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

CASE NO. 81/2012

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 EUCATION: 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

APPLICANTS' HEADS OF ARGUMENT

Table of Contents

INTRODUCTION 4

FACTUAL BACKGROUND 8

The Minister's failure to answer the allegations made in the application 8

The undisputed facts as to the desperate infrastructure needs of public schools 11

National overview *11*

The 24 individual schools *12*

The educational consequences of inadequate infrastructure 15

The uncertainty and lack of delivery caused by the absence of minimum norms and standards 17

The Minister undertook to prescribe norms and standards, and then reneged 21

THE FAILURE TO ADOPT NORMS AND STANDARDS VIOLATES THE RIGHTS TO BASIC EDUCATION, EQUALITY & DIGNITY 26

The right to a basic education 26

The nature and importance of the right to a basic education *26*

The content of the right to a basic education includes infrastructure *28*

The right to equality 31

The right to dignity 34

The Minister is obliged by section 7(2) of the Constitution to prescribe norms and standards in order to fulfil the rights to education, equality and dignity 37

THE SCHOOLS ACT OBLIGES THE MINISTER TO PRESCRIBE BINDING NORMS AND STANDARDS 39

Legislation must be interpreted to promote constitutional values 39

The use of the word "may" entails an authorisation coupled with an obligation 43

The word 'may' interpreted in the scheme of the Schools Act 48

THE 'GUIDELINES' ARE INADEQUATE 51

The Guidelines are non-binding and unenforceable 52

The Guidelines provide no basis to hold the State to account 53

The Guidelines provide no timeframes 55

EVEN IF THE SCHOOLS ACT CONFERS A DISCRETION, THE MINISTER'S DECISION FALLS TO BE REVIEWED AND SET ASIDE 56

The supposed reasons for the Minister's decision 58

The need for flexibility 59

The budgetary constraints argument 62

CONCLUSION & COSTS 67

INTRODUCTION

1. This application concerns the ongoing and daily violation of the rights of learners in public schools around the country, as a result of the inadequate and often dangerous school infrastructure to which they are subjected. A central cause of this situation is the failure of the Minister of Basic Education ("the Minister") to exercise her power to prescribe binding minimum norms and standards for school infrastructure.

2. It is common cause that many learners, predominantly those who are black and from poor families, do not receive the basic education which they are constitutionally guaranteed. It is also common cause that inadequate school infrastructure contributes to this result.

3. The first applicant, Equal Education ("EE") and the second and third applicants ("Mwezeni SPS" and "Mkanzini JSS"; collectively "the applicant schools") bring this application in the interest of EE as an organisation working for the improvement of infrastructure at schools, on behalf of learners at the applicant schools and other schools affected by inadequate infrastructure, in the interests of learners and parents at those schools, and in the public interest. Their right to do so is not disputed.

4. This application consists of two parts:

    4.1. <u>The first part</u> is concerned with emergency conditions at the two applicant schools. After the application was launched, the Minister and her Department in effect conceded the emergency relief sought by taking steps to remedy the dangerous conditions at those two schools. Mkanzini JSS is satisfied with the progress in providing it with emergency infrastructure. Mwezeni SPS is not yet in a position to assess whether the plans to provide it with infrastructure will be

fully implemented. Mzwezeni SPS accordingly seeks an order in terms of paragraphs 3.3 and 4 of the notice of motion, directing the first to fourth respondents to report to court on the implementation of the plans, and permitting Mwezeni SPS to re-enrol the matter on supplemented papers if necessary. No such remedial steps have been taken in relation to the many other individual schools that deposed to affidavits in this application; and those schools represent only a small sample of the many public schools in which, it is common cause, there is inadequate infrastructure.

4.2. The second part seeks an order compelling the Minister to prescribe minimum norms and standards for school infrastructure in terms of section 5A of the South African Schools Act 84 of 1996 ("the Schools Act").

5. Only the Minister opposes the application. The MECs responsible for education in all nine provinces do not oppose; neither do the Governments of the Republic and of the Eastern Cape Province; and neither does the national Minister of Finance. All of them have filed notices to abide.

6. Section 29(1) of the Constitution provides that *"Everyone has the right –*

(a) to a basic education including basic adult education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

7. Section 5A of the Schools Act gives effect to the section 29(1)(a) right and the correlative obligations which it imposes upon the state. It provides in relevant part:

"*(1) The Minister may, after consultation with the Minister of Finance and 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."

8. The Minister has failed to exercise her power to prescribe minimum uniform norms and standards for school infrastructure.

9. In outline, EE and the applicant schools submit:

9.1. The constitutional right to a basic education in section 29(1)(a) guarantees a basic education of adequate quality.

9.2. Many South African learners do not receive a basic education of adequate quality. One of the main reasons for this is inadequate infrastructure.

9.3. That inadequacy includes infrastructure that diminishes learning (for example, the absence of libraries and computer laboratories); infrastructure that inhibits or prevents teaching and learning (for example, school structures that expose learners to inclement weather); and infrastructure that positively endangers the health and safety learners and teachers (for example, the absence of working toilets, and classrooms that risk collapse).

9.4. Adequate infrastructure is an essential component of a basic education.

9.5. If minimum norms and standards on infrastructure were prescribed in terms of section 5A of the Schools Act, this would lead to improved infrastructure. The norms and standards could provide timeframes for the provision of infrastructure which would lead to substantial progress over time, in a phased approach.

9.6. Improved infrastructure would lead to improved learning outcomes and to learners enjoying the right that is currently denied to them.

9.7. As a matter of proper interpretation in the light of the Constitution, in particular the rights to a basic education, equality and dignity, and in the light of the scheme of the Schools Act as a whole, section 5A *obliges* the Minister to prescribe norms and standards for infrastructure.

9.8. Even if that is not the case as a matter of statutory interpretation, the Minister's constitutional obligations oblige her to take this measure, in the light of the factual circumstances which prevail, in order to give effect to the Constitution and remedy the breach. By failing to prescribe norms and standards, the Minister is failing to meet her constitutional obligation to promote and fulfil the right to a basic education and her statutory duty in terms of the Schools Act.

9.9. Even if the Minister had a discretion as to whether to prescribe binding norms and standards in terms of section 5A, her decision not to do so is unlawful, unreasonable, and irrational. The Minister does not deny that she misdirected herself in the exercise of her alleged discretion. The Minister's decision falls to be reviewed and set aside, and she should be directed to prescribe norms and standards in terms of section 5A.

FACTUAL BACKGROUND

The Minister's failure to answer the allegations made in the application

10. The answering affidavit does not answer the bulk of the facts contained in the founding affidavit. Even more fundamentally, the Minister has not made an affidavit answering the allegations at all. The deponent to the affidavit is Mr Padayachee, the Deputy Director-General of the Department (the DDG). The Minister has not filed any confirmatory affidavit.

11. While the DDG may have personal knowledge relating to general factual and policy questions, there is no basis to suggest that he has personal knowledge of matters that necessarily fall within the knowledge of the Minister, and in particular the Minister's reasons for deciding not to prescribe norms and standards.

12. The Constitutional Court has held that a deponent's assertion that information is within his or her personal knowledge is of little value without some indication of how that knowledge was acquired.[1] That case concerned claims by a Director General in the Presidency to have knowledge relating to decisions by the President, who had not deposed to an affidavit. The Court held that the Director General had not provided sufficient detail to explain how he had acquired personal knowledge of the relevant facts.[2] The same applies to the present matter in so far as it relates to the Minister's reasons and opinions.

---

1 *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) at paras 28-31 (per Ngcobo CJ) and paras 107-112 (per Cameron J), and the authorities cited there.

2 *M & G Media* (CC) at para 63.

13. Mr Padayachee states that he makes his affidavit "on behalf of" the Minister.[3] It is trite that a person cannot make an affidavit "on behalf of" another person, in respect of matters which are within the knowledge of the latter person:

> *"Clearly one person cannot make an affidavit on behalf of another and Mr Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible."*[4]

14. In *Von Abo*, the High Court pointed to the consequence of unconfirmed allegations "on behalf of" another person, by reference to the words of the Appellate Division in an oft-cited decision:[5]

> *"If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence 'calls for an answer' then, in such case, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the prima facie proof, being undestroyed, again amounts to full proof."*

15. In this matter, the DDG has simply made the standard assertion of personal knowledge, and knowledge of the contents of official records of the Department.[6] He has however not explained how he has personal knowledge of the reasons why the Minister took

---

3 AA p 585 para 3.

4 *Gerhardt v State President* 1989(2) SA 499 (T) at 504 H-J; see also *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para [70]; and *Von Abo v Government of the Republic of South Africa* 2009 (2) SA 526 (T) para [46].

5 *Von Abo v Government of the Republic of South Africa* 2009 (2) SA 526 (T) para [47] – [48], quoting *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 479

6 AA pp 584-585 paras 2-3.

certain decisions, or of the Minister's opinions. He cannot speak "on behalf of" the Minister in this regard.

16. This is not a matter of technicality or formalism. It goes to the question of accountability for key decisions by organs of state It is for the Minister to account for her exercise of her power, or her failure to exercise her power: *"Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution."*[7]

17. The result is that there is no evidence before the Court as to the Minister's reasons for her decision or her opinions, other than the evidence which is produced by the applicants of what she has said, and which is not denied.

18. In relation to questions of <u>fact</u> (as opposed to the Minister's personal reasons or opinion), the answering papers do not engage with the bulk of the applicants' averments. The answering affidavit states that "*the Minister does not dispute the fundamental reality that there are serious inadequacies and shortcomings in relation to infrastructure at many schools, both the two individual schools and various other schools across the country*."[8]

19. The application therefore falls to be decided on the uncontroverted facts in the founding papers relating to the infrastructure problems at the schools that have put up affidavits, the problems at other schools, and the causes and consequences of those problems.

---

7 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) paras 73-76.

8 AA p 589 para 15.

The undisputed facts as to the desperate infrastructure needs of public schools

20. Public schools throughout the country face a desperate lack of adequate infrastructure. We consider the situation at two levels: the national overview reflected in statistics published by the Department; and the evidence of the 24 individual schools that have deposed to affidavits.

National overview

21. The National Education Infrastructure Management System Report (NEIMS) published by the Department in May 2011 reports that of the 24 793 public ordinary schools in the country:

21.1. 3 544 schools (14%) do not have electricity, while a further 804 schools (3%) have an unreliable electricity source;

21.2. 2 401 (10%) schools have no water supply, while a further 2611 schools (11%) have an unreliable water supply;

21.3. 913 schools (4%) do not have any ablution facilities at all, while 11 450 schools (46%) are still using pit latrine toilets;

21.4. 22 938 schools (93%) do not have stocked libraries, while 19 541 schools (78%) do not even have a space for a library;

21.5. 21 021 schools (85%) do not have any laboratory facilities, while only 1 231 schools (5%) have stocked laboratories;

21.6. 2 703 schools (11%) have no fencing at all; and

21.7. 19 037 schools (77%) do not have a computer centre, while a further 3267 schools (13%) have a room designated as a computer centre but are not stocked with computers.[9]

The 24 individual schools

22. EE and attorneys from the LRC collected detailed affidavits from 24 schools across the country regarding their infrastructure problems and the impact on teaching and learning. We refer to these as "the individual schools".

23. The affidavits reflect the following systemic inadequacies across the individual schools:

23.1. Shortage of classrooms/overcrowding

23.1.1. 15 of the 24 schools experience problems with overcrowding.

23.1.2. The draft norms and standards published in 2008 provided there should be no more than 30 learners per class in Grade R, no more than 40 for all other classes, no more than 25-40 for specialised FET subjects, and no more than 40 in science laboratories.[10] However some of the individual schools have classes of more than double that number, as high as 80 or 90 in a classroom.[11]

23.2. Deteriorating school buildings and leaking roofs

23.2.1. Poor quality buildings and leaking roofs are a problem at 18 of the 24 schools.

---

9 FA p 43 para 85. The NEIMS Reports is annexure "YD10" to the FA and appears at pp 158-171.

10 Draft norms and standards (annexure "YD39") p 531 para 3.2.5.

11 FA pp 52-53 paras 106-108 and the supplementary affidavits of the individual schools.

23.2.2. At some schools the problem is bearable, but at others it means that a large portion of the teaching year is lost due to having to close classrooms during inclement weather.[12]

23.3. Toilets

23.3.1. 20 of the 24 schools do not have adequate, functioning toilets.

23.3.2. The absence of adequate (or any) toilets exposes learners to poor hygiene and violates the privacy and dignity of learners, especially female learners.[13]

23.4. Libraries, science laboratories and computer facilities

23.4.1. Only 5 of the 24 individual schools had a library.[14] Some of the schools do not even have space for a library and are forced to turn away book donations because they have no place to store the books.[15] The individual schools report that the lack of a library impacts on reading ability and the capacity of learners to source information for school projects.[16]

23.4.2. The majority of the schools visited also do not have science laboratories. Individual schools report that this has devastating consequences for the performance of students, especially matriculants, in science subjects. These

---

12 FA pp 53-54 paras 109-111 and the supplementary affidavits of the individual schools.

13 FA pp 54-57 paras 112-117.

14 FA p 57 para 118.

15 See, for example, the affidavit on behalf of Maceba Secondary School in Nqutu, Kwa-Zulu Natal: annexure "YD26" to the FA pp 391-400.

16 FA pp 57-58 paras 118-119.

schools report disturbingly high (up to 90-100%) failure rates in matric science.[17]

23.4.3. Two-thirds of the individual schools do not have computers or computer laboratories. As a result, their learners have no exposure to computers and leave school without any computer skills.[18]

23.5. Electricity

23.5.1. Six of the 24 individual schools report that the absence of electricity is a major problem for the administration of the school. Among other consequences, this makes it difficult for these schools to communicate with the Department by fax or e-mail and makes it impossible to photocopy documents for lessons.[19]

23.6. Water

23.6.1. At more than a third of the 24 individual schools, there is no reliable source of safe drinking water. Some schools rely on water tanks or seasonal rain. Some schools report that when there is no drinking water, learners are thirsty and lose concentration easily.[20]

23.7. Security

23.7.1. Nine of the 24 individual schools report security issues as a major infrastructural concern, in particular because of the lack of perimeter fences.

---

17 FA pp 58-59 para 120.

18 FA p 59 para 121.

19 FA p 60 paras 123-124.

20 FA p 61 paras 125-126.

> As a result, livestock wander into school grounds, damaging property and leaving droppings. Also, learners' safety is threatened by criminal elements.[21]

24. The Minister admits the evidence of the individual schools. That evidence paints a bleak picture of inadequate infrastructure, demotivated teachers and learners, frustrated parents, and schools that are rarely, if ever, provided with information about the Department's plans (if any) to provide infrastructural improvements. The 24 individual schools are not 'outliers' or the worst effected, but a fair representation of the national picture.[22]

25. The DDG notes that the 24 individual schools have, together with the two applicant schools, put up "*considerable detail relating to unsatisfactory and inadequate conditions*" and that the problems relating to infrastructure at "*many schools… require urgent attention*".[23] He puts up no additional facts, makes no comment, and puts up no plan or formal mechanism to address any of the infrastructure problems. He does not explain why plans have been put up to provide much-needed infrastructure to the two applicant schools, but not to the 24 individual schools or to the other affected schools.

The educational consequences of inadequate infrastructure

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

---

[21] FA p 62 para 127.

[22] FA p 62 para 128.

[23] AA p 587 paras 7-8.

Inadequate infrastructure has a negative effect on educational outcomes, leading to less effective learning and teaching and higher failure rates.

27. The direct relationship is shown by local and international research, which demonstrates that:

    27.1. a causal relationship exists between the quality of school infrastructure and learner outcomes and performance;

    27.2. the causal relationship is stronger in disadvantaged schools where the state of infrastructure is inadequate;

    27.3. the causal relationship is stronger in developing countries;

    27.4. inadequate infrastructure has a negative impact on learners' self-esteem and views on the importance of education, which, among other things, demotivates learners and teachers and increases absenteeism.[24]

28. That direct relationship is not denied in the answering affidavit. The Minister and her Department have acknowledged the direct relationship between infrastructure and educational outcomes, in policy documents[25] and in correspondence to EE.[26]

29. The direct relationship between poor infrastructure and educational outcomes, especially the quality of teaching and learning, is therefore a common cause fact.

---

[24] Review of international research by Debbie Budlender: annexure "YD14" to the FA, pp 242-245; FA p 50 para 102.

[25] The *National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment*: annexure "YD12" to the FA, p 175 at p180 para 1.2 and pp 196-197, quoted in the FA, pp 49-50 paras 99-100.

[26] Letter from the Minister to EE dated 9 May 2010: annexure "YD13" to the FA, p 135 at p 136, quoted in the FA, p 50 para 101.

The uncertainty and lack of delivery caused by the absence of minimum norms and standards

30. The admitted facts reveal that the failure to prescribe minimum uniform norms and standards has impacted adversely on the delivery of infrastructure at public schools. This is apparent from the following facts:

30.1. the uneven and ad hoc response to the infrastructure needs of individual schools;

30.2. the service delivery and budgeting failures of provinces; and

30.3. the fact that other organs of state, based on their own constitutional and statutory mandates, have called on the Minister to prescribe norms and standards in terms of section 5A.

31. We address each in turn.

31.1. <u>The uneven and ad hoc response to the individual schools:</u>

31.1.1. In response to the launching of this application, and only at that stage, the Minister and the Department took steps to address the emergency conditions at the two applicant schools. Neither school had previously appeared on any government plan relating to infrastructure. Earlier correspondence from the two applicant schools highlighting their emergency conditions, and requesting urgent assistance, received no response from the respondents.[27] Even now, the response was uneven, resulting in Mwezeni SPS persisting in seeking relief.

---

[27] RA p 698 para 11.

31.1.2. None of the 24 individual schools have received this attention, despite the detailed affidavits about conditions at those schools. The answering affidavit simply states that the "*project in respect of the two individual schools is part of a wider project currently being undertaken at the initiative and costs of the Department at national level*",[28] without indicating whether the 24 individual schools are included in this "wider project" or what aspects of infrastructure will be addressed. The same applies to the large number of schools with inadequate infrastructure which are not identified by affidavits.

31.2. <u>The service delivery and budgeting failures of the provinces:</u>

31.2.1. The Minister states that the Eastern Cape Provincial Department "*failed to take adequate steps for the budgetary provision for and prioritisation of urgent projects such as those relating to the two individual schools*". This led to a national intervention in terms of section 100(1)(b) of the Constitution.[29]

31.2.2. It is submitted that the failure by some provincial governments resulted, at least in part, from the absence of binding minimum norms and standards on infrastructure. Norms and standards would have enabled provinces to determine what would constitute "*adequate steps for the budgetary provision and prioritisation*" of infrastructure projects, and would have triggered the obligations of MECs and HoDs to ensure compliance with the norms and standards in terms of section 58C of the Schools Act. Norms and standards, as contemplated by sections 5A and 58C, would also have allowed for better monitoring of provincial spending and prioritisation by the Minister.

---

[28] AA p 592 para 26.

[29] AA p 591 para 20.

31.3. Other state regulatory and planning bodies have called for binding norms and standards to enable other governmental processes to run effectively:

31.3.1. The Minister herself initially stated, on several occasions, that she would prescribe binding norms and standards. She then reneged on that undertaking. A number of other organs of state have independently called on the Minister to prescribe norms and standards. They include the following

31.3.1.1. The Auditor-General recommended:

> *"5.2 National norms and standards for infrastructure should be compiled and adherence to it should be promoted.*
>
> *5.3 The norms and standards should be incorporated into standard and uniform designs to reduce professional fees…*
>
> *5.5 The department should finalise and promote adherence to the national minimum norms and standards for school infrastructure."*[30]

31.3.1.2. The Financial and Fiscal Commission commented on the draft norms and standards published (and later abandoned) by the Minister:

31.3.1.2.1. Norms and standards for infrastructure "*will go a long way in strengthening the way in which learners are taught, enhancing teaching effectiveness, as well as improvements in student learning outcomes*";

31.3.1.2.2. Government has budgeted an estimated R17 billion for education infrastructure over the 2008 medium term expenditure framework;

---

[30] RA p 715 para 64.2.

31.3.1.2.3. Achieving value for the money and maximising the opportunities for improved educational outcomes should be central issues within the government's commitment to service delivery;

31.3.1.2.4. In this regard, the norms and standards should ensure that school facilities are designed in relation to spaces of physical facilities for the betterment of the teaching and learning processes.[31]

31.3.1.3. The National Planning Commission noted that the Department had adopted the Guidelines for norms and standards, and recommended:

> "*The guidelines are sound and should be legislated to ensure that they are adhered to. Legislated guidelines will help to ensure they are not deliberately ignored by officials involved in planning, constructing and improving school infrastructure.*"[32] (emphasis added)

32. EE is thus not alone in the view that binding norms and standards on infrastructure are a critical part of the comprehensive response required of the State to address the inadequate infrastructure at thousands of public schools throughout South Africa. Important regulatory and planning organs of state have independently recommended that the Minister prescribe norms and standards in terms of section 5A. Again, it is significant that the Minister is also the only one of the 13 respondents to oppose the application. The Provincial Ministers, who are the parties who would be bound by the prescribing of minimum uniform standards, do not object to the Minister being ordered to do this.

---

31 Annexure "RA4" to the RA, p 731.

32 Supplementary affidavit, p 772 para 5 and annexure "SA1" p 777.

The Minister undertook to prescribe norms and standards, and then reneged

33. EE's approach is to resort to litigation only when other avenues of democratic engagement have been exhausted.[33] EE engaged with the Minister and government for approximately two years before launching this application. This engagement led to promises by the Minister to prescribe norms and standards, only for her to renege.

34. EE engaged with the Minister in the following ways:

    34.1. Through extended correspondence, including not less than seven letters from EE or the LRC[34] and several unanswered letters from the two applicant schools regarding their own infrastructure crises;[35]

    34.2. Attending several meetings with the Minister and officials of the Department to discuss this specific issue;

35. In addition, EE's members and members of the public have conducted petitions, pickets, marches, night-vigils and a 24-hour sleep-in at the gates of Parliament in relation to school infrastructure. Over 100,000 people have signed EE's petitions and over 40,000 have marched in EE's marches. All of these activities were peaceful.[36]

36. The position of the Minister changed over time during the course of this engagement:

    36.1. In 2007, the Schools Act was amended to introduce several new provisions. The new provisions included section 5A.

---

33 FA pp 10-11 para 9.

34 Annexures "YD42" to "YD45" and annexures "YD49", "YD50" and "YD54" to the FA.

35 FA p 31 para 64.

36 FA, p 10 para 7.

36.2. In 2008, the Department published in draft form the National Policy for Equitable Provision of an Enabling School Environment ("the National Policy"). It was formally gazetted in mid-2010.[37] The National Policy stated that "*National Norms and Standards will be developed and will be fully adopted by the end of the 2010/2011 financial year*" (that is, by the end of March 2011).[38]

36.3. On 21 November 2008, the Department published draft norms and standards in the Government Gazette for comment.[39] The publication of draft norms and standards for comment indicated a clear intention to prescribe norms and standards in terms of section 5A. The draft norms and standards stated:

> "*These norms will be fully adopted by the end of 2009 and will be implemented in a phased manner starting from 2010*."[40]

36.4. In September 2009, in answer to parliamentary questions, the Minister stated that the draft norms and standards were already being applied in respect of new schools, that they were an "*obligatory*" standard, for new schools and that they were "*awaiting the concurrence of the Minister of Finance for finalisation*".[41] That can only mean that she intended to prescribe them as regulations in terms of section 5A.

---

37 Annexure "YD12"

38 Annexure "YD12" p 183 para 1.14.2.

39 FA p 63 para 131. The draft norms and standards appear as annexure "YD39" to the FA at pp 496-531.

40 Annexure "YD39" p 501 para 1.7.

41 FA pp 64-65 paras 133-134.

36.5. When binding norms and standards were not prescribed, EE addressed letters and ultimately had a meeting with the Director-General and other officials. Both in writing and at the meeting, it was confirmed that norms and standards would be prescribed:

36.5.1. At the meeting of 22 April 2010, the Director-General 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.

36.5.2. EE wrote to the Director-General recording what he had said in the meeting, notably that the draft norms and standards were with the Department's legal department awaiting "*the signature of the Minister of Basic Education and thereafter promulgation*".[42]

36.5.3. In a response dated 9 May 2010, the Minister confirmed that the National Policy "*will be followed by the Norms and Standards for School Infrastructure*".[43]

36.6. In a later letter dated 20 July 2010, the Director-General stated that the draft norms and standards were with the Department's legal services "*and will be promulgated as regulations thereafter*".[44]

---

42 Annexure "YD45" p 546 para 2.

43 Annexure "YD46" p 551.

36.7. When the National policy's deadline of the end of the 2010/2011 financial year came and passed, EE secured a meeting with officials of the Department. 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."*

36.8. The officials added that the draft Regulations had not yet been approved by Council of Education Ministers (CEM), and that "Amendments will be effected and the Norms will be presented to HEDCOM and CEM".[45]

36.9. On 25 June 2011, at an event hosted by EE, the Minister spoke and stated that draft norms and standards regulations would be published for comment shortly. She stated (incorrectly)[46] that she needed to secure the consent of the CEM to make the regulations.[47]

36.10. On 3 August 2011, the LRC on behalf of EE sent a letter to the Minister asking for reasons why the regulations for minimum norms and standards had

---

44 Annexure "YD47" p 557.

45 FA p 77 paras 159-160 and annexure "YD51". The CEM consists of the Minister and the nine provincial MECs responsible for education. HEDCOM is the Heads of Education Committee, which consists of the Director-General of the national Department of Basic Education and the Heads of the nine provincial departments.

46 Section 5A(1)(a) provides that "*[t]he Minister may, <u>after consultation</u> with the Minister of Finance and the Council of Education Ministers' by regulation prescribe minimum norms and standards for … school infrastructure*" (emphasis added). The provision does not require consent of the CEM, as would be the case if it provided "*in consultation*", but merely that the Minister consult the CEM.

47 FA p 78 para 162.

not been promulgated, and requesting emergency relief for the two applicant schools.[48]

36.11. The Minister responded on 10 October 2011. She stated that the Schools Act does not oblige her to prescribe norms and standards for infrastructure; and for the first time, she stated that she had decided to compile "proposals" which had been adopted by the CEM as "guidelines" on school infrastructure.[49] The Minister refused to furnish EE with a copy of the Guidelines, which were published after this application had been launched.

36.12. In the answering affidavit, the DDG purports to provide the reasons for the Minister's decision.

36.13. It is submitted that the Minister was obliged to prescribe binding norms and standards as regulations. In the alternative, it is submitted that if the Minister had a discretion and that her decision not to prescribe binding norms and standards is reviewable and is liable to be set aside. These submissions are developed below.

---

48 FA p 79 para 164 and annexure "YD7".

49 FA p 79 para 165.

THE FAILURE TO ADOPT NORMS AND STANDARDS VIOLATES THE RIGHTS TO BASIC EDUCATION, EQUALITY & DIGNITY

37. We submit that the Minister's failure to prescribe minimum norms and standards on infrastructure violates the constitutional rights to a basic education, equality and dignity.

The right to a basic education

The nature and importance of the right to a basic education

38. Section 29(1) of the Constitution states that *"Everyone has the right ... to a basic education"*.

39. In ***Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995***, the Constitutional Court held (in dealing with the equivalent provision in the interim Constitution) that the right to a basic education is a 'positive right' requiring positive State action:

> *"Section 32(a)* creates *a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education."*[50]

40. The Constitutional Court has recently dealt extensively with the ambit of this right, in the ***Juma Musjid*** decision. The Court emphasised the significance of the right to a basic education in the overall scheme of the Constitution:

---

50 *Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995*1996 (3) SA 165 (CC) at para 9.

> *"The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.*
>
> *Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."* [51]

41. The UN Committee on Economic, Social and Cultural Rights has explained the critical importance of education as an 'empowerment right' as follows:

> *"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."* [52]

42. The African Charter on the Rights and Welfare of the Child provides in Article 11(1) and (2)(a) that

> *"[e]very child shall have the right to an education"* and *"[t]he education of the child shall be directed to... the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential..."*

---

[51] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 37. See also *Western Cape Forum for Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC).

[52] United Nations Committee on Economic, Social and Cultural Rights General Comment No 13.

The content of the right to a basic education includes infrastructure

43. Our courts have not yet pronounced in detail on the elements of the right to education.

44. In ***Section 27 and Others v Minister of Education and Another***, which concerned textbooks, Kollapen J stated that there are "compelling arguments" that the right to a basic education

> "*must and should, in order to be meaningful, include such issues as infrastructure, learner transport, security at schools, nutrition and such related matters. However, for the purposes of this application it is not necessary to determine those broader issues, or indeed to express the view on that matter, except to say that the arguments that the right must be broad and encompassing, appear to be compelling.*"[53] (emphasis added)

45. International law reinforces this approach. In terms of section 39(1)(b) of the Constitution, courts *must* consider international law when interpreting the Bill of Rights.[54]

46. South Africa has signed the International Covenant on Economic, Social and Cultural Rights, and the Cabinet has announced the intended ratification of the Covenant,[55] which guarantees the right to education.[56] Our courts regularly use the General

---

53 *Section 27 and Others v Minister of Education and Another* [2012] 3 All SA 579 (GNP) at para 22.

54 *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC) at para 201

55 Cabinet announcement following the ordinary meeting of Cabinet in Pretoria on 10 October 2012.

56 Article 13 provides:

"*1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;

Comments of the UN Committee on Economic, Social and Cultural Rights, which interprets the ICESCR, in interpreting the provisions of our Constitution.[57]

47. In **General Comment 13**, the Committee identified the following "*interrelated and essential features*" of the education to be provided to all children:

> *"(a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party….;*
>
> *(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:*
>
> > *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...;*
> >
> > *Physical accessibility - education has to be within safe physical reach …;*
> >
> > *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) …*

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved."

57 For examples in the Constitutional Court see *Government of the Republic of South Africa and others v Grootboom and Others* 2001 (1) SA 46 (CC) para [29] – [31]; *Jaftha v Schoeman and Others Others* 2005 (2) SA 140 (CC) para [24]; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) para [232] – [237].

> *(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.*"

48. The CESCR stated that 'availability', as an element of a basic education, means that

> *"functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes 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."*[58] (emphasis added)

49. In terms of section 39(1)(a), courts interpreting the Bill of Rights may consider foreign law. Courts in the United States have considered the meaning of an 'adequate' education:

49.1. In ***Rose v Council for Better Education***,[59] the Court ordered that funding must be provided to ensure each child in the state of Kentucky had an 'adequate education'. The Court described an adequate education as oral, written, artistic, academic and vocational skills, combined with sufficient economic, social and political knowledge to function as a citizen.

49.2. In ***Campaign for Fiscal Equity Inc v The State of New York***,[60] the New York State Court of Appeals found that a sound basic education should not be linked to completing a certain number of grades, but rather to a measurable goal. The Court

---

58 General Comment 13 at para 6*(a)*.

59 790 SW 2d 186 (Ky).

60 100 NY 2d 893.

found that education had to enable people to obtain competitive employment and full civil participation.

49.3. In ***Pauley v Kelly***,[61] the West Virginia Supreme Court set out scholastic and societal achievements that a thorough and efficient education system should produce.[62]

50. The right to a basic education includes adequate infrastructure. This is apparent from the dicta of South African courts and relevant international and foreign law. The Minister does not suggest otherwise in the answering papers.

The right to equality

51. The Constitution makes a fundamental commitment to creating a society that is not only formally equal, but substantively equal. Substantive equality requires positive action to redress current imbalances in the distribution of resources. In the words of Ngcobo J (as he then was):

> "*[O]ur Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. … The effects of discrimination may continue indefinitely unless there is a commitment to end it.*"[63]

---

61 255 SE 2s 859 (1979).

62 These included literacy, numeracy, knowledge of government, self knowledge and knowledge of environment, work training, recreational pursuits, creative arts and social ethics. The court spelled these requirements out more fully at page 877 of the judgment.

63 *Bato Star* (above) at para 37; quoted with approval in *Minister of Finance and Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 26.

52. The Constitutional Court has held that the Constitution "*enjoins us to dismantle*" all "*forms of social differentiation and systematic under-privilege, which still persist*" and to "*prevent the creation of new patterns of disadvantage*."[64]

53. The Court held further:

> "*Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.*"[65]

54. While many facets of South African society remain unequal, the inequality is particularly stark and tragic in the realm of basic education. Our society has yet to undo the "painful legacy of our apartheid history"[66] that actively deprived black schools of resources, while lavishing resources on white schools. The Constitutional Court recently explained the root cause of continuing inequality in basic education:

> *"It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education."*[67]

55. In ***Hoërskool Ermelo***, Moseneke DCJ noted that these inequalities continue to plague the South African education system after the advent of democracy:

---

64 *Van Heerden* (above) at para 27.

65 *Van Heerden* at para 31. See also *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

66 *Ermelo* (above) at para 2.

67 *Ermelo* at para 46. See also *Juma Musjid* (above) at para 42.

> *"Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us."*[68]

56. Transforming the current, unjust and unequal basic education system is not only about redressing past injustices: it is about breaking the cycle of poverty that reproduces the patterns of class and racial inequality generation after generation. The right to education is an empowerment right that enables people to realise their potential and improves their conditions of living. As the Constitutional Court held in ***Hoërskool Ermelo***, "*education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage*."[69]

57. Inequality in education is graphically illustrated by the factual picture that emerges from the affidavits of the individual schools. Subjecting the learners of these schools – who are predominantly poor, black children in rural South Africa – to inadequate and often dangerous infrastructure perpetuates inequality that tracks historical discrimination in education. Prescribing minimum norms and standards would set a uniform, minimum legal standard for *all* learners across the country.

---

[68] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) at para 45.

[69] *Ermelo* (above) at para 2. See also *Juma Musjid* (above) at para 43.

The right to dignity

58. Section 10 of the Constitution provides that "*everyone has inherent dignity and the right to have their dignity respected and protected*".

59. Certain of the school infrastructure deficiencies infringe the right to dignity of learners (and educators and other school staff). The right to dignity is violated in at least the following respects:

59.1. by failing to provide functional toilets and sanitation facilities for learners and teachers;

59.2. by exposing learners and teachers to school buildings that are vulnerable to the weather, dangerous or otherwise unfit for teaching and learning; and

59.3. by failing to engage meaningfully with those affected around what their needs are, and what will be provided and when.

60. Subjecting learners and teachers to inadequate sanitation is a clear breach of the right to dignity.

60.1. In ***Beja and others v Premier of the Western Cape and others***, the High Court held that the toilets provided by the municipality to residents of Silvertown, Khayelitsha, did not satisfy "*the minimum requirement to promote dignity*" in that the toilets were unenclosed, generally filthy and underserviced and located at excessive distances from the residents.[70]

---

[70] *Beja and others v Premier of the Western Cape and others* [2011] 3 All SA 401 (WCC), 2011 (10) BCLR 1077 (WCC) at para 30.

60.2. At the international level, the **Report of the independent expert on the issue of human rights obligations related to access to safe drinking water** described the relationship between sanitation and the right to dignity:[71]

> "*In its general comment No. 15 (2002) on the right to water, the Committee on Economic, Social and Cultural…notes that "ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources … States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children".*[72]
>
> *…*
>
> *Sanitation, more than many other human rights issue, evokes the concept of human dignity; consider the vulnerability and shame that so many people experience every day when, again, they are forced to defecate in the open, in a bucket or a plastic bag. It is the indignity of this situation that causes the embarrassment. The Supreme Court of India eloquently described the indignity of lack of access to sanitation where the Court found that the failure of the municipality to provide basic public conveniences was driving "the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art". 81 It is such infringements on the very core of human dignity that are not wholly captured by considering sanitation only as it relates to other human rights.*[73]
>
> *…*
>
> *Dignity closely relates to self-respect, which is difficult to maintain when being forced to squat down in the open, with no respect for privacy, not having the opportunity to clean oneself after defecating and facing the constant threat of assault in such a vulnerable moment. Therefore, the independent expert believes that lack of access to sanitation constitutes demeaning living conditions; it is an affront to the intrinsic worth of the human being and should not be tolerated in any society.*[74]

---

71 Submitted to the Human Rights Council of the U.N. General Assembly on 1 July 2009 in accordance with Council Resolution 7/22).

72 At para 24.

73 At para 55.

74 At para 57.

60.3. The papers show that many of the individual schools (and other schools) have an insufficient number of toilets,[75] toilets that do not work and are not repaired,[76] pit toilets and toilets in unsecure locations or toilets that have to be shared by boys and girls.

61. Secondly, where the actual school buildings (and especially classrooms) are of such an inadequate standard that they impact on the self-esteem of learners and lead to increased absenteeism, the dignity of learners and teachers is violated.[77]

62. Finally, the State's failure to engage meaningfully and clearly with learners, educators and school communities about their needs and about what infrastructure will be provided and when, is itself an infringement of their right to dignity:

62.1. In the ***Joe Slovo*** *case*,[78] the Constitutional Court explained that the requirement to meaningfully engage on fulfilment of socio-economic rights is deeply rooted in the right to dignity:

---

75 See, for example, Samson SPS in the Eastern Cape where there are virtually no toilets: FA para 115. See, for example, the affidavit of W Ngxabani who describes the conditions at Samson SPS in the Eastern Cape, annexure "YD19" at pp 310-311 paras 1-2.

> *"In November 2010 the school was struck by a severe storm, and the roof of the toilet block was completely blown off. Two years later in November 2012 the toilets are still without a roof despite the problem being reported to the DBE.*
>
> *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. The school is not securely fenced."*

76 See, for example, the affidavit of N Mhlangu who describes the conditions at Lehabe Primary School in the North West Province, annexure YD38 at p 492. The 11 pit toilets for the school's 283 learners are in a deplorable condition and the Department of Health actually declared them unsuitable in 2004. No improvements have been made to them by the DBE despite being aware of their condition.

77 See, for example, Sakhikamva SSS in the Eastern Cape (FA para 107) where there are 90 learners in one Grade 9 classroom and teachers "teach from the door"; and Bogosi Primary School in the North West Province, where children are sent home when it rains because the structures may collapse.

> "*In my view, the key requirement in the implementation of a programme is engagement. There must be meaningful engagement between the government and the residents. The requirement of engagement flows from the need to treat residents with respect and care for their dignity. Where, as here, the government is seeking the relocation of a number of households, there is a duty to engage meaningfully with residents both individually and collectively. Individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns.*"[79]

The Minister is obliged by section 7(2) of the Constitution to prescribe norms and standards in order to fulfil the rights to education, equality and dignity

63. Section 7(2) of the Constitution provides that "*the State must respect, protect, promote and fulfil the rights in the Bill of Rights*".

64. In ***Glenister v President of the Republic of South Africa***, the Constitutional Court considered the obligations imposed on the State by the Constitution in relation to combating corruption. The Court held that corruption infringes a number of rights, including the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.[80] Moseneke DCJ and Cameron J described the duties imposed by section 7(2) of the Constitution in relation to combating corruption as follows:

> "*The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation.*

---

78 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC) ; 2010 (3) SA 454 (CC).

79 *Joe Slovo* at para 238.

80 Para 198.

> *Section 7(2) casts an especial duty upon the state. It requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms.*"[81]

65. Inadequate infrastructure at public schools similarly infringes a number of rights: at least the rights to a basic education, equality and dignity. Section 7(2) requires the State to develop an "*integrated and comprehensive response*" to ensure that adequate infrastructure is provided. Just as independent corruption-combatting mechanisms are an indispensable part of the response to corruption, minimum uniform norms and standards are indispensable to respond to the infrastructure needs of public schools.

66. The norms and standards envisaged by section 5A have three key features, each of which would constitute part of the "integrated and comprehensive response" required of the State to address the violations of these three rights:

66.1. first, they set *minimum* norms and standards – guarding against standards below which the right to dignity is violated;

66.2. second, they establish a measure of *uniformity* – securing a measure of equality; and

66.3. third, the substance of the norms and standards would relate to the substantive standards required to provide adequate infrastructure – ensuring that the adequate infrastructure required to enjoy the right to a basic education is provided.

---

81 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 177 (per Moseneke DCJ and Cameron J for t he majority).

THE SCHOOLS ACT OBLIGES THE MINISTER TO PRESCRIBE BINDING NORMS AND STANDARDS

67. It is submitted that the Schools Act places an obligation on the Minister to prescribe binding norms and standards on infrastructure in terms of section 5A, having regard to:

67.1. the obligation in terms of section 39(2) of the Constitution to interpret the Schools Act to promote the spirit, purport and objects of the Bill of Rights, in particular the education, equality and dignity rights discussed above;

67.2. the jurisprudence relating to legislative obligations, including the principle that the word "may" is capable of constituting both an empowering provision and an obligation to exercise the power; and

67.3. the overall scheme of the Schools Act, several key provisions of which are dependent upon the Minister exercising the section 5A power to prescribe norms and standards.

Legislation must be interpreted to promote constitutional values

68. Section 39(2) of the Constitution provides that "*[w]hen interpreting any legislation … every court … must promote the spirit, purport and objects of the Bill of Rights.*" (emphasis added)

69. The effect of section 39(2) was explained in ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others***.[82]

---

82 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) ('*Hyundai*').

Langa DCJ stressed that, because of section 39(2), "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[83]

70. South African courts have, since 1994, gradually abandoned textualism and instead endorsed a contextual and purposive approach to statutory interpretation. This approach requires courts to "*have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous*."[84] The Constitution – and, by extension, statutes interpreted in terms of section 39(2) – "*must be understood as responding to our painful history and facilitating the transformation of our society so as to heal the divisions of the past, lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa*."[85] Furthermore, courts must pay "*close attention to the socio-economic and institutional context in which a provision under examination functions*."[86]

71. The section 39(2) duty is one in respect of which "*no court has a discretion*" and must "*always be borne in mind*" by the courts. There are two independent obligations that emerge from the Constitutional Court's jurisprudence in this regard.

72. The first obligation may conveniently be referred to as the "***Hyundai** obligation*".

---

83 Ibid at para 23.

84 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90 (Ngcobo J concurring) quoted with approval in *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) at para 37.

85 *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 19.

86 Ibid at para 20.

72.1. This is that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution.

72.2. Thus, in ***Hyundai*** the Constitutional Court held that:

> *"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*
>
> *... judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."*[87]

73. The second obligation may conveniently be referred to as the "***Wary** obligation*".

73.1. This is that if a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that "better" promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.[88]

73.2. Thus, as the Constitutional Court explained in ***Fraser v Absa Bank***:

> *"Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights."*[89]

---

87 *Hyundai* at paras 22-23.

88 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

89 *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47.

74. The effect of section 39(2) is that this Court must always seek to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values.

75. This is subject only to the proviso that the relevant provision of the Bill must be "*reasonably capable*" of the interpretation concerned – that is, the interpretation must not be "*unduly strained*".[90]

76. The primary rights engaged in the present matter are the right to a basic education in section 29(1)(a) of the Constitution, the right to equality in section 9, and the right to dignity in section 10. The statutory rights, powers and obligations of the parties must be understood in the context of the constitutional commitment to substantive equality in section 9, and the constitutional guarantee of immediate access to a basic education in section 29(1).

77. Section 5A is framed by and gives effect to section 29 of the Bill of Rights, which provides an unqualified, fundamental right to a quality basic education – to which learners are entitled "immediately". The minimum uniform norms and standards at issue are a means by which the immediate realisation of the right to education can be properly secured and measured. As described above, the rights to equality and dignity in sections 9 and 10 of the Constitution are also clearly engaged. The prescription of the required norms and standards gives effect to these rights by establishing a minimum threshold below which schools may not fall. If the section is interpreted to require this, it gives effect to those rights.

---

90 *Hyundai* at para 24; *Wary* at paras 59-60 and 106-108.

78. Accordingly, adopting the purposive and contextual approach to interpretation required under the Constitution, the interpretation that *best* promotes the spirit, purport and objects of the Bill of Rights (the ***Wary*** rule) is that section 5A requires the Minister to prescribe norms and standards. Indeed, an interpretation of section 5A that entails that the Minister does not need to prescribe norms and standards would sanction the on-going violation of the rights to basic education, equality and dignity identified above.

79. The only basis on which to prefer the alternative, discretionary interpretation would be if the obligatory interpretation "*unduly strains*" the language of section 5A and the Schools Act. We turn now to address the textual questions – the meaning of "*may*" in the context of section 5A and the place of section 5A within the overall scheme of the Schools Act.

The use of the word "may" entails an authorisation coupled with an obligation

80. Our courts have held that the use of the word "may" in legislation does necessarily mean that the statute confers a free discretion, and does not impose an obligation. The courts have interpreted statutes to impose obligations despite the apparent use of discretionary language, and even in the absence of an apparently discretionary empowering provision.

81. In ***S and Others v Van Rooyen and Others***[91] the Constitutional Court had to interpret the word "may" in section 13(3)(aA) of the Magistrates Act. The Court addressed whether the Minister has a discretion to confirm a recommendation by the Magistrates'

---

91 *S and Others v Van Rooyen and Others* (General Council of the Bar of South Africa Intervening) (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (CC).

Commission that a magistrate be suspended. The Court held that interpreting "may" to confer a discretion on the Minister would not be consistent with the constitutional principle of judicial independence.[92] The Court held that "may", in the context of that section , must be read to authorise an action coupled with a duty to take that action:

> *[181] As far as the Act is concerned, if "may" in section 13(3)(aA) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so. In that event the reference in section 13(3)(c) to a report on the reasons for the suspension would be construed as referring to the Commission's reasons for its decision.*
>
> *[182] In my view this is the constitutional construction to be given to section 13(3)(aA). On this construction, the procedure prescribed by section 13(3) of the Act for the removal of a magistrate from office is not inconsistent with judicial independence.*" [emphasis added]

82. In ***South African Police Service v Public Servants Association***[93] ("***SAPS***"), the Constitutional Court considered the interpretation of the word "may" in the context of Regulation 24(6) of the regulations for the SAPS, which reads as follows:

> *"(6) If the National Commissioner raises the salary of a post as provided under subregulation (5), she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-*
>
> *(a) already performs the duties of the post;*
>
> *(b) has received a satisfactory rating in her or his most recent performance assessment; and*
>
> *(c) starts employment at the minimum notch of the higher salary range.*" (emphasis added)

---

92 *Van Rooyen* at para 178.

93 *South African Police Service v Public Servants Association* (CCT68/05) [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) (13 October 2006).

83. The Court examined the constitutional, statutory, and factual context in which the word "may" was used. The Court confirmed that "may" sometimes means "must". The Court held that regulation 24(6) could not be interpreted to mean an absolute "must", but that the provision conferred a narrow discretion that was qualified in order to render it consistent with the Constitution.

> *"[35] It follows, then, that subject to the qualification mentioned below, "may" in the context of this case does not mean "must". The Commissioner has a discretion and is accordingly entitled to make a declaration that although he is authorised without advertising to promote an incumbent whose job is upgraded, he is not obliged to do so. The declaration should, however, be qualified by a further declaration that the Commissioner's discretion must be exercised in a manner which does not place an incumbent who is performing satisfactorily in jeopardy of losing his or her job in the service simply because his or her post is being upgraded*."

84. Courts have also applied this approach to interpreting legislation applicable to schools and education, including the Schools Act, in order to promote the spirit, purport and objects of the Bill of Rights. Courts have held that, properly interpreted to promote the right to a basic education, education legislation imposes obligations on the government to take certain steps even in the absence of explicit peremptory language.

85. In the recent matter of ***Centre for Child Law and Others v Minister of Basic Education and Others***,[94] the Eastern Cape High Court (per Plasket J) considered provisions of the Schools Act and the Employment of Educators Act to determine whether government is obliged to declare a post establishment for non-educator staff at public schools.

85.1. The post establishment provides the basis for the appointment of non-educator staff, such as administrative staff, cleaners, security staff and so on to public

---

94 *Centre for Child Law and Others v Minister of Basic Education and Others* [2012] 4 All SA 35 (ECG).

schools. The legislation is silent on whether there is an obligation, and does not even contain an empowering provision stating that government "may" declare a post establishment for non-educators.

85.2. Although there is no explicit statutory obligation requiring provincial governments to determine a post establishment for non-educator staff at public schools, Plasket J held that the only interpretation of the legislation consistent with the obligation to respect, protect, promote and fulfil the right in section 29(1)(a) was that government is obliged to determine a post establishment for non-educators.[95]

85.3. The court's conclusion was based on an analysis of the legislative scheme overall and the impact on the basic education rights of learners if non-educator staff are not appointed.

86. In ***Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others***,[96] Mbha J considered the statutory provisions governing school capacity. Capacity is one of the matters, in addition to infrastructure, in respect of which section 5A provides for the Minister to prescribe norms and standards.

86.1. The Minister has not prescribed norms and standards dealing with capacity. The court in ***Rivonia*** was not asked to direct the Minister to prescribe norms and standards. Mbha J nevertheless discussed the role played by norms and standards

---

95 At para 32.

96 *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* [2012] 1 All SA 576 (GSJ); 2012 (5) BCLR 537 (GSJ) ("*Rivonia*").

within the statutory framework governing capacity.[97] He observed that, once norms and standards are prescribed, the MEC and the Head of Department must perform their obligations in terms of section 58C.[98] He went further to exhort the Minister to prescribe norms and standards dealing with capacity in terms of section 5A:

> "*It is clear from the provisions of sections 5A and 58C of the Act that in providing for the promulgation of norms and standards on capacity, the Act envisaged national government limiting the ambit of the power conferred on a school governing body to adopt an admission policy.*
>
> *In my view it would provide significant guidance to school governing bodies and provincial governments on the issues raised in this matter if the National Minister of Basic Education were to act in terms of section 5A read together with section 58C, and promulgate norms and standards on capacity.*"[99]

87. The clearest illustration of the appropriate approach is in the judgment of the Constitutional Court in the ***Hoërskool Ermelo.*** The Court pointed out:

> "*The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools.*[100] (emphasis added)

88. In the context of norms and standards in relation to language envisaged by section 6(1) of the School Act, the Court added:

> "*The Minister has in fact published the required norms and standards*."[101] (emphasis added)

---

97 *Rivonia* at paras 60-63.

98 *Rivonia* at para 62.

99 *Rivonia* at paras 62-63.

100 *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) at para 56. Footnote 37 following this statement in the judgment refers to sections 5A(1) and (2) of the Schools Act.

89. Significantly, the wording of section 6(1) of the Schools Act is the same as section 5A, in that it uses the word "may". The Court interpreted this as creating a requirement. (Elsewhere in the judgment the Court does refer to norms and standards for school infrastructure. It mistakenly assumes that these already exist, referring to them as "*described*" (para 60) and "*set*" (para 104) by the Minister.)

90. It is submitted that the provision in section 5A both empowers the Minister to prescribe norms and standards relating to infrastructure *and* imposes an obligation to do so – similarly to the statute in issue in ***Van Rooyen***.

91. It follows that the courts in ***Hoërskool Ermelo*** (in relation to norms and standards on language) and ***Rivonia*** (norms and standards on capacity) have already suggested in *obiter dicta* that section 5A *requires* the Minister to prescribe norms and standards.

92. We turn now to the provisions of the Schools Act which demonstrate that section 5A imposes a duty to prescribe norms and standards, not merely a discretion.

The word "may' interpreted in the scheme of the Schools Act

93. The scheme of the Schools Act requires the adoption of norms and standards in order for certain key provisions and processes of the Act to operate. The provisions of the Act that demonstrate that norms and standards are not merely an optional 'extra', but are required to be prescribed, include the following four provisions:

93.1. the Preamble;

---

[101] *Hoërskool Ermelo* at para 60.

93.2. section 5A(2);

93.3. section 3(3); and

93.4. Section 58C.

94. First, the Preamble to the Schools Act states in the clearest terms:

> "*WHEREAS it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa"*. (our emphasis)

If uniform norms and standards are "necessary", then it must follow that it is obligatory that they be prescribed: the very purpose of the Schools Act does not contemplate that this will be left to the whim of the Minister.

95. Secondly, it is noteworthy that while the empowering provision in sub-section (1) of section 5A uses the word "may", sub-section (2) provides that the norms and standards "must" provide for the listed matters. It is submitted that it would be anomalous to find that the Minister has a discretion to decide whether or not to prescribe norms and standards but that, if she decides to do so, she has no discretion as to what matters to cover. An "all-or-nothing" interpretation would have no logic at all.

96. Thirdly, section 3(3) provides 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)*". Without the norms and standards, provinces are left to their own devices and are not required to do what is necessary to provide sufficient school infrastructure to cater for every child in the province.

97. Finally, section 58C imposes obligations on the MEC and the HoD to comply with the norms and standards prescribed by the Minister in terms of section 5A.[102] Section 58C was introduced into the Schools Act in 2007 as part of the same package of amendments that inserted section 5A. The provisions of section 58C directing the MEC and HoD to comply with the norms and standards established by the Minister would lack meaning and purpose if the norms and standards would only see the light of day at the whim of the Minister. To interpret section 5A as allowing the Minister a free discretion whether to prescribe norms and standards would enable the Minister to avoid the statutory obligations of the MEC and the HoD from even arising.

98. The scheme of the Schools Act is thus premised on the assumption that norms and standards *will* – not might – be made by the Minister.

---

[102] Section 58C provides, in relevant part:

"*(1) The Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005), 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."

THE 'GUIDELINES' ARE INADEQUATE

99. The Minister has published infrastructure Guidelines, which have no legal effect. We do not address the content of the Guidelines in any detail. EE has always recognised that the content of the minimum uniform norms and standards for school infrastructure is primarily a matter for the Minister,[103] provided that they are consistent with the Constitution and applicable legislation. This is therefore not a case in which the Court is asked to determine policy.

100. While the Minister has a discretion as to the content to the norms and standards made under section 5A, and must exercise that discretion, she cannot refuse to prescribe binding norms and standards at all.

101. The Guidelines are not on any basis an adequate substitute for binding norms and standards.

102. The Minister states in the Foreword to the Guidelines that they "*will ensure that our learners enjoy the same educational environment, irrespective of where a school is situated*". This is simply unfounded, and inconsistent with the nature and content of the Guidelines themselves. The Minister does not explain how the Guidelines will "ensure" this outcome.

103. The Guidelines demonstrate a failure by the Minister to promote and fulfil the constitutional right to basic education for the following three main reasons:

103.1. The Guidelines are non-binding and unenforceable;

---

[103] FA p 87 para 184.

103.2. They provide no means of holding the State to account for the provision of school infrastructure;

103.3. They provide no timeframes.

The Guidelines are non-binding and unenforceable

104. The non-binding nature of the Guidelines is a fundamental flaw. They place absolutely no obligation on the national or provincial education departments to address the infrastructure needs of schools, irrespective of how serious or harmful those conditions may be. The Minister's contention that the Guidelines are currently "in force" (paragraph 6.3) is a fundamental misdescription. The Guidelines have no force at all.

105. The Guidelines provide criteria to identify school environments that do not meet the "basic safety requirements" and the requirements for "minimum functionality". However, no legal consequences follow from any such identification. Although these criteria are listed under the heading "Measures for an enabling school environment" (para 6), the Guidelines do not in fact provide for "measures" to address these deficiencies. Nor do they enable stakeholders to insist on infrastructure that is lacking in their schools.

106. Under "Implementation of guidelines", the Guidelines state that the measures that they contain will be "*phased into the planning and budgeting of new schools or facilities to be planned or built*" after their commencement (para 3). The Guidelines make the fundamental admission that the rights of learners in such school environments to a basic education are violated – yet they provide no assurance as to what will be done or when it will be done. Even more importantly, they contain no mechanism to ensure that the

necessary steps are taken to render schools even safe and minimally functional, let alone compliant with the Constitution.

107. In respect of *new schools*, the Guidelines do not set an enforceable minimum standard and require those schools to meet the safety and functionality standards contained in the Guidelines. Accordingly, the Guidelines fail to ensure that new schools will meet even these most basic standards.

108. In respect of *existing schools*, the Guidelines impose no obligation to act to address the specific infrastructure predicaments of the kind highlighted in the founding papers, which identify a sample of the schools which do not meet the "basic safety" and "minimum functionality" standards in the Guidelines. The Guidelines do not provide any basis to hold the State to account for failing to comply with the Guidelines. They provide no recourse for stakeholders, such as district officials, principals, parents, learners and community organisations to demand the resources which are necessary for the provision of the basic education required by the Constitution and the Schools Act.

The Guidelines provide no basis to hold the State to account

109. If schools look to the Guidelines, they will understand that their infrastructure is recognised as unsafe and dysfunctional, but they will receive no greater assurance than that their infrastructure needs will be "*phased into*" planning and budgeting at an indeterminate point in the future. It is impossible for the schools to have any idea when or to what extent steps will be taken to provide them with (at least) safe and minimally functional infrastructure. They are given no means of insisting that the unconstitutional situation be remedied.

110. The Guidelines do not enable the national executive to assess whether provincial governments are meeting their executive obligations in relation to the provision of school infrastructure, or whether national intervention may be necessary in terms of section 100(1) of the Constitution. The Guidelines in their current form provide an inadequate basis on which to assess whether such national interventions may be necessary and, where necessary, for the national government itself to assess whether it has discharged the relevant executive responsibilities to provide school infrastructure.

111. Accordingly, the Guidelines fail to remedy the on-going breaches of the rights of learners to a basic education, equality and dignity. They are at best aspirational. They are unenforceable. The Constitution requires effective remedies for a breach, not statements of good intentions.

112. As we have pointed out above, *"Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution."*[104]

113. This is an essential part of the democratic process: ours is a participative democracy, and the purpose of conferring enforceable rights is to enable citizens to hold their government accountable to them for its conduct.[105] The Guidelines provide no means of doing this.

---

104 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para [73]-[76]

105 Compare *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para [160]-[161], where this point is made in relation to socio-economic rights which are qualified by the duty of progressive realization. As the Constitutional Court pointed out in *Juma Masjid*, the right to a basic education is not so qualified: it is immediately realizable.

The Guidelines provide no timeframes

114. The lack of a timeframe for achieving any of the non-obligatory goals is a further fundamental flaw. This is particularly problematic in relation to eliminating conditions which prevent schools from meeting the "*basic safety*" gradation, and conditions which constitute the threshold for meeting the "*minimum functionality*" gradation. The absence of timeframes shows the lack of urgency that the Guidelines place on the issue of school infrastructure. The Guidelines hold out no hope of respite for thousands of learners currently being taught in unsafe schools, including those without potable water, without toilets, in overcrowded classrooms, or in structures that may collapse.

115. For existing schools, the Guidelines do no more than to enable the State to identify the problems. At paragraph 3.2 they state that:

> "*The measures contained in these guidelines will be applied to existing facilities, in order to identify all those schools or facilities at schools that fail to meet the measures for basic safety and functionality, or other requirements contained in these guidelines."*

116. Identification is not enough: that is illustrated by this application. In this application, the applicants have identified schools which do not meet any reasonable minimum standard, and in which learners as a result do not achieve their right to a basic education. The Minister and the Department do not dispute this. However, that identification has not resulted in any remediation of the defects, or even an undertaking to remedy them.

117. Defective schools gain nothing from the Guidelines, apart from recognition that the conditions at their schools probably fall short of an unenforceable standard, and the loose promise that measures to address these deficiencies will be "*phased into*" planning and budgeting.

EVEN IF THE SCHOOLS ACT CONFERS A DISCRETION, THE MINISTER'S DECISION FALLS TO BE REVIEWED AND SET ASIDE

118. We have submitted above that the Minister is obliged by sections 29(1)(a) and 7(2) of the Constitution and section 5A of the Schools Act to prescribe minimum norms and standards.

119. We submit in the alternative that even if the Minister did have a discretion to decide whether to prescribe norms and standards, her decision to do so in the circumstances falls to be reviewed and set aside.

120. The decision of the Minister to adopt the Guidelines and not to prescribe minimum norms and standards in terms of section 5A constitutes administrative action in terms of section 1 of PAJA.[106]

121. In ***Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc***,[107] the Constitutional Court held:

---

[106] Section 1 defines 'administrative action' to mean

"any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; …

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a) , (b) , (c) , (d) , (f) , (g) , (h) , (i) and (k) , 85 (2) (b) , (c) , (d) and (e) , 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution; …"

> "*It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action*."

122. It is submitted that the Minister's decision to exercise the "discretion" that she asserts in terms of section 5A, namely not to prescribe binding norms and standards, constitutes administrative action.

123. In ***Mazibuko***,[108] O'Regan J held as follows for a unanimous Constitutional Court:

> *"When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected."*[109]

124. Even if the Minister's decision did not constitute administrative action, it would fall foul of the constitutional principle of legality. This requires that

124.1. the entity exercising public power must act within the powers conferred on it;[110]

---

107 *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) at para 18.

108 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

109 *Mazibuko* at para 161.

110 *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) paras 56 and 58.

124.2. the holder of power must act in good faith and not misconstrue his or her powers;[111] and that

124.3. the exercise of public power must not be arbitrary or irrational.[112]

125. It is submitted that the Minister's decision was both unreasonable and irrational, and is in any event unconstitutional and unlawful.[113]

126. The applicants have made detailed allegations of fact, followed by detailed allegations as to the inferences to be drawn from those facts, as to why the Minister's decision falls to be set aside on these grounds.[114] The Minister has failed to deny those facts, she has failed to deny the inferences, and she has failed to explain why she made the decision.

127. We submit that the Minister's decision falls to be set aside.

The supposed reasons for the Minister's decision

128. The DDG purports to state what the Minister's reasons were for deciding not to prescribe binding norms and standards. As explained above, that evidence is inadmissible. It is also contradicted by admissible evidence. For the sake of completeness, we address it here.

129. The purported "reasons" are that serious "*practical difficulties…would flow*" because

---

111 *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) para 148.

112 *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 85.

113 Sections 6(2)(f)(ii), 6(2)(g) and 6(2)(h) of PAJA.

114 They are summarized in FA para 176 pp 83 - 86

provinces have "*different practical problems, have different budgetary constraints and priorities, and have different approaches and ideas for dealing with the various situations that they face*".[115] Strikingly, this objection is not raised by any one of the provinces.

130. In essence, the DDG suggests that the Minister made her decision for two main reasons:

130.1. The need for flexibility; and

130.2. Budgetary constraints.

The need for flexibility

131. The DDG argues that uniform, binding regulations would:

131.1. thwart efforts to share resources,[116]

131.2. prevent junior and high schools from being on the same campus where appropriate,[117] and

131.3. be impractical for schools that do not have enough land for recreational facilities.[118]

132. This argument is contradicted by the Minister's own statement, in the foreword to the

---

115 AA p 598 para 36.12.

116 AA p 597 para 36.9.

117 AA p 598 para 36.10.

118 AA p 598 para 36.12.

Guidelines, that "*[t]he guidelines will ensure that our learners enjoy the same educational environment, irrespective of where a school is situated*".[119]

133. In any event, the premise that binding norms and standards could not allow for flexibility is irrational and unreasonable. The DDG himself noted, as recorded in the minutes of the CEM meeting of 2 June 2011,[120] that the draft norms and standards which were then proposed would give "*the MEC the power to establish or retain a school below the norms after consultation with relevant stakeholders and report to the Minister motivating why the particular decision was made"*.

134. There is no reason why regulations could not make provision for appropriate flexibility, prioritisation and exceptions. It is irrational, in the legal sense, to decline to exercise a power to promote the fulfilment of constitutional rights, on the premise that the exercise of the power has to be inflexible and rigid. EE accepts that the regulations would need to make provision for some flexibility, in light of the range of circumstances faced by different schools and the fact that the situation on the ground obviously cannot be changed overnight by simply making a law.

135. The draft regulations acknowledged the varied circumstances and contain numerous exceptions, many of which speak directly to the "*practical difficulties*" which the DDG cites. In particular:

---

119 Guidelines, annexure "R3" to AA, p 675.

120 Annexure "RA3" to the RA.

135.1. Section 2.20 of the 2008 draft norms and standards permit combined and intermediate schools.[121] The plan is to phase them out, but they can be retained at the discretion of the provincial MEC after reporting to the Minister.

135.2. Similarly, section 3.3 of the draft norms and standards allows an MEC to deviate from the minimum size of a school site if reasons for the deviation are forwarded to the Minister.[122]

136. Accordingly, the reasons given by the DDG for not making binding regulations are without any substance at all, and are irrational.

137. The DDG argues that the innovative ideas of some provinces would be hampered by rigid binding regulations.[123] He gives the example of Gauteng province's plan to share resources among three schools in the new Cosmos residential development. Again, it is striking that the Gauteng Minister does not say that the Minister should not be ordered to make regulations. She does not appear to share the DDG's concern. There is no reason at all why regulations could not accommodate such innovation by making provision for the sharing of certain resources.

138. Certainly, the applicants would welcome innovation and attempts to be creative in the provision of sufficient school infrastructure. It would be sensible to arrange for the sharing of resources until such time as each school has all of the resources conducive to an environment that meets "*optimum functionality*". There will be instances in which learners have to share a library or science laboratory with learners from another school

---

121 Annexure "YD39" to the FA p 508.

122 FA p 519.

123 AA p 597 para 36.9.

(or schools) in the short term, or even in the longer term if the schools' proximity makes this reasonable. The regulations could provide for this. The failure to make regulations has the perverse result that learners are not guaranteed even shared resources.

The budgetary constraints argument

139. The DDG cites the budgetary constraints of provinces as a further practical difficulty put forward by the CEM in motivating against binding norms and standards.[124] Again, this purported reason is neither reasonable nor rational.

139.1. The Fiscal and Financial Commission, commenting on the 2008 draft norms and standards, stated that standardised architecture and infrastructure requirements could produce savings because departments would be able to purchase materials in bulk or administer turnkey projects while avoiding individualistic procurement, as was and continues to be the case.[125]

139.2. The Auditor-General's report dated August 2011 states that "*norms and standards should be incorporated into standard and uniform designs to reduce professional fees*".[126] (emphasis added)

---

[124] AA p 597 para 36.8.

[125] Annexure "RA4" to RA, p 732 para 3.

[126] FA p 40 para 78.1 and annexure "YD8" p 153.

140. In any event, learners have an unqualified right to a basic education under section 29 of the Constitution. Reliance on budgetary constraints is inconsistent with that right. The Constitutional Court made this clear in ***Juma Musjid***:

> *"Unlike some of the other socio-economic rights, [the right to a basic education] is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within "available resources' subject to 'reasonable legislative measures'."*[127]

141. Indeed, even in respect of those constitutional rights which are expressly linked to available resources, the Court has made clear that it is not sufficient to assert simply that there are insufficient funds. The respondent must show that it appreciates the nature of its obligations, and then provide evidence as to why it cannot meet them:

> *"The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is. This court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."*[128]

142. We accept that conceptually, the Minister could attempt to justify a breach of the right on the grounds that this is a permissible limitation under section 36 of the Constitution. She would have to

142.1. put up full financial information in order to justify the contention that the limitation is reasonable and justifiable, and

---

127 *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) at para 37.

128 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 039 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 74

142.2. identify a law of general application which authorises this limitation of the right.

143. As to the first requirement:

> *"A final consideration [in assessing reasonableness] will be the relevant human and financial resource constraints that may hamper the organ of State in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided."*[129]

144. The Minister has not even attempted to provide any information as to what would be the cost of implementing uniform norms and standards, and why this cannot be afforded.

145. As to the second requirement: The Guidelines are not a law (they are formulated as guidelines precisely so that they will not be legally binding). They are therefore not a law of general application.

146. Again, it is significant that the Minister of Finance approved the adoption of the draft norms and standards, and has chosen not to oppose this application.

147. Accordingly, any attempt to rely on budgetary arguments to resist the obligation to prescribe norms and standards is inconsistent with the state's statutory and constitutional obligations.

---

[129] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) para 88

Unlawful, unreasonable and irrational

148. We submit the Minister's decision falls to be set aside on the following principal grounds.

149. First, it is unlawful on two grounds:

149.1. The Minister has no discretion in this regard, and is obliged to prescribe norms and standards;

149.2. In any event, the Minister failed to appreciate the nature of her powers, as she wrongly believed that she did not have the power to make regulations prescribing minimum norms and standards unless she had the consent of the Council of Education Ministers.[130] A decision is arbitrary and inconsistent with the principle of legality if the decision-maker misconstrues the nature of his or her powers.[131] Where the decision constitutes administrative action, it is reviewable under PAJA on that ground.[132]

150. Second, to the extent that the Minister has a discretion, her decision falls to be set aside on the ground that it is unreasonable in the Constitutional and PAJA sense: it is a decision which *"is one that a reasonable decision-maker could not reach"*.[133] The facts call out for minimum uniform norms and standards, to ensure that every learner achieves his or her right to a basic education. The Minister has provided no reasons at

---

130 FA para 162-163 page 78; not denied either by or "on behalf of" the Minister.

131 *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) para 148.

132 PAJA section 6(2)(d).

133 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) para 45.

all for her decision. The purported reasons provided by the DDG are demonstrably without any logic or substance.

151. Third, the decision is is irrational in the constitutional sense: the Minister's exercise of her power

> *"must be rationally related to the purpose sought to be achieved by the exercise of it…. If it is not, it falls short of the standard that is demanded by the Constitution…. where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."*[134]

152. The Minister has not proffered any explanation of how a refusal to prescribe uniform minimum norms and standards is rationally related to

152.1. the purpose of the power which is conferred upon her, namely to ensure that adequate infrastructure is provided at public schools, existing inequality is addressed, and every learner achieves his or her right to a basic education;

152.2. the stated purpose of her exercise of the power – which is the same purpose.

153. It follows that the Minister's decision is irrational in the constitutional sense.

---

134 *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC) para 49-51

CONCLUSION & COSTS

154. We submit that the Minister is obliged by law to prescribe binding norms and standards for school infrastructure. She is obliged to do so by the Constitution, the Schools Act, and the fact that a very large number of learners do not achieve their right to a basic education because of the inadequate infrastructure. The inadequacy of infrastructure is demonstrated by the evidence of the applicant schools and the 24 individual schools, and by the NEIMS survey.

155. The applicants accept that the infrastructure crisis at public schools arises in large part because of the legacy of apartheid discrimination, and that the scale of the challenge is enormous. This is no reason for not adopting minimum uniform norms and standards: to the contrary, the adoption of binding minimum uniform norms and standards is an indispensable step in addressing this challenge. The scale of the challenge and its roots in apartheid are reasons for concerted action.

156. In ***MEC for Education: Kwazulu-Natal and Others v Pillay*** 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC),[135] O'Regan J explained the legacy of discrimination in education and the constitutional imperative to provide equal education:

> *"[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. . . ."*

135 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

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."

157. The events in this case demonstrate the need for binding norms and standards.

157.1. As a result of the launch of the application, the Minister and the Department developed a plan and took steps to remedy the emergency infrastructure conditions at the two applicant schools.

157.2. However, although the Minister admits the facts relating to the desperate infrastructure needs of the other 24 individual schools (to say nothing of the thousands of other public schools), the Minister puts up no plan and makes no commitment to do anything in relation to these schools. This is despite the applicants having filed detailed affidavits relating to the other 24 individual schools.

157.3. These events show that in order for any school to secure relief, it will be forced to litigate individually. In each case – in the absence of norms and standards – it will be forced to rely directly on the constitutional right in section 29(1)(a) and to ask the court to determine, on a case-by-case basis, the adequacy of the infrastructure.

157.4. The Guidelines will not change this, as they are unenforceable, contain no time-frames, and provide no mechanism for holding the State to account for failing to provide adequate infrastructure. It will remain necessary to litigate every individual school's infrastructure problems by relying directly on the Constitution.

158. It is obviously not realistic to require every school with inadequate infrastructure to engage in extensive, costly and avoidable litigation across the country. It is not the vision of our Constitution that rights violations can be ignored unless and until the person affected initiates litigation. And it is undesirable from a separation of powers perspective that schools should be compelled to follow this route. This would force individual schools to litigate every infrastructure deficiency and compel the courts to decide in each case whether a particular deficiency constitutes a breach of the constitutional right to a basic education.

159. As the Constitutional Court pointed out in ***Mazibuko***, it is primarily the responsibility of the executive and the legislature to give content to the right. The legislature has enacted the Schools Act; the Minister's obligation is to prescribe norms and standards on infrastructure.

160. The Guidelines will not remedy the ongoing and daily violation of the rights of learners.

161. Even if the Minister does have a discretion under section 5A as to whether to prescribe minimum uniform norms and standards, her decision not to do so is unreasonable, irrational and unconstitutional, and falls to be reviewed and set aside. It should be held that the Minister is obliged to prescribe minimum uniform norms and standards, and she should be directed to do so. Legitimate concerns about the separation of powers are addressed by leaving it to the Minister to determine the content of those norms and standards.

162. The applicants seek an order in terms of paragraphs 3.3 and 4 (only in respect of Mwezeni SPS) and paragraphs 5 to 8 of the notice of motion, with costs to include the costs of two counsel.

Geoff Budlender SC

Jason Brickhill

Counsel for the applicants

Chambers, Cape Town and Johannesburg

13 November 2012

TABLE OF AUTHORITIES

International instruments

1. African [Banjul] Charter on Human and Peoples' Rights (1981), adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986

2. International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976

3. Report of the independent expert on the issue of human rights obligations related to access to safe drinking water - Submitted to the Human Rights Council of the U.N. General Assembly on 1 July 2009 in accordance with Council Resolution 7/22)

4. United Nations Committee on Economic, Social and Cultural Rights General Comment No 13

Legislation

- Promotion of Administrative Justice Act 3 of 2000
- South African Schools Act 84 of 1996

South African case law

1. *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC)

2. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)

3. *Beja and others v Premier of the Western Cape and others* [2011] 3 All SA 401 (WCC), 2011 (10) BCLR 1077 (WCC)

4. *Centre for Child Law and Others v Minister of Basic Education and Others* [2012] 4 All SA 35 (ECG)

5. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 039 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)

6. *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC)

7. *Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995*1996 (3) SA 165 (CC)

8. *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466

9. *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC)

10. *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC)

11. *Gerhardt v State President* 1989(2) SA 499 (T)

12. *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC)

13. *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC)

14. *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* [2012] 1 All SA 576 (GSJ); 2012 (5) BCLR 537 (GSJ)

15. *Government of the Republic of South Africa and others v Grootboom and Others* 2001 (1) SA 46 (CC)

16. *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC)

17. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC)

18. *Jaftha v Schoeman and Others Others* 2005 (2) SA 140 (CC)

19. *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)

20. *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)

21. *Minister of Finance and Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC)

22. *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-*

College (PE) (Section 21) Inc 2001 (2) SA 1 (CC)

23. *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)

24. *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC)

25. *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC)

26. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC)

27. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC)

28. *S and Others v Van Rooyen and Others* (General Council of the Bar of South Africa Intervening) (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (CC)

29. *Section 27 and Others v Minister of Education and Another* [2012] 3 All SA 579 (GNP)

30. *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC)

31. *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC)

32. *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T)

33. *Von Abo v Government of the Republic of South Africa* 2009 (2) SA 526 (T)

34. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC)

35. *Western Cape Forum for Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC)

Foreign cases

1. *Campaign for Fiscal Equity Inc v The State of New York* 100 NY 2d 893

2. *Pauley v Kelly* 255 SE 2s 859 (1979)

3. *Rose v Council for Better Education* 790 SW 2d 186 (Ky)