

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

CASE NO. 276/16

In the application to be admitted as *amicus curiae* of:

BASIC EDUCATION FOR ALL

Applicant

In the matter between:

**EQUAL EDUCATION
AMATOLAVILLE PRIMARY SCHOOL**

First Applicant
Second Applicant

and

**MINISTER OF BASIC EDUCATION
MEC FOR EDUCATION: LIMPOPO
MEC FOR EDUCATION: EASTERN CAPE
MEC FOR EDUCATION: FREE STATE
MEC FOR EDUCATION: GAUTENG
MEC FOR EDUCATION: KWAZULU-NATAL
MEC FOR EDUCATION: MPUMALANGA
MEC FOR EDUCATION: NORTHERN CAPE
MEC FOR EDUCATION: NORTH WEST
MEC FOR EDUCATION: WESTERN CAPE**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT Basic Education for All hereby makes application to the above Honourable Court for an order on the following terms:

1. That Basic Education for All is granted condonation for its non-compliance with the time periods set out in Uniform Rule 16A, to the extent that such condonation is necessary;
2. That Basic Education for All is admitted as *amicus curiae* in the above matter in terms of Rule 16A of the Uniform Rules of Court;
3. That Basic Education for All is granted leave to –
 - 3.1. Adduce the evidence contained in the founding affidavit and the annexures and supporting affidavits thereto;
 - 3.2. Make written submissions in the above matter; and
 - 3.3. Make oral submissions at the hearing of the above matter.
4. That any party opposing this application pays the costs of Basic Education for All; and
5. Further and/or alternative relief.

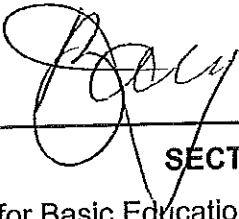
TAKE NOTICE FURTHER THAT the affidavit of **MAKODELELE SAMUEL MAKWARELA** and the annexures and supporting affidavits thereto shall be used in support of this application.

TAKE NOTICE FURTHER THAT the applicant has appointed **SECTION27** as its attorneys of record, and will accept service of all process at the office of the correspondent attorneys set out below.

BE PLEASED TO TAKE NOTICE FURTHER that should any of the parties intend to oppose this application, they are required to –

- a. deliver notice of intention to oppose within 5 (five) days of receipt of this application; and
- b. deliver their answering affidavits within 15 (fifteen) days of notifying the applicants of their intention to oppose this application.

DATED AT *Johannesburg* ON THIS THE 7th DAY OF OCTOBER 2016.


SECTION 27

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MEC FOR EDUCATION: NORTHERN CAPE

Eighth Respondent

MEC FOR EDUCATION: NORTH WEST

Ninth Respondent

MEC FOR EDUCATION: WESTERN CAPE

Tenth Respondent

FOUNDING AFFIDAVIT
APPLICATION FOR ADMISSION AS *AMICUS CURIAE*

I, the undersigned

MAKODELELE SAMUEL MAKWARELA

hereby state under oath:

1. I am an adult male and the school principal at Vhulaudzi Secondary School in the Vhembe District of Limpopo.
2. I am also the chairperson of Basic Education for All ("BEFA"), the applicant in this application to be admitted as *amicus curiae*. I am duly authorised to depose to this affidavit on behalf of BEFA. The resolution of the Executive Committee of BEFA authorising BEFA to bring this application and authorising me to depose to this affidavit is attached as "MM1".
3. The facts contained in this affidavit are both true and correct and, unless the context indicates otherwise, within my personal knowledge. Where I make legal submissions, I do so on the advice of BEFA's legal representatives, which advice I believe to be correct.

A INTRODUCTION

4. This is an application in terms of rule 16A(5) of the Uniform Rules of Court for BEFA to be admitted as *amicus curiae* in the application brought by Equal Education and Amatolaville Primary School against the Minister of Basic Education and the Members of the Executive Council for the nine provincial departments of education, under case number 276/2016 ("the main application").
5. BEFA seeks to be permitted to introduce evidence and to make legal submissions that we believe will be of assistance to the Court in adjudicating this matter.
6. If admitted as *amicus curiae*, BEFA's submissions will centre on the constitutional validity of regulation 4(5)(a) of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 ("Norms and Standards") considering the rights and obligations arising from sections 9, 10, 28(2) and 29(1)(a) of the Constitution.
7. In support of its legal arguments, BEFA seeks to adduce evidence of inadequate provisioning of school infrastructure in Limpopo with a particular focus on the state's failure to account for urgent infrastructure needs, and the consequences of these failures.
8. BEFA therefore supports the submissions of the applicants in the main application, as well as the relief sought by the applicants in this matter.

9. As I set out in further detail below, BEFA has secured the consent of all of the parties to the main application to its admission as *amicus curiae*, to lead evidence and make legal submissions. BEFA has been advised, against the background of this consent, to seek this Court's leave to intervene as *amicus curiae* to the extent that this is necessary in terms of Uniform Rule 16A.

10. In order to address the requirements set out in Uniform Rule 16A(6) for an application for leave to intervene as *amicus curiae*, I structure my affidavit as follows:

10.1 A description of BEFA's interest in this matter;

10.2 A brief overview of BEFA's intended submissions and the evidence we intend to introduce;

10.3 BEFA's intended submissions and the evidence that we intend to adduce in support of these submissions. These address the constitutional standard to be applied to the right to basic education, and the requirement that any steps taken to realise the right must make provision for those in desperate need. We also address the nexus between the right to education and other rights, including the rights to equality, dignity and children's rights. These submissions are all made in support of the constitutional challenge to regulation 4(5)(a).

- 10.4 The manner in which BEFA's submissions differ from the issues already raised by the parties to the proceedings;
- 10.5 The other parties' attitudes to the admission of BEFA as *amicus curiae*; and
- 10.6 Condonation for the late filing of BEFA's application for admission as *amicus curiae*.

B BEFA'S INTEREST IN THESE PROCEEDINGS

11. BEFA is a voluntary association consisting of learners, parents, teachers, members of School Governing Bodies ("SGBs"), principals and community members concerned with improving access to and the quality of basic education in South Africa.
12. BEFA was formed in October 2012 in Giyani, as a direct response to the education crisis in Limpopo province. It has subsequently grown membership in each of the five districts of Limpopo and is connected to 137 schools in Limpopo and the communities in which these schools are situated.
13. Prior to establishing a formal structure, many of the current members of BEFA were actively involved in addressing infrastructure and infrastructure-related issues at a variety of Limpopo schools.

14. BEFA has previously litigated on the right to basic education, including litigation to compel the national Department of Basic Education ("DBE") and the Limpopo Department of Education ("LDOE") (who are the First and Second Respondents in the main application) to deliver textbooks to learners at public schools in Limpopo. In *Minister of Basic Education and others v Basic Education for All and others* 2016 (4) SA 63 (SCA) ("the *BEFA* judgment"), the Supreme Court of Appeal recognised the critical role that education plays in the transformation of our society, and the central role of textbooks to the right to education.
15. Some of the legal arguments that BEFA intends to make in respect of the State's obligations arising from the rights to basic education, dignity and equality are based on the findings of the SCA in the *BEFA* judgment. This includes the obligation to deliver on each aspect of the right to basic education, as well as the obligation to ensure that sufficient resources are allocated for this purpose.
16. BEFA's constitution sets out, among other things, its objectives, powers and composition. A copy of the full constitution is attached and marked "MM2".
17. I draw the Court's attention in particular to BEFA's objectives, as set out in paragraph 3 of its constitution, which include the following:

"3.1. To monitor the learning and teaching environment in public schools across South Africa so as to ensure the provision of quality education for all;

3.2. To investigate allegations of violations of public school learners' rights to education and other related rights, including but not limited to the provision of

teachers, LTSM, classrooms and a sound and healthy built learning environment;

3.3. To participate in advocacy and training and empower local actors, such as learners, teachers and SGB members...;

3.4. To enforce the right to education of public school learners;

3.5. To engage with, to work with, and, where necessary, to hold to account the national and provincial governments in their obligation to provide a quality education for all learners..."

18. Pursuant to these objectives, one of BEFA's key focus areas is the provision of safe and adequate school infrastructure. As is set out in further detail below, and in the attached affidavits of some of BEFA's members, the state of school infrastructure at many schools in Limpopo is unsafe, and creates an obstacle to effective teaching and learning. BEFA's work on school infrastructure, particularly in the areas of storm damage and school sanitation, has involved extensive engagement with the DBE and the LDOE, regarding the consequences of unsafe infrastructure.
19. BEFA has also led school and SGB engagements on the Norms and Standards, which are the subject of this litigation. It regularly conducts constitutional literacy workshops with schools, teachers and learners. Understanding the Norms and Standards, and their role in the realisation of the right to basic education guaranteed in section 29(1)(a) of the Constitution, forms a significant portion of these workshops.

20. BEFA also engages directly with schools to measure conditions in schools against the standards set out in the Norms and Standards. It assists schools with writing letters to relevant State departments, or engages with relevant departments on behalf of schools and learners primarily on school infrastructure, furniture and textbook provisioning.
21. Many of the schools to which BEFA has provided assistance have urgent infrastructural needs that have not been adequately addressed. If admitted as *amicus curiae* in this matter, BEFA intends to adduce evidence from some of these schools to detail the state of their infrastructure and the consequences thereof for teaching and learning.
22. For these reasons, BEFA has an interest in ensuring that full effect is given to the right to basic education contained in section 29(1)(a) of the Constitution, which includes the provision of adequate and safe school infrastructure that is conducive to effective teaching and learning.
23. We therefore bring this application for admission as *amicus curiae* in our own interest, in the interest of learners, teachers, school governing bodies and communities across Limpopo, and in the public interest.

C OVERVIEW OF BEFA'S INTENDED SUBMISSIONS

24. If admitted as *amicus curiae* in this matter, BEFA intends to make legal submissions addressing the following:

- 24.1. The State's obligations arising from the right to basic education: section 29(1)(a) of the Constitution, and the jurisprudence that gives content to the right, requires the State provide every learner with every necessary component of the right to basic education in full and immediately. To the extent that it cannot do so, the State is required to explain and justify the existence and extent of its failure, which explanations and justifications are required to be reasonable.
- 24.2. The State's obligation to make provision for urgent need: within this framework, the State must demonstrate that it has not simply achieved statistical improvements in the realisation of the right to basic education. It must ensure that adequate measures are in place to provide immediate relief to those in most desperate need.
- 24.3. The nexus between the right to basic education and other rights: the State's failure to meet its obligations to provide safe and adequate school infrastructure are not only in breach of the right to basic education; they also constitute a breach of the rights to equality and dignity, and undermine the paramountcy of the child's best interests. These rights are affected through the breaches of the right to basic education, as well as in their own right.
25. Within this context, BEFA is advised that –

- 25.1. regulation 4(5)(a) of the Norms and Standards provides that the implementation of the Norms and Standards is subject to, firstly, available resources, and secondly, co-operation of government agencies and entities. This suggests that the standard of the right to basic education is being watered-down to a standard of progressive realisation, which is contrary to the constitutional text and concomitant State obligations;
- 25.2. while seeking to limit the State's obligations in terms of the right to basic education, the Norms and Standards make no provision for urgent needs. Although they create "priority categories" of school infrastructure, these (in addition to being subject to the qualifications set out above) make no special provision for those most in peril;
- 25.3. these qualifications set in regulation 4(5)(a) read with regulation 4(3) therefore violate sections 29(1)(a), 9, 10 and 28(2) of the Constitution.
26. In support of its legal arguments in paragraph 0 above, BEFA intends to adduce evidence of –
- 26.1. schools in Limpopo whose sanitation facilities are no longer usable and pose a safety threat to learners, and whose needs have not been urgently addressed;

- 26.2. schools in Limpopo whose infrastructure has been severely affected by storm damage, halting or severely interrupting teaching and learning, that was not urgently addressed;
- 26.3. the absence of any provision to address unsafe and inadequate sanitation and infrastructure requiring urgent attention, and the impact that this failure has on learners and their rights;
- 26.4. the DBE and LDOE's policies, instructions in litigation, and plans, which reflect an understanding that the right to basic education is qualified or progressively realisable; and
- 26.5. schools in Limpopo where the failure to develop infrastructure has exacerbated pre-existing inequalities.
27. I elaborate on each of these issues in the following sections.

D THE OBLIGATIONS ARISING FROM THE RIGHT TO BASIC EDUCATION

28. If admitted as *amicus curiae*, BEFA intends to put forward an approach to develop and frame the contours of the "immediate realisation" principle.
29. In particular, we seek to establish that the State is obliged in terms of section 29(1)(a) of the Constitution to take positive steps to realise every necessary component of the right to basic education in full and immediately. Regulation

4(5)(a), which qualifies this constitutional obligation and makes it subject to available resources and the cooperation of other government agencies and entities, falls foul of the standard required of the State. It creates a limitation on the right to basic education that is both unreasonable and unjustifiable.

The development of the "immediate realisation" principle

30. Section 29(1)(a) of the Constitution provides that "[e]veryone has the right to a basic education, including adult basic education". Section 7 of the Constitution requires the State to respect, protect, promote and fulfil this right. BEFA intends to argue that, in the context of the right to basic education being immediately realisable, the State is required to provide all necessary components of the right to basic education in full and immediately, unless it can justify its failure to do so.
31. The right to basic education is framed in the Constitution as an unqualified right. While the realisation of other socio-economic rights, such as the right to further education (section 29(1)(b)), the right to housing (section 26) and the rights to health care food, water and social security (section 27) is expressly made subject to "reasonable legislative and other measures, within [the State's] available resources, to achieve the progressive realisation" of these rights, no such qualifiers have been imposed on the right to basic education.
32. I am advised that the Constitutional Court has confirmed this in several decisions. For example, in *Governing Body of the Juma Musjid Primary School & others v Essay NO & others (CCL & another, amici curiae)* 2011 (8) BCLR 761 (CC)

("Juma Masjid") at paragraph 37 held:

"It is important, for the purpose of this judgment, to understand the nature of the right to a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application, which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'" (own emphasis.).

33. Thus, the Court in *Juma Masjid* held that the right to basic education is "immediately realisable" and may only be limited through section 36 of the Constitution, which requires a law of general application that is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom..."

34. This "immediate realisation" principle was subsequently confirmed by courts dealing with the State's obligations to provide various educational inputs. This includes the *BEFA* judgment before the Supreme Court of Appeal described in paragraph 14 above and a case before the Eastern Cape High Court for provision of furniture to schools, *Madzodzo v Minister of Basic Education* 2004 (3) SA 441

ECM ("*Madzodzo*").

35. Having determined that the right to basic education is "immediately realisable", both the *BEFA* and *Madzodzo* judgments go on to note that textbooks and furniture respectively constitute entitlements that make up the right to basic education. In other words, they are necessary components of the right.
36. In *Madzodzo*, the Eastern Cape High Court elaborated further by noting that the obligation to provide a basic education extended beyond merely ensuring that every person should be admitted to a school, but also to include "a range of educational resources – schools, classrooms, teachers, teaching materials and appropriate facilities for learners" (*Madzodzo* at paragraph 20. See also *BEFA* at paragraphs 41 and 50).
37. In sum, therefore, the jurisprudence to date notes the obligation on the state to *immediately* provide specific educational inputs such as textbooks, furniture and safe and adequate infrastructure.
38. However, the courts have not provided further guidance on the meaning of "immediate realisation", and how it is to be interpreted and applied in practice.
39. *BEFA* contends that such guidance is necessary given the nature of the different educational inputs and the practical exigencies inherent in providing each of these different inputs.

Submissions to develop the meaning of immediate realisation

40. In support of its interpretation of the right to basic education, BEFA intends to refer to legal scholarship in respect of the relationship between the principle of immediate realisation and the limitations clause in the Constitution, and the relationship between immediate realisation and remedy.
41. BEFA relies on this scholarship to explore in particular the feasibility of immediate realisation, which has not been fully developed by our courts. While this will be addressed in detail if BEFA is granted leave to intervene as *amicus curiae*, I highlight two key academic articles on which BEFA intends to rely:
- 41.1 Professor Ann Skelton "How far will courts go in ensuring the right to basic education?" (2012) 27 SAPL 392.
- 41.2 Cameron McConnachie and Chris McConnachie "Concretising the right to a basic education" (2012) 129 SALJ 554.
42. Both articles consider the practical implications of the immediate realisation principle. The article of McConnachie and McConnachie in particular does this within the specific context of the State's obligation to provide safe and adequate school infrastructure. Should BEFA be admitted as *amicus curiae*, it therefore intends to proffer a viable approach for the application of the immediate realisation principle.

The standard applied by the State to the right to basic education falls short of the constitutional standard

43. If BEFA is admitted as *amicus curiae* in these proceedings, and if we are permitted to introduce evidence, we intend to demonstrate that the DBE and the LDOE have consistently misunderstood their obligations arising from the right to basic education. The manner in which the State is implementing education policy in itself shows a lack of urgency that is incompatible with an immediately realisable right. In addition, the right has also been explicitly mischaracterised by the State as progressively realisable. BEFA will provide three important examples of this.

The development of the Norms and Standards

44. The first example emerges from the process leading up to the final publication of the Norms and Standards, and the way in which the State had characterised its obligations in the draft documents that preceded the Norms and Standards.
45. Prior to the final publication of the Norms and Standards, BEFA's legal representatives, SECTION27, submitted comments on two versions of the Draft Regulations Relating to the Minimum Norms and Standards for Public School Infrastructure in March and October 2013. Copies of the submissions are attached as "MM3" and "MM4" respectively.

46. In both submissions, SECTION27 raised concerns about the manner in which the State's obligations in respect of the right to basic education were phrased in the draft norms and standards.
47. SECTION27's first submission was submitted in March 2013 in response to the draft norms and standards published in terms of Government Notice 6 of 2013 on 8 January 2013 ("March submission"). At the heart of this submission lay serious concerns about the failure in the draft to create binding obligations to provide safe and adequate school infrastructure, particularly in the light of the State's obligations to realise the right to education in full and immediately. In this draft of the Norms and Standards, the State had failed to prescribe any norms and standards for school infrastructure at all, which, SECTION27 argued, created an unreasonable delay in discharging its obligations.
48. SECTION27 said the following with regard to the State's obligation:

"In the face of the prevailing inequalities and disrepair of thousands of schools... the DBE and the nine provincial departments of education cannot practicably bear an obligation to create optimal conditions in all schools across the country immediately.

However, what they are obligated to do is establish reasonable minimum conditions in schools in order to make them compliant with the right to basic education, and to continue to build upon these conditions so as to reach an optimal level. Clear norms and standards, which prescribe these minimum

conditions and that are based on a recognition of what environmental factors are necessary to facilitate successful learning, are crucial to this process."

49. The March submission goes on to warn that the draft Norms and Standards as they were then formulated would be susceptible to a legal challenge in that "[n]o consideration was given to the nature of the right to basic education as an unqualified right, or to the urgent nature of infrastructure challenges..."

50. Despite revisions, the second draft of the Norms and Standards published in Notice 932 of 2013 on 12 September 2013 still failed to take account of the nature of the State's obligations. In particular, this draft of the Norms and Standards provided for the implementation of measures to ensure safe and adequate infrastructure over extended periods of time: those aspects of school infrastructure specified as "priority areas" would be implemented over a ten-year period, and all other aspects of the Norms and Standards would be completed by 31 December 2030.

51. SECTION27's comment on the second draft ("October submission") noted that the draft was still inadequate and lacking in "essential elements". At paragraph 4.1 it notes that:

"[the draft norms and standards] do not take account of the nature of the right to basic education, which in terms of our Constitution, is realisable in full and immediately.

This requires the State to deliver all components of the right to basic education immediately, or to produce evidence to establish that this is impossible. The current time frames in the draft norms and standards are not consistent with this obligation".

52. Despite these submissions, the Minister of Basic Education has maintained, through Regulation 4(5)(a), that the implementation of the Norms and Standards is subject to a standard far less stringent than that of immediate realisation.

Qualified ratification of ICESCR

53. The second example of the State's mischaracterisation of its obligations arising from the right to basic education is the State's qualification of its ratification of the International Covenant on Economic, Social and Cultural rights ("ICESCR").
54. On 18 January 2015, the Government of South Africa ratified the ICESCR with a qualification in respect of the right to education stating that "The Government of the Republic of South will give progressive effect to the right to education...within the framework of its National Education Policy and available resources" (my emphasis). A copy of the ratification is attached as "MM5".
55. This demonstrates a continued failure to acknowledge that the obligation arising from the right to basic education is one that requires the State to provide all necessary components of the right to basic education in full and immediately.

Litigation on the delivery of textbooks

56. The third example arises from BEFA's litigation against the DBE and LDOE in 2014 and 2015, to compel the delivery of textbooks to learners in Limpopo. While at times stating explicitly that the right to basic education is immediately realisable, the State nonetheless justified its failure to ensure complete textbook delivery to all learners in Limpopo by arguing that this imposed on them an impossible standard of perfection. They argued that what was required was only that "the DBE take reasonable measures in order to fulfil the right to basic education" (at paragraph 28.4). This portion of the heads of argument is attached as "MM6".
57. BEFA intends to highlight the gap between the State's apparent understanding of its obligations, and the nature of these obligations as determined by the Constitutional Court and other courts.
58. This gap between the nature of the State's obligations, and its mischaracterisation of these obligations, is explored by Faranaaz Veriava in her publication in the South African Journal on Human Rights "The Limpopo textbooks litigation: a case study into the possibilities of a transformative constitutionalism", published electronically on 8 September 2016 (forthcoming in print).
59. To give effect to the State's duties, the Norms and Standards must incorporate the immediate realisation standard, and impose on the State an obligation to

immediately provide every learner with every necessary element of the right to basic education.

E THE NORMS AND STANDARDS FAIL TO MAKE PROVISION FOR URGENT NEEDS

60. If admitted as *amicus curiae*, BEFA will argue that, due to the absence of any provision to prioritise and address urgent needs, regulation 4(5)(a) falls short of the State's constitutional obligations and should therefore be set aside. Our legal argument and evidential basis are set out in greater detail below.

Any plan for the realisation of socio-economic rights must take account of urgent needs

61. If admitted as *amicus curiae* in these proceedings, BEFA intends to make the following submissions:

61.1. Any plan for the realisation of socio-economic rights – including a plan to provide safe and adequate school infrastructure – must cater for vulnerable people in desperate need.

61.2. In the context of the right to housing, which is subject to progressive realisation within the State's available resources, the Constitutional Court has held that a plan for the realisation of this right that does not make provision for urgent needs will be unreasonable. Arising from this

decision, the State has included in its housing policy measures to cater on a temporary emergency basis to people in desperate need. The housing policy has not been included so as not to overburden the papers, but will be made available to the Court at hearing of this matter.

61.3. The measures adopted by the State to realise the right to basic education, which is not subject to progressive realisation, must meet – and exceed – the standard of reasonableness applicable to other socio-economic rights. At a minimum, those steps taken under the right to housing which acknowledge and seek specifically address desperate need must be duplicated if not intensified for purposes of the right to basic education.

61.4. Similarly, the State must both plan and budget so as to fulfil its obligations.

61.5. A plan to realise the right to basic education will therefore be inconsistent with the State's constitutional obligations if it does not include provision for urgent needs to be met.

61.6. In failing to cater for the urgent needs of those in the direst circumstances, and prioritising the availability of resources and the co-operation of other government agencies and entities in providing safe and adequate school infrastructure, regulation 4(5)(a) falls short of the standard of reasonableness and is therefore unconstitutional.

62. In describing the needs of those in dire circumstances, and the urgency within which this need must be addressed, we seek to introduce the following evidence:

62.1. Evidence of schools that have experienced storm damage, which has a grievous impact on the quality of teaching and learning and the amount of time available for teaching and learning. This storm damage therefore creates direct obstacle to the exercise of the right to basic education.

62.2. Evidence of schools whose toilets are not only unusable, but pose a direct threat to the health and safety of learners and therefore require urgent attention.

62.3. In this regard, in addition to the other evidence we wish to introduce, we seek to highlight the tragic death of five-year-old Michael Komape on 20 January 2014. As I highlight below, Michael's death was a consequence of the failure of the State to make provision for the urgent needs of those in dire circumstances.

63. Before providing an outline of the evidence and the legal submissions BEFA intends to make, I provide a brief description of the operation of the regulations insofar as they apply to urgent needs.

Regulations regarding the implementation of the Norms and Standards

64. Regulation 4, which deals with the implementation of the Norms and Standards, delineates the State's obligations in two ways:

64.1. Regulation 4(3) creates a list of "priorities", and prescribes time frames within which these "priority categories" are to be addressed. For example, as the applicants in the main application have pointed out, regulation 4(3)(a) provides that schools built entirely out of wood, asbestos or mud must be replaced within a period of three years from the date that the Norms and Standards came into effect, i.e. by 28 November 2016. I do not deal with these priority areas in detail in this affidavit. The urgent needs I discuss below arise over and above the "priority areas" listed in regulation 4(3).

64.2. In terms of regulation 4(1)(b)(iv), any aspects of school infrastructure that are not listed in the "priority" categories set out in regulation 4(3) must be implemented by 31 December 2030.

64.3. Notwithstanding these "priority" categories and time frames, the implementation of the Norms and Standards in their entirety is expressly made subject to the resources available for such implementation, and to the co-operation of other government agencies and entities, in regulation 4(5)(a).

65. Regulation 4(5)(a) therefore provides an overarching demarcation of the State's obligations, and the "priority" categories set out in regulation 4(3) are to be implemented within this framework, and to the extent that a failure to comply is not excused by regulation 4(5)(a).
66. In other words, for the purpose of assessing the State's compliance with its constitutional and statutory obligations, regard will ultimately be had to the availability of resources and to the co-operation by other government agencies and entities.
67. I have set out the reasons why this limitation unreasonably and unjustifiably falls short of the State's obligations to do provide every learner with every necessary component of the right to basic education in full and immediately.
68. BEFA seeks to establish that regulation 4(5)(a) is also constitutionally invalid for another reason: in delineating the State's obligations regarding the implementation of the Norms and Standards in this manner, it fails to make provision for urgent needs that arise outside the ordinary course, and that cannot wait to be addressed as prescribed by the ordinary time frames.
69. Without detracting from the obligation on the State to immediately realise the right to basic education, and the medium- to long-term delivery to meet ideal infrastructural standards, I turn now to illustrate to the Court some examples of these urgent needs.

Urgent needs arising from unsafe and inadequate sanitation facilities

70. Sanitation is identified in regulation 4(3) as one of the "priority" areas for implementation:

70.1 In terms of regulation 4(3)(b) read with regulation 4(1)(b)(i), schools with no power supply, water or sanitation must receive these facilities within three years of the Norms and Standards coming into effect, i.e. by 28 November 2016.

70.2 In terms of regulation 4(3)(c) read with regulation 4(1)(b)(ii), all other schools whose sanitation facilities (among other facilities) do not comply with the requirements of safety and adequacy in the Norms and Standards must have full implementation of the Norms and Standards by 28 November 2020.

71. All problems with school sanitation must therefore be addressed by the end of 2016 or 2020, depending on whether the school has usable toilets on its premises.

72. In this context, BEFA continues to witness schools with sanitation infrastructure that is in such a dangerous condition that it is no longer usable, and presents a direct threat to the health and safety of learners. In these circumstances, a plan to build toilets within three years (as required by the Norms and Standards) cannot be a reasonable plan.

73. If admitted as *amicus curiae*, BEFA will introduce evidence of schools, parents and learners that speaks to the threats to health and safety and the barriers to learning, particularly for girl learners, created by unusable sanitation infrastructure. For example –

73.1. Learners relieve themselves in bushes, sometimes a distance from the school property to avoid being witnessed by peers (as described in the affidavits of Ramalepe Prince, Thabiso Selowa, Kgaugelo Moloko, Mapowane Mahasha, and Letsoapele Sunnyboy Mokwana).

73.2. Learners utilising bushes for their ablutions fear physical attacks by people and snakes when they are walking to and from the bushes and when they are relieving themselves. In this regard I refer to the affidavits of Ramalepe Prince and Thabiso Selowa.

73.3. Female learners are vulnerable to sexual abuse in these circumstances. They also note that using bushes for ablutions affects their self-esteem and makes them feel bad about themselves. They feel particularly ashamed if, while defecating in bushes, someone passes by the bush, as occurs from time to time. In this regard I refer to the affidavits of Kgaugelo Moloko and Lestoapele Sunnyboy Mokwana. This is also highlighted in the Water Research Commission Report on "Understanding and addressing the issues experienced in rural on-site school sanitation in South Africa" (2016), the relevant extract of which is

attached as "MM7". The entire report has not been included to avoid overburdening the papers, but can be made available to the parties and Court on request and will be available at the time of hearing.

73.4. Because they do not have safe and adequate sanitation facilities at school, some learners have to go home to use the toilets (as described in the affidavits of Mapowane Mahasha, Tshepo Selowa and Lestoapele Sunnyboy Mokwana). This is only an option for learners whose homes are in close proximity to the school. It takes significant time out of their school day, especially for girl learners who are menstruating and who need to change their sanitary wear regularly throughout the day. It is also more difficult for teachers to keep note of where learners are for the duration of the day in these circumstances, as they are legally required to do to ensure learners are safe and in class learning.

73.5. Due to the lack of safe and adequate sanitation facilities at school, some learners do not relieve themselves at all during the school day (see for example the affidavits of Mapowane Mahasha, Ramalepe Prince and Thabiso Selowa). This is at best extremely distracting for learners who feel pressed to use the toilet but cannot for sometimes long parts of the school day. At worst, it is detrimental to learners' health, particularly girl learners when they are menstruating and should be regularly changing sanitary wear. It means that learners are prevented from performing as

well as they could, or as well as learners in schools with operating toilets are able to perform.

73.6. Female learners often cannot attend school while they are menstruating if there are no appropriate facilities for them to change their sanitary wear and clean themselves when doing so. This means that female learners sometimes do not attend school for up to a week of every month and may miss up to 20% of teaching time from which their peers benefit. I refer the Court to page 12 of the Water Research Commission Report attached as "MM7".

73.7. Learners use dilapidated and full toilets despite their condition (see for example the affidavit of Thabiso Selowa). This raises serious health and safety concerns, as well as affecting learners' dignity and ability to learn. Learners are exposed to feces and urine in full pit latrines and on toilet seats and floors. Learners fear breathing in the toilets because of the smell and germs in the toilets. This affects their pride and confidence and makes them afraid of using the toilet.

73.8. The most extreme example of the consequences of learners using toilets in these conditions is the tragic death of Michael Komape, who was a learner at Mahlodumela Full Service School in Chebeng Village, Capricorn District, Limpopo. The toilet structure at this school was so dilapidated that it could not support five-year-old Michael's weight when he went to use the toilet, and he fell through the toilet into the pit of

human waste, and drowned. I attach a copy of a photograph of the toilet out of which Michael's body was removed marked "MM8". The Komape family has brought a claim for civil and constitutional damages against the State for Michael's death under case number 1416/2015, and the State is defending this claim on the basis (among others) that the toilet was not objectively unsafe for use.

74. These problems are manifestly urgent. The learners attending these schools are exposed to continued risks to their health and safety arising from the failure to provide them with safe and adequate sanitation facilities. The state of the sanitation facilities at their schools also has a direct impact on their right to basic education.

75. As I set out in more detail below, it is not sufficient for the State to address these problems as part of its implementation of the Norms and Standards in the ordinary course; it must make provision for urgent situations such as those described above and in the attached report to be addressed, so that these direct threats to learners may be removed. This includes an identification by the State of objective criteria to assess which schools require urgent attention.

76. The consequences of the failure to do this as the evidence suggests is dire. It can lead to tragedy, and it can lead to severe disruption in a learners' education.

Urgent needs arising from storm damage

77. Regulation 4(3) does not create "priority" categories for schools who have suffered storm damage. As a result, where storms have blown off the roof of a school, or caused classroom walls to collapse, the State is required to address this damage by 31 December 2030 and subject to available resources and co-operation by other government agencies and entities.

78. The evidence in the attached school affidavits illustrates the direct impact of storm damage on the ability to conduct teaching and learning. Where inclement weather causes substantial damage to school buildings, both the quality of education, and the time available for teaching and learning, suffers irreparably. For example –

78.1. Where classrooms affected by storm damage cannot be used at all, schools are forced either to conduct certain lessons outside (as described in the affidavits of Malasha Rendani, Mokgadi Raboroko and Kamogele Teffo), or to fit two or more classes of learners into a single classroom (as described in the affidavits of Mothotse Phineas Mokwele, Tabane Malati Remmy, ~~Mphahane Johannes Mmakola~~ and Malasha Rendani). Where lessons are conducted outside, schools have no choice but to cancel these lessons when it rains, because there is no available shelter from the rain.

78.2. In some cases, such as those illustrated in the affidavit of Tabane Malati Remmy, where schools still use the storm-damaged classrooms for teaching and learning, they must also cancel lessons in rainy or

extremely windy weather, because the classrooms provide inadequate shelter, or no shelter at all.

78.3. Even where classes are not cancelled due to bad weather, the conditions in storm-damaged classrooms still work to interrupt teaching and learning. Wind in the classroom creates noise when loose beams rattle against the walls and the remainder of the roof, which prevents the learners from hearing what the teacher is saying. Windy weather also causes objects such as leaves, sand and stones to blow into the classrooms, and this serves as a severe distraction to learners. This is aggravated by factors such as overcrowding, and learners being forced to share desks and chairs. I refer to the affidavits of Mothotse Phineas Mokwele, ~~Munyanyi Takalani Phillip~~, Tabane Malati Remmy, Mmaphuti George Thokolo, ~~Mpitsane Johannes Mmakola~~, Moses Nkoane Phalane, Mokgadi Raboroko and Kamogele Teffo.

TP
SM
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78.4. Where schools still make use of storm-damaged classrooms, the teachers and learners in these classrooms are exposed to an increased safety risk. For example, loose beams that previously supported the roof could collapse into the classroom at any stage, causing a risk of injury to teachers and learners. At Cracouw Primary School, the safety risk became so pronounced that the school abandoned the use of these classrooms altogether. This is discussed in more detail in the affidavits of Mothotse Phineas Mokwele and Malasha Rendani.

79. Given this impact, storm damage of this nature can only be described as an emergency. It operates to deteriorate the quality of teaching and learning, or, in some cases, to halt it completely. In extreme cases, it poses a danger to the safety of learners and teachers. The failure to repair this infrastructure operates as a direct obstacle to the exercise of the right to basic education. In other words, teaching and learning – which lies at the heart of a basic education – cannot take place effectively or at all until repairs are effected.

80. The attached report “MM9” (“SECTION27 Limpopo Report”) highlights the severe damage that occurred at two other schools, and the direct impact of the State’s failure to make provision to address their needs on an urgent basis.

Jaji Secondary School

81. In January 2013, BEFA’s attorneys started to correspond with the DBE and the LDOE about the conditions at Jaji Secondary School. The school had leaks in the roof, which had worsened over eight years, with the result that, during the rainy season, teachers and learners had to spend the first two to three lessons each day sweeping water out of classrooms. They also carried umbrellas inside their classrooms to shelter them from the rain during their lessons. This is illustrated in the attached photographs marked “MM10”. The confirmatory affidavit of Solanga Milambo, who took these photographs, will be attached.

82. The report records that the SGB of the school notified the LDOE of these conditions on seven occasions before approaching SECTION27 for assistance.

83. SECTION27 began its engagement with the DBE on 24 January 2013, in the attached letter marked "MM11". As is set out in more detail in the SECTION27 Limpopo Report, this correspondence continued for nine months, with very little progress in addressing learners' urgent needs.
84. Although the repairs to the school started in June 2013, they were delayed due to non-delivery of building materials and were only completed in October 2013. These delays were aggravated by the failure to provide mobile classrooms for urgent temporary relief to the learners, until mid-July 2013.
85. For eight years, therefore, and despite several efforts to secure urgent assistance, learners at Jaji Secondary School missed class time while they swept away the water in their classrooms, and when sitting in their lessons, had to focus on sheltering themselves from the rain.
86. The confirmatory affidavit of Constance Mphaphudi, the chairperson of the SGB of Jaji Secondary School, will be attached.

Tshianane Secondary School

87. The SECTION27 Limpopo Report indicates that Tshianane Secondary School had been requesting assistance with repairs to its poor infrastructure since 1996. It received no assistance, and therefore the state of the school buildings continued to deteriorate.

88. On 12 January 2013, following heavy rains, the roof of the school was blown off and several windows were blown out of their frames, leaving the classrooms exposed to rain and direct sunlight. A series of photographs depicting the damage is attached marked "MM12". The confirmatory affidavit of Solanga Milambo, who took the photographs, will be attached.
89. Although the school requested the LDOE to effect the necessary repairs, they were told that there were insufficient funds to do so.
90. On 18 April 2013, SECTION27 wrote to the LDOE and DBE requesting that they undertake to make repairs to the roof, to indicate their projected timeline for doing so, and to provide mobile classrooms as urgent interim relief. A copy of this letter is attached as "MM13". They received no response.
91. After several follow-up letters, the school still received no clear time frames within which they would receive assistance.
92. On 28 June 2013, SECTION27 was forwarded an email between the provincial Administrator, Mr Mzwandile Matthews, the LDoE, and the Department of Public Works, in which Mr Matthews admonished the LDoE for its failure to act in urgent circumstances. He also asked: "*Why was it easy to [sic] the principal and the SGB chairperson to approach SECTION27 after the Circuit failed them, and not the District at least, or Head Office at most?*" A copy of this e-mail is attached as "MM14".

93. Despite this, DBE and LDOE officials continued to refuse to intervene on the basis that the situation at Tshianane was "not urgent". SECTION27's attempts to secure urgent remedies and the State's failure to do so are reflected in correspondence which is attached marked "MM15".
94. Tshianane only received its mobile classrooms in December 2013. The entire academic year had therefore passed before the interim measures to provide urgent relief had been put in place.
95. The roof of the school was finally repaired after December 2014, 23 months after it had been blown off.
96. A confirmatory affidavit from David Makhavane, member of the SGB of Tshianane Secondary School, will be attached.
97. It is clear from these two examples that the State does not provide an urgent response to desperate and acute needs as or soon after they arise, and that this has a crippling impact on teaching and learning, and the role of education as a tool for transformation. The Norms and Standards must make special provision for urgent needs in order to manage this impact.
98. As a principal of a school in Limpopo, I would also like to convey to this Court the difficulty schools have in effecting their own repairs. Schools are required by the DBE and LDOE to use their day-to-day funding to effect repairs. This fails to take

into account the possibility of major damage occurring, which the schools cannot address with their small allocations.

99. Schools' day-to-day funding may be used for minor maintenance of infrastructure, but is also to be used for all incidental costs arising from schooling, including but not limited to administrative running costs, municipal charges, toilet paper, cleaning products and cleaning and security companies. We simply cannot afford to use these funds to pay for major infrastructural repairs to enable teaching and learning to continue. I deal with this in further detail below.

The State's approach to urgent infrastructure needs

100. Although they recognise that there are several schools in Limpopo requiring urgent attention, the DBE and the LDOE have failed to make adequate provision for this.

101. While the DBE recognises the need to make provision for urgent circumstances, and specifically notes the problem of storm damage and deterioration of school toilets, these needs often take months or even years to be resolved. It is critical, in order to meet the obligation to provide safe and adequate school infrastructure to all learners, that provision is made in the Norms and Standards to give immediate assistance to those in desperate need.

102. In 2010, the Minister of Basic Education published the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning

Environment (GG No. 33283, 11 June 2010). The policy was a precursor to the Norms and Standards and set out, among other things, levels of adequacy to be reached in school infrastructure and data management to assist in accomplishing this level of adequacy. The policy is attached to the founding affidavit of the applicants in the main application as annexure "TM3".

103. The policy sets out the State's view of the impact of physical environments on teaching and learning effectiveness similarly to BEFA's findings in its work with storm-damaged schools. It notes that poor learning environments contribute to "irregular attendance and drop out; teacher absenteeism, attrition and turnover; a poor state of learners and a poor ability of teachers to engage them in learning". It further notes that "[e]xtreme thermal conditions of the environment affect academic achievement; affect learner ability to grasp instruction; temperatures above 27 degrees Celsius tend to produce harmful physiological effects on learners; increase annoyance and reduce attention span and mental efficiency of all, especially in situations where learners are performing tasks calling for quick recognition and response, increase errors in performing tasks; [and] increase teacher fatigue and deterioration of work patterns" (at page 27, box 1).

104. With regard to sanitation infrastructure, the policy states that "[t]he availability or lack of certain physical facilities – e.g., ablution – is a strong determinant of gender patterns of participation and completion rates in education, training and skills development" (at para 3.3).

105. These are examples of the DBE's recognition of safe and adequate school infrastructure as a necessary condition for the exercise of the right to basic education and poor and girl learners' rights to equality.

106. In its recognition of the importance of school infrastructure, the DBE has also recognised that not all necessary interventions to ensure the provision of safe and adequate school infrastructure can be planned and budgeted for in the ordinary course. For example:

106.1 In its Annual Performance Plan for 2015/ 2016, the DBE cited a concern that "natural disasters may lead to more schools that do not meet minimum sanitation standards". A copy of the relevant extract of this performance plan is attached as "MM16".

106.2 On 23 February 2016, Mr Mpumi Mabula, the head of infrastructure for the DBE told the Parliamentary Portfolio Committee for Basic Education that funds had to be redirected to provide temporary or mobile classrooms due to storm damage. The minutes from the meeting of the Parliamentary Portfolio Committee record that "Although it is not part of the anticipated budget for the department, he stressed that they cannot wait for the new financial year." A copy of these minutes is attached as "MM17".

107. Despite these recognitions, the DBE and the LDOE fail to plan appropriately to enable them to meet urgent needs.

Planning for urgent sanitation needs

108. As noted previously, BEFA works with approximately 130 schools across Limpopo province. The state of some of these schools' sanitation infrastructure is illustrated in the supporting affidavits of Ramalepe Prince, Thabiso Selowa, Mapowane Mahasha, Kgaugelo Moloko and Letsoapele Sunnyboy Mokwana.

109. This sample of schools gives BEFA some indication of the state of sanitation in the province generally. The general state of education infrastructure has been very poorly recorded since before BEFA began operating in the province in 2012.

110. To illustrate this, I would like to refer this Court to some of the State's own data on Limpopo public schools and how they have used it in the process of prioritisation of sanitation infrastructure projects since 2012.

111. When BEFA was formed in 2012, we knew that the schools with which we had been interacting on the whole had unsafe and unhygienic sanitation facilities. When we began to work with SECTION27, we were made aware of their efforts to secure plans for improving sanitation infrastructure, including prioritisation of schools with no or unusable facilities. These efforts are set out in detail in the SECTION27 Limpopo Report. The report details problems with sanitation at several schools in Limpopo, and their difficulties in having their urgent needs addressed.

112. We understand that after lengthy correspondence with the State, the first plan for prioritisation of sanitation infrastructure for a list of 216 schools in Limpopo was provided to SECTION27 by the DBE in March 2013. I attach a copy of this plan, together with the email to which it was attached, as "MM18".
113. In response to this plan, SECTION27 noted a number of schools with urgent sanitation needs, and motivated for their inclusion. In May 2013, the DBE updated its list of priority schools to include 414 schools requiring urgent intervention to address the state of their sanitation facilities. I attach a copy of this plan, together with the letter to which it was attached, as "MM19".
114. The history of the correspondence between SECTION27 and the State securing this plan is described from pages 23 to 29 of SECTION27 Limpopo Report. Some of this correspondence, which includes letters from SECTION27 to the DBE, the LDOE, the departments of Water Affairs and Forestry, Public Works and Human Settlements, and the Minister of Finance, is attached chronologically and marked "MM20."
115. As the report details, several requests were made for details of the criteria used in deciding which schools would be included on the priority list to receive new sanitation facilities. SECTION27 stated specifically that these were required to ascertain, and to advise its clients, which schools would be treated as priority schools.

116. At a meeting on 18 September 2013 with the DBE and the LDOE, Mr Mzwandile Matthews, the head of the intervention team that had taken over the functions of the LDOE in terms of section 100(1)(b) of the Constitution, suggested that no such objective criteria existed. A copy of the minutes of this meeting is attached as "MM21.1". In other words, the identification of schools requiring urgent repairs to their sanitation facilities was not a systematic process.
117. Together with SECTION27, BEFA continued to monitor the infrastructure projects and conditions at schools and to suggest further schools to be included in plans over 2013, 2014 and the beginning of 2015, based on their urgent needs. As the SECTION27 Limpopo Report reflects, the DBE and the LDOE accepted many of these suggestions and undertook to effect the necessary renovations.
118. BEFA was therefore surprised to find that these sanitation plans did not appear to be in any way reflected in the LDOE's User Asset Management Plan 1 of 2015, or in the Infrastructure Norms and Standards Implementation Plan released in November 2015. Both of these documents are attached to the founding affidavit of the applicants in the main application, marked "TM44" and "TM49".
119. For example, Mareseleng Secondary School (see affidavits of Kgaugelo Moloko and Letsoapele Sunnyboy Mokwana) was included in the May 2013 list of priority schools with "physical progress" marked "complete", but has still not received new sanitation infrastructure. It was subsequently included in the User Asset Management Plan 2015 as scheduled to receive rehabilitation, refurbishment and repairs between 2017 and 2020 but described as "to be confirmed" in the Infrastructure Norms and Standards Implementation Plan. I understand that this

means that the Infrastructure Planning and Property Management directorate in the LDOE did not have the requisite information to be assigning an implementing agent to the school, and would need to gather this information.

120. It is therefore clear that Mareseleng has not been prioritised by the LDOE, despite the fact that, as the affidavits attest, the school is clearly in desperate need. Its urgent need was also recognised by the DBE and the LDOE as far back as May 2013.

121. It is difficult to know how prioritisation of schools could ever be achieved in the framework of the LDOE's current plans.

122. The Infrastructure Norms and Standards Implementation Plan does not include information on sanitation infrastructure for the majority of schools in Limpopo, despite sanitation infrastructure being one of three of the LDOE's priority areas for implementation up to November 2016. Out of 4 090 schools listed in the Implementation Plan, 2 863 (70% of) schools are marked as "to be confirmed" under "access to sanitation".

123. Whereas the Implementation Plan indicates that when it was published in November 2015 the LDOE did not have data of sanitation infrastructure in most Limpopo schools, the User Asset Management Plan, released in July 2015, uses the National Education Information Management Systems data from 2014. The data within this plan contradicts itself, but gives an indication of the seriousness

of the sanitation crisis in Limpopo schools. In particular, the plan notes that (out of 4 110 schools):

123.1 there are 2 895 schools in the province that need to have pit latrines removed (at page 22);

123.2 there are 3 083 schools that need to be provided with toilets (at page 24); and

123.3 there are 4 010 schools with "basic safety issues", which includes "A lack of access to potable drinking water and sanitation facilities; toxic substances in the school environment; extremely unsafe building structures that could collapse on top of the learners; classrooms that are overcrowded; inadequate fencing; and security risks" (at page 14).

124. We were told by the LDOE of a complete audit of school infrastructure that was to be imminently available from the time of our first interactions with the LDOE. We understand that this audit has in fact been completed by the Council for Scientific and Industrial Research but we have not been able to secure a copy of the report as of yet. We hope that the report will assist the LDOE with its planning such that urgent needs can be properly defined and prioritised.

Planning for storm-damaged schools

125. Natural disasters are an annual concern in Limpopo where schools are regularly damaged by storms, particularly in the rainy season between November and January.

126. Storm-damaged schools are therefore noted as a departmental weakness or a potential threat in each of the available Annual Performance Plans ("APP") of the LDOE from 2010 until 2015. A copy of the relevant pages of the APPs are attached as "MM21.2" See, for example, page 37 of the 2014/ 2015 APP, page 9 of the 2011/ 2012 APP, and page 17 of the 2012/ 2013 APP which states as follows:

"School infrastructure has always been a challenge more especially in rural areas where many schools are built by the communities. The structures in these areas are largely of poor quality and many of them collapse during rainy season. Although attempts are made annually to provide proper infrastructure, the backlog created remains huge. Furthermore, the situation is exacerbated by storms which leave a number of schools with blown-off roofs."

127. This problem is a compound one:

127.1 Firstly, inclement weather poses a threat to physical infrastructure and, as I set out in further detail below, schools regularly suffer severe damage as a result of storms in the area.

127.2 Secondly, the DBE has recognised that because school infrastructure in Limpopo is already unstable and inadequate, the storm damage may be more widespread, and could cause more serious harm, than would be the case if schools had previously been provided with better infrastructure.

128. Despite this recognition, and as is clear from the examples of Jaji Secondary School and Tshianane Secondary School, the State has repeatedly failed to make provision this damage to be addressed as a matter of urgency.

129. In a meeting between BEFA, SECTION27 and the LDOE on 24 August 2016, the MEC for Education in Limpopo noted that "when we have rainy season, we lose schools" and that a condition assessment report yet to be released shows that some schools in the province are actually built on storm lines.

130. The MEC further noted that the 2012 storm-damaged schools backlog requires more than R1 billion to be reconstructed. He recognised that some of the infrastructure problems caused by storms are "small" and "become bigger" because of poor maintenance. As a result, he said, "the fund for storm damaged schools has to fix the backlog of schools already damaged since 2012." He went on to confirm that there is no contingency funding for schools that may be damaged in upcoming storms. The confirmatory affidavit from BEFA member, Tebogo Sephakgamela, who attended the meeting, will be attached.

131. The Infrastructure Norms and Standards Implementation Plan confirms that "the entire budget allocation up and till [sic] 2018/2019 has already been committed to various implementing agents through Service Level Agreements (SLA's) and the addendums to it" (at page 6).

132. The real impact of this is that when, for example, a storm causes damage to a school overnight, there is no funding allocated and available for even temporary redress. These schools in urgent need are expected to join a long-term queue, which is backlogged. While the schools wait for infrastructure to be repaired, the conditions worsen due to the buildings' exposure to inclement weather and general wear and tear. By the time the buildings are repaired, learners and teachers have been exposed to increasingly unsafe conditions for a prolonged period of time.

A "reasonable" plan must make provision for urgent needs

133. I am advised that the Constitutional Court has held, in the housing context, that any plan for the realisation of socio-economic rights must include provision to address urgent needs, which needs cannot afford to wait to be addressed in the ordinary course.

134. If admitted, BEFA will advance legal argument in support of extending this finding on emergency provisions to the right to basic education. It will canvas the jurisprudence on the subject and explain the basis for addressing educational infrastructure-related emergencies in a similar manner in State policy.

135. Broadly, and in support of its argument, BEFA will address the following:

135.1 In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), the Constitutional Court held that, in order to be reasonable, a housing programme must, amongst other things: (i) clearly allocate responsibilities, tasks and resources at different levels of government; (ii) be "balanced and flexible", amenable to continuous review, attentive to "short, medium and long term needs, and (iii) go beyond measures which will ensure statistical success in housing delivery, and cater in addition for those in desperate or emergency situations (para 44).

135.2 The Court defined people in desperate or emergency situations as "people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition" (at para 52).

135.3 Although the Court generally commended the State housing programme, it held that the programme could not be considered reasonable because it failed to provide interim relief for those who were facing crisis situations and were in "desperate need", in circumstances where the permanent housing plan would be rolled out over many years as opposed to over "a reasonably short time". Secondly, the Court found

that the policy's failure to address immediate crises is counterproductive to the overall plan because the predicament of those rendered homeless and helpless "inevitably results in land invasions by the desperate thereby frustrating the attainment of the housing plan generally."

- 135.4 This approach was echoed in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) which found that a court's decision on the justice and equity of an eviction may involve a more wide-ranging enquiry into the reasonableness of the state's housing programme, and linked emergency needs to values of equality and dignity:

"The Constitution requires that everyone be treated with care and concern; if the measures [taken to implement a housing programme] though statistically successful fail to respond to the needs of the most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress can be avoided."

- 135.5 The jurisprudence clearly requires that (housing) emergencies be planned for, and rejects the claim that emergencies by their nature are impossible to plan for. In *City of Johannesburg Metropolitan*

Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC), the City of Johannesburg argued that it could not "predict, plan and budget for" emergency situations due to their uncertain nature (para 62). The Court rejected this argument, concluding: "[T]he budgetary demands for a number and measure of emergency occurrences are at least to some extent foreseeable, especially with regard to evictions. Predictions can be made on the basis of available information."

136. We will argue that these decisions were made in the context of the right to housing, which is a right that is subject to progressive realisation within the State's available resources. For the reasons set out above, the right to basic education is not subject to such limitations. The State must provide all necessary components of the right to basic education in full and immediately.

137. On this basis, we will argue that a determination as to whether the State has made meaningful progress in realising the right to education is not simply a matter of reducing, and ultimately eliminating, the number of schools without toilets or the number of schools built from inappropriate materials. While progress on these programmes is critical to the realisation of the right to education, the State's efforts will be incomplete without a plan that identifies and addresses the urgent needs of the most vulnerable learners.

138. The Norms and Standards fail to do this. While they create "priority" categories through Regulation 4(3), these are based on the types of intervention required to implement the Norms and Standards rather than the level of urgency of the

required intervention. These are also subject to the limitations of available resources and the co-operation of government agencies as per regulation 4(5)(a). These limitations are elevated to an overarching cap on the state's obligations; no provision is made for urgent needs, with the direst impact on the exercise of the rights to dignity, equality and basic education, to be addressed immediately.

139. BEFA's classification of certain needs as urgent is not intended to undermine the urgency and importance of the other provisions set out in the Norms and Standards. We maintain that the right to basic education includes the full provision of safe and adequate school infrastructure, as defined in the Norms and Standards. Learners must be provided with each and every component of safe and adequate school infrastructure in order for their right to basic education to be realised in full.

140. The legal submissions BEFA seeks to make on this issue will therefore not be aimed at delaying the implementation of the Norms and Standards as a whole. These must be implemented as soon as possible, in line with the State's constitutional obligations. The purpose of these submissions is to ensure that provision is made for the urgent needs of those in the direst circumstances within that framework.

F THE RIGHTS TO EQUALITY, DIGNITY AND THE BEST INTERESTS OF THE CHILD

141. If admitted as *amicus curiae*, BEFA intends to make submissions that regulation 4(5)(a) violates other rights in the Constitution, in particular, the right to equality (section 9) and dignity (section 10) and the best interests of child learners (section 28(2)).

142. It will do so by --

142.1. referring to legal authority on the nexus between the right to basic education and the rights to equality and dignity, and the best interests of the child;

142.2. setting out the State's obligations within the education framework to respect, protect, promote and fulfil these rights; and

142.3. adducing evidence indicative of the impact of poor educational infrastructure, which is one of the necessary conditions for the exercise of the right to basic education, on the aforementioned rights.

143. I shall deal first with the link between the right to basic education and the rights to dignity and equality. I will then deal with the best interests of child learners.

The State's obligations arising from the right to equality in the education framework

144. The jurisprudence in respect of the right to basic education acknowledges the indivisibility between the right to basic education and other rights. For present

purposes, these include also the rights to equality and dignity, and rights accruing to children under section 28(2) of the Constitution.

145. The Supreme Court of Appeal expands on the "inter-related and mutually supporting" nature of the rights to equality and basic education at paragraph 45 of the *BEFA* judgment, particularly in the light of the role education plays as a vehicle for the transformation of our society. Given that the right to basic education is a right held by children, it is also critical in terms of section 28(2) of the Constitution that their best interests be kept paramount in all programmes and policies developed by the State.

146. If admitted as *amicus curiae*, *BEFA* intends to argue that –

146.1 The State's failures to meet its obligations arising from the right to basic education, including the obligation to provide all necessary components of the right to basic education in full and immediately, and the obligation to provide urgent assistance to those in desperate need, constitute unfair discrimination in breach of section 9(3) of the Constitution. The grounds of this unfair discrimination include, but are not limited to, race, ethnic and social origin and gender.

146.2 The State is obliged in terms of section 9(2) of the Constitution to take specific positive steps to promote the enjoyment of all rights and freedoms for certain particularly vulnerable groups. Its failure to do so

will perpetuate patterns of unfair discrimination on the abovementioned grounds.

147. I deal with these in turn below.

Unfair discrimination in terms of section 9(3)

148. Section 9(3) of the Constitution provides that the State may not discriminate unfairly, directly or indirectly, against people on the basis of, amongst other things, race, ethnic and social origin, or gender.

149. I am advised that, in terms of the test developed by the Constitutional Court in *Harksen v Lane* 1998 (1) SA 300 (CC) and subsequent jurisprudence, the right not to be unfairly discriminated against is violated when: (i) a person receives differential treatment on the basis of the grounds listed in section 9(3) of the Constitution (which include race, ethnic and social origin and gender), and (ii) where this differentiation cannot be justified under the constitutional framework.

150. I am further advised that once it is established that the State is differentiating on listed grounds (such as race, ethnic and social origin or gender), then it bears the onus of proving the fairness of its discrimination to a court.

151. Limpopo has a predominantly African population, and which is a conglomeration of three former homelands (Venda, Lebowa and part of Gazankulu). The BEFA member schools have entirely African learnership. The poor or non-existent

infrastructure at schools, as a deliberate and direct effect of the apartheid educational provisioning, and the slow pace at which the State has chosen to remedy this apartheid backlog means that African learners in these rural areas and forced to lag far behind their peers in other parts of the country.

152. The position of female learners is even more dire. As well as the disproportionate impact that unsafe and inadequate infrastructure has on all learners across Limpopo, there is a further impact on female learners. As is set out above, and in the affidavit of Kgaugelo Moloko, where there are inadequate sanitation facilities at schools, female learners often miss many lessons in a school day, or several days of school every month, while they are menstruating because they do not have appropriate facilities at school to manage their periods.

153. An even more severe consequence – and unfortunately not an uncommon one – is that unsafe and inadequate infrastructure may encourage learners, particularly girl learners, to drop out of school entirely. I refer in this regard to page 24 of the extract of the Water Research Commission Report attached as “MM7”.

154. If admitted as *amicus curiae* BEFA will argue that the failure by the State to ensure equal education opportunities, through the provision of safe and adequate infrastructure to all learners throughout all public schools in South Africa constitutes unfair discrimination on the basis of race, gender and ethnic and social origin.

155. BEFA will also argue that the right to equality is violated in the disproportionate outcomes for learners on these grounds. I set out below the evidence that we seek to introduce in support of these arguments.

The obligation to take positive measures in terms of section 9(2)

156. Section 9(2) of the Constitution requires that the State must promote the achievement of equality in respect of people who were disadvantaged by past practices, policies and legislation. I am advised that this stems from a historical appreciation of South Africa's racist and unequal past.

157. In this light, I am further advised that the right to equality encompasses a positive duty on the State to to perform at a higher level for certain particularly vulnerable groups. This is the basis of the concept of substantive equality, which focuses on equality of outcome, as opposed to formal equality which denotes equal treatment for all groups.

158. Limpopo learners ought to be primary beneficiaries of substantive equality. The schools in Limpopo are in rural areas, with almost exclusively Black African populations, and where unemployment is high and income is low. This is evidenced by the fact that all of BEFA's member schools are classified as no-fee schools. I am advised that this means that, in terms of the legal framework governing school fees, the DBE and the LDOE have accepted that parents cannot afford to pay fees for their children's education. They also cannot afford to take steps to mitigate the impact of the State's failure to provide quality basic

education to all learners. These are schools which require something more from government.

159. As a result, if it is admitted as *amicus curiae*, BEFA will argue that the failure by the State to actively pursue policies aimed at prioritising learners in poor historically disadvantaged schools in order to achieve substantive equality constitutes a violation of the State's section 9(2) obligations.

160. Insofar as the Norms and Standards fail to address urgent infrastructure needs, and delay the overall implementation of the norms and standards by making them subject to progressive realisation, they treat poor learners in infrastructure-compromised schools unequally, and do not accord with the constitutional focus on substantive equality.

161. As a result of the failure to create a suitable learning environment for the most vulnerable learners, these learners do not receive the standard of education to which they are entitled. They also do not receive the standard of education that their peers, who may benefit from superior school infrastructure, may receive. The failure to provide learners with all components of their right to basic education – including safe and adequate infrastructure – undermines the role of education as a vehicle for transformation and accordingly unjustifiably limits their rights to equality and dignity as well. And that every day that passes compounds the experiences, making the equality more and more difficult to reverse.

162. The substantive component of the right to equality necessitates the State adopting special measures aimed at supporting the learners furthest away from accessing the right to basic education. This, we will argue, supports the Norms and Standards setting clearer terms for realisation of schools' infrastructural needs and to prioritise schools in urgent need of attention. Should the Norms and Standards fail to do so, they will do nothing to address pre-existing inequality, which will then be perpetuated and deepened. This is in direct conflict with the role of education as a tool to achieve transformation and equality.

Evidence in support of legal submissions

163. In support of the legal submissions it intends to make, BEFA will refer to the following evidence:

163.1. Supporting affidavits which indicate the disproportionate impact that inadequate and unsafe infrastructure has on poor learner in rural areas, and in certain cases, on female learners in particular. For example –

163.1.1. There is already a problem of overcrowding at schools across Limpopo and this is worsened by unsafe infrastructure that renders certain classrooms unusable, as I have set out above. I refer to the affidavits of Mmaphuti George Thokolo and Kamogele Teffo in respect of Matsoukwane Secondary School; Mothotse Phineas in respect of Mokwele in respect of Cracouw Primary School; Munyai

~~Takalani Phillip in respect of Hlalelani Primary School;~~

Tabane Malati Remmy and Mokgadi Raboroko in respect of ^{T.P}

Moshao Secondary School; ~~Mpitsane Johannes Mmakola in~~ ^{M.S}

~~respect of Mmakola Secondary School;~~ and Moses Nkoane

Phalane in respect of Serare Secondary School.

163.1.2. All of the learners at BEFA's client schools rely on the National School Nutrition Programme (NSNP), through which they receive a hot lunch every day. For many of them, this is the only meal they eat regularly. As an example, I refer the Court to the attached affidavits of Mothotse Phineas ^{T.P} ^{M.S} ~~Mmakole~~ ^{Mmaphuti George Thokolo} Mokwele and ~~Mapowane Mahasha~~. Where school is cancelled because of bad weather, or where they cannot attend school when they are menstruating, they are denied access to the NSNP as well.

163.2. In 2014, Statistics South Africa released a report entitled "Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011". The report records that individuals with little to no education experienced greater poverty, and that the poverty gaps were far greater in respect of adults who did not complete school. Specifically, the report finds that measures of the severity of poverty "*were significantly higher amongst adults with lower levels of education. Whereas the poverty gap for adults with post-matric education was only 1,9% in 2011, for those adults with no education it stood at 29,9%, while those with some primary*

school education had a poverty gap of 26,9%." Relevant pages of the report are attached marked "MM22".

163.3. A working paper produced by the University of Stellenbosch entitled "Low Quality Education as a Poverty Trap" (Stellenbosch Economic Working Paper 25/11) states that *"by the age of eight there are already very large gaps in the performance of school children in the top 20% of the population (top quintile) versus those in the bottom 80% (bottom four quintiles). In other words, by an early age there are already stark distinctions between the prospects of children from poorer communities and those from more affluent communities."* It shows that *"the education system generally produces outcomes that reinforce current patterns of poverty and privilege instead of challenging them. Unsurprisingly, we find that the inequalities in schooling outcomes manifest via labour market outcomes, perpetuating current patterns of income inequality."* Relevant pages of the paper are attached marked "MM23".

163.4. Nic Spaull's analysis of the report of the Southern and Eastern African Consortium for Measuring Educational Quality ("SACMEQ III"), entitled "A Preliminary Analysis of SACMEQ III South Africa" indicates that when ranked by the performance of the wealthiest 25% of learners, South Africa ranks fourth out of fifteen countries for reading. When ranked according to the poorest 25% of learners, however, South Africa comes last. Mathematics rankings show a similar pattern: the wealthiest 25% of learners rank sixth out of fifteen, while the poorest 25% of learners rank

twelfth. An extract from Spaul's analysis is attached as "MM24". This is a stark illustration of the gap in educational outcomes between wealthy learners and poor learners, and highlights the extent of the positive action required of the State to achieve substantive equality.

163.5. Another report produced by Statistics South Africa entitled "Education Series I: Focus on Schooling in Limpopo" (2013) attempts to provide "some pointers" towards addressing education in Limpopo. The report explains that one of the reasons for poor educational outcomes at higher levels is "[a] poor educational base during the early years". The report continues: *"Even though repetition is not a good sign, the fact that it only starts in the senior years is indicative of a system that does not identify poor performance early enough to allow students who have fallen behind to repeat and catch up before they reach the senior phase. By that time entrenched gaps are difficult if not impossible to correct."* In other words, when addressing education needs of children, time is of the essence: Each year that a child goes without quality education impacts on the next year, and the deficits from previous years are harder to rectify with the passage of time. An extract of this report is attached as "MM25".

163.6. The DBE's National Education Infrastructure Management (NEIMS) report from 2009 of the 24 460 public schools, illustrates the full extent of the school infrastructure backlog, and will illustrate what would be necessary to meaningfully address this backlog. The NEIMS study shows that, in 2009, 3 600 schools (14,7%) had no electricity supply,

2 444 (10%) had no water supply, 2 563 (10,1%) had an unreliable water supply, 970 (4%) did not have any ablution facilities, and 11 231 (46%) used pit-latrines toilets. A copy of the relevant pages of the report are attached marked "MM26".

164. Finally, it is extremely difficult to mitigate the impact of unsafe and inadequate infrastructure. As a school principal, I emphasise that I could not expect the parents of learners at my school to make financial contributions to, for example, building school toilets or repairing a damaged roof. These families cannot afford to pay school fees.

165. It is against this background that the violations of the rights to dignity and equality occur.

166. For this reason, and in the interests of achieving the right to equality, the State must allocate sufficient and adequate resources to lessen inequality, and not be permitted to act in a manner which exacerbates it.

Child learners' best interests

167. The Constitutional Court has, when interpreting the right to basic education, done so with reference to section 28(2) of the Constitution which states that the child's best interests are of paramount importance in every matter concerning the child (*Juma Musjid* paragraph 8).

168. If admitted as *amicus curiae*, BEFA intends to refer to A Skelton 'The role of the courts in ensuring the right to basic education in a democratic South Africa: A critical evaluation of recent education case law' (2013) 1 *De Jure* 1. This article notes that "it is clear that this principle –which has been a self-standing right – is a central feature in litigation relating to children's right to education."

169. In this light, and if admitted as *amicus curiae*, BEFA will argue that the failure to provide adequate infrastructure constitutes a failure to act in the best interests of the learners in breach of section 28(2) of the Constitution.

170. These arguments will be expanded on if BEFA is permitted to make legal submissions in the main application.

G BEFA'S SUBMISSIONS ARE RELEVANT TO THE MAIN DISPUTE AND DIFFER FROM THOSE ALREADY BEFORE THE COURT

BEFA's intended submissions are different

171. As described above, despite supporting the submissions made by the applicants in the main application, BEFA's intended submissions are substantially different from those raised by the applicants.

172. The applicants do not canvass a developing approach to the "immediate realisation" principle. On the other hand, the respondents' approach to the right to basic education is inconsistent with developing jurisprudence.

173. None of the parties has addressed the requirement of provision for urgent needs, which is a necessary component of any plan or program for the realisation of socio-economic rights, including the right to basic education.

174. The applicants also do not deal substantially with arguments based on equality or dignity, which arguments BEFA intends to lead if it is admitted as *amicus curiae*.

175. BEFA also has demonstrated that it has significant evidence in its institutional knowledge that will benefit the Court in making its decision. Much of this evidence is exclusively in the possession of BEFA, its legal representatives and its member schools.

BEFA's intended submissions are relevant

176. BEFA's submissions speak directly to the constitutionality of regulation 4(5)(a) of the Norms and Standards through its formulation as a progressively realisable right and its failure to account for urgent infrastructural needs, and are thus relevant to the main application.

177. In addition, BEFA's submissions intend to develop the "immediate realisation" principle in accordance with the developing approach of the courts to the interpretation of the right to basic education. This is necessary because the meaning and contours of the "immediate realisation" principle have implications

for determining the extent of the obligations of the State to provide safe and adequate infrastructure and indeed for all future cases dealing with the obligations of the State to provide various educational inputs.

178. An investigation into whether inadequate provisioning of infrastructure amounts to unfair discrimination within the context of the jurisprudence on provisioning for basic education and through the application of the tests for unfair discrimination will also have implications for the constitutionality of regulation 4(5)(a).

H OTHER PARTIES' ATTITUDES TO BEFA'S ADMISSION AS AMICUS CURIAE

179. On 12 September 2016 in the attached letter marked "MM27", BEFA's attorneys requested the parties to the litigation to consent to our intervention as *amicus curiae* in terms of Uniform Rule 16A(2). Our attorneys requested consent specifically to introduce evidence and to make legal submissions relevant to these proceedings, that we believe will be of assistance to the Court in adjudicating the matter.
180. The respondents' representative confirmed on 16 September 2016 that the respondents consent to BEFA's admission as *amicus curiae*. I attach a copy of their consent, which was transmitted to BEFA's attorneys via e-mail, as "MM28".
181. On 26 September 2016, and in the attached letter marked "MM29", the applicants confirmed their consent to BEFA's admission as *amicus curiae*.

182. All parties to the main application have therefore provided their consent to our intervention, which would include introducing evidence as well as making legal submissions.

I CONDONATION FOR THE LATE FILING OF THIS APPLICATION

183. The Applicant filed a notice in terms of Rule 16A(1) on 17 August 2016. I am advised that, in terms of Rule 16A, BEFA was required –

183.1. to secure the written consent of the parties to the main application by 14 September 2016; and

183.2. to lodge that consent with the Court, if given by all of the parties, or to make application for admission as amicus curiae in terms of Rule 16A(5), by no later than 21 September 2016.

184. This application is therefore being filed 12 court days late.

185. I respectfully request condonation for the late filing of this affidavit, for the reasons set out below.

186. The delay in the filing of this application was caused by three factors:

186.1. As is clear from this affidavit and the attached school affidavits, the evidence that BEFA seeks to introduce comes from a range of schools in

rural Limpopo. We were required to travel to all of these schools to collect first-hand evidence of their difficulties with the infrastructure, and the impact of these difficulties. It is also important to ensure that the information presented to the Court is current, given our arguments about time frames and urgency. On a practical level, collecting this evidence takes a long time. Due to the poor state of roads in the province, the rural locations of many of the affected schools, and the variety of districts covered, our members were only able to visit a maximum of two schools per day, working every week day. Confirmatory affidavits from Mr Milambo and Mr Sephakgamela, who were responsible for this process, will be attached.

186.2. Although the Rule 16A notice was filed on 17 August 2016, our attorneys only received this notice from the applicants' attorneys on 29 August 2016, which delayed the commencement of our work.

186.3. I am advised that the consent of the parties to the main application is not a necessary condition for an application in terms of Rule 16A(5). However, both the applicants and the respondents required more time in responding to our request for their consent for leave to intervene. In this regard I note that the respondents' attorneys provided their consent on 16 September 2016, and the applicants' attorneys provided their consent on 26 September 2016. We were advised to await the outcome of this process so that we could advise the Court of the parties' attitude to our intervention.

M.S.

187. I submit that the delay in filing this application is slight and will not cause prejudice to the parties. In this regard I am advised that they are still exchanging affidavits in the main application. To my knowledge, at the date of signing this affidavit the respondents' answering affidavit had not yet been filed.
188. The parties to the main application have been notified of the late filing of the application:
- 188.1 BEFA's attorneys addressed a letter to the parties on 26 September 2016, indicating that there would be a delay. A copy of the letter is attached as "MM30".
- 188.2 The applicants' attorneys indicated that they would not oppose an application for condonation, subject to this application being delivered by 7 October 2016. A copy of this confirmation is attached as "MM31".
- 188.3 Our attorneys did not receive a response from the respondents' attorneys.
189. BEFA's evidence and legal submissions are also critical to the Court's determination of the important questions raised in this application. In this regard I am advised that in deciding on the constitutional validity of laws, courts have expressed their appreciation for all relevant submissions to be made, to assist them in this process.

M.S

