

**IN THE EASTERN CAPE HIGH COURT, BHISHO
(REPUBLIC OF SOUTH AFRICA)**

CASE NO. _____

In the matter between:

EQUAL EDUCATION First Applicant

**INFRASTRUCTURE CRISIS COMMITTEE OF
MWEZENI SENIOR PRIMARY SCHOOL** Second Applicant

**INFRASTRUCTURE CRISIS COMMITTEE OF
MKANZINI JUNIOR SECONDARY SCHOOL** Third Applicant

and

MINISTER OF BASIC EDUCATION First Respondent

MEC FOR EDUCATION: EASTERN CAPE Second Respondent

GOVERNMENT OF THE EASTERN CAPE PROVINCE Third Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent

MEC FOR EDUCATION: FREE STATE Fifth Respondent

MEC FOR EDUCATION: GAUTENG Sixth Respondent

MEC FOR EDUCATION: KWAZULU-NATAL Seventh Respondent

MEC FOR EDUCATION: LIMPOPO Eighth Respondent

MEC FOR EDUCATION: MPUMALANGA Ninth Respondent

MEC FOR EDUCATION: NORTHERN CAPE Tenth Respondent

MEC FOR EDUCATION: NORTH WEST Eleventh Respondent

MEC FOR EDUCATION: WESTERN CAPE Twelfth Respondent

MINISTER OF FINANCE Thirteenth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

YOLISWA DWANE

state under oath the following:

- 1 I am the Head of the Policy, Communication and Research Department of Equal Education, the first applicant. I was a co-founder of Equal Education. I grew up in Dimbaza Township in the Eastern Cape and finished school in King William's Town. I have completed a degree in film and media studies and an LLB degree at the University of Cape Town.
- 2 I am duly authorised to bring this application on behalf of Equal Education. I attach the resolution of the Board of Equal Education taken on 11 December 2011, marked [YD1](#).
- 3 Separate affidavits will be filed on behalf of each of the second and third applicants. These affidavits are attached as [YD2](#) and [YD3](#) for convenience.
- 4 The facts contained herein are, to the best of my knowledge, true and correct. Unless otherwise stated or indicated by the context, they are within my personal knowledge.

PARTIES

- 5 The first applicant is **EQUAL EDUCATION** ("EE").

- 5.1 EE is established in terms of a written constitution. It is a registered non-profit organisation. The relevant sections of its Constitution are attached as annexure [YD4](#). Under its Constitution, it has capacity to sue and be sued in its own name.
- 5.2 EE is a community- and membership-based organisation. It advocates for quality and equality in the South African education system, and engages in evidence-based activism for improving the country's schools. Youth and particularly learner leadership development is central to our work.
- 5.3 EE works to promote quality education for all through campaigns grounded in detailed research and policy analysis and supported, where appropriate, by litigation.
- 5.4 EE has approximately 1500 members who are active on a weekly basis in approximately 80 schools around the country. It has many more active supporters. Its membership consists of learners, parents, teachers and community members. The largest section of the membership is made up of high school learners. It has a representative learner Leadership Committee of approximately 60 members. It also has a parents committee. EE has conducted awareness programmes and campaigns for the improvement of education in the Western Cape, Eastern Cape, Gauteng, Mpumalanga, KwaZulu-Natal, the North West Province and Limpopo.
- 5.5 A list of EE's board members is attached as annexure [YD5](#).
- 5.6 EE is supported by numerous civil society organisations locally, nationally and internationally. Locally our campaigns have been supported by the

Congress of South African Trade Unions (COSATU), the South African Democratic Teachers' Union (SADTU), and the Treatment Action Campaign.

- 6 Since its inception, EE has been concerned with learning conditions in poor and working class schools and communities. Our very first campaign was aimed at ensuring that over 500 broken windows at a school in Khayelitsha were fixed so as to improve the school's physical conditions and to ensure that teachers and learners could better focus in the classroom.
- 7 We have engaged provincial and national departments through meetings, letters, petitions, pickets, marches, night-vigils, and a 24-hour sleep-in at the gates of Parliament. Our marches have taken place in Cape Town, Johannesburg, Tshwane, Polokwane and Bhisho. Over 100,000 people in South Africa have signed our petitions and over 40,000 have marched in our marches. All of our activities have been peaceful.
- 8 Since 2010, EE has run campaigns against learners coming to school late in Cape Town and Ekhuruleni schools, and campaigns encouraging learners to return textbooks at the end of the school year. The campaign against late-coming has involved hundreds of learners, parents, and civil society.
- 9 We have also instructed legal representatives on behalf of learners without textbooks, African learners excluded from schools reserved under apartheid for Coloured learners, and a learner from a Rastafarian background suspended because of his religious observances. Although not a matter of formal policy, it

has generally been our approach to resort to legal action only when other avenues of democratic engagement have been exhausted.

10 EE believes that achieving quality and equality in education requires active citizenship. Therefore, when EE embarked on a national campaign for school libraries we also established a library project located in an old bakery in Roeland Street, Cape Town – called ‘The Bookery’. Since 2010 The Bookery has collected more than 100 000 books from the public and has fully stocked more than 15 school libraries in working-class township schools. We did this while pursuing the primary demand of the campaign, which is for the national government to develop and implement a policy for school libraries.

11 We believe that the systemic crisis in education cannot be solved by government alone. However, government has a duty to lead society, and marshal all the resources available, both public and private, to achieve quality education for all.

12 The second applicant is the **INFRASTRUCTURE CRISIS COMMITTEE OF MWEZENI SENIOR PRIMARY SCHOOL** (“Mwezeni SPS”), and its members. Mwezeni SPS is located in the Mbashe Local Municipality, approximately sixty kilometres south east of Mthatha. I refer in this regard to the affidavit by Nokhululekile Mshumayeli, the chairperson of the Infrastructure Crisis Committee of Mwezeni SPS.

13 The third applicant is the **INFRASTRUCTURE CRISIS COMMITTEE OF MKANZINI JUNIOR SECONDARY SCHOOL** (“Mkkanzini JSS”), and its members. Mkkanzini JSS is located in the Port St Johns Local Municipality,

approximately 15 kilometres north west of Port St Johns. I refer in this regard to the affidavit by Fikile Billi, the chairperson of the Infrastructure Crisis Committee of Mkanzini JSS.

- 14 The first respondent is the **MINISTER OF BASIC EDUCATION (“the Minister”)**. She bears constitutional and statutory responsibilities in respect of the provision of basic education, the administration and funding of public schools arising particularly from the Constitution, the SA Schools Act 84 of 1996 and the National Education Policy Act 27 of 1996. Among the Minister’s powers is the power to prescribe national minimum uniform norms and standards for school infrastructure (“minimum norms and standards”).
- 15 The second respondent is the **MEC FOR BASIC EDUCATION, EASTERN CAPE (“the MEC”)**. The MEC bears constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in the Eastern Cape, arising particularly from the Constitution, the South African Schools Act 84 of 1996 (“the SA Schools Act”), and the Eastern Cape Schools Education Act 1 of 1999 (“the EC Schools Act”).
- 16 The third respondent is the **GOVERNMENT OF THE EASTERN CAPE PROVINCE**. It too bears constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in the Eastern Cape.
- 17 The fourth respondent is the **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**. It too bears constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in South Africa.

- 18 The fifth to twelfth respondents are the **MECs FOR BASIC EDUCATION** in each of the provinces other than the Eastern Cape. They bear constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in their respective provinces. These MECs are joined for such interest as they may have in the part of this application dealing with the Minister's obligation to prescribe minimum uniform norms and standards for school infrastructure. No relief is sought against them.
- 19 The thirteenth respondent is the **MINISTER OF FINANCE**. He bears statutory responsibility for the financial management of government affairs, formulating the budget, and developing economic policy. In terms of section 5A of the SA Schools Act (as amended by the Education Laws Amendment Act No. 15 of 2011), the Minister is obliged to consult with the Minister of Finance prior to prescribing minimum uniform norms and standards for school infrastructure. The Minister of Finance is joined for such interest as he may have in the part of this application dealing with the Minister's obligation to prescribe minimum uniform norms and standards for school infrastructure. No relief is sought against him.
- 20 Service on the first to thirteenth respondents will be effected care of the State Attorney in accordance with the Rules of Court.

STANDING

- 21 EE brings this application in several capacities:

- 21.1 in terms of section 38(a) of the Constitution, in its own interest as an organisation which has as one of its objectives the improvement of infrastructure at schools in South Africa;
- 21.2 in terms of section 38(b) of the Constitution, on behalf of the learners at Mwezeni SPS and Mkanzini JSS and other schools who have been and will be affected by inadequate infrastructure at their schools, and who for lack of resources, lack of knowledge of their rights, lack of access to legal services, and because of their number, cannot individually bring these proceedings;
- 21.3 in terms of section 38(c) of the Constitution, in the interests of the learners and their parents at the two named schools and other schools similarly situated; and
- 21.4 in terms of section 38(d) of the Constitution, in the public interest.

22 The standing of the second and third applicants and their members is dealt with in the affidavits filed on their behalf. Suffice it to say that the Infrastructure Crisis Committee of each school and the members of that committee approach this Court in their own interests, in the interests of the learners and parents of learners at the school, and in the public interest.

THE NATURE OF THIS APPLICATION

23 This is an application in two parts. I refer to them as the first part and the second part. In the affidavits on behalf of the second and third applicants, the first part is referred to as Part A.

- 24 The first part of this application concerns two schools in the Eastern Cape, Mwezeni SPS, and Mkanzini JSS. Both have suffered serious infrastructural damage caused by severe weather storms and fire, resulting in a situation of danger and emergency. The first part concerns the State's duty to provide adequate emergency relief to Mwezeni SPS and Mkanzini JSS. It is of a more urgent nature and concerns narrower questions of fact and law than the second part.
- 25 The Applicants contend that by failing to remedy the emergency conditions at the applicant schools,
- 25.1 the first to fourth respondents have failed to respect, protect, promote and fulfil the constitutional right to a basic education;
 - 25.2 the first to fourth respondents have violated the right to equality in section 9 of the Constitution;
 - 25.3 the MEC has failed to discharge his duties under the SA Schools Act, including the duty not to discriminate; and
 - 25.4 the MEC has failed to discharge his duties under section 4(1) of the EC Schools Act.
- 26 On 2 March 2011 the national Cabinet invoked section 100(1)(b) of the Constitution and intervened in the management and operations of the Eastern Cape Department of Education. The relevant pages of a statement released by Cabinet on 3 March, confirming this, are attached as annexure [YD6](#). The applicants do not know the terms and extent of this intervention because to the

best of my knowledge they have not been made public. I submit that, notwithstanding the intervention, the legal responsibilities of the MEC and provincial government remain those of second and third respondents. To the extent that the national government has assumed responsibility for those obligations, it too now has legal responsibility in that regard. My references to the obligations of the MEC and the provincial government should therefore be read also as references to the Minister and the national government, to the extent that they have assumed the obligations of the MEC and the provincial government. I invite the first and fourth respondents to inform the Court of the full extent to which the fourth respondent has assumed the obligations of the province (the third respondent).

27 The second part of this application concerns the failure by the Minister to make regulations prescribing the minimum norms and standards for school infrastructure as contemplated in section 5A(1)(a) and (2)(a) of the SA Schools Act.

28 The applicants contend that by failing to make the regulations the Minister has:

28.1.1 failed to discharge the duties imposed on her under the SA Schools Act;

28.1.2 failed to respect, protect, promote and fulfil the right to a basic education in section 29(1) of the Constitution; and

28.1.3 infringed the constitutional right to equality (section 9) and dignity (section 10) of the Constitution; and

28.1.4 violated an express promise made by her that minimum norms and standards for school infrastructure would be prescribed within a specified period; and

28.1.5 failed to promote the values of accountability, responsiveness and openness which underpin the Constitution.

29 The applicants accordingly seek the orders set out in the Notice of Motion. They can be summarised as follows:

29.1 In respect of the first part:

29.1.1 declaring that the failure of the MEC and the provincial government to address and resolve the dire conditions at Mwezeni SPS and Mkanzini JSS by at least providing adequate emergency structures, is unconstitutional and unlawful; directing the MEC and the provincial government immediately to provide emergency relief to Mwezeni SPS and Mkanzini SPS in the form of safe and adequate structures, temporary or otherwise;

29.2 In respect of the second part:

29.2.1 declaring that the failure of the Minister to make regulations which prescribe minimum norms and standards for school infrastructure constitutes a breach of the constitutional right to a basic education, a breach of the constitutional right to equality, a breach of the constitutional right to dignity, a breach of her statutory duties under section 5A of the SA Schools Act, and a breach of the values of

accountability, responsiveness and openness which underpin the Constitution; and

29.2.2 directing the Minister to make regulations which prescribe minimum norms and standards for school infrastructure in terms of section 5A of the SA Schools Act, within 3 months of the date of judgment.

30 In this affidavit, I first set out the constitutional framework applicable to the right to a basic education. This is applicable to both the first and second parts of the application. I then deal in turn with the first and second parts as follows:

30.1 First Part:

30.1.1 The SA Schools Act and the EC Schools Act;

30.1.2 The facts of the emergency situations at the applicant schools;

30.1.3 The impact on the education of learners at these schools;

30.1.4 The facts relating to the government's failure to remedy the emergency conditions;

30.1.5 Appropriate relief with respect to the first part of the application;

30.2 Second Part:

30.2.1 Section 5A of the SA Schools Act;

30.2.2 The link between the two parts of this application;

- 30.2.3 The facts relating to the widespread lack of adequate and safe physical infrastructure at schools across the country;
- 30.2.4 The impact of inadequate and unsafe physical infrastructure at schools on learning outcomes and the impact on the right to a basic education and the right to equality;
- 30.2.5 Government's response to addressing the widespread problems in school infrastructure;
- 30.2.6 Equal Education's engagement with government;
- 30.2.7 The relief which is sought;
- 30.2.8 Submissions with regard to the obligations of the Minister and the national government.

THE CONSTITUTIONAL RIGHT TO A BASIC EDUCATION

- 31 Section 29(1)(a) of the Constitution provides that "*everyone has the right to a basic education...*".
- 32 The right to a basic education is immediately realisable and is not subject to progressive realisation in the light of available resources.
- 33 I submit that in giving meaning to the content and scope of the right to a basic education, regard must be had to its unqualified nature, and to the purposes of the right.

- 34 The purposes of the right to a basic education, as variously described in domestic legislation and policies, and in international covenants and commentaries, are several-fold. The right to education is essential, *inter alia*, to:-
- 34.1 the full development of the human personality and the individual's sense of dignity;
 - 34.2 substantive equality and equal opportunity, as education is the primary vehicle by which economically and socially marginalised persons can lift themselves out of poverty and obtain the means to participate meaningfully in society; and
 - 34.3 the enjoyment of democratic participation and meaningful citizenship.
- 35 The right to a basic education is thus unusual among other human rights in its nature as an *empowerment right*: education is an end in itself, but it is also a means of realising and promoting other rights, including dignity and equality. The *White Paper on Education and Training* (March 1995) accordingly describes the primary "goal" of basic education as follows:

"To enable a democratic, free, equal, just and peaceful society to take root and prosper in our land, on the basis that all South Africans without exception share the same inalienable rights, equal citizenship, and common national destiny."

36 Similarly, the National Education Policy Act 27 of 1997 provides that the Minister's national education policy must be directed towards, among other things—

“enabling the education system to contribute to the full personal development of each student, and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes” (section 4(b)); and

“achieving equitable education opportunities and the redress of past inequality in education provision...” (section 4(c)).

37 I submit that international law must be considered when interpreting the Bill of Rights. In this context, I point out that the United Nations Committee on the Rights of the Child emphasised in its General Comment 1 that the purpose of education must be to *empower* the child:

“The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights and values”. (paragraph 2)

38 Similarly, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) observed in its General Comment 13 on the Right to Education that:

“Education is both a human right and an indispensable means of realising human rights. As an empowerment right, education is the primary vehicle

by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.” (paragraph 1)

39 Given the purposes of the right to a basic education, the importance of these purposes in a free and democratic society founded on the values of dignity, equality and freedom, and the unqualified wording of section 29(1)(a), I submit that the right to a basic education necessarily implies the right to a basic education that is *adequate*.

40 As is illustrated by the situation at the applicant schools, safe and functional infrastructure is essential for adequate education to be provided. Educating a child requires more than a teacher, or a teacher and a textbook. The achievement of an adequate basic education requires amongst other things that a child study in classrooms and an environment that are *safe and conducive to learning*.

41 The “interrelated and essential features” of the right to education are enumerated in the CESCR’s General Comment 13 as follows:

(a) Availability: *functioning schools must be available and “are likely to require buildings or other protection from the elements, sanitation*

facilities for both sexes, safe drinking water, trained teachers receiving domestically-competitive salaries, teaching materials and so on; while some will also require facilities such as a library, computer facilities and information technology,”

(b) Accessibility: educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

i. Non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds...;

ii. Physical accessibility: education has to be within safe physical reach ...;

iii. Economic accessibility: education has to be affordable to all...;

(c) Acceptability: the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) . . . ;

(d) Adaptability: education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings. (Emphasis added.)

42 Section 29(1) must be read with the duty of the state to ensure accountability, responsiveness, and openness (section 1) and to respect, protect, promote and fulfil the rights contained in the Bill of Rights (section 7(2)); as well as with other constitutional rights, including the right to equality (section 9); the right to human dignity (section 10); the right to freedom and security of the person (section 12); the rights of children (section 28); the basic values and principles governing the

public administration (section 195); and the duty on the state to perform its obligations diligently and without delay (section 237).

- 43 I submit that these constitutional rights and principles reinforce the duty imposed on the government under section 29(1)(a) of the Constitution to ensure that public schools have adequate and safe infrastructure conducive to learning, and to respond to requests from public schools for emergency relief and assistance.

PART ONE

THE SOUTH AFRICAN SCHOOLS ACT

- 44 The Preamble to the SA Schools Act highlights the fundamental importance of setting nationally applicable uniform norms and standards for schools. It states that *“it is necessary to set uniform norms and standards for the education of learners at schools ... throughout the Republic of South Africa.”* (my emphasis)
- 45 Section 3(1) of the Act states that *“every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such a learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.”*
- 46 Section 3(3) of the Act states that *“every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or*

her province can attend school as required by subsection 1.” This obliges the MEC to ensure that there are sufficient places and infrastructure to meet the basic education needs of every child required to attend school.

- 47 I submit that it is inconceivable that Parliament could have made attendance at schools compulsory, and criminalised the failure of a parent to cause his or her child to attend school, without intending that learners would be provided with safe structures at schools. Parliament could not have intended to compel children to attend school in unsafe or unhealthy conditions. Section 3 necessarily implies that the MEC must provide a safe school for each child.
- 48 I submit that section 3 of the SA Schools Act obliges the MEC to provide public schools that are safe, functional, and adequate to meet the education needs and rights of the learners in the province.
- 49 Section 34(1) states that *“the state must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.”*
- 50 I submit that the state is obliged under the SA Schools Act to fund the provision of infrastructure required to provide basic education, necessarily including the provision of safe buildings.

THE EASTERN CAPE SCHOOLS EDUCATION ACT

51 Section 4(1) of the EC Schools Act states that the MEC shall determine school education policy in the Province within the framework of, inter alia, the following principles:

“(a) every person shall have the right to basic education and to equal access to schools and centres of learning;

...

(c) no learner or educator shall be unfairly discriminated against by the Department...;

(d) There shall be a duty on the Department to foster the advancement of persons or groups or categories of persons previously disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of education rights without disadvantaging other persons or groups or categories of persons;...”

52 Against that background, I now set out the facts of the conditions at the applicant schools, and their consequences.

THE FACTS

EMERGENCY CONDITIONS AT THE APPLICANT SCHOOLS AND THEIR IMPACT ON THE LEARNERS' EDUCATION

- 53 Mwezeni SPS is a Senior Primary School that provides education to 295 learners in Grade R through Grade 6. Mkanzini JSS is a Junior Secondary School providing education to 408 learners in Grade R through Grade 9.
- 54 A third school, Menziwa Senior Secondary School (Menziwa SSS) initially intended being a litigant in this application. The letter of demand sent to the Respondents dated 3 August 2011, and attached as annexure [YDZ](#), was written on its behalf. Since this letter was sent, some positive steps have been taken by the respondents towards satisfying the school's needs. The building of classrooms at the school is now scheduled to begin in the first quarter of 2012. Menziwa SSS is therefore no longer an applicant in this matter. However, the circumstances surrounding the school's unacceptably poor conditions, which still exist at the time of signing this affidavit, and the respondents' apparent ability to address them, are relevant to this application. They illustrate the problems which are faced by many schools.
- 55 These schools are in the area which previously constituted the Transkei. This is one of the poorest areas in South Africa. The learners who attend these schools and their parents are impoverished people from rural communities.

56 As appears in more detail from the affidavits of the second and third applicants, these schools have been severely damaged either by extreme weather conditions or by fire. Mwezeni SPS was seriously damaged by heavy rains in January and February 2011. Mkanzini JSS was gutted by fire on 15 July 2009. Menziwa SSS was struck by a tornado on 20 December 2010 and by a severe storm in March 2011. Even before the schools were struck by these disasters, the learners at these schools had suffered deplorable conditions for years. These schools now operate under appallingly unsafe conditions, and require emergency infrastructural relief.

57 As a result of the pre-existing inadequacies and the severe storm or fire damage, the condition of the school infrastructure at these schools endangers the physical safety of the learners, and impedes their ability to attain a basic education.

58 The issue of safety is urgent, as described in the second and third applicants' affidavits:

58.1 At Menziwa SSS, all of the five shutter-board classrooms lack significant portions of their walls; heavy metal gutters dangle from classroom roofs; all of the windows in the school have been smashed or blown out; and electrical wiring is exposed in many classrooms.

58.2 At Mwezeni SPS, learners are being educated in a structure that appears to be in imminent danger of collapse. Parents and educators fear for the safety of these children, but are left with no other option during inclement weather conditions.

- 58.3 At Mkanzini JSS, learners are taught in corrugated iron shacks that are overcrowded, poorly constructed, leak badly when it rains, and provide little protection from the elements. Two of the school's five corrugated iron classrooms become unusable in wet weather due to seepage which turns the dirt floors into pools of mud.
- 59 The effect of the inadequate infrastructure on school enrolment, attendance and learning at the Menziwa SSS, Mwezeni SPS and Mkanzini JSS is demonstrable.
- 60 High absenteeism and unfit conditions for teaching and test-taking have severely impacted on the quality of education at Menziwa SSS:
- 60.1 Absenteeism increased among both learners and educators following the storm damage to the school, in part due to frequent illnesses resulting from exposure to extreme weather conditions.
- 60.2 Enrolment numbers dropped from 416 to 306 following the storm damage. Parents who are able to afford transport, send their children elsewhere. This leaves the poorest and most vulnerable students continuing to suffer the crisis at Menziwa SSS.
- 60.3 Due to the deteriorated condition of the classrooms, teachers have found it impossible to maintain discipline in the classrooms. In part because of the difficulty of teaching in such circumstances, many teachers are currently attempting to transfer to other schools.
- 60.4 Matriculation exam pass rates have declined over the past five years - from 47% in 2006, to 29% in 2008, to 10% in 2010. During the matric exams in

November 2008, 2009, and 2010, examination monitors stated that the conditions were unfit for any assessments to take place. At the time of these exams, some learners collapsed due to the extreme heat in the school.

61 At Mwezeni SPS, the following effects are described:

61.1 After the damage to the classrooms, 220 children in grades R through 4 were taught outside, because of the instability of the remaining standing classrooms. During periods of rain, learners simply did not attend school.

61.2 Teacher morale at the school has steadily declined due to the poor condition of the classrooms. Learner absenteeism has increased. This is attributable in large part to the unsafe and deteriorating conditions in which the teachers and learners must operate. Classrooms are overcrowded, many of the mud walls have serious problems with damp, roofs leak in many classrooms, there is a severe shortage of furniture, and classrooms are dark because of a lack of windows. Teaching and learning is extremely difficult in these conditions.

62 At Mkanzini JSS, the Infrastructure Crisis Committee describes the effects of the poor infrastructure on teaching and learning as follows:

62.1 After the fire gutted the four permanent classrooms, the hastily constructed corrugated iron shacks provide inadequate shelter and are inappropriate structures for teaching and learning to take place in. The corrugated iron shack classrooms are dark and dirty and too small to accommodate the

learners. Many children have to be taught outside at some stage of the day. Learner absenteeism is extremely high, particularly when there is wet weather and the shacks' leaking roofs result in the school's entire enrolment of 408 children being taught in the two classrooms that are built of bricks.

62.2 The corrugated iron shack classrooms are unstable. Two are completely unusable for weeks after rainfall due to seepage which turns the dirt floors into a quagmire. In warm weather the tin shacks become unbearably hot and students struggle to concentrate in the extreme heat. There is also a dire lack of furniture at the school.

GOVERNMENT'S FAILURE TO REMEDY EMERGENCY CONDITIONS

63 In the many months following these disasters, these schools have not received any emergency or other relief from the government. Damaged walls, fallen roofs, fire gutted classrooms and broken windows at the schools have not been fixed since they were destroyed by the storms or fire. The schools remain unsafe, and present a dangerous environment for the learners.

64 Both applicant schools have repeatedly written letters to the government pleading for urgent assistance. These efforts are described in the second and third applicants' affidavits. Despite these efforts, neither of the schools has received a response to any of its correspondence, or any form of assistance. The schools have been given no indication of when they will be provided with emergency classrooms, if at all.

- 65 Despite the urgency of the situation, it appears that the respondents do not even have a plan in place to remedy the crisis conditions at these schools. While Menziwa SSS is now scheduled to receive new classrooms to address the disaster conditions at the school, it required a letter of demand to nudge the respondents into taking action. It is unclear why there are no indications of remedial steps being taken to alleviate the plight of Mwezeni SPS and Mkanzini JSS.
- 66 The most recent Eastern Cape Department of Education Budget Statement that the applicants' attorneys have been able to obtain is dated 25 May 2011. Certain programmes are listed as "Emergency" on the Budget Statement, although there is no explanation of these programmes or the policies that inform them. Neither Mwezeni SPS nor Mkanzini JSS is listed on the Budget Statement. Neither is scheduled to receive any sort of emergency assistance.
- 67 It is evident, from the omission of the applicant schools from this programme, that whatever emergency policies do exist are woefully inadequate. Any programme that may currently exist is clearly failing to identify schools that are in dire need of emergency assistance, and address their problems timeously. This is also relevant to the second part of this application.

RESPONDENTS' BREACH OF THEIR CONSTITUTIONAL AND LEGISLATIVE DUTIES

- 68 The unsafe and otherwise unacceptable conditions at the applicant schools make them wholly inadequate as a learning environment. The physical conditions at these schools threaten the safety of the learners and teachers on a

daily basis; result in high absenteeism among learners; and have made it practically impossible for the learners to obtain adequate basic education.

69 By failing to remedy these conditions, the respondents have denied the learners at the applicant schools the enjoyment of an adequate basic education. I submit that the respondents have failed to fulfil their constitutional duty to respect, protect, promote and fulfil the learners' constitutional right to a basic education, and have violated the learners' constitutional right to a basic education under section 29(1)(a).

70 I submit further that, in failing to respond to the repeated requests from the applicant schools for emergency relief and assistance, the MEC has breached his duties under the Schools Act to provide public schools, which must necessarily mean safe and functioning schools. In particular:

70.1 The MEC failed to fulfil his duty under section 3(3) of the Schools Act (read with section 3(1) of the Schools Act) to ensure that there are sufficient places and infrastructure at the public schools in the province to meet the basic education needs of every child required to attend school in the province.

70.2 The state has breached its duty under section 34(1) of the SA Schools Act by failing to *“fund public schools on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision”*.

71 I submit further that, by failing to develop policies to address emergency situations at poorly-resourced, poorly-built and historically-disadvantaged schools such as the applicant schools, the MEC has failed to comply with section 4(1) of the EC Schools Education Act.

72 I respectfully submit that the matter is self-evidently urgent. Every day that there is a failure to address the unsafe and inadequate conditions at these schools results in a further breach of the rights of these learners. The 2012 school year has already started, and there is still no reason to believe that the matter will be addressed either promptly or at all.

RELIEF

73 The Applicants accordingly seek the following relief in respect of the first part of this application:

73.1 A declarator that the failure of the MEC to provide the applicant schools with adequate emergency structures is unconstitutional and unlawful.

73.2 An order requiring the MEC to provide the second and third applicants with immediate emergency relief in the form of safe and adequate infrastructure, temporary or otherwise.

73.3 Structural relief to ensure the MEC's compliance with that order.

PART TWO

THE LEGAL FRAMEWORK GOVERNING SCHOOL INFRASTRUCTURE

74 I have referred above to the meaning and scope of the constitutional right to a basic education. I wish also to draw attention to the historical context in which the unqualified constitutional commitment to this right must be appreciated. It was articulated as follows by O'Regan J in *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC):

“[121] Education is the engine of equal opportunity. Education in South Africa under apartheid was both separate and deeply unequal. Notoriously, HF Verwoerd proclaimed in 1953 that –

“Native education should be controlled in such a way that it should be in accord with the policy of the state . . . If the native in South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake . . . There is no place for him in the European community above the level of certain forms of labour. . . .”

And the apartheid state implemented this vision. Spending on Black school children in 1976 was a fraction of spending on White school children. It is not surprising then that education was the trigger for the Soweto revolt by Black school children. Throughout the 1970s and 1980s, the issue of unequal

education mobilised thousands of South Africans of all ages to oppose the apartheid state.

[122] When democracy dawned in 1994, the picture was bleak. By and large South African children of different colours were educated separately in institutions which bore the scars of the appalling policy of apartheid. Excellence in the matriculation examination at the end of twelve years of formal schooling reflected this unequal past. A tremendous challenge faced the new government.

[123] Things have improved somewhat but the pattern of disadvantage engraved onto our education system by apartheid has not been erased. In 2003 there were 440 396 candidates for matriculation, of whom 77,4% were Black, 7,2% were Coloured, 3,8% were Indian and 10,5% were White. Only 73% of these candidates passed and a tiny 19% obtained a university entrance pass. While more than 50% of all white candidates who wrote obtained a university entrance pass, only just over 10% of Black candidates who wrote did so. There is much to be done to achieve educational equality of opportunity.”

Section 5A of the South African Schools Act

75 One of the mechanisms created by Parliament to ensure adequate education for all, and some measure of equality, is contained in section 5A of the SA Schools Act. It was inserted in the Act in 2007 in order to give effect to the recognition in the Preamble to the Act that it is “necessary” to set uniform norms and standards for the education of learners at schools throughout the Republic. It provides:

“Norms and standards for basic infrastructure and capacity in public schools

(1) The Minister may, after consultation with the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for –

(a) school infrastructure;

(b) capacity of a school in respect of the number of learners a school can admit; and

(c) the provision of learning and teaching support material.

(2) The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following:

(a) in respect of school infrastructure, the availability of –

(i) classrooms;

(ii) electricity;

(iii) water;

(iv) sanitation;

(v) a library;

(vi) laboratories for science, technology, mathematics and life sciences;

(vii) sport and recreational facilities;

(viii) electronic connectivity at a school; and

(ix) perimeter security.”

76 Section 5A must be read with section 58C of the Act, which was inserted in the Act at the same time:

“(1) The Member of the Executive Council must...ensure compliance with

(a) norms and standards determined in terms of sections 5A,...;

(3) The Member of the Executive Council must, annually, report to the Minister the extent to which the norms and standards have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply.

...

(5) The Head of Department must comply with all norms and standards contemplated in subsection (1) within a specific public school year by –

(a) identifying resources with which to comply with such norms and standards;

(b) identifying the risk areas for compliance;

(c) developing a compliance plan for the province, in which all norms and standards and the extent of compliance must be reflected;

(d) developing protocols with the schools on how to comply with norms and standards and manage the risk areas; and

(e) reporting to the Member of the Executive Council on the state of compliance and on the measures contemplated in paragraphs (a) to (d), before 30 September of each year.

(6) The Head of Department must –

(a) in accordance with the norms and standards contemplated in section 5A determine the minimum and maximum capacity of a public school in relation to the availability of classrooms and educators, as well as the curriculum programme of such school; and

(b) in respect of each public school in the province, communicate such determination to the chairperson of the governing body and the principal, in writing, by not later than 30 September of each year.”

77 I submit that the prescription of minimum norms and standards for school infrastructure is (in the words of the Preamble to the Act) “necessary” for at least the following reasons:

77.1 It provides a legal standard and mechanism for ensuring that government meets its constitutional obligation to fulfil the right to an adequate basic education.

77.2 It provides a legal standard and mechanism for ensuring that a basic level of educational facilities is provided to every learner, thus addressing the issue of equality.

77.3 It enables government to meet its constitutional obligations within a clear framework of targets and priorities. As I show below, on the Government's own admission this is necessary for the equitable provision of adequate school infrastructure. Spending and development of infrastructure planning must be guided by a clear policy framework with defined and measurable targets.

77.4 It enables national government to exercise its oversight and monitoring role in respect of provincial education departments.

77.5 It sets legal standards by which MEC's are bound.

77.6 It enables communities, learners and educators, civil society organisations, and the public at large to know what they are entitled to require of government. It enables them to monitor government's performance, hold government accountable for meeting its obligations, and ensure that government meets those obligations. This is an element of the participatory democracy which is contemplated by the Constitution.

78 Three recent publications or events support the submissions made above:

78.1 First is the "Report of the Auditor-General (AG) of South Africa to Parliament on a performance audit of the infrastructure delivery process at the provincial departments of Education and Health", which was released in

August 2011. The report highlights wasteful and inefficient expenditure by the Department of Basic Education in the provision of school infrastructure and recommends that, inter alia, “(n)ational norms and standards for infrastructure should be developed and incorporated into standard and uniform designs to reduce professional fees.” The relevant page of the report is attached as annexure “[YD8](#)”.

78.2 Second is the National Development Plan (the Plan) produced by the National Planning Commission, and released on 11 November 2011. It seeks to provide practical guidance on how to achieve the country’s goals of, *inter alia*, eliminating poverty and reducing inequality. The Plan identifies a number of areas requiring directed interventions. Education, not surprisingly, is one of them. At page 266, the Plan states:

"Infrastructure backlogs need to be addressed so that all schools meet the basic infrastructure and equipment standards set by the Department of Basic Education. This requires targeted action to address the lack of basic infrastructure, such as libraries, books, science laboratories, sports fields, electricity and running water."

The targeted action called for by the Planning Commission to address the lack of basic infrastructure is founded on the mistaken belief that “basic infrastructure and equipment standards” exist, and have been “set by the Department of Basic Education”. I submit that the Commission’s suggested interventions cannot be implemented effectively without minimum norms and standards for school infrastructure being spelt out and

prescribed by regulation. The relevant pages of the Plan are attached as annexure [YD9](#).

78.3 Third, the problematic and fragmented nature of the education system has resulted in severe non-delivery of services which came to a head in Limpopo and the Eastern Cape during the last year. The provincial departments of education in both Limpopo and the Eastern Cape are under administration by national government after takeovers in terms of section 100 of the Constitution were implemented. I submit that the vast discrepancies that exist between the provinces in terms of the delivery of education, as is evidenced by the takeovers, make it necessary that there be nationally uniform minimum norms and standards to ensure that a basic level of adequacy and equality exists in the provision of infrastructure.

THE LINK BETWEEN PART ONE AND PART TWO OF THIS APPLICATION

79 The appalling conditions at Menziwa SSS, Mwezeni SPS and Mkanzini JSS are both indicative of and the result of an underlying systemic problem: poor and inadequate physical school infrastructure.

80 Poor physical infrastructure renders impoverished schools vulnerable to harsh weather conditions, and results in the recurrence of emergency situations at these schools. The emergency relief sought under the first part does not however address the underlying problem that many impoverished schools, particularly but not only in the Eastern Cape, were not properly built in the first instance.

- 81 The poor physical conditions at Menziwa SSS, Mwezeni SPS and Mkanzini JSS are not unique. There are many more schools which, while not in this unsafe condition, do not have the basic infrastructure which is necessary for the provision of adequate basic education. As I discuss below, there is a widespread, systemic and continuing failure to provide adequate infrastructure for public schools, which affects the poorest schools in the country. The enduring infrastructural backlog at these schools is an unacceptable, and I submit, unconstitutional and otherwise unlawful perpetuation of apartheid patterns of race and class inequality and disadvantage.
- 82 The failure to provide adequate infrastructure also results in a direct breach of the right of the learners to dignity. Education is itself a means of achieving human dignity. The failure to fulfil the right to a basic education inevitably results in a breach of the right to dignity. The unsafe and inadequate conditions at the schools themselves constitute a breach of the right to dignity. The lack of access to clean and hygienic toilets, the lack of access to clean drinking water, and being required to study in unsafe and inadequate conditions result in a direct breach of the right to dignity. The appalling conditions at the schools mentioned in Part One are in part the result of the systemic failure which Part Two seeks to address.
- 83 In Part Two of this application, the applicants seek measures that address the systemic, underlying cause of this situation. They seek the prescription of minimum norms and standards for school infrastructure. This would prevent the perpetuation of the existing intolerable situation, and prevent or reduce the recurrence of the kind of crises described in Part One.

84 As I will show, the national Government has recognised that the prescription of minimum norms and standards for school infrastructure is key to addressing the underlying systemic failures, dealing with inequality, and ensuring that the enduring vulnerability of historically-deprived schools is addressed. However, the prescription has not been put into place by the Minister.

WIDESPREAD LACK OF ADEQUATE INFRASTRUCTURE AT SCHOOLS

85 Today there are still thousands of schools across South Africa that are operating without adequate resources and in unsafe conditions. Government reports, most notably the National Education Infrastructure Management System Report (NEIMS), detail the lack of resources at public schools in the country. Relevant pages of the most recent NEIMS Report, published by the national Department of Basic Education (DBE) in May 2011, are attached as annexure [YD10](#). The Report notes that of the 24 793 public ordinary schools:

- a) 3 544 schools still do not have electricity, while a further 804 schools have an unreliable electricity source;
- b) 2 401 schools have no water supply, while a further 2611 schools have an unreliable water supply;
- c) 913 schools do not have any ablution facilities while 11 450 schools are still using pit latrine toilets;
- d) 22 938 schools do not have stocked libraries, while 19 541 do not even have a space for a library;

- e) 21 021 schools do not have any laboratory facilities, while only 1 231 schools have stocked laboratories;
- f) 2 703 schools have no fencing at all; and
- g) 19 037 schools do not have a computer centre, while a further 3267 have a room designated as a computer centre but are not stocked with computers.

86 The NEIMS Report shows that inadequate school infrastructure exists particularly in the former Bantustan areas. Although the Eastern Cape and KwaZulu-Natal are in the worst condition, the problem of poor infrastructure is also found in other provinces.

87 Some of the very worst conditions are found at the schools which are known as “mud schools”, because they are constructed of mud. The existence of these schools has become more widely known as a result of litigation which was instituted in this regard in the Eastern Cape. As a result of that litigation, the government committed funds towards addressing that problem in the Eastern Cape and other provinces. That is a welcome development, however:

87.1 If uniform and legally binding minimum norms and standards had been in place, provincial education MEC’s and departments and school governing bodies would have been placed on notice that the existence of these mud schools was unlawful, and would have been prompted to take steps to remedy the situation.

87.2 If uniform and legally binding minimum norms and standards had been in place, and made widely known, affected communities would have been

empowered to insist that the situation be remedied, and it is unlikely that the situation would have continued for as long as it has (and still does).

88 The problem of poor infrastructure at schools was highlighted in a study conducted by Transparency International, which looked at primary schools in the Gauteng, North West, and Mpumalanga provinces. The study was released in August 2011. It is 50 pages long, and I have therefore not attached it. I tender to make it available to any of the Respondents on request. It will also be made available at the hearing of this matter. It states:

“There are major problems related to the learning environment, both in terms of safety and infrastructure. Three out of four principals estimate that they don’t have the means required to run the schools, and one out of two learners says she is not always provided with a desk. About 15 per cent of schools had no electricity and 10 per cent no water supply.

For instance, 76 per cent of principals reported not having the required facilities to run their schools and a further 52 per cent of learners indicated that they are not always provided with a desk.”

89 The Report of a study by the “SACMEQ III Project in South Africa”, which was released on 18 January 2012 by the Department of Basic Education and the *Southern and Eastern Africa Consortium for Monitoring Educational Quality* (SACMEQ), again highlights the problem of inadequate school infrastructure in South Africa. The report is 94 pages long and I have therefore only attached the relevant pages as annexure [YD11](#). Again I tender to make the full report

available to any of the Respondents on request. It will also be made available at the hearing of this matter.

- 90 SACMEQ III is titled "A Study of the Conditions of Schooling and the Quality of Education". It found as follows in relation to school toilets:

"Provision of adequate separate sanitation facilities such as separate toilets for boys and girls is another basic requirement. Otherwise female learners may feel unsafe in the absence of these facilities and be forced not to stay long in school. In Table 1, the average numbers of learners per toilet in 2000 and 2007 are shown separately for boys' toilets and girls' toilets. For boys and girls it is worrisome that the ratio of learners to toilets increased between 2000 and 2007. Although no norms for numbers of learners per toilet were available for South Africa, the recommendation of the World Health Organisation is a ratio of 1:30, i.e. 30 learners should be sharing a toilet. Using this norm (in the absence of a national norm) it is evident that Grade 6 learners in South Africa were in schools where toilets were overcrowded as can be evidenced from the relatively high learner-toilet ratios and the fact that these increased considerably during the period in question." (page 41)

- 91 The report's recommendations in relation to toilets are clear:

"the Physical Planning Unit of the Department of Basic Education should immediately seek to: (i) establish and publish norms and standards for provision of separate toilets for boys and girls; and (ii) monitor that all schools adhere to the norms and standards." (page 87)

- 92 I submit that the SACMEQ III report's recommendation in relation to toilets – that norms and standards should be established, published, and then enforced – applies to all infrastructure indicators in schools. Publishing norms and standards will not ensure that the necessary results are achieved unless the norms and standards are made binding. If they are binding, it will be possible for the school authorities to be held to account, including by the learners and their parents, and if necessary through the courts. While non-binding recommendations are no doubt helpful, they are inadequate in ensuring that learners achieve their right to basic education, their right to equality, and their right to dignity.
- 93 A major cause of the widespread inadequacy and inequality in infrastructure and amenities in schools is the legacy of the apartheid education system. Racist apartheid laws and policies, and the apartheid government's deliberately unequal allocation of resources, favoured schools reserved for white learners, to the detriment of black learners (African, Coloured and Indian). This resulted in massive racial inequality in school resources and infrastructure.
- 94 This is recognised by the Minister in the *National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment* ("the National Policy for an Equitable Provision"). She states that the physical teaching and learning environment "has historically been one of the most visible indicators of inequitable resource inputs" (pg 7). The National Policy for an Equitable Provision is annexed as [YD12](#).

95 The official statistics show that inadequate infrastructure is still widespread. This situation has a clear racial dimension. Overwhelmingly, it is black children who attend the schools where the infrastructure is inadequate. Most schools in South Africa, including the original Mwezeni SPS and Mkanzini JSS buildings, were built during apartheid. The infrastructure reflects the racial inequality which was then a matter of policy. Many schools in poor rural communities had to be and were built by community members themselves, using the limited resources that they had.

96 It is of course no longer policy to maintain this inequality. But the inescapable fact is that gross inequality continues with regard to school infrastructure. It has a clear racial dimension, with black children suffering the consequences of under-provision. It is the most disadvantaged learners whose education and opportunities in life are compromised by the continuing failure to provide adequate infrastructure.

THE IMPACT OF INADEQUATE INFRASTRUCTURE ON THE EDUCATION OF LEARNERS

97 There is a direct relationship between adequate school infrastructure and learner performance. Adequate infrastructure is a key element of providing an adequate education.

98 The Minister and her Department have acknowledged this causal relationship. This is made clear both in official government documents, and in government's correspondence with the first applicant.

99 For example, in the Minister's foreword to the National Policy for an Equitable Provision she highlighted the significance of school infrastructure as follows:

“School infrastructure remains a critical issue on the social agenda for South Africa for a number of reasons. In the first place, infrastructure differentials are so large in South Africa and some of the infrastructure available so inadequate that it is inconceivable that it DBEs [does] not impact on learner performance. Secondly, the highly unequal access to quality facilities remains critical in the light of our Constitution and the Bill of Rights which demand equity and equality.” (page 4)

100 The National Policy for an Equitable Provision states:

“Significance of the Physical Teaching and Learning Environment:

Yet as recent studies show, there is a link between the physical environment learners are taught [in], and teaching and learning effectiveness, as well as learning outcomes. Poor learning environments have been found to contribute to learner irregular attendance and dropping out of school, teacher absenteeism and the teacher and learners' ability to engage in the teaching and learning process. The physical appearance of school buildings are shown to influence learner achievement and teacher attitude toward school. Extreme thermal conditions of the environment are found to increase annoyance and reduce attention span and learner mental efficiency, increase the rate of learner errors, increase teacher fatigue and the deterioration of work patterns, and affect learning achievement. Good lighting improves learners' ability to perceive a visual stimuli and their ability to concentrate on instructions. A colourful environment is found to improve learners' attitudes and behaviour, attention span, learner and teacher mood, feelings about school and reduces absenteeism. Good acoustics improves learner hearing and concentration, especially when considering the reality that at any one time, 15 percent of learners in an average

classroom suffer from some hearing impairment that is either genetically based, noise-induced or caused by infections. Outdoor facilities and activities have been found to improve learner formal and informal learning systems, social development, team work and school-community relationships.” (Page 7. See also pages 23-25).

101 In a letter to EE dated 9 May 2010 (Annexure [YD13](#)), the Minister acknowledged that:

“Research indicates that learners who achieve at higher levels have invariably come from a well-resourced school infrastructure which includes electricity, sanitation, playgrounds, equipment and access to books and resources.” (page 1)

102 These statements are consistent with international and local research on school infrastructure and its relation to learner performance. A review of the international research compiled by Specialist Researcher, Debbie Budlender, which is annexed as [YD14](#) together with her affidavit and curriculum vitae, confirms this. This review demonstrates that:

102.1 International research supports the finding that a causal relationship exists between the quality of school infrastructure and learner outcomes and performance.

102.2 The causal relationship is stronger in disadvantaged schools where the state of school infrastructure is poor and inadequate.

102.3 The causal relationship is stronger in developing countries.

102.4 There is a strong relationship between the lack of adequate school infrastructure and the negative impact this has on learners' self-esteem and the importance of school. It ultimately increases absenteeism among other things.

SUPPORTING AFFIDAVITS FROM SCHOOLS

103 Equal Education's work in the Western Cape, Limpopo, Mpumalanga, Gauteng, KwaZulu-Natal, Eastern Cape and North-West had shown it that the problem of inadequate school infrastructure is widespread. In order to document this and its impact on school education, Equal Education and attorneys from the Legal Resources Centre collected 24 affidavits from schools situated throughout South Africa during November and December 2011. Learners, parents, teachers and principals discussed, at length, the infrastructure problems facing their schools and their impact on teaching and learning. They deposed to supporting affidavits that are attached to this affidavit and marked [YD15](#), [YD16](#), [YD17](#), [YD18](#), [YD19](#), [YD20](#), [YD21](#), [YD22](#), [YD23](#), [YD24](#), [YD25](#), [YD26](#), [YD27](#), [YD28](#), [YD29](#), [YD30](#), [YD31](#), [YD32](#), [YD33](#), [YD34](#), [YD35](#), [YD36](#), [YD37](#) and [YD38](#).

104 These affidavits paint a bleak picture of schools with poor or absent infrastructure, demotivated teachers and learners, frustrated parents, and schools that are rarely provided with any information regarding the Department's plans, if any exist, to provide desperately needed infrastructural improvements. Classroom shortages and classrooms that are structurally unsafe or leak; a lack of electricity; inadequate water and sanitation; absent or non-functioning libraries,

science laboratories and computer facilities; and poor security were prevalent infrastructural problems at the schools.

105 I here provide an overview of the problems relating to infrastructure that were encountered at these schools, including some examples that illustrate their impact on the education of learners at these schools. Further detail is contained in the attached affidavits.

Shortage of Classrooms/Overcrowding

106 The shortage of classrooms at many schools causes extreme disruptions and seriously impedes teaching and learning. Of the 24 schools visited that deposed to affidavits, 15 reported problems with overcrowding. While the accepted, but non-binding, number of pupils that should be in a single classroom is 35 in high schools and 40 in primary schools, many schools are forced to accommodate more than double that number. Steven Matsimbi, the chairperson of the School Governing Body (SGB) at Malatse Secondary School in the village of Lefiso in Mpumalanga, describes the debilitating problem of overcrowding in classrooms with as many as 58 learners:

“The challenges the learners face in these poor quality classrooms that leak, don’t have electricity, and have crumbling floors are exacerbated by the fact that the classes are overcrowded and the school’s furniture is old and inadequate. Learners are forced to share desks and this is uncomfortable and distracting. Completing writing tasks is virtually impossible when there are up to four learners squashed into a desk made for two. These cramped conditions make it difficult for learners to write

and focus, which is especially problematic during examinations.”
(annexure [YD34](#))

107 SGB member Makhaya Bophi of Sakhikamva Senior Secondary School in East London, Eastern Cape explains the effects of having only one classroom for 80 grade 8 learners and one classroom for 90 grade 9 learners.

“The overcrowding means that learners do not do their work properly. On average, three learners share one desk... It is difficult for teachers to give learners individual attention. Classes are crowded and there is poor ventilation so classes are hot and stuffy. There have been instances where learners are taking drugs at the back of classes and fighting. But teachers can only teach from the door as they can’t move around the over-crowded space.” (annexure [YD18](#))

108 At Mabu-a-tlou Primary School near Suurman in Gauteng Province, the minimum number of learners in a classroom is 50. Dikeledi Shabalala, an SGB member at the school, describes the impact of overcrowding on teaching and learning as follows.

“The overcrowding is compounded by the limited amount of furniture. Teaching is not as effective as it could be. Because there are too many learners for each teacher, the teachers are not able to give the students the individual attention they require. Students are forced to resort to relying largely on the help of fellow students to assist them if they fail to grasp the lesson taught. While peer teaching can be beneficial when it is in addition to teachers providing explanation and assistance, on its own it is insufficient. This is apparent especially in mathematics where the poor performance of the majority of the students indicates there is a systemic problem.” (annexure [YD36](#))

Deteriorating Infrastructure

109 Poor quality buildings and leaking roofs are a major source of frustration at 18 of the 24 schools deposing to affidavits. Creating an environment conducive to teaching and learning is extremely difficult at many schools due to leaks or crumbling walls. At some schools it is bearable and simply a nuisance to be contended with, while at others it is so problematic that a large portion of the teaching year is lost due to having to close classrooms during inclement weather.

110 At Bogosi Primary School in the village of Moretele in the North West Province,

“The structure of the buildings is dangerous, as the buildings are very old. They were built in 1967 and have not been renovated or improved since. When it rains or when there are strong winds we have to send the students home because we are scared that the structure may collapse and fall on them.” (affidavit of Amos Hlungwane, principal, annexure [YD37](#))

111 Maceba High School is located in Nqutu, KwaZulu-Natal. The principal of the school, Mr Bethwell Mveli, describes the impact of leaking roofs on teaching and learning as follows:

“When it rains learning and teaching has to stop in half of our classrooms, because learners, their books and the desks get wet. It rains on up to half of the school days in the year. Learners and teachers also fear that the roof, which has holes in it, could blow off or collapse on them. Many of the wooden ceiling beams are also broken and bent and could easily fall on the learners and teachers.” (annexure [YD26](#))

Toilets

- 112 The absence of clean, functioning, adequate toilets at schools was a major concern at 20 of 24 schools that were visited. These are 20 of the 913 schools nationally that do not have any ablution facilities, and the 11 450 schools that are still using pit latrine toilets (as per the NEIMS Report referred to above). At Lehabe Primary School near Hammanskraal in the North West Province (annexure [YD55](#)), the Department of Health declared during a 2004 visit to the school that the 13 pit latrines were unsuitable for use by the school. Eight years later there has been no improvement to the situation, and students constantly complain to the principal about the terrible smell of the latrines. The structure is old and unstable and the roof is not properly secured. In fact, the pit latrines are the same ones used by the principal when she was a student at the school.
- 113 At Meadowridge Primary School in Mitchell's Plain (Western Cape), there are sufficient flushing toilets for the students but they are in a deplorable state of disrepair. The principal, Norman Daniels, states in his affidavit that

“The pipes are very old and have corroded, the lids are broken, there is no tiling, and there is urine seeping into the cement. It is unhygienic, and some parents instruct their children not to use the toilets at the school.... The poor state of the toilets means that many learners do not go to the toilet all day which also then affects their concentration in class. It is also extremely unhygienic and we even had 2 separate cases where learners caught Hepatitis C from the toilets. This was verified by their doctors, who told the parents that it was most likely from a toilet, and since the toilets at their homes were hygienic, it was likely to be the school's toilets

that caused the diseases. An adequate learning environment is one in which there is no health risk.” (annexure [YD16](#))

114 August Filander, a senior teacher at Alpine Primary School in Mitchell’s Plain, describes the toilets for the school’s 1300 students as very problematic.

“There are approximately 6 (toilet) seats available for 700 girls, but many of the toilets are broken and not functioning and often there are only 2 working toilets. The boys toilets have similar problems. Our janitors work hard to keep the bathrooms clean but often because of theft there are broken seats, tap handles and door handles. This creates hygiene and privacy issues for the learners and often they have to wait to use the bathroom.” (annexure [YD17](#))

115 At Samson Senior Primary School near Libode in the Eastern Cape, the roof on the block of pit latrine toilets was blown off by a storm in November 2010. At the time of signing this affidavit, 15 months after the storm, the toilets have not been repaired.

“The teachers have no choice but to use the damaged toilets, even though there is no roof or shelter. There is no privacy, humanity or dignity when they have to use the open toilets. More importantly, the toilets are a health hazard. Most learners use the fields surrounding the school to relieve themselves because the toilets are unusable. Livestock often enter the toilets and make a terrible mess.” (Wenani Ngxabani’s affidavit, annexure [YD19](#))

116 At Ashburton Primary School, located near Pietermaritzburg in Kwazulu-Natal, the poor state of the school’s three pit latrine toilets that are used by 133 children has a particularly harsh impact on female students.

“The toilets are smelly and unhygienic. The fact that there are no doors on the toilets also means that you have no privacy. This is degrading and humiliating and grossly violates their dignity. You think twice before using the toilet. You think whether you can’t just wait until you get home, and if you really have to use the toilet, you sometimes go the schools’ neighbours and ask them if you can use their toilet. When the girls and teachers are experiencing menstruation, they do not have the necessary privacy or facilities to take appropriate care of themselves. As a result, some of the girls stay away from school when they are experiencing menstruation, which can mean they are away for up to a week.” (affidavit of C E Ntshangase, principal) (annexure [YD24](#))

117 At Lehlaba Primary School outside Tzaneen in Limpopo, there is one pit latrine toilet for 90 learners (annexure [YD33](#)). At Iqonce High School in King William’s Town, Eastern Cape, there are two toilets for the 254 learners at the school (annexure [YD23](#)).

Absence of libraries, science laboratories, and computer facilities

118 The absence or inadequacy of library facilities and the severely negative impact it has on education was widespread at the schools visited. Only 5 of the 24 schools visited had a library. This is consistent with national government statistics (see the NEIMS report referred to above), which show that 22 938 schools do not have stocked libraries, while 19 541 do not even have a space for a library. The principal of Nape a Ngwato Secondary School in Tsimanyane village Limpopo, Mathabethe Hlokoa, stated:

“The school does not have a library or even a space for a library. The lack in variety of reading and media resources inhibits the kinds of assessments that teachers can set for the learners. Those who can afford

to travel to Marbel Hall to visit the town public library are able to go there and source additional information for their projects. They often perform much better than those who cannot afford to travel to the public library. The fact that the school does not have a library limits the teachers' ability to teach, and the learners' ability to study in a suitable environment and access resources for their education.” (annexure [YD30](#))

119 The principal of Maceba Secondary School in Nqutu, KwaZulu-Natal, Mr Bethwell Mveli, refers not only to the negative impact on education which results from the absence of a library, but also to the fact that donated resources cannot be accepted because of a lack of infrastructure for storing them.

“Without a library, learners do not have access to reading and reference books, only textbooks. This affects their ability to do research and complete assignments, which is a crucial part of their education... When the learners need to do research, we have to take them to Town. This costs a lot of money. It costs R60 to transport a learner by taxi to Town and back home again. The school has to pay for this. We can't afford to pay for everyone, so we usually select a few learners to go to Town to do the research for everyone. The learners who do not get to go to Town complain to me, but there is nothing that I can do to change this... Not having a physical space for a library also means that the school loses out on books which ELITS, the Department's Library Services Unit wants to donate to us. We cannot accept these books because we have nowhere to put them. As a result, our learners suffer.” (annexure [YD26](#))

120 The lack of science laboratories, particularly in high schools, has had devastating consequences for many matric students. At Iqonce High School in King William's Town all 10 matriculants writing science in 2010 failed the subject (annexure [YD23](#)). At Sakhikamva Secondary School in East London, only two

out of approximately 40 matric students passed science in 2010 and both received an E symbol or lower (annexure [YD18](#)). At Malatse Secondary School in Mpumalanga only 10 out of the 39 candidates writing matric science passed the subject in 2010 (annexure [YD34](#)). None of those schools have science laboratories. Virtually all of the schools visited stressed the difficulty of trying to teach complicated scientific concepts without the assistance of a laboratory where practical experiments can be performed. The overall national picture is that 21 021 schools do not have any laboratory facilities.

- 121 The negative impact of the absence of computers and computer laboratories on education in primary and secondary schools was referred to by two thirds of the schools visited. Nationally, 19 037 schools do not have a computer centre, while a further 3267 have a room designated as a computer centre but not stocked with computers. The impact of not having computers was summed up by Makhaya Bopi, an SGB member at Sakhikamva Senior Secondary School in East London, Eastern Cape.

“There are five computers in the school, however only three of them work. The members of staff use the computers to prepare lessons. Our learners have no exposure to the computers themselves and will leave the school with no computer skills. This directly and negatively impacts on their ability to study further or seek employment that is better than irregular physical labour.” (annexure [YD18](#))

- 122 For schools like Lehabe Primary School in the North West Province, the infrastructure needs are even more fundamental than computers and science laboratories:

“Although we would like a computer lab and a science lab for our learners at the school, these are not our most urgent problems, we need to have the roofs and toilets fixed as a necessity before we can begin to think about the luxury of a computer lab or a science lab.” (affidavit of NK Mahlangu, principal, annexure [YD38](#))

Electricity

123 Six of the 24 schools stressed that the absence of electricity was a major problem for the proper administration of the school. This echoes the national picture, described in government statistics, which show that 544 schools still do not have electricity, while a further 804 schools have an unreliable electricity source. At Malize Senior Primary School near Lusikisiki in the Eastern Cape,

“The lack of electricity frustrates the teachers’ ability to effectively run the school as teachers struggle to communicate with the DOE. In the absence of a school phone and fax, energy and time is wasted in travelling to meetings to receive information that could have been relayed via fax. This comes at the expense of being able to singularly focus on the students. The absence of electricity also means that should we be able to secure a computer through a donation, it would be almost impossible to use it at the school.” (affidavit of Zenzile Nomwenzana, annexure [YD20](#)).

124 Similar problems face Samson Senior Primary School near Libode in the Eastern Cape.

“Samson SPS has never had an electricity supply. This means that we cannot operate a photocopier to prepare for lessons, we don’t have computers for students to use, and administrative tasks are made much

more difficult without fax machines and computers.” (affidavit of Wenani Ngxabani, annexure [YD19](#)).

Water

125 At more than one third of the 24 schools deposing to affidavits the absence of a reliable source of potable water was a serious infrastructural concern, having a negative impact on teaching and learning in many ways. This problem of access to potable water is national, with 401 schools having no water supply, and a further 2611 schools having an unreliable water supply. At Milente Secondary School near Polokwane in Limpopo,

“The school does not have running water and therefore relies on two water tanks provided by the community. There are weeks when the school is unable to obtain any water and the tanks run dry. When the tanks are dry the school must purchase water with money from its own limited budget. We then have to sacrifice the purchase of additional educational resources for the students. We have wanted to purchase an extra computer for student to use but have had to postpone this purchase because we do not have the funds.” (affidavit of David Mineyuku, SGB Chairperson, annexure [YD29](#))

126 Five of the 24 schools are totally reliant on seasonal rain for their water supply. At Samson SPS near Libode in the Eastern Cape, storms have damaged the school’s limited capacity to collect seasonal rainwater.

“Previously, the school relied on rain water tanks. However, the metal gutters of the buildings have been damaged by storms and now hang off the buildings. The water tanks no longer collect rainwater and pose a

serious danger to learners and teachers. The nearest tap is approximately five kilometers away. The lack of water negatively affects the learners as they are often extremely thirsty and lose concentration easily.” (affidavit of Wenani Ngxabani, SGB member, annexure [YD19](#))

Security

127 For nine of the 24 schools, security issues were a major infrastructural concern. This supports government statistics which show that 2 703 schools in South Africa have no fencing at all. For many schools in rural areas, the lack of perimeter security means that livestock can wander freely through the grounds after school hours, and leave droppings which must be cleaned up. For some schools, the lack of fencing and security has a more sinister impact on education. At Mabu-a-tlou Primary School in the village of Suurman, Gauteng, SGB member Dikeledi Shabalala describes the need for perimeter security as the most pressing infrastructural need at the school.

“During the 2011 school year we have had three incidents of theft. Thieves break the doors and steal the food meant for the learners as part of the feeding program. Older boys who are not learners at the school loiter near the premises. They smoke and disturb the students. The teachers are constantly monitoring the premises and the safety of the learners during school hours. We are very concerned about the safety of learners within the school vicinity after school hours. The school is not adequately fenced in and is therefore vulnerable to acts of vandalism and petty theft. The fence is constantly being cut leaving gaping holes for persons to pass through. We do our best to repair it, but it is always cut again. There is a security guard but he only arrives at the school late in the evening. Our school needs a proper fence or wall to better protect our learners and the school during and after school hours.” (annexure [YD36](#))

128 The schools whose stories are told in the affidavits attached are by no means the worst public schools in terms of infrastructure. I submit that they give a fair representation of the types of problems faced by many public schools. They show the consequences for learners of the facts set out in the NEIMS Report.

GOVERNMENT'S RESPONSE TO THE WIDESPREAD INFRASTRUCTURE PROBLEMS

129 The national Government has acknowledged that the problem of poor school infrastructure is widespread. It has taken some steps towards addressing this problem. However, I submit below that the Government has acted unreasonably and unlawfully by failing to take the steps it has acknowledged are needed to address these problems adequately and comprehensively.

130 In 2007, Parliament amended the SA Schools Act through the Education Laws Amendment Act 31 of 2007, by introducing section 5A. This new section provides for the Minister to make regulations prescribing minimum norms and standards for school infrastructure.

131 On 21 November 2008 the national Department of Education (then under the leadership of Minister Naledi Pandor) published in the Government Gazette, for public comment, two documents which addressed the question of national norms and standards in respect of school infrastructure:

131.1 the Draft National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment. It was the precursor of the National Policy for an Equitable Provision, which I have already annexed as [YD12](#); and

131.2 the Draft National Minimum Uniform Norms and Standards for School Infrastructure (“Draft Norms and Standards for School Infrastructure”), which is annexed as [YD39](#). They were both released for public comment on 21 November 2008.

132 In 2009 the current Minister, Ms Matsie Angelina Motshekga, stated in answers to Parliamentary Questions that the Draft Norms and Standards for School Infrastructure were being applied in respect of new schools.

133 In an internal parliamentary question (question 1257 – Internal Question Paper 11/09/09) dated 11 September 2009, the Minister was asked whether she or the DBE had formulated a turnaround strategy to address inequalities in education without lowering the standard of education. In her response, a copy of which is attached marked [YD40](#), the Minister addressed the topic of infrastructure as follows:

“[W]e have developed norms and standards that commit government to providing school buildings of a particular standard. The backlogs are great and will take many years to address – however we are committed to ensure that all schools are provided with the minimum infrastructure for them to work in an enabling environment. The Department is seeking

creative ways to fund this backlog, especially that of libraries and laboratories. In the meanwhile, schools are encouraged to use science kits and to establish reading corners in classrooms.

134 In an internal question in Parliament (question 1418 – Internal Question Paper 29/09/09) dated 29 September 2009, the Minister was asked about the shortage of libraries and librarians. In her reply, a copy of which is attached marked [YD41](#), the Minister stated:

“Norms and standards for physical infrastructure approved by both the Council of Education Ministers and the Head of Education Committee in 2008 make it obligatory for all new schools to only be considered complete if they make provision for school library facilities. These are awaiting the concurrence of the Minister of Finance for finalisation.”

135 No such finalised norms and standards have been published in the Government Gazette or been made publicly available.

136 As I describe below, EE has made concerted and sustained efforts to engage the Minister and other organs of state in order to press for minimum norms and standards to be prescribed, as provided for under section 5A of the Schools Act.

137 EE has received undertakings from the national DBE and the Minister in respect of norms and standards for infrastructure. They have however not been fulfilled.

EQUAL EDUCATION’S ENGAGEMENT WITH GOVERNMENT

- 138 As I have stated, EE has since its inception been concerned with learning conditions and outcomes in poor and working class schools and communities.
- 139 Over an extended period, EE has actively sought to engage government on the issue of minimum norms and standards for school infrastructure and the National Policy for an Equitable Provision.
- 140 On 2 March 2010, EE wrote to Mr Bobby Soobrayan, the Director General of DBE (“the DG”), requesting information as to the status of the Draft Norms and Standards for School Infrastructure, and the National Policy for Equitable Provision. The letter specifically enquired when the Minister would promulgate the regulations and a policy document. A copy of the letter is attached marked [YD42](#).
- 141 In early April 2010, EE sent an undated letter to the Minister and the DG requesting a meeting. This letter also asked the Minister and the DG to clarify, in writing, the status of the National Policy for an Equitable Provision and the Draft Norms and Standards for School Infrastructure. A copy of the letter is attached marked [YD43](#).
- 142 A copy of an earlier letter, dated 1 April 2010, was attached to the undated letter of early April 2010. This earlier letter, attached as annexure [YD44](#), had been addressed to the Minister and DG, and copied to President Zuma. Among other issues, it requested written clarification on the current status of regulations pertaining to minimum norms and standards for school infrastructure. It cited the Minister’s written response to question 1418 – Internal Question Paper 25/09/09,

to which I have referred above, where she had referred to norms and standards awaiting the concurrence of the Minister of Finance. It also referred to the 2 March 2010 letter to the DG which had requested some of the same information, and contained an overview of the reasons for the need for minimum norms and standards for school infrastructure. Specifically, the 1 April 2010 letter requested the following information from the Minister by 8 April 2010:

142.1 a copy of the norms and standards to which the Minister had referred in her written response to Question 1418 – Internal Question Paper 25/09/09;

142.2 clarity on the legal status of the norms and standards to which the Minister had referred in her written response;

142.3 clarity on whether the norms and standards to which the Minister had referred in her written response differed from the draft regulations ('National Minimum Uniform Norms and Standards for School Infrastructure') tabled in the Government Gazette (Notice 1439 of 2008) in November 2008 ([YD39](#));

142.4 clarification of the Minister's intentions with regard to those draft regulations, and the timetable for finalisation; and

142.5 clarity on what the Minister's intentions were with regard to the draft 'National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment', and the timetable for finalisation.

143 The Minister did not answer these questions.

144 On 22 April 2010, EE had a meeting in Pretoria with the DG and three members of his staff. I was present. On 19 May 2010 EE sent a letter to the DG following up on this meeting. A copy of this letter ([YD45](#)) was sent to the Minister. It correctly reflected what transpired at the meeting of 22 April 2010.

144.1 The letter recorded that among the issues addressed in the meeting was a request for clarity on the status of the Draft National Policy for the Equitable Provision of an Enabling School Physical Teaching and Learning Environment, and the Draft Norms and Standards for School Infrastructure. EE also sought clarity on the various answers to parliamentary questions put to the Minister on minimum norms and standards for school infrastructure, and on time frames for these items.

144.2 At that meeting, the DG and his colleagues stated that the Draft Norms and Standards for School Infrastructure and the Draft National Policy for the Equitable Provision of an Enabling School Physical Teaching and Learning Environment had been finalised, had been given concurrence by the Minister of Finance at the end of 2009 or beginning of 2010, and were with the national DBE's legal department, awaiting the signature of the Minister, and thereafter promulgation. EE's letter of 19 May 2010 sought confirmation that this was correct. Subsequent correspondence from the DBE (discussed below) stated that this was the case.

144.3 The 19 May 2010 letter also recorded that the DG had mentioned an Accelerated Infrastructure Roll-out Programme, and an increase in infrastructure budget from R4.5bn to R6bn with regard to the implementation of the Draft Norms and Standards for School Infrastructure.

145 On 9 May 2010, the Minister wrote to EE in response to a memorandum and petition which had been submitted by EE at Parliament after an EE-led march of 10,000 people on 21 March 2010 (Human Rights Day). A copy of the Minister's letter is attached as [YD46](#).

145.1 The Minister acknowledged that research indicates that high-achieving learners invariably come from a well-resourced school with adequate infrastructure, including electricity, sanitation, playgrounds, equipment, and access to books and resources.

145.2 She stated that the National Policy for an Equitable Provision had been developed in order to enable the national DBE to address infrastructure provisioning holistically. She stated further that this policy would be followed by minimum norms and standards for school infrastructure.

The National Policy for an Equitable Provision

146 On 11 June 2010, the Minister published the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment in the Government Gazette. This is already attached as annexure "[YD12](#)".

147 The National Policy for an Equitable Provision contains an Executive Summary (pages 7 to 14) of the contents of the Policy. The whole of paragraphs 1.1 to 1.14.7 of the Executive Summary is relevant to this application, and the applicants will rely on all of it. However, in order to avoid unnecessarily burdening the papers, I quote only those parts of it which are of the greatest

relevance to this application. I then also draw attention to other parts of the Policy.

148 The Executive Summary states the following:

148.1 *“... as recent studies show, there is a link between the physical environment learners are taught, and teaching and learning effectiveness, as well as learning outcomes. Poor learning environments have been found to contribute to learners’ irregular attendance and dropping out of school, teacher absenteeism and the teacher and learners’ ability to engage in the teaching and learning process. The physical appearance of school buildings are shown to influence learner achievement and teacher attitude toward school. Extreme thermal conditions of the environment are found to increase annoyance and reduce attention span and learner mental efficiency, increase the rate of learner errors, increase teacher fatigue and the deterioration of work patterns, and affect learning achievement...”*

(Para 1.2, p 7)

148.2 *“Inequalities in the teaching and learning environment may therefore frustrate core sector policies to improve education quality, equity of inputs and equity of outcomes.”* (Para 1.3, p 7)

148.3 *“Progress is evident, albeit inadequate and uneven. Inadequacies are stark in some aspects like the provision of school libraries where nearly 80 percent of schools are still without science laboratories, lack of computers for teaching and learning in 68 percent of our schools, and inadequate*

classrooms leading to overcrowding in nearly a quarter of our schools.”

(Para 1.5, p 8)

148.4 *“... a typical South African school still does not provide a physical environment that enables effective implementation of core sector policies, such as the progressive curricula, co-curricula activities and the level of quality, equity, efficiency, relevance, and values.”* (Para 1.6, p 8)

148.5 *“Inadequate though current provision may be, the situation has phenomenally improved over the first decade and half of freedom. However, these improvements have progressed without a clear policy framework. The risk is that more resources may be invested without a clear definition of what constitutes an enabling physical teaching and learning environment in South Africa's schools of the future, without a clear benchmarking of progress toward the attainment of that environment, and without a clear monitoring of the impact of that environment on the attainment of our core sector policy targets and outcomes.”* (Para 1.7, p 8)

148.6 A principle area required for a clear national strategic policy direction is *“the authority for setting National Norms and Standards that should guide the adequacy, equity and fit-for-purpose of the physical teaching and learning environment”* (Para 1.13, p 9). I point out that this is a stronger formulation than that in the draft Policy, published on 21 November 2008, which had referred only to *“... setting norms and standards that should guide ...”*

148.7 ***“Policy Statement # 1: Nationally established norms and standards for an enabling environment***

“1.14.1. Effective from 2010/2011 financial year, norms and standards for the physical teaching and learning environment will be set at the national level by the Department of Basic Education. National Norms and Standards will set and express in terms of minimum and optimum provision. Along this continuum, norms and standards for basic safety, minimum functionality, optimum functionality and enrichment will be explicitly defined at a national level by the Department of Education. The DBE will also set clear target dates by which a set proportion of schools will meet each level of enablement in its environment. The DBE will also set a clear date by which all South Africa schools will meet norms and standards for optimum functionality.

“1.14.2. National Norms and Standards and will be developed and will be fully adopted by the end of 2010/2011 financial year.

“1.14.3. Provinces will adapt National Norms and Standards to their contexts without prejudice to set minimum. Effective from 2010/2011 financial year, all provinces will have aligned their plans and budgets in accordance with these norms and standards. By the end of 2010 to 2014 strategic plan period all schools will be applying all the necessary process norms and standards required for basic safety and minimum effectiveness.” (Para 1.14, page 10)

148.8 *“During 2010/2011 financial year--criteria and procedures for the identification and prioritisation of the teaching and learning environment needs will be nationally standardised by the Department of Basic Education. Provinces must adapt national procedures to reflect their unique*

contexts. Provincial adaptations must not lower the national minimum criteria, but may only pertain to enrichment but not diminution.” (Para 1.14.8 p 11)

148.9 *“The above three legal instruments demand that education, training and skills development opportunities should be extended to all South African learners in an equitable and non-discriminatory manner. The currently wide disparities in the provision of the physical teaching and learning environment violate the rights of citizens enshrined in these instruments in two principal ways: Firstly, by affecting physical access to education and training . . . Secondly, by affecting the quality of instruction learners are exposed to, thus leading to unequal opportunity. This may be the case where intolerable differentials in the environment – classrooms, special teaching rooms, laboratories, co-curricula facilities, libraries, books and instructional materials, equipment etc. - lead to substantial differences in learning outcomes. Equity in the provision of an enabling physical teaching and learning environment is therefore a constitutional right and not just a desirable state.” (para 2.6.1, p 21) [emphasis added]*

149 The Policy also states the following:

149.1 *“... the 2008/2012 strategic plan of the System Planning and Monitoring branch of the DBE identifies the development of norms and standards as well as the Basic Minimum Package (BMP) for the provision of school infrastructure as a first priority policy issue.” (para 1.20, p 18)*

149.2 In the context of the discussion of the “Nationally established norms and standards for an enabling environment” there is an analysis of different grades of functionality, these levels being: 1) basic safety 2) minimum functionality 3) optimum functionality and 4) enrichment. (para 4.10, p 31-32; para 4.23, p 34)

149.3 *“In the absence of National Norms and Standards, provinces have developed their own norms and standards, generating a set of 9 provincial norms and standards. What is in question is the adequacy of those norms and standards and, the extent to which they are actually applied.”* (para 4.20 p 33-34)

150 The production of the National Policy for an Equitable Provision was a welcome development. However, the last passage which I have quoted, explains why the National Policy is not adequate in ensuring compliance with the Constitution, unless it is backed by legally binding Norms and Standards: there will inevitably be questions about *“the extent to which they are actually applied”*. It is only if the Norms and Standards are legally binding, that it can be ensured that they are actually applied, through action by the national government or by those who are affected.

151 The published Draft Norms therefore contemplated that government would be under a legal obligation to give effect to them. They also contemplated that the obligation would be phased in over stipulated periods. This would address the problem that it would obviously not be able to remedy unsatisfactory conditions at each and every school overnight.

152 On 20 July 2010 the DG sent a letter to EE, a copy of which is attached marked "[YD47](#)". He wrote the following:

"The National Minimum Norms and Standards for School Infrastructure respond to policy area 1 in the Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment. The policy states that the Minister of Basic Education must develop national minimum norms and standards for an enabling environment which should be adopted by the end of the 2010/2011 financial year. Section 5(a) of the Education Laws Amendment Act 31 of 2007 also states that the Minister may, after consultation with CEM, by regulation prescribe minimum norms and standards for infrastructure. On adoption, Minimum Functionality norms and standards and maintenance will apply to all new schools, and where possible and when budget is available provinces will apply both Basic Safety and Minimum Functionality norms and standards to existing schools. The Norms are currently with the DBE Legal Services and will be promulgated as regulations thereafter." (page 2)

153 This was a further commitment on behalf of the Minister to make nationally binding Norms and Standards as contemplated by the SA Schools Act.

154 Towards the end of 2010, the Minister provided the following written answer to a question in Parliament, in Internal Question Paper 39-2010 (attached as [YD48](#)):

"The Department of Basic Education developed the Minimum Uniform Norms and Standards for Schools infrastructure. The norms classify

schools into primary and secondary schools and gives the minimum and maximum sizes for classrooms and core spaces and the design manual which is in the process of development will provide guidelines and specifications for classrooms and other core educational spaces.”

155 On 10 February 2011, EE representatives (including members of the Board of EE) had a meeting with the Minister, the Deputy Minister of Basic Education, the DG, the Minister’s Special Advisor (Dr Linda Chisholm) and the Chief of Staff in the Minister’s office (Mr Dingane Ngobeni). I was present. In this meeting a number of issues were discussed, including problems in the Eastern Cape and a march that EE was planning to hold on 21 March 2011 in order to call on the Minister to promulgate national minimum norms and standards for school infrastructure. The meeting was constructive and amicable.

156 The following day I wrote a letter to the Minister (annexed as [YD49](#)) thanking her for the meeting, and inviting her to attend the march on 21 March 2011.

157 On 21 March 2011, EE led a march of 20 000 people to Parliament. This was double the number who had participated in the same event in 2010. The purpose was to remind the Minister that the deadline she had set for the adoption of regulations for minimum norms and standards was approaching at the end of the month, and that she was expected to have them promulgated by that date. A memorandum outlining this was received on the Minister’s behalf by her Chief of Staff, Mr Ngobeni, and is attached marked [YD50](#).

158 The deadline of the end of March 2011 - which the Minister had communicated to EE, and which is specifically stated in the National Policy for an Equitable Provision - came and passed. The Minister still did not promulgate regulations in respect of minimum norms and standards.

159 On 18 April 2011, I met in Pretoria with DBE officials who included the current Deputy Director General and Head of ASIDI (Accelerated Schools Infrastructure Delivery Initiative) and three members of his staff (Including the Director of Planning and Monitoring). In a power point presentation they stated that:

"The draft Norms and standards were approved by CEM and the Minister of Basic Education and received concurrence from Minister of Finance during 2008/09 financial year. The Norms and Standards were then translated into regulations and were presented to the State Law Adviser for comments."

160 However, the presentation went on to state that the draft Regulations were not approved by CEM, and that "Amendments will be effected and the Norms will be presented to HEDCOM and CEM". The relevant pages of this power point presentation are attached as annexure [YD51](#).

161 On 25 June 2011, the Minister spoke at the official opening of the People's Summit for Quality Education at Khayelitsha. This was an event organised and hosted by EE. It brought together 400 learners, parents, teachers, activists, academics, union officials, government officials and members of the public, from across the country, for three days of deliberations about improving education in South Africa. A copy of a transcript of her address is attached, marked [YD52](#).

She stated that she views minimum norms and standards for school infrastructure as “*crucial*”. She went on to say that she had gazetted the National Policy for an Equitable Provision in June 2010. She said that draft Norms and Standards for School Infrastructure regulations were to be developed based on this policy, and would be released shortly for public comment. The Minister claimed that the Draft Norms and Standards for School Infrastructure were already being used by provinces in the planning of new schools, and were being phased in for existing schools based on provincial capacity.

162 The Minister stated further that a barrier to the finalisation and promulgation of regulations for Norms and Standards for School Infrastructure was the need to secure the consent of the Council of Education Ministers, made up of the nine provincial MECs for Education. She stated that she is required to secure the consent of the Council of Education Ministers before she may make regulations for minimum norms and standards for school infrastructure, and that she may not make the regulations without such consent.

163 I have been advised and respectfully submit that this last statement is simply incorrect. It shows that the Minister has failed to understand, and has misconstrued, her powers. I submit that on this ground alone, her refusal to make regulations falls to be set aside. In addition, her assertion that the CEM was preventing the promulgation of Norms and Standards contradicts previous assurances given by her in writing, and detailed above, that the Norms and Standards had in fact already been approved by the CEM.

164 On 3 August 2011, the Legal Resources Centre, on behalf of the applicants, sent a letter to the Minister. A copy was sent to the MEC (the second respondent).

The letter (attached as annexure [YD7](#)):

164.1 requested the Minister to provide written reasons why the regulations for minimum norms and standards had not yet been promulgated, and to state when the regulations are reasonably likely to be promulgated.

164.2 requested that emergency relief be provided to the second and third applicants and that the plans to provide the second and third applicants with emergency relief be communicated to them respectively.

164.3 requested a satisfactory response from the Minister within 14 days of receipt, failing which legal action would be pursued in order to protect the rights of the second and third applicants and many other schools in a similar situation.

165 The Minister replied to this letter on 10 October 2011. Her response is attached as annexure [YD53](#). Her response in relation to the second part of this application was:

165.1 the SA Schools Act does not compel her to promulgate Minimum Norms and Standards for School Infrastructure;

165.2 Instead of making regulations, she had decided to compile “proposals” which have now been adopted by the Council of Education Ministers as “guidelines” on school infrastructure.

166 In a follow up letter on behalf of the applicants dated 18 October 2011 ([YD54](#)), the Legal Resources Centre requested a copy of the proposals that, the Minister had said, had been adopted as “guidelines”. The Minister replied in a letter dated 12 November 2011 (attached as [YD55](#)) stating that

“the guidelines are still in draft format. Before they can be disseminated, the guidelines must be approved by the Heads of the Education Departments Committee and the CEM. It is expected that the guidelines will be submitted to the meetings of the above two bodies scheduled for, respectively, 24 October 2011 and 17 November 2011... (T)he Department cannot share the document with you until such approval has been obtained. Once the document has been approved, it will be available on the Department’s website.”

167 A further three months have now elapsed since the later of the dates stipulated by the Minister. At the time of signing this affidavit, no “guidelines” were available on the Department’s website.

168 I submit that in light of the repeated affirmations by the Minister and her Department of the critical need for minimum norms and standards for school infrastructure, and the undertakings to prescribe them, the Minister’s abrupt and unexplained about-turn and her decision to adopt non-binding “guidelines” (which have still not been published for public comment) is irrational and unlawful. Her decision is not rationally related to the purpose for which she is to exercise her powers. Her decision will inevitably have a negative impact on the provision of school infrastructure, and result in children not achieving their right to an adequate basic education. This is contrary to the purpose for which she is given the power.

- 169 The absence of binding minimum norms and standards for school infrastructure contributes directly to the continuing failure to provide adequate infrastructure at public schools. This in turn undermines and prevents the achievement by learners of their right of learners to adequate education. It impacts disproportionately on black learners, and on learners from poor families, who are overwhelmingly black.
- 170 The absence of prescribed minimum norms and standards impacts particularly harshly on learners at thousands of poor and historically disadvantaged schools, such as the second and third applicants. In the absence of prescribed norms and standards, the poor and hazardous condition of infrastructure at these schools is allowed to persist, leaving the learners and teachers in an unsafe environment that is uncondusive to learning.
- 171 In saying this, Equal Education recognises that government wishes to remedy the school infrastructure crisis, and has taken material steps in that direction. Its financial commitments include an R8.3bn allocation for school infrastructure in the Medium Term Expenditure Framework, announced in the 2011 budget speech. Various new initiatives including the Accelerated Schools Infrastructure Delivery Initiative (ASIDI) and the Priority Spending Unit (PSU) are intended to address the situation, and have made some progress. However, these efforts are bedevilled and undermined by the absence of legally binding Norms and Standards. The provinces are the sphere of government which are responsible for the construction of schools. Some of them overspend, whilst the province in greatest need, the Eastern Cape, had only spent 28% of its school infrastructure

allocation at the start of the fourth quarter. As a result of this, the Department of Basic Education decided to withhold additional funds.

172 The result of the failure to prescribe legally binding Norms and Standards is twofold. First, the national Department of Basic Education is unable to exercise the necessary oversight and enforce “top-down” accountability, as has been demonstrated most vividly but not only in the Eastern Cape. Second, local communities lack both a standard by which to assess their entitlements, and a mechanism for enforcing them. They have therefore not generated an effective bottom-up accountability mechanism.

RELIEF IN RESPECT OF PART TWO

173 In respect of the second part of the application, the applicants seek orders which may be summarised as follows:

- a) declaring that the failure of the Minister to make regulations which prescribe national minimum uniform norms and standards for school infrastructure constitutes a breach of the constitution and of section 5A of the Schools Act; and
- b) directing the Minister to make regulations which prescribe national minimum uniform norms and standards for school infrastructure in terms of section 5A of the Schools Act, within three months of delivery of judgment in this application.

SUBMISSIONS

174 The applicants submit that the word “may” in section 5A of the Schools Act is to be interpreted as meaning “shall”, having regard *inter alia* to the following factors:

174.1 The Constitution creates an unqualified right to basic education, which is immediately realisable and not subject to the requirement that the state takes reasonable steps to give effect to it. It does not admit the exercise of any discretion as to whether and when the right is to be realised.

174.2 The right to a basic education cannot be guaranteed unless binding norms and standards are prescribed in that regard.

174.3 The Preamble to the Schools Act states that it is “necessary” to set uniform norms and standards for the education of learners throughout the Republic. This plainly reflects a legislative intention that there shall be uniform norms and standards.

174.4 Section 5A was inserted in the Schools Act in 2007 in order to give effect to that intention and purpose.

174.5 Section 5A(2) provides in obligatory language that the norms and standards “must” provide for stipulated matters.

175 This will be addressed further in argument.

176 The applicants submit further that even if the word “may” is not to be read to mean “shall”, the Minister is obliged to prescribe minimum norms and standards for infrastructure, having regard to the following:

- 176.1 The Constitution creates an unqualified right to basic education, which is immediately realisable and not subject to the requirement that the state takes reasonable steps to give effect to it. It does not admit the exercise of any discretion as to whether and when the right is to be realised.
- 176.2 The right to a basic education cannot be guaranteed unless binding norms and standards are prescribed in that regard.
- 176.3 The Preamble to the Schools Act states that it is “necessary” to set uniform norms and standards for the education of learners throughout the Republic. This plainly reflects a legislative intention that there shall be uniform norms and standards.
- 176.4 Section 5A was inserted in the Schools Act in 2007 in order to give effect to that intention and purpose.
- 176.5 Section 5A(2) provides in obligatory language that the norms and standards “must” provide for stipulated matters.
- 176.6 It is common cause that there is widespread inadequate infrastructure at schools.
- 176.7 It is common cause that the consequence of inadequate infrastructure is to prevent learners achieving the right to a basic education, and to perpetuate unfair discrimination.
- 176.8 The prescription of minimum norms and standards for infrastructure would have the result that children would be ensured adequate infrastructure which would enable them to fulfil their right to a basic education.

176.9 The Minister and her Department have repeatedly referred to the need for minimum norms and standards for infrastructure.

176.10 the Minister has repeatedly stated that she will exercise her powers under section 5A.

176.11 The National Policy for an Equitable Provision, gazetted by the Minister on 11 June 2010, states that the first priority for addressing the crisis in school infrastructure is the promulgation of the regulation for Norms and Standards for School Infrastructure, and stated that this was to happen by April 2011.

176.12 The Minister is obliged, by her duty under section 7(2) of the Constitution to “protect, promote and fulfil” the rights to basic education, equality and dignity, to prescribe minimum norms and standards for infrastructure

176.13 Unless binding uniform minimum norms and standards are prescribed, it is not possible for learners, their parents and the public effectively to hold the Respondents accountable to ensure that they comply with their obligation to fulfil the right to basic education and to equality, and to ensure that learners achieve those rights.

176.14 The prescription of binding minimum uniform norms and standards is necessary in order to fulfil the right to basic education, to equality, and to dignity, and to ensure that learners achieve those rights.

176.15 Alternatively, the prescription of binding minimum uniform norms and standards will promote and advance the fulfilment of the right to basic

education, to equality, and to dignity, and ensure that learners achieve those rights.

176.16 The Minister's continuing failure to prescribe norms and standards for infrastructure violates both her positive and negative duties under section 29, section 9, section 10, and section 12 of the Constitution.

177 The Minister has

177.1 failed to comply with the deadline which she herself set for the completion of this task;

177.2 now stated that she will not pass regulations at all in this regard, and

177.3 failed to provide any adequate reason for this, despite request.

178 The applicants submit, with due respect, that the Minister's statements and conduct with regard to this matter are simply inconsistent and incoherent.

179 The only reason which the Minister has given for her failure to make regulations is that she is required to secure the consent of the Council of Education Ministers before she may make regulations for minimum norms and standards for school infrastructure, and that she may not make the regulations without such consent.

180 The applicants submit that this is wrong as a matter of law, and that the Minister has misdirected herself in the exercise of such discretion as she may have. Further it in any event contradicts an earlier written statement that Council of Education Ministers had in fact given approval.

181 The applicants submit that the Minister

181.1 has failed and continues to fail to carry out her duty to fulfil the right to basic education, the right to equality, and the right to dignity;

181.2 has failed without good reason to exercise the statutory power which has been conferred upon her for this purpose; and

181.3 has misdirected herself in the exercise of her discretion;

181.4 has acted irrationally, in the sense which I have described above.

182 The applicants have been advised and submit that the failure to prescribe minimum uniform norms and standards constitutes administrative action in terms of the Promotion of Administrative Justice Act, and that the Minister has delayed unreasonably in prescribing minimum norms and standards for school infrastructure. Her failure should accordingly be reviewed, and she should be ordered to take the decision in that regard.

183 These matters will be addressed further in argument.

184 The applicants recognise that it is for the Minister to determine and prescribe the content of the minimum uniform norms and standards for school infrastructure. For this reason, the applicants do not seek any order in that regard.

185 This matter is inherently urgent. It is particularly urgent for the learners at the named schools. However, it is also urgent because the breach of the Constitution and the SA Schools Act continues on a daily basis, with

consequences for learners which are deep and irremediable. The applicants will therefore seek an early hearing of this application so that the matter can be determined as soon as possible.

186 The applicants accordingly pray for an order as set out in the notice of motion.

YOLISWA DWANE

I hereby certify that the deponent stated that she knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at **CAPE TOWN** on this the ____day of **FEBRUARY 2012**. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS