



EQUAL  
EDUCATION  
LAW CENTRE



**JOINT SUBMISSION BY EQUAL EDUCATION, THE EQUAL EDUCATION LAW CENTRE AND  
SECTION27**

**ZONDO COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION  
AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE**

**JULY 2018**

## INTRODUCTION:

1. This is a joint submission prepared by Equal Education (EE), the Equal Education Law Centre (EELC) and SECTION27 for the Zondo commission of inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state.
2. EE is a membership-based, democratic movement of learners, parents, teachers and community members. EE's head office is located in Khayelitsha (Cape Town), South Africa, in addition to offices in both the Eastern Cape and Gauteng provinces. EE's membership base also spans across various provinces including the Western Cape, the Eastern Cape, Gauteng, Limpopo and Kwazulu-Natal. Its core objective is to work towards achieving quality and equality in South Africa's education system.
3. The EELC is a public interest law centre specialising in education law and located in Khayelitsha (Cape Town), South Africa. The EELC works closely with EE in pursuit of their mutual goals of an equal education system and quality education for all.
4. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. SECTION27's main areas of work are the rights to health care services and basic education to further substantive equality and social justice.
5. This joint submission focuses specifically on issues related to the misappropriation and misuse of public funds which should have been geared towards the provision of basic education. In this regard, the following aspects of the Commission's terms of reference bear emphasis:<sup>1</sup>

*"The Commission shall inquire into, make findings, report on and make recommendations concerning the following..."*

*1.4 whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state.*

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<sup>1</sup> Government Gazette, *Judicial commission of inquiry to inquire into allegations of state capture, corruption and fraud in the public sector including organs of state*. Proclamation No. 3 of 2018. 25 January 2018. Available at: [http://www.justice.gov.za/legislation/notices/2018/20180125-gg41403\\_P3-StateCaptureCommissionTOR.pdf](http://www.justice.gov.za/legislation/notices/2018/20180125-gg41403_P3-StateCaptureCommissionTOR.pdf)

1.5 *the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended.*

...

1.9 *the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest..."*

6. This joint submission will highlight the significant although often 'unseen' impact of state capture and corruption on the realisation of learners' constitutionally enshrined right to basic education. It will provide case studies that demonstrate instances of state capture, fraud and corruption by public representatives in the delivery of education related services. Finally, the joint submission will put forward recommendations to the Commission related to the case studies provided in this document.

## CONTEXT

7. South Africa's basic education system continues to suffer as a direct consequence of apartheid. While apartheid policies no longer dictate the status of education funding and provision, the country's public education system remains highly unequal. "More than twenty years into democracy, the pace of change has been slow. A fortunate few receive a world-class education; for the majority, a [quality] basic education remains a hope rather than a reality."<sup>2</sup>
8. Section 29 (1) of the Constitution provides that "everyone has the right-
  - (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."<sup>3</sup>
9. The right to basic education is an unqualified right, and not subject to caveats such as, "progressive realisation" or "within available resources" – as is the case with other socio-economic rights contained in the Constitution. In a 2011 Constitutional Court judgement – *Governing Body of Juma Masjid Primary School v. Essay* – Justice Nkabinde asserted that, "unlike some of the other socio-economic rights, this right [education] is immediately realisable."<sup>4</sup>

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<sup>2</sup> SECTION27. 2017 *Basic Education Rights Handbook: The Constitution and the Right to Basic Education*. p. 14. Available at: <http://section27.org.za/wp-content/uploads/2017/02/Chapter-1.pdf>

<sup>3</sup> Constitution of the Republic of South Africa, 1996

<sup>4</sup> *Governing Body of the Juma Masjid Primary School v Essay NO 2011 (8) BCLR 761 (CC); 2011 ZACC 13* Available at: <http://www.saflii.org.za/za/cases/ZACC/2011/13.html>

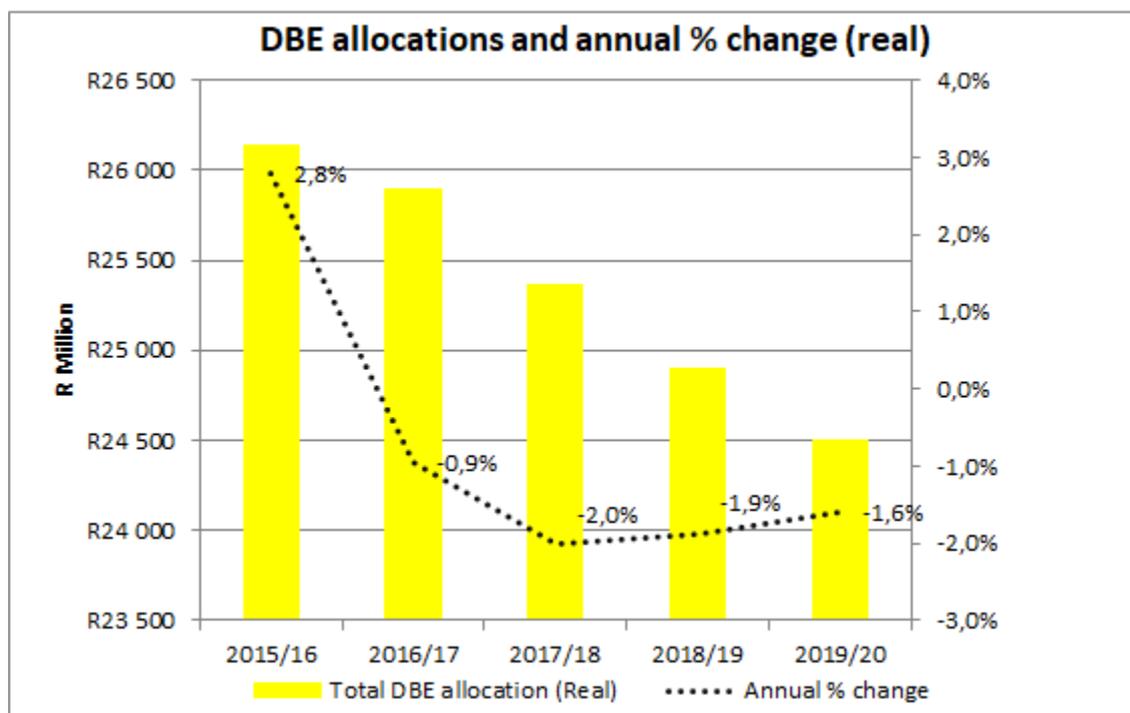
10. A number of court cases have, over the last decade, brought to the fore components that make up a holistic basic education system, and in so doing, have concretised the content of the right to basic education. While quality teaching and learning is fundamental to education outcomes, other factors such as safe and dignified school infrastructure, access to textbooks and classroom furniture are also crucial to create an enabling environment for learners to learn and teachers to teach.
11. These components are all ultimately acquired through procurement systems. It is for this reason that the fulfilment of the right to basic education suffers when there is corruption and maladministration within these systems. Irregularities within procurement processes or systems – where funds are syphoned off and spent elsewhere – compromise learners’ access to their constitutionally enshrined right to a quality basic education.
12. The national budget is an instrument that should be utilised by the state to provide social goods such as education and health care, as well as mitigate against the impact of poverty and unemployment. Yet, over the years there have been numerous reports in the public domain on the loss of state funds through corruption and the capture of state institutions.
13. While the dysfunctionality of state-owned entities (SoEs) and dubious dealings by public representatives have captured the public imagination, and rightly so; it is the ‘unseen’ impact of state capture and corruption on citizens’ enjoyment to their constitutional rights that is most profound. In summary, public funds that have been lost to corruption have been at the cost of effective service delivery.
14. It is impossible to quantify the full cost of state capture on the state coffers. However, the newly appointed National Director of Public Prosecutions, Shamila Batohi, estimates that it has cost South Africa a whopping R1.4 trillion.<sup>5</sup> The result of pillaging the public purse has also become visible in changes to the fiscal framework. To cover the persistent revenue short-fall, off-set South Africa’s substantial debt and bail-out SoE’s, money needs to come from somewhere. Amongst departments affected by austerity measures, the Department of Basic Education (DBE) and the basic education sector as a whole, have seen lower budgetary allocations.
15. During the 2018 Budget Speech then-Minister of Finance, Mr Malusi Gigaba, announced extensive austerity measures for the 2018/19 financial year. These measures included reductions to social spending, meaning cuts in funding for sectors such as education and housing. In addition, Mr Gigaba put into effect a 1% Value Added Tax (VAT) hike.<sup>6</sup>
16. The Department of Basic Education’s (DBE) allocations have been decreasing since the 2015/16 financial year. Nominal allocations have grown by an average of about 4.7 percentage points between the 2015/16 and 2019/20 financial years, while *real* allocations,

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<sup>5</sup> Haffajee.F., Why Markus Jooste and Jacob Zuma are two peas in a pod. *Fin24*, 20 June 2019. Available at: <https://www.fin24.com/Opinion/the-sunday-read-by-ferial-haffajee-why-markus-jooste-and-jacob-zuma-are-two-peas-in-a-pod-20190630>

<sup>6</sup> National Treasury, *Budget Speech* (2018). Available at: <http://www.treasury.gov.za/documents/national%20budget/2018/speech/speech.pdf>

when the rate of inflation has been considered, reflect decreases as illustrated in the graph below (own calculations):<sup>7</sup>



17. That being said, this joint submission will focus on more localised cases of corruption and state capture that have permeated certain facets of the education sector – at both national and provincial levels. These cases impact the quality of education that learners receive. That the provision of textbooks, meals, infrastructure and sanitation at schools is compromised because of self-enriching individuals is an immense disservice to millions of learners.

## CASE STUDIES

### *Corruption in public procurement processes*

18. The significance of monitoring public procurement processes cannot be overstated. Procurement systems are highly vulnerable to corruption, leading to the mismanagement of public funds and malfeasance. Simply put – public contracting is the meeting point of significant power and money, as demonstrated in South Africa recently.
19. Departments of education are heavily involved in procurement due to the high number of goods and services that must be purchased in order to fulfil the mandate of providing education. These include transactions such as the purchase of classroom infrastructure, textbooks, scholar transport and furniture. The large amounts of public money required to

<sup>7</sup> National Treasury. 2019. *Estimates of National Expenditure: Vote 14, Basic Education*. Pg, 259 & 263. Available: <http://www.treasury.gov.za/documents/national%20budget/2018/ene/Vote%2014%20Basic%20Education.pdf>

ensure the fulfilment of this mandate makes these departments particularly susceptible to state capture and corruption.

#### *Corruption in the provision of school nutrition in the Eastern Cape*

20. Corruption in school procurement processes has had an impact on numerous components of the education sector. The Eastern Cape saw this play out in the provision of school nutrition in the province. An example of the depths of corruption and the sense of impunity is demonstrated by media reports from 2015.
21. In 2015, an audio recording between two of the Eastern Cape's most senior government officials – former Acting Superintendent-General of Education, Mr Raymond Tywakadi, and former Head of the Eastern Cape Treasury, Ms Marion Mbina-Mthembu – was revealed by media reports. To note, Ms Mbina-Mthembu has also been implicated in a recent Public Protector's report looking into allegations of funds geared towards replacing mud schools in Eastern Cape, being improperly siphoned to former President Nelson Mandela's funeral.<sup>8</sup>
22. According to the *Daily Dispatch*, the officials were recorded discussing political interference in two department of education contracts, including a proposed R1 billion schools nutrition programme. The officials are reported to have explicitly discussed instructions, allegedly from then-ANC Eastern Cape Secretary Mr Oscar Mabuyane, to distribute one of the tenders to his "boys from Ngcobo".<sup>9</sup>
23. Rather than commit to public accountability, the former Premier of the Eastern Cape, Mr Phumulo Masualle, is reported to have dismissed the issue by stating "people were just making something out of nothing".<sup>10</sup> Soon after the publication of the articles, Mr Mabuyane laid a complaint to the Press Ombudsman against the *Daily Dispatch*, where the newspaper was instructed to apologise.<sup>11</sup> While the majority of the panel found in favour of Mabuyane, it did note that, "...it was not the panel's mandate to find whether Mabuyane had been guilty or not – our only task was to adjudicate if what the newspaper had published had conformed to the Press Code. Our finding for Mabuyane on critical issues should therefore not be interpreted as a decision that he was innocent."<sup>12</sup>

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<sup>8</sup> Office of the Public Protector, *Report on an investigation into allegations of misappropriation of public funds, improper conduct and maladministration by the Eastern Cape Provincial Government and other organs of state in connection with expenditure incurred in preparation for the funeral of former President Nelson Rolihlahla Mandela*. Available at: [https://cisp.cachefly.net/assets/articles/attachments/72218\\_mandela\\_report\\_final\\_signed.pdf](https://cisp.cachefly.net/assets/articles/attachments/72218_mandela_report_final_signed.pdf)

<sup>9</sup> Mukhuthu, Z., 'Give it to my boys': Top Bhisho officials implicate ANC boss in tender manipulation. *Daily Dispatch*, 18 July 2015. Available at: <https://www.dispatchlive.co.za/news/2015-07-18-give-it-to-my-boys-top-bhisho-officials-implicate-anc-boss-in-tender-manipulation/>

<sup>10</sup> Nini. A., and Macanda. S., Masualle laughs off recording. *Daily Dispatch*, 21 July 2015. Available at: <https://www.dispatchlive.co.za/news/2015-07-21-masualle-laughs-off-recording/>

<sup>11</sup> Daily Dispatch, Apology to Oscar Mabuyane, 03 October 2015. Available at: <https://www.dispatchlive.co.za/news/2015-10-03-apology-to-oscar-mabuyane/>

<sup>12</sup> The Press Council of South Africa, Oscar Mabuyane vs. Saturday Dispatch (2015). Available at: <http://www.presscouncil.org.za/oscar-mabuyane-vs-saturday-dispatch-2836/>

24. Following the 2019 national elections, Mr Mabuyane has become Premier of the Eastern Cape. However, as he takes on leadership of the province, it is still not clear whether the serious allegations relating to tender interference in education-related contracts in the Eastern Cape was effectively tested. In addition, more recently, there have been further allegations of Mr Mabuyane being implicated in fraudulent payments made by the Mbizana local municipality during his tenure as ANC chairperson in the province.<sup>13</sup>
25. The commitment by President Cyril Ramaphosa that the ruling party would, "...show no tolerance in the fight against corruption and misconduct within the ANC"<sup>14</sup> will ring hollow if allegations such as these are not properly ventilated.

#### *Limpopo Textbook Crisis and impacts of corruption*

26. In 2012, following reports that schools in Limpopo had not received textbooks for the academic year, SECTION27 began investigating this non-delivery and assisting schools in attempting to ensure books were delivered.
27. By May 2012, following several unmet promises by the Limpopo Department of Education (LDoE) and the DBE to deliver textbooks, SECTION27 initiated litigation against the Minister of Basic Education and the LDoE. The case sought to compel the procurement and delivery of prescribed textbooks to learners in Limpopo.<sup>15</sup> During the litigation, the role and impact of corruption on what became known as the "Limpopo textbooks crisis" became evident.
28. Two years prior to the litigation, the DBE assumed responsibility for the education function of the Limpopo Provincial Executive in an intervention in terms of section 100(1)(b) of the Constitution.
29. As part of this intervention, Dr Anis Karodia, former administrator for the intervention task team produced a damning report on the state of education in Limpopo. One of his findings reads as follows:

*"Documents reveal that the [Bid Adjudication Committee] has been influenced by members of the staff that do not sit on the [Bid Adjudication Committee] and other forces, and that the principles of the PFMA have not been followed in many instances. It also appears that there is a dominant force of members within the [Bid Adjudication Committee] and they receive instructions and pronouncements from influential staff."*<sup>16</sup>

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<sup>13</sup> Jika, T. 'Eastern Cape ANC bigwigs in a 'loan' fracas'. *Mail&Guardian*, 17 May 2019. Available at: <https://mg.co.za/article/2019-05-17-00-e-cape-anc-bigwigs-in-loan-fracas>

<sup>14</sup> Ramaphosa, C., The ANC's 2019 election manifesto, *PoliticsWeb*. 13 January 2019

<sup>15</sup> *SECTION27 and others v Minister of Education and another* 2013 (2) SA 40 (GNP) ("First Textbooks Case").

<sup>16</sup> Karodia report at page 8 - authors willing to provide a copy to the Commission upon request

30. On 27 July 2010, the Bid Adjudication Committee for the LDoE appointed EduSolutions as the preferred bidder for the procurement of Learner Teacher Support Materials (LTSM) in the province.<sup>17</sup> The contract was valued at R320 million.<sup>18</sup>
31. The LDoE entered into a contract with EduSolutions on 18 October 2010.<sup>19</sup> In terms of this contract, EduSolutions took over the whole textbook procurement process – including receiving, processing, placing orders, effecting payment and delivery of textbooks.<sup>20</sup> This meant that the entire process for the procurement and delivery of textbooks had been outsourced. The LDoE book unit was at this point disbanded and the database containing the list of schools in the province was handed over to EduSolutions.<sup>21</sup>
32. Once the EduSolutions contract was cancelled, the DBE no longer had access to the database of schools and did not even know which schools existed.<sup>22</sup> This was one of the key reasons for the failure of textbook delivery in the province at the time of this case.
33. The budget for textbooks for the 2011/2012 financial year was R126 393 000.<sup>23</sup> However, the amount owed in terms of the contract with EduSolutions for textbooks had inflated to R343 226 224.<sup>24</sup> This amount far exceeded the actual budget for textbooks.<sup>25</sup> Because of an outstanding payment of approximately R21 000 000 allegedly owed to EduSolutions, it failed to place orders for textbooks for the 2012 academic year.<sup>26</sup>
34. The academic year began on 18 January 2012. On this date, textbooks had still not been delivered to schools in the province. In April 2012, when the LDoE was under administration, Dr Karodia cancelled the contract because of alleged irregularities, including suspicions of fraud and corruption in the bidding process.
35. The allegations of irregularities around the EduSolutions contract are numerous. Some of these include that the procedures set out in the Public Finance Management Act (PFMA) were not followed in awarding of the tender,<sup>27</sup> that members of the Bid Adjudication Committee were unduly influenced in awarding the tender to EduSolutions,<sup>28</sup> and payments

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<sup>17</sup> Supporting affidavit in Labour Court of Mmbulahiseni Solomon Tshitangano, 1 March 2012 (Case number JR 366)

<sup>18</sup> Evans. S., and Erasmus. J., Textbook Crisis: Education department favoured dodgy tender. *Mail&Guardian*, 29 June 2012. Available at: <https://mg.co.za/article/2012-06-29-education-department-favoured-dodgy-tender>

<sup>19</sup> Supporting affidavit in Labour Court of Mmbulahiseni Solomon Tshitangano, 1 March 2012 (Case number JR 366)

<sup>20</sup> Ibid

<sup>21</sup> Chisholm, L. "Corruption in Education: The Textbook Saga", *International, Comparative Perspectives on Corruption: A Symposium hosted by the Public Affairs Research Institute and Innovations for Successful Societies, Princeton University*, 2012, p.11.

<sup>22</sup> This is evidenced by the DBE making different claims in different affidavits about the number of schools in the province.

<sup>23</sup> See respondents' heads of argument in the second application-authors willing to provide a copy to the Commission upon request

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Evans. S., and Erasmus. J., Textbook Crisis: Education department favoured dodgy tender. *Mail&Guardian*, 29 June 2012. Available at: <https://mg.co.za/article/2012-06-29-education-department-favoured-dodgy-tender>

<sup>28</sup> Ibid

of 90% of the EduSolutions administration and management were paid prior to any work being done on the contract.<sup>29</sup> There has also been media speculation on whether EduSolutions had been favoured in the awarding of government tenders because of the close links between EduSolutions and government officials.<sup>30</sup>

36. Solly Tshitangano, the then Acting Chief Financial Officer of the LDoE alleged that there were irregularities and numerous instances of non-compliance with the PFMA both prior to and subsequent to awarding the tender to EduSolutions.<sup>31</sup> He also raised several other red flags regarding financial mismanagement in the awarding of the tender.<sup>32</sup> He was concerned, for example, that the LDoE would lose millions of rands from the discount it could receive by contracting directly with the publisher and instead EduSolutions would benefit from the discount.<sup>33</sup> He was also concerned about payments made to EduSolutions before it had fulfilled any of its contractual obligations such as the delivery of textbooks.<sup>34</sup> Tshitangano was subsequently dismissed. His case was referred to the Labour Court on the basis that the dismissal was unfair and that he was targeted for being a whistle-blower. The case was ultimately settled and Tshitangano was reinstated in his position.
37. For most of the 2012 academic year, many learners went without textbooks. This was particularly problematic at a time in which a new school curriculum had just been implemented, and the new curriculum (Curriculum and Assessment Policy Statement – “CAPS”) relied heavily on the associated textbooks for its implementation and as a support tool for teachers.
38. Many unanswered questions still surround the widely publicised stories of the EduSolutions tender, the dumping and stockpiling of textbooks, and the accountability of high-ranking officials. Professor Mary Metcalfe, a respected educationalist, who during July 2012 conducted an independent verification of textbook delivery in Limpopo, recommended that an “...investigation [be] conducted [into] procurement practices involving the over-ordering of books”,<sup>35</sup> and allegations regarding increased commission and possible links to stockpiled books “...be investigated by a competent authority”.<sup>36</sup>
39. Similarly, a presidential task team established to investigate the non-delivery of textbooks in the province's schools found “...a general tendency to disregard and transgress legislation...” and recommended that the Public Service Commission investigate “[a]lleged non-compliance with Supply Chain Management and PFMA in awarding the textbook contract to

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<sup>29</sup> Hlongwane. S, Limpopo Textbook Crisis: Whistleblower out in the cold. *Daily Maverick*, 19 July 2012. Available at: <https://www.dailymaverick.co.za/article/2012-07-19-limpopo-textbook-crisis-whistleblower-out-in-the-cold/>

<sup>30</sup> Evans. S., and Erasmus. J., How Masemola favoured EduSolutions. *Mail&Guardian*, 20 July 2012. Available at: <https://mg.co.za/article/2012-07-19-how-mec-favoured-edusolutions>

<sup>31</sup> Supporting affidavit in Labour Court of Mmbulahiseni Solomon Tshitangano, 1 March 2012 (Case number JR 366)

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> Metcalfe. M, “Report: Verification of Textbooks Deliveries in Limpopo” (2012), Recommendation 2 p.6.

<sup>36</sup> *Ibid*. Recommendation 16 p.10.

a service provider without a Cost Benefit Analysis".<sup>37</sup> Indeed, *Corruption Watch* compiled a six-part investigative series into corruption in the education sector, with the Limpopo textbooks crisis as its focal point.<sup>38</sup>

40. The absence of full and proper investigations by competent authorities into these issues is perturbing because of the direct impact that they have had on education delivery, and more importantly on the necessity to prevent them from occurring again.

#### *School Infrastructure non-delivery and the syphoning of public money: Eastern Cape and Limpopo*

41. The slow pace of school infrastructure delivery in the Eastern Cape has raised concerns for several years. In particular, significant aspects of service delivery have been out-sourced to Implementing Agents (IAs), who act as professional service providers to manage the building of schools on behalf of Provincial Education Departments (PEDs), and the DBE. IAs provide technical support and project management support to the state, and can receive about 4.5% to 10% of the value of a project in management fees.<sup>39</sup> Infrastructure projects can therefore generate significant business.
42. One case is that of Coega Development Corporation (CDC). This IA is a state-owned entity and one of the implementing agents supporting the Eastern Cape Department of Education's (ECDoE) infrastructure projects, as well as the DBE's Accelerated School Infrastructure Delivery Initiative (ASIDI).
43. In the 2017/18 financial year, CDC was allocated R262 million to build school infrastructure in the Eastern Cape.<sup>40</sup> In 2017, CDC was involved in more than 900 ongoing school infrastructure projects, "...many of which suffered from poor or incomplete service delivery, the result of poor contract management and internal controls."<sup>41</sup>
44. A 2015/16 Auditor General's report revealed that CDCs procurement processes were uncompetitive or unfair.<sup>42</sup> The report outlined the CDC's inability to address areas of risk, instability or vacancies in key positions, and key officials' lack of competence, as the root causes.<sup>43</sup> In the CDCs 2016/17 Annual Report, the Auditor General highlighted significant

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<sup>37</sup> Report of the Presidential Task Team established to investigate non-delivery of textbooks in Limpopo Schools.

<sup>38</sup> This series is available here: <https://www.corruptionwatch.org.za/unpacking-sas-education-crisis-part-six/>

<sup>39</sup> Equal Education (2018) *Implementing Agents: The Middleman in Charge of Building Schools*, p. 11. Available at: <https://equaleducation.org.za/wp-content/uploads/2018/11/Equal-Education-Implementing-Agents-Report-November-2018.pdf>

<sup>40</sup> Soon-Shiong. N., *Equalisers fight for schools to be built*. *Mail&Guardian*, 03 November 2017. Available at: <https://mg.co.za/article/2017-11-03-00-equalisers-fight-for-schools-not-built>

<sup>41</sup> *ibid*

<sup>42</sup> Auditor General, 2015-16 PFMA report. Part 14: Annexure 2. Available at: <http://www.agsa.co.za/Portals/0/Reports/PFMA/201516/Annexures/Part%2014%20PFMA%202015-16%20Sect%2010%20Annexure%202.pdf>

<sup>43</sup> *ibid*

internal control deficiencies, and reported that the board did not always exercise oversight to ensure compliance with procurement legislation.<sup>44</sup>

45. In addition, the DBE's 2016/17 annual report stated that "...CDC Eastern Cape did not comply with the supply chain processes as agreed..."<sup>45</sup> and that expenditure incurred for the appointment of contractors without following the Supply Chain Management (SCM) processes, was declared as irregular expenditure.
46. During the same financial year, it was found that the CDC was responsible for just over R3 million in irregular expenditure in the Eastern Cape, which was under investigation, while also being responsible for the fruitless and wasteful expenditure of another R 8 million (also under investigation).<sup>46</sup>
47. Another case of apparent corruption involves the abuse of power by a public official in extracting money from an IA. In March 2019, *City Press* reported that the former MEC of Education in Limpopo, Mr Ishmael Kgetjepe had allegedly been paid over R1 million by the Mvula Trust for "...constituency work and various political work at the branch level".<sup>47</sup>
48. The Mvula Trust provides school sanitation infrastructure on behalf of the Limpopo Department of Education and on behalf of the Department of Basic Education. The Mvula trust also acts as an implementing agent for the Eastern Cape Department of Education and the Mpumalanga Department of Education.<sup>48</sup> According to a *City Press* report, the Mvula Trust had been hired through the DBE's Accelerated School Infrastructure Delivery Initiative (ASIDI) to provide sanitation facilities in the form of toilets, at schools in Limpopo. The article states that the funds, which were improperly diverted to former MEC Kgetjepe, could have built proper toilets for at least 17 schools in the province.<sup>49</sup>
49. The article, which draws its information from a confidential report compiled by the audit firm Nexia SAB&T on behalf of Mvula Trust, states that Mr Kgetjepe allegedly requested the money by phone or in person. He was then subsequently paid R1 050 000 in eight tranches of between R100 000 and R150 000 between September 2017 and June 2018.<sup>50</sup>

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<sup>44</sup> Equal Education, Dear Coega Development Corporation, tell no lies and claim no easy victories. 15 December 2017. Available at: [https://equaleducation.org.za/2017/12/15/dear-coega-development-corporation-tell-no-lies-and-claim-no-easy-victories/#\\_ftn4](https://equaleducation.org.za/2017/12/15/dear-coega-development-corporation-tell-no-lies-and-claim-no-easy-victories/#_ftn4)

<sup>45</sup> Department of Basic Education, 2016/17 Annual Report. p. 19. Available at: [https://nationalgovernment.co.za/department\\_annual/173/2017-department:-basic-education-\(dbe\)-annual-report.pdf](https://nationalgovernment.co.za/department_annual/173/2017-department:-basic-education-(dbe)-annual-report.pdf)

<sup>46</sup> *ibid* p. 309

<sup>47</sup> Fengu. M., R1m 'bribe' paid to MEC by NGO contracted to build toilets. *City Press*, 05 March 2019. Available at: <https://city-press.news24.com/News/r1m-bribe-paid-to-mec-by-ngo-contracted-to-build-toilets-20190305>. The Mvula Trust Annual Report and Financial Statements for 2017/2018 contain no mention of these transactions.

<sup>48</sup> Mvula Trust Annual Report 2017/2018 Financial Year - authors willing to provide a copy to the Commission upon request

<sup>49</sup> Seleballo. H., Kota. Z., and McLaren., D., Call for government to open procurement data to public scrutiny. *Daily Maverick*, 14 June 2019. Available at: <https://www.dailymaverick.co.za/article/2019-06-14-call-for-government-to-open-procurement-data-to-public-scrutiny/>

<sup>50</sup> Fengu. M., R1m 'bribe' paid to MEC by NGO contracted to build toilets. *City Press*, 05 March 2019. Available at: <https://city-press.news24.com/News/r1m-bribe-paid-to-mec-by-ngo-contracted-to-build-toilets-20190305>

50. After further investigation, the same publication found that an additional R650 000 had been paid over to the former MEC by Mvula Trust. At the time, a representative of the Limpopo Department of Education denied that Mr Kgetjepe had received any money from Mvula Trust.<sup>51</sup>

## CONCLUSION AND RECOMMENDATIONS

51. The case studies cited above, from the dubious dealings in school nutrition programmes in the Eastern Cape, to the Limpopo textbook saga and outright corruption in infrastructure procurement, outline the **direct** impact of corruption and state capture on the government's ability to deliver services in respect of key components of the right to basic education, such as textbooks and infrastructure (including sanitation). We therefore recommend that the Zondo Commission fully investigate the following:

- a. The audio recording implicating Premier Oscar Mabuyane in his alleged attempt to influence a R1 billion school nutrition programme tender. The Commission must also investigate the involvement of Mr Raymond Tywakadu and Ms Marion Mbina-Mthembu in these allegations.
- b. The planning, supply chain management (including procurement) processes, contract awards and contract implementation where there have been allegations and evidence of impropriety and corruption in respect of government contracts, which have directly hampered the fulfilment of the right to basic education. Clear examples of this are described in our case studies above, and summarised below, but these serve only as illustrations of the possible devastating effects of state capture and corruption on the fulfilment of socio-economic rights, and particularly the right to basic education:
  - i. The EduSolutions tender relating to failed textbook delivery by the Limpopo Department of Education
  - ii. Irregular expenditure and non-compliance with supply chain management requirements by the Coega Development Corporation relating to poor provision of school infrastructure by the Department of Basic Education and the Eastern Cape Department of Education
  - iii. Inappropriate payments made and/or abuses of power by former MEC for education in Limpopo, Mr Ishmael Kgetjepe, impinging on the successful provision of safe and adequate school sanitation in Limpopo schools.

52. Subsequent to these investigations, we request that the Commission recommend appropriate sanctions, including criminal prosecution of individuals implicated, if necessary. In addition to the more commonly known crimes, such as the crime of corruption, we draw the Commission's attention to Section 86 of the Public Finance Management Act 1 of 1999,

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<sup>51</sup> Fengu. M., Limpopo education MEC received more money from trust contracted to build toilets. *City Press*, 19 March 2019. Available at: <https://city-press.news24.com/News/limpopo-education-mec-received-more-money-from-trust-contracted-to-build-toilets-20190319>

which provides for fines or imprisonment where there has been willful or grossly negligent discharge of duties by accounting officers of public entities (including directors general of national departments and heads of provincial departments). This includes the willful or grossly negligent failure by an accounting officer to take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure.

53. We recommend that the Zondo Commission ensure the effective protection of whistleblowers when these recommendations are implemented and/or when allegations described above are investigated. The public should be made aware that such protections are in place, to encourage more whistleblowers to come forward. Parties to this submission have repeatedly encountered state employees, for example school teachers and principals, who have refused to disclose accurate information regarding service provision, for fear of dangerous consequences. This is due to the direct intimidation they have been subjected to from higher-ranking officials in the state.
54. Unless individuals are held to account for corrupt practices, impunity will continue and the poorest South Africans will continue to bear the brunt of the effects of corruption.