have been the best decision in the circumstances.

50 But that is not for a court on review to consider. It merely has to decide whether the decision struck a reasonable equilibrium.[37]

51 The Constitutional Court held in *Bato Star* that:

---

[35] ***Law Society of South Africa and Other v Minister for Transport and Another*** 2011 (1) SA 400 (CC) at para 35

[36] ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*** 2004 (4) SA 490 (CC) at para 44, citing ***R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd*** [1999] 1 All ER 129 (HL) at 157

[37] ***Bato Star*** at para 54

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. The distinction between appeals and reviews continues to be significant. The court should take care not to usurp functions of administrative agencies. Its task is to ensure that the decision taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.[38]

52 The discussion of reasonableness review by the SCA in *Calibre Clinical Consultants* is also helpful:

"On the second count – whether the decision was one that was so unreasonable that no reasonable person could have made it – there is considerable scope for two people acting reasonably to arrive at different decisions.[39]

---

[38] ***Bato Star*** at para 45

[39] ***Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council For the Road Freight Industry and Another*** 2010 (5) SA 457 (SCA) at paras 58-59. See also: ***MEC for Environmental Affairs and Development Planning v Clairiston's*** CC 2013 (6) SA 235 (SCA) at paras 20-22