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IN THE EASTERN CAPE HIGH COURT, 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**

FILING NOTICE

DOCUMENT:	FIRST RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

ON THE ROLL: 14 – 16 MARCH 2018

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

Case No: 276/16

In the application of:

BASIC EDUCATION FOR ALL	*Amicus Curiae*

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

FIRST RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

A. INTRODUCTION

1 These Supplementary Heads of Argument deal with the issue arising from the Applicants' Heads of Argument in respect of Regulations relating to minimum uniform norms and standards for public school infrastructure ("the Regulations")[1] to the extent that they are not already covered by the Main Heads of Argument dated 27 February 2018.

2 At the outset we again point out that the whole case (and thus the arguments) for the Applicants is based on the attack of regulation 4(5)(a) of the Regulations for being unlawful and invalid as it is inconsistent with the Constitution of the Republic of South Africa, 1996[2], the South African Schools Act, 84 of 1996[3] and the order granted on 11 July 2013 by Dukada J in the above Honourable Court under case number 81/2012. In the alternative to this relief, the Applicants seek an order reviewing and setting aside regulation 4(5)(a) of the Regulations. The Applicants also purport to seek a declaratory order to remedy defects (an allegation that is denied by the Respondents) in regulations 4(3)(a) and (b); 4(2)(b); 4(6)(a) and 4(7).

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

2 Hereinafter referred to as "*the Constitution*".

3 Hereinafter referred to as "*SASA*".

3 We repeat that the relief sought by the Applicants is not competent and furthermore, the Applicants failed to make out a case that the promulgation of the Regulations does not comply with the requirements of legality and rationality.

4 Accordingly we respectfully submit that the Respondent's decision to promulgate the Regulations on the 29 November 2013 constitute an " *administrative action*" as defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000.[4]

5 Based on the incompetent premise of the Applicants' arguments in this regard, the foundation for their attack on the validity of the Regulations is, with respect, misconceived; on this basis alone the relief sought by the Applicants in paragraphs 1 to 12 of the Notice of Motion should be dismissed with costs, such costs to include the costs incumbent upon the employment of three counsel.

6 Furthermore, and in any event, the grounds or reasons relied upon by the Applicants in this regard are also unfounded or incompetent: we deal with each of those ground or reasons in turn.

B. THE RIGHT TO A BASIC EDUCATION AND THE DUTY ON THE STATE

[4] Hereinafter referred to as "*PAJA*".

7 In our Main Heads of Argument we have already dealt with the argument as advanced by the Applicants, based upon the principles of co-operative government and intergovernmental relations under Chapter 3 of the Constitution. We repeat that Chapter 3 does not diminish the autonomy of any given sphere of government since section 41(1) of the Constitution re-enforce the notion that each sphere of government is distinct. We also submit that the Respondent cannot be expected to assume any power or function except those conferred on her in terms of the Constitution as envisaged in section 41(1)(f).

8 We respectfully submit that section 7(2) of the Constitution imposes an obligation on the state to 'respect, protect, promote and fulfill the rights in the Bill of Rights' and this include the right to education. The Constitutional Court in ***Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995***[5] makes it clear that there are positive and negative obligations on the state to give effect to a basic education. The Court stated as follows:

> *"[The right to [a] basic education] creates a positive right that basic education be provided for every person and not*

[5] 1996(3) SA 165 (CC) .

merely a negative right that such person should not be obstructed in pursuing his or her basic education."[6]

9 With regard to the positive obligation, the state is required to take effective steps in order to guarantee that every child has access to educational facilities so that every child benefits from the right to education. The negative obligation, on the other hand, poses a duty on the state and its agencies not to impede or hinder children's access to education.

C. ADEQUATE INFRASTRUCTURE IS A NECESSARY PRE-CONDITION FOR A BASIC EDUCATION

10 In our Main Heads of Argument we have already dealt with the provision 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 prescribed minimum uniform norms and standards for public school infrastructure by way of Regulations. This the Minister did when she promulgated the norms and standards on the 29 November 2013, in compliance with the Constitution, SASA and Court Order granted by the above Honourable Court as per Dukada J.

11 In the result we respectfully submit that there is no merit in the argument advanced by the Applicants alleging that the Respondent

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[6] Para 9.

denied the fact that adequate school infrastructure is a necessary precondition for a basic education. The promulgation of the Regulations was in support of the notion that infrastructure in public schools is part of the right to a basic education.

D. INFRASTRUCTURE IN SOUTH AFRICAN PUBLIC SCHOOLS

12 In our Main Heads of Argument we have already dealt with the issue relating to the infrastructure in South African public schools which is still characterized by a painful legacy of the apartheid history in South Africa. We reiterate that the better-endowed public schools in South Africa tend to be located in white communities and serve white interest while the less-endowed public schools tend to be located in black communities and serve black interests.

13 In the result we respectfully submitted that the promulgated Regulations is aimed to address this injustice of the past which was more characterized by a radically unequal distribution of resources that left most of black community based schools to be less privileged in terms of infrastructure as compared to the white counter-party. Those schools as mentioned in regulation 4(3)(a) which are in a dilapidated state of disrepair are to be given priority and attended to as a matter of urgency.

14 With respect, the Applicants has overlooked the importance of the promulgated Regulations by the Minister which promotes unhindered

learning in accordance with safety and health concerns of learners as a measure to rectify the lingering injustices of the apartheid legacy in South Africa. Apartheid education has left a profound legacy, not only in the unequal and inadequate distribution of resources but in the appalling levels of literacy and numeracy still found in the general population as a consequence of decades of unequal and inadequate education. As noted in ***Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others***[7]:

> *"The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."*[8]

E. SECTIONS 5A AND 58C OF SASA IMPOSE AN OBLIGATION ON THE MINISTER TO PRESCRIBE UNIFORM NORMS AND STANDARDS FOR INFRASTRUCTURE

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7 2011 8 BCLR 761 (CC).
8 Para 42.

15 In the Main Heads of Argument we have already dealt with regulations 4(6)(a) and 4(7) of the Regulations to the extent that both regulations are as a result of section 5A and 58C of SASA.

16 The arguments advanced by the Applicants in this regard selectively place the focus on these facts which support those arguments by completely ignoring other facts which destroy those very same arguments: the main rationale for section 58C is that any plans and reports prepared by the Member of Executive Council will be informed by inputs from school governing body which is consisted of the school principal, teachers, parents and member of the community concerned.

17 With respect, the Applicants have overlooked the pivotal role played by school governing bodies in our public schools more particularly to proper and holistic approach to learning and teaching of learners in South Africa. The applicants also ignored the fact that school governing bodies are elected and constituted in a democratic and participatory manner to advance the legitimate interest of learners at a school.

18 Dealing with the structure of governance in public schools, the Supreme Court of Appeal in Governing Body of the Rivonia Primary

School and Another v MEC for Education: Gauteng Province and Others[9] noted that:

> *"[28] The governance of public schools is now vested in their governing bodies whose functions, obligations and rights are prescribed. Their membership in primary schools is elected from the learners' parents, educators and staff members. They may co-opt other members to assist in discharging their functions. The principal serves ex officio on the governing body as a representative of the HoD and must assist the governing body to perform its functions and responsibilities. It is implicit in this that the principal is obliged to implement the policies lawfully determined by the governing body within its sphere of authority.*
>
> *[29] A governing body stands in a position of trust towards the school. It promotes the school's best interests and strives to ensure its development by providing quality education to the learners. Implicit in this model of governance is an acceptance on the lawmaker's part that the state cannot provide all the resources for the proper functioning of a high quality schooling system. So governing bodies are enjoined to 'take all reasonable measures within [their]*

[9] 2013 (1) SA 632 (SCA).

means to supplement the resources supplied by the State in order to improve the quality of education provided by the school. . ."

19 In the result we respectfully submit that there is no basis for the Applicants' arguments that the Regulations contain no mechanism for making plans and reports available to the public and the Applicants failed to challenge the constitutionality of section 58C.

F. THE MINISTER'S ARGUMENTS

20 The argument advanced by the Applicants that the right to basic education in section 29(1) (a) of the Constitution is an *'immediately realizable'* right and not *'progressively realizable'* right as submitted by the Respondent should not be applicable in this application dealing with the infrastructure of public schools in terms of the Regulations.

21 In the result we respectfully submit that the positive dimension of socio-economic rights is *'realized'* or fulfilled through State action *'progressively'* or over a period of time. The fact that the full realization of the rights can only be achieved progressively does not alter the obligation on the State to take those steps that are within its power immediately and other steps as soon as possible.[10] In ***Head of Department, Department of Education, Free State Province v***

[10] Currie & De Waal, The Bill of Rights Handbook Ed 6 (2013) 580.

Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another,[11] the Constitutional Court held:

'[g]iven this legacy, the state's obligations to ensure that the right to education is meaningfully realised for the people of South Africa are great indeed. The primary statute setting out these obligations is the Schools Act.[12]

22 SASA, which its avowed purpose is to give effect to the constitutional right to a basic education, records in its preamble that:-

"*...the country requires a new national system for schools which would redress past injustices in the provision of education and will provide education of a progressively high quality for all learners.*"[13]

23 Paragraph 36 of the National Norms and Standards for School Funding[14] [NNSSF], determined subject to the Constitution and SASA states that:-

"*...the state's duty, in terms of the Constitution and SASA, is to progressively provide resources to safeguard the right to education*

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[11] 2014 (2) SA 228 (CC)

[12] ***Head of Department, Department of Education, Free State Province v Welkom High School and Another***, at para 36.

[13] ***Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*** 2010 (2) SA 415 (CC), at para 55.

[14] Government Gazette 29179, GN 1282/2006 as amended.

of all South Africans. However, educational needs are always greater than the budgetary provision for education."

24 Paragraph of 31 NNSSF states further that:

"Effecting redress and equity with a view to progressively improving the quality of school education... and providing education services, are matters of urgent priority for the Ministry of Education."

25 Even though the term "*progressively*" is not expressly used in the Regulations, by implication the delivery of the right to 'a basic education' in connection with 'availability' of education through adequate and functioning educational institutions or infrastructure will have to be "*progressively realised*" and qualified by the terms such as "*as far as reasonably practicable*" and "...*subject to the resources*."

26 The above enabling legislative regime contemplates that the right to a basic education with regard to desired infrastructure at public schools be realised progressively subject to available resources at the disposal of the State.

27 .In ***Government of the Republic of South Africa v Grootboom***[15], the Constitutional Court held that:

> *"The term 'progressive realization' shows that it was contemplated that the right could not be realized immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realization means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.*[16]

28 The Constitutional Court in ***Grootboom***[17] then cited with approval the following passage from the Committee on Economic, Social and Cultural Rights' General Comment 3:

> *"Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the*

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15 2001 (1) SA 46 (CC).
16 Para 45.
17 *supra*

difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'etre, of the Covenant which is to establish clear obligation for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[18]

29 We respectfully submitted that socio-economic rights are further limited by the qualification that they are only available to the extent that State resources permit. In ***Mazibuko v City of Johannesburg***[19], the Constitutional Court approach on socio-economic rights was follows:

"The positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realize the rights, the courts will require government to take steps. If government's adopted measures are

[18] Para 45.
[19] 2010 (4) SA 1 (CC).

unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standards of reasonableness. From ***Grootboom****, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in* ***Treatment Action Campaign No 2****, the Court may order that those are removed. Finally, the obligation of progressive realization imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realized."*[20]

G. THE IMPUGNED REGULATIONS

30 In the Main Heads of Argument we have already dealt with the regulations 4(5)(a); 4(3)(a) and (b); 4(1) (a); 4(2)(b); 4(6)(a) and 4(7) of the Regulations.

31 The arguments advanced by the Applicants in this regard is incompetent and selectively place the focus on these facts which support those arguments and by completely ignoring those facts which destroy these very same arguments: the Applicants attack the constitutionality of the Regulations but has failed to attack the provisions that empowers the Respondent to promulgate the Regulations.

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[20] Para 67.

32 The Applicants have overlooked regulation 4(5)(a) which provides that the implementation of the norms and standards contained in the Regulations, where applicable, are subject to the resources and cooperation of other government agencies and entities responsible for infrastructure in general. Section 41(1) of the Constitution provides that all spheres of government and all organs of state within each sphere must among others, not assume any power or function except those conferred on them in terms of the Constitution, and exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. It is implicit in these provisions that infrastructure is not only dependent upon the Respondent, but it is dependent on both the co-operation and assistance of other government agencies and entities responsible for infrastructure in general.

H. NON-JOINDER

33 In the Main Heads of Argument we have already dealt with the defect of non-joinder of other government agencies and entities responsible for infrastructure.

34 The Applicants appears to argue that, it is not necessary to join every one of those governments which plays some role in providing services to schools. In the result we respectfully submitted that this

assertion undermines the Constitution and SASA and also overlook the principle of co-operative and intergovernmental relations which guard against one department not to encroach on other departments' field of competence.

35 We also submit that the relevant principles of law has been established that, in the exercise of its inherent power, a Court will refrain from deciding a dispute unless and until all persons or entities who have a direct and substantial interest in both subject matter and the outcome of the litigation, have been joined as parties.[21]

36 Dealing with the issue of the non-joinder of the national and provincial sphere of government responsible for housing, the Constitutional Court in City of ***Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another***[22] was of the view that it would generally be preferable for all of them to be involved in complex legal proceedings regarding eviction and access to adequate housing. Indeed, joinder might often be essential and a failure to join fatal. The Constitutional Court noted that:

> *"Generally, a party must be joined in proceedings if it has a direct and substantial interest in any order the court might*

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[21] 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.

[22] 2012 (2) BCLR 150 (CC) at para 45.

make, or when an order cannot be effected without prejudicing it. The Rules of this Court require the joinder of an organ of state responsible for executive, administrative or legislative conduct that is being constitutionally challenged. This court has also joined other spheres and organs of state in cases where they were not responsible for the conduct."[23]

37 In the result we therefore respectfully submit that non-joinder by the Applicants of other government departments responsible for infrastructure is fatal.

38 In ***Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited***,[24] the Constitutional Court recently held:

"*At common law, courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, mero motu, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected. This is consistent with the Constitution.*[25]

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[23] Para 44.
[24] 2018 (1) SA 1 (CC)

[25] ***Matjhabeng Local Municipality*** at para 91.

39 We respectfully submit that if the above Honourable Court were to grant the orders as sought by the Applicants in the absence of the other government departments, as already referred to by the Respondents, as relevant to this application, then the order granted will prejudice those government departments as they have a direct and substantial interest in the outcome of this proceeding. We also submit that the order will be of no consequence as the present Respondents, on their own, without the co-operation and aide of the other relevant government departments, cannot effectuate or carry out the relief sought by the Applicants.

I. RELIEF SOUGHT BY THE APPLICANTS

40 The applicants argue that much of the relief which they seek is based on the provision of section 172(1) of the Constitution, which empowers the Court to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

41 In the result we respectfully submit that the arguments advanced by applicants in this regard failed to place the attack on the enabling provisions of SASA that empowers the Minister to promulgate the Regulations in question.

42 We repeat to respectfully submit that this Court is enjoined by the judgment of the Constitutional Court in ***Mazibuko and Others v City of Johannesburg and Others***[26] where the Court held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.[27]

J. DELAY

43 We have already dealt with this issue in the Main Heads of Argument; in addition, we point out that the Applicants have failed to bring the proceedings for judicial review in terms of section 6(1), namely without unreasonable delay, but not later than 180 days. The Applicants only brought the application on or about the 19 March 2016 which is more than 2(two) and half years after the promulgation of the Regulations by the Minister.

44 The further argument by the Applicants, that it is in the interests of justice that the period referred to in section 7(1) of PAJA be extended in terms of section 9 to the date when this application was instituted, is irrational or unreasonable because after the 180 day period[28] the issue of unreasonableness is pre-determined by the legislature. The 180 day period therefore commenced to run, when,

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[26] 2010 (4) SA 1 (CC) at para 73.
[27] The principle of subsidiarity.
[28] At the latest.

taking a broad view, the public at large might reasonably have been expected to have become aware of the action, and not as argued by the Applicants.

45 The Applicants appear to argue that, after the Regulations were promulgated on 29 November 2013, they were aware of such decision taken by the Minister but ignored to bring an application for judicial review in terms of PAJA.

46 We therefore dispute that the relief sought by the Applicants is forward-looking, unlike most reviews, which seek to undo what has been done in the past. The argument that the time-bar in section 7 of PAJA does not apply to this application is without basis and such interpretation of section 7 of PAJA cannot be justified. We respectfully submit that Section 7(1), on the plain wording, applies to 'any proceedings for judicial review'.

47 In the result we respectfully submit that there is no basis to extend the period in section 7(1) of PAJA in terms of section 9 of PAJA and the applicants in any event failed to bring any application for extension.

K. CONCLUSION

48 In the result we respectfully submit that the promulgated Regulations are valid and legal and were promulgated fully in accordance with

the law and that there is no ground, reason or basis upon which it should be reviewed and set aside.

49 We therefore respectfully submit that the relief pursued by the Applicants in respect of Regulations be dismissed with costs, such costs to include the costs incumbent upon the employment of three counsel.

M C ERASMUS SC
E M BALOYI-MERE
J MERABE
Counsel for First Respondent
Circle and Sandton Chambers
3 March 2018