IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 22588/2020

In the matter between:

EQUAL EDUCATION	First Applicant
THE SCHOOL GOVERNING BODY OF VHULAUDZI SECONDARY SCHOOL	Second Applicant
THE SCHOOL GOVERNING BODY OF MASHAO HIGH SCHOOL	Third Applicant

and

MINISTER OF BASIC EDUCATION	First Respondent
MEC OF EDUCATION, EASTERN CAPE	Second Respondent
MEC OF EDUCATION, FREE STATE	Third Respondent
MEC OF EDUCATION, GAUTENG	Fourth Respondent
MEC OF EDUCATION, KWAZULU-NATAL	Fifth Respondent
MEC OF EDUCATION, LIMPOPO	Sixth Respondent

MEC OF EDUCATION, MPUMALANGA	Seventh Respondent
MEC OF EDUCATION, NORTHERN CAPE	Eighth Respondent
MEC OF EDUCATION, NORTH WEST	Ninth Respondent
MEC OF EDUCATION, WESTERN CAPE	Tenth Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. In 1994 the State instituted the National School Nutrition Programme (**NSNP**) to provide meals at school to indigent learners. At the beginning of 2020, the NSNP provided a meal every school day to 9 million learners.

2. The NSNP has the dual goal of fulfilling the learners' right to education and to food.

3. When the national state of disaster was declared and schools were closed, the NSNP was suspended. The result was widespread hunger.

4. The Minister, the Department and the Council of Education Ministers all stated that when learners returned to school, the NSNP would be resumed for all learners, including those whose classes had not yet returned to school.

5. On 1 June 2020 the Minister reversed course. She announced that when Grade 7 and 12 learners returned to school on 8 June 2020, only they would be provided with meals under the NSNP. That is what happened. Other learners were not provided with meals.

6. When correspondence with the Minister failed to resolve the problem, on 12 June 2020 the applicants instituted this application.

7. In an attempt to avoid an order being made by this court, the respondents then hurriedly took some steps so that they would be able, when they filed their answering affidavits on 22 June 2020, to claim that there was no need for this application, as they were doing what the applicants required.

8. In fact, the respondents did not provide meals to all learners on 22 June 2020. They do not allege that they did so. The last-minute attempt to reverse course again has led to widespread administrative chaos and confusion.

9. The applicants submit that the state has a constitutional obligation to resume the NSNP for all learners, and that each qualifying learner has a right to a daily meal at school. The respondents continue to deny that this is the case.

10. There is no material dispute of fact. The respondents say that they planned to resume the NSNP for all learners on 22 June 2020. They do not allege that they did so. The appellants have on very short notice produced extensive evidence which demonstrates a widespread failure to resume the NSNP for all learners; and widespread administrative confusion and chaos in the NSNP.

11. The undisputed expert evidence is that the suspension of the NSNP has been a “colossal disaster” for indigent children. A very large number of children have found themselves living in extreme poverty, and going hungry.

12. There is no valid reason why the NSNP was not resumed forthwith once the schools reopened. The respondents’ failure to do this has unnecessarily prolonged, and is still prolonging, the suffering of these children. This breach of the Constitution continues on a daily basis.

13. The applicants seek declaratory and mandatory relief, coupled with a supervisory order, to ensure that hungry indigent children now receive the daily school meals to which they have a right.

THE CORE FACTS

14. The National School Nutrition Programme (**NSNP**) was introduced by the democratic government in 1994. It was designed to address two related problems: many South African children go hungry; and when they go hungry, they often either do not attend school, or are not able to learn effectively when they do attend school.

15. The NSNP seeks to increase the ability of learners to learn, and therefore to promote the right to basic education in section 29(1)(a) of the Constitution. Through the NSNP, the DBE seeks primarily to discharge its constitutional responsibility for the functional area of basic education.[1] The NSNP has been shown to improve punctuality, regular school attendance, concentration, and general well-being of participating learners.[2]

16. As at the beginning of this year, the NSNP provided 9 million school children with a daily meal on school days.

17. On 18 March 2020, the schools were closed as a result of the Covid-19 pandemic and the national state of disaster. As a result, the NSNP ceased to operate.[3]

18. The consequences were predictable. Children went hungry. While various programmes were instituted in an attempt to mitigate this, they were limited in

[1] Record 011-75 AA para 63.

[2] Record 011-8 AA para 5.

[3] Record 011-10 AA para 9.1.

their reach and in their scope. The consequences are described graphically in the founding affidavits.

19. On 8 June 2020, learners in Grades 7 and 12 were readmitted to classes. They have generally been provided with a meal each day at school, in accordance with the NSNP.

20. This case is about learners in other grades, whose schools have reopened, but whose classes have not been resumed.

21. Initially, the government committed to providing meals in terms of the NSNP to all learners when their schools reopened, regardless of whether their own classes had resumed. Repeated undertakings were given in this regard. For example:

    21.1. On 29 April 2020, the Director-General (the deponent on behalf of the respondents) made a presentation to the National Coronavirus Command Council on the Basic Education sector plan. He stated that the meals for learners would be procured as soon as the date for the reopening of the schools was announced. He drew no distinction between whose classes were immediately resumed, and learners whose classes were resumed later.[4]

[4] Record 011-28 AA para 28; MBE 13 011-218.

21.2. On 11 May 2020, the Minister responded to a letter from the applicants with regard to the NSNP. The Minister stated that the programme would resume once the schools reopened.[5]

21.3. On 11 May 2020, the Council of Education Ministers[6] resolved that when schools reopened, the NSNP would be extended to all learners, and not only to the Grade 7 learners and Grade 12 learners, whose classes would be the first to return to school.[7]

21.4. On 19 May 2020, the Minister announced at a media briefing that schools would reopen on 1 June 2020, starting with Grade 7 and Grade 12 learners. She stated that the NSNP would be reopened for all learners when the Grade 7 and Grade 12 learners returned to their classes.[8]

21.5. On 19 May 2020, the Director-General wrote to the South African Human Rights Commission. He stated that the NSNP would be extended to all learners, and not only to the Grades 7 and 12 learners, when the schools were reopened.[9]

21.6. On 21 May 2020, the Chief Director: Care and Support of the Department, wrote to all provincial education departments. That letter

[5] Record 011-30 AA para 30; NM 36 011-326..

[6] The Council of Education Ministers (**CEM**) is established by s 9 of the National Education Policy Act 27 of 1996. It consists of the Minister, the Deputy Minister, and all of the MECs for Education.

[7] Record 011-31 AA para 31.

[8] Record 011-32 AA para 32.

[9] Record 011-33 AA para 33.

dealt with the reporting which would be undertaken by provincial education departments on their readiness for the phasing-in of the reopening of schools. One item of it dealt with the resumption of the NSNP. No distinction was drawn between learners actually returned to school and learners yet to return to school at a later date.[10]

21.7. On 26 May 2020, the Department released a media statement in relation to the reopening of schools. It stated that the NSNP would be rolled out for the benefit of all learners.[11]

21.8. On 31 May 2020, the Council of Education Ministers decided that Grade 7 and 12 learners would return to classes from 8 June 2020.

21.9. The position was therefore consistent and unequivocal: when the schools re-opened, the NSNP would resume for all learners, including those whose classes had not resumed.

Sudden about-turn

22. But on 1 June 2020, the respondents made a sudden about-turn. The Minister held a press conference in which she said that the NSNP would restart for Grades 7 and 12 learners, but:

> *"We would have wished also even to provide nutrition for grades that we have not phased in. But I had requested the sector and the MEC[s] to*

[10] Record 011-35 AA paras 34 and 35.

[11] Record 011-38 AA para 37.

say maybe we need to wait a little. Get ourselves to acclimatise to the new environment, manage that which we are still struggling to get right before we can introduce new programmes. So there is intention to start the nutrition but we just really need to find our feet in this new environment, be comfortable that we are able to manage this new environment we find ourselves in before we can get into more programmes. But we have intentions to do that".[12]

23. On 2 June 2020, SECTION27 and the Equal Education Law Centre *(***EELC***)* wrote to the Minister and the Department, seeking clarity on their intentions, and an undertaking that the NSNP would be rolled out for all learners, and that the Department would direct provinces to comply with its undertaking.[13]

24. On 7 June 2020, the Minister replied to this letter in a letter dated 6 June 2020. She stated:

> *"When schools re-open, meals for the National School Nutrition Programme will be provided to learners in a phased-in approach."*

25. She stated further that provinces had *"context-specific plans to reach those learners not yet in school"*. She stated that *"It will take a gradual process to acclimatise with the new environment"*.

26. On 8 June 2020, the Grades 7 and 12 learners returned to school. For the most part, they received the meals to which they were entitled under the NSNP.

[12] Record 006-14 FA para 6.

[13] Record 006-50 FA para 97; NM 47 006-311.

However, the rest of the qualifying 9 million learners did not receive meals under the NSNP. That is common cause.

27. Contrary to the undertaking which the Director-General had given to the National Coronavirus Command Council on 29 April 2020, the meals for learners had not been procured as soon as the date for the reopening of the schools was announced. Meals were not available for learners others than those in Grades 7 and 12. Learners outside those Grades continued to go hungry.

Another about-turn

28. This application was launched and served on 12 June 2020. This resulted in another about-turn.

29. As we explain below, the *"phased-in approach"* and *"gradual process"* to which the Minister had referred in her letter of 7 June 2020 was suddenly abandoned. A new process was created to deal with this matter by 22 June 2020.

30. The date of 22 June 2020 was significant: The parties to this application had agreed that the respondents would file their answering affidavits by 22 June 2020;[14]

[14] Record 012-22 RA para 57.

31. On 19 June 2020 the Director-General wrote to the Head of the Gauteng Department of Education (and presumably in similar terms to the Heads of the other Provincial Departments) stating the following:

31.1. On Friday 12 June 2020, the Department and the Provincial Departments had been served with this application, challenging the decision of the Minister that the NSNP would only be rolled out to learners currently attending Grades 7 and 12, and would be rolled out later to other learners as they were phased in. The applicants had requested the court to grant an order that the NSNP be rolled out to all learners notwithstanding whether they are currently in school.

31.2. The legal basis for the application was the right to nutrition and basic education. The applicants alleged that these rights of learners were being infringed by the decision that the NSNP be phased-in and not available immediately to all learners.

31.3. At a virtual meeting on 14 June 2020 with senior officials responsible for the NSNP, the plans in progress on feeding learners had been presented. Thereafter, agreement was reached to submit *"refined"* plans to resume feeding to all learners, including those not yet attending school.

31.4. In the court papers submitted to Counsel, all provinces were required to start feeding all learners with effect from 22 June 2020. *"Any later*

dates will force the department to report to the court on a fortnightly basis".[15]

32. In essence, the sequence was thus the following:

32.1. Initially, the respondents made repeated public undertakings that the NSNP would be resumed for all learners when the schools reopened;

32.2. On 1 June 2020, the Minister announced that when the schools re-opened, meals would be provided only for learners in Grades 7 and 12;

32.3. On 7 June 2020, the Minister stated that the provision of meals to learners not in Grades 7 or 12 would take place in a *"phased-in approach"*, and through a *"gradual process"*;

32.4. This application was launched on 12 June 2020;

32.5. The parties agreed that the respondents' answering affidavits would be delivered on 22 June 2020;

32.6. Thereafter, the respondents made a hurried attempt to take steps by 22 June 2020, which could then be referred to in their answering affidavits of that date, in an attempt to prevent this Court making an order.

[15] Record 012-146 RA14.

33. If the respondents had admitted their reversal of policy after this application was launched, and had immediately complied with their constitutional and statutory obligations, there would be little more to be said, other than in respect of costs. Unfortunately, that is not the case, for two reasons:

33.1. First, the respondents have not been candid with this Court. In their answering affidavit, they assert that they have done what needs to be done to meet their obligations, and that this case is therefore moot:

> *"… we are in fact doing precisely that which the Applicants want us to do and we have been doing so without judicial supervision under a structural interdict. There is with respect no need for any of the relief pursued in this application."*[16]

But that is misleading. It omits the fact that to the extent that steps were taken, that was as a result of this application.

33.2. Second, and more fundamentally, <u>in fact the respondents have not complied with their constitutional and statutory obligations</u>. When the respondents received the answering affidavits, on 23 June 2020 they undertook a rapid survey of what had actually happened in the provinces with regard to meals for learners other than those in Grades 7 and 12. They discovered administrative chaos, confusion, and non-delivery.

[16] Record 011012 AA para 11.

RESPONDENTS HAVE NOT COMPLIED WITH THEIR CONSTITUTIONAL OBLIGATIONS

34. The rapid survey on 23 June 2020 revealed that the NSNP has not been rolled out to all qualifying learners in all grades across the country. In the Limpopo Province, even learners in Grades 7 and 12 are not receiving sufficient food in terms of the NSNP.

35. The following information emerged from the survey of a sample of schools, learners and parents who were contacted on 23 June 2020, the day after the "due date" of 22 June 2020:[17]

36. In the Limpopo Province, 45 schools and two parents were contacted:

    36.1. None of the schools reported providing NSNP meals to learners other than the Grade 7 or 12 learners who had returned to class.

    36.2. None of the schools reported having received any communication from the Department that meals must be provided to all learners.

    36.3. 18 of the schools reported that the food delivered for the Grade 7 or 12 learners was insufficient even to feed learners in those grades. Learners are being sent home early; asked to bring extra food; or given smaller portions; or principals, educators or SGBs are funding the purchase of additional food for the Grade 7 and 12s.

[17] Record 012-14 - 012-19, RA.

36.4. One of the schools is part of a pilot program in which the NSNP funds are transferred directly to schools. This school reported that it had received funds sufficient to feed all learners and will implement such feeding upon being given the go ahead. As of 23 June 2020, the school had not been given the go ahead. None of the other schools had plans to expand feeding.

36.5. The two parents of learners in Limpopo reported that they were not aware that the NSNP had been reinstated for all the learners who ordinarily benefit from the program and their children, who are not yet back at school, have not received any meals. There has been no communication with them in this regard.

37. In KwaZulu-Natal, nine schools and 10 parents were contacted:

37.1. Five of the schools reported providing meals to all learners, regardless of whether they have returned to class. However, one of these schools reported that it had only received sufficient food for the Grade 7s.

37.2. Eight of the schools received sufficient food for all learners. However, five of them had no plan for the distribution of meals to learners who have not yet returned to class.

37.3. None of the parents of learners in grades other than Grade 7 and 12 reported that their children received school meals this week, although four of them had received communication that this would occur and that

the plan, as explained to them, was that their children would receive a meal through other learners.

37.4. [redacted] deposed to an affidavit in the founding papers. She is a minor and primary care giver to her two siblings, one in Grade 2 and another in Grade 5 at Bhekabantu Primary School. She reported that she was not aware of plans to reinstate the NSNP for all eligible learners. To date, her two siblings had not received any meals from their school. She did not know when they will start to do so.

37.5. [redacted] a parent of four learners in Grades R, 3 and 9, reported that since the re-opening of schools, none of her children have received school meals. She does not know when the NSNP will resume for learners who are not in Grades 7 or 12.

38. In Mpumalanga, two schools were contacted. One of them reported feeding all learners and the other reported feeding only Grade 7 learners.

39. In the Eastern Cape, 15 schools were contacted by the Legal Resources Centre:

39.1. All reported that towards the end of May 2020, they had received NSNP funding for the month of June.

39.2. However, only three schools reported that they had received sufficient funds to feed learners in all the grades. Most of the schools had received allocations for only Grade 7 or 12 learners.

39.3. None of the 15 schools fed learners in grades other than Grade 7 and Grade 12.

40. In Gauteng, 13 parents and two Equalisers (learner-members of the First Applicant) were contacted:

40.1. All 13 parents indicated that their children had not received any meals from school and that they had not received any form of communication informing them that their children would be receiving meals from their respective schools.

40.2. One Equaliser, who is in Grade 10, said that she had not received any meals from her school to date, and that she has not received any indication of when she would start receiving meals.

40.3. The second Equaliser, who is in Grade 12 stated that she had returned to school and that meals have been made available.

41. In the Western Cape, a mother of two children, one of whom ordinarily received NSNP meals, and two Equalisers were contacted.

41.1. The mother stated that her child had not received any meals since the re-opening of schools. Further, she had not received any form of communication informing her that the child will be getting food from the school.

41.2. One Equaliser, who is in Grade 10, stated that she had not received any meals from her school to date and had not received any indication of when she would start receiving the meals.

41.3. The second Equaliser, who is in Grade 12, stated that she had returned

42. What transpired in the provinces simply shows why a supervisory order is mandatory on these facts.[18]

43. The undeniable fact is that the respondents have not complied with their constitutional and statutory obligations.

44. It is important to appreciate that the answering affidavit does not allege that they have done so. In respect of each province bar one, the Director-General states that *"the feeding of all learners will commence on Monday 22 June 2020"*,[19] or uses another formulation to that effect, by referring to this as a "target date" or saying what "should happen" on that date.

45. Two things are striking in this regard:

45.1. The Director-General signed the answering affidavit on 22 June 2020, and the heads of the provincial departments signed their confirmatory affidavits on the same day. The answering affidavit refers to 22 June

[18] Record 012-23 - 012-29.

[19] Record 012-49 AA para 49.1.4.

2020 as the date on which the feeding of learners *"will commence"*, as if it were a date in the future.

45.2. Nowhere in the affidavit is an allegation made, or evidence produced, that the feeding of learners did in fact commence on that date.

46. There is therefore no dispute of fact on the papers.

47. The respondents did not even produce evidence of plans which had been made to ensure that this would take place on 22 June 2020. The administrative chaos and confusion demonstrate that such evidence could not have been produced.

Administrative chaos and confusion

48. Administrative chaos and confusion are widespread. It can be fairly inferred that this arises from the attempt by the respondents to cover their tracks by scrambling around after the launch of this application, to show that it had at all times been their intention to provide meals to all qualifying learners, and to avoid an order being made by this Court.

49. In the Free State:[20]

49.1. A circular was only issued to school principals on 17 June 2020, requesting the development of plans for the roll-out of NSNP to all grades;

[20] Record 011-50 para 49.2.

49.2. The provincial department then issued a statement on 18 June 2020 announcing that learners not yet phased into school may collect meals from 22 June 2020.

49.3. In response, SADTU objected to this short notice period, stating that schools were not provided any real opportunity to plan for the announced implementation.

49.4. No facts have been provided to show that the NSNP was in fact rolled out to all learners on 22 June 2020.

50. In Gauteng:[21]

50.1. On 15 June 2020 the Department made a presentation to a committee of the heads of all provincial education departments. The nutrition contract with the supplier had been finalised with effect from 19 June 2020. But the problem was to find a feasible option to include learners who were not yet back at school in the feeding programme.

50.2. The plan was to roll out the programme to learners not back at school from 22 June 2020. (I explain below the transparent unfeasibility of any such plan.)

51. In KwaZulu-Natal:[22]

[21] Record 011–54 para 49.3.

[22] Record 011-56 para 49.4.

51.1. An initial circular was issued, which committed to *all* learners receiving meals under the NSNP once schools reopened.

51.2. This circular was summarily revoked on 5 June 2020 and replaced by a circular indicating that the NSNP would only be provided to returning grades.

51.3. On 15 June 2020, after this application had been launched, the initial circular was reinstated, with an indication that food would be delivered to learners of all grades from 17 June 2020 – a mere two days later (one of them being a public holiday).

51.4. It is fanciful to imagine that this could have been achieved.

52. In respect of Limpopo:[23]

52.1. An initial circular to schools limiting the roll-out of the NSNP to returning grades was withdrawn, presumably after the institution of this application;

52.2. The Director-General states that the "target date" for full operational status was 22 June 2020, but no evidence is provided that this "target" was met.

52.3. The Second Applicant has not even received sufficient weekly rations to provide for learners in Grade 7 and 12 for the full week, let alone for

[23] Record 011-58 para 49.5.

those learners who have not yet returned to school. Moreover this appears to be the situation at neighbouring schools in the district.[24]

53. In the Northern Cape:[25]

53.1. On 17 June 2020 the provincial department retracted an earlier decision to roll-out the NSNP only to Grades 7 and 12, and distributed a circular directing that the NSNP should be provided to all qualifying learners.

53.2. Again, the inference is unavoidable that this was the result of this litigation.

53.3. The Director-General states that the roll-out "should be" fully operational from 22 June 2020. It also states, however, that human resource capacity has presented a challenge, and that "all indications are that more funding is going to be needed" to sustain the programme.

53.4. No indication is provided as to what plans, if any, exist to ensure that funding is obtained to mitigate the impact of funding shortages.

53.5. And again, there is no evidence that what "should" happen did in fact happen.

[24] RA1 Record 012-57.

[25] Record 011-62 para 49.7.

54. In the North West:[26]

54.1. The North West only planned to roll-out the NSNP to Grades 7 and 12.

54.2. In a letter dated 9 June 2020 headed "NSNP response to Section27 demands" (Annexure MBE48), the provincial education department stated that the province will engage schools on catering for provision to all learners. No indication is provided as to whether, and if so when, this will actually happen.

54.3. The Director-General states that the Province is in "full swing" to roll-out by 1 July 2020, but there is no evidence as to what finalised planning documents, circulars or guidelines have been distributed within the Province.

54.4. But what is crystal clear is that the transfer of relevant funds will only be taking place in July 2020. It is therefore not clear how schools will be able to implement the programme from 1 July 2020. It seems very unlikely.

55. The Eastern Cape provincial education department was one of the first to communicate an intention to roll-out the NSNP to all learners. However[27]

[26] Record 011-65 para 49.8.

[27] Record 011-48 para 49.1.

55.1. It is clear from the Answering Affidavit that these plans were only finalised following the initiation of this litigation.

55.2. On 15 June 2020, in a letter headed "Provincial response pertaining Equal Education and Section 27", the province states that the NSNP will be provided to all learners;

55.3. An instruction note was subsequently circulated to schools on 17 June 2020 indicating that schools should submit plans for the roll-of the NSNP to all learners as from 22 June 2020.

55.4. There is no evidence as to the extent to which schools were able to provide and then implement such plans on short notice.

56. In Mpumalanga:[28]

56.1. The provincial education department issued a circular on 9 June 2020 stating that meals would be provided to all learners and requiring schools to develop written implementation plans by 15 June 2020 for approval by the Circuit Manager.

56.2. The Answering Affidavit states that the province's target for full operational status was 22 June 2020 but "that status has already been achieved" and that the NSNP has been resumed "very effectively and efficiently".

[28] Record 011-60 para 49.6.

56.3. This is encouraging. But again, the Respondents have not furnished any evidence as to the implementation plans that have been approved, or any reports demonstrating that full roll-out by schools to all learners has in fact been achieved.

57. In the Western Cape:[29]

57.1. As was recognised in the Founding Affidavit there has been a consistent commitment to roll-out the NSNP since May 2020.

57.2. The provincial education department has admitted that the feeding scheme is not yet reaching all learners who qualify.

57.3. It appears that steps have been implemented for schools to inform parents of the roll-out of the NSNP to all learners.

58. The reason for the administrative chaos and confusion is illustrated by what happened in Gauteng. The Director: School Nutrition of the Gauteng Provincial Department of Education sent a circular to the District Coordinators of the NSNP on 22 June 2020. The circular is headed *"Feeding Learners in All Grades"*. It does the following:

58.1. It attaches a copy of this application to this Court;

[29] Record 011-67 para 49.9.

58.2. It refers to *"the meeting which we had <u>this morning</u> as to the action plan that needs to be followed"*;

58.3. It states that the Department *"intends implementing this project as of 22nd June 2020"*.[30]

59. The circular demonstrates that this sudden decision to undertake another about-turn, apparently made on or about 14 June 2020, could not conceivably have been implemented by 22 June 2020. The respondents must have known this.

60. If the respondents had wanted to place the truth before the court, they could have done so by stating frankly that:

60.1. they had decided to change course again as a result of this application, and would without delay recommence providing meals under the NSNP to all qualifying learners;

60.2. it would not be possible to implement this by 22 June 2020, the date when the answering affidavit was filed;

60.3. it would be possible to implement this by a date stipulated by them; and that

60.4. they undertook to report to the applicants and to the court on their compliance with that deadline.

[30] Record 012-22 para 59; RA15 012-148.

61. We submit that if the respondents had followed this course, the court might have looked upon their position with some limited measure of sympathy.

62. Instead, however, the respondents have chosen to attempt to brazen it out by concealing the fact that this sudden burst of activity was brought about by this very application, in an attempt to contend that they at all times intended to provide meals to all qualifying learners; to conceal the fact that they would not be able to deliver meals to all qualifying learners by 22 June 2020; and to assert that there was no need for this application, because they were already doing what the applicants require.

63. We respectfully submit that this lack of candour calls for adverse comment by the court.

64. More fundamentally, it demonstrates why there is a need for the court to exercise supervision by means of a structural interdict. Regrettably, the respondents have demonstrated by word and deed that their assurances cannot be relied upon.

A "COLOSSAL DISASTER": THE CONSEQUENCES FOR CHILDREN ON THE NSNP

65. For the learners with whom this application is concerned, the consequences have been devastating. It will be recalled that the National School Nutrition Program (the Nutrition Program) feeds some 9 million learners.[31]

66. Food security across the country has decreased since the Lockdown. Hunger has increased. On 4 June 2020 the Human Sciences Research Council presented a study which found that 38 % in the group that had been sampled had gone to bed hungry and 22 % reported a member of their household having gone hungry since the announcement of the Lockdown. This was especially the case for people whose household income is under R10 000 per month.[32]

67. For NSNP beneficiaries, the problem was acute. Overnight, a reliable source of food came to an end.

68. The respondents assert that they have used their *"best endeavours, within the scope and ambit of their resources available*" to put reasonable measures in place for the continuation of the NSNP. They claim that they are *"in fact doing precisely that which the applicants want us to do and we have been doing so without judicial supervision under a structural interdict.*[33]

[31] Record 006-13; FA para 4

[32] Record 006-26; FA para 37, Record 006-90; Annexure NM5

[33] Record 011-12; AA para 11

69. It is so that some *measures* have been put in place to mitigate the suffering. But Professor Jeremy Seekings in his study *"Report on Social Grants and Feeding Schemes under the Covid-19 Lockdown in South Africa"* shows that an estimated 34 million people have been pushed below the extreme poverty line since the Lockdown.

70. Seekings noted the statement by the Government on 29 May 2020 that 788 000 food parcels had been distributed. He says that this does not come close to making up for the suspension of the school feeding scheme:

    70.1. The NSNP plays a unique and targeted role. It provides 9 million meals per day, or 45 million meals per week, or 400 million meals over nine weeks, specifically to children.

    70.2. By contrast the 788 000 food parcels, focused on an entire family, would translate to some 200 million meals over a nine week period - not even half of what the children-specific programme provided.

    70.3. He concludes that the suspension of the NSNP was *"a colossal disaster*".[34]

71. The respondents state that they *"lacked the infrastructure and resources to continue feeding learners*" under the NSNP during the Lockdown.[35] Now that the schools have re-opened, that infrastructure is again available. Yet it is clear

[34] Record 006-29; FA para 46.

[35] Record 011-16; AA para 18.

that the overwhelming majority of the 9 million beneficiaries of the NSNP still do not receive their daily meals.

72. The Director-General says that the state *"could immediately commence*" in co-operation with the National Department of Social Development to target needy learners in households and communities as part of the Disaster and Social Relief Program.[36] A random sample of donations is mentioned in the Answering Affidavit.[37] This is followed by vague statements regarding an alleged co-operation with the National Department of Social Development. But it is frankly admitted that the Department of Social Development was *"experiencing quite a number of logistical problems and the effort, to reach the learners that benefited from the National Schools Nutrition Program when schools were in session during this period when the schools were closed, was not as successful as we had hoped.*"[38] And as the Minister acknowledged, that Department has been unable to produce any credible data as to the reach of the programme.[39]

73. The Western Cape allocated additional funds that were used for a feeding scheme for needy learners during the period of the Lockdown. It appears to have been possible in the Western Cape to put in place a substantial alternative which ensured the continuation of access to food during the Lockdown.

74. But for most of the affected learners, the "colossal disaster" was not only not averted after March 2020 – even now, in June 2020, it continues. They are still

[36] Record 011-20; AA para 20.

[37] Record 011-18; AA para 19.4.

[38] Record 011-18; AA para 19.4.

[39] MBE22 011-287 at 288.

without their daily school meals. The promise to resume the programme with the planned resumption of schools on 1 June 2020 has not materialized.

75. And so the hunger described in the founding papers continues. The founding affidavit and supporting affidavits set out in detail the experiences of learners and their parents across the country. They explained the devastating impact of the suspension of the NSNP on learners and their families; an impact that continues for as long as learners are not receiving food.[40] For example:

75.1. Learner EE7 and his sister survive on R500 a month with which they can buy pap, but nothing else. EE7 has now returned to school and is receiving meals, but his sister is not receiving NSNP meals.

75.2. Learner EE2 says her younger sister gave up trying to study from home because there is not enough money for food and data. EE2 feels guilty that, as a Grade 12 learner, she is now receiving an NSNP meal but her younger sister and others in the area are still hungry. Guilt at eating when others go hungry was an emotion shared by many of the Grade 12 learners whose testimony is reflected in this application.

75.3. Learner EE7 describes her family fighting over bread and necessities given the suspension of the NSNP and the food shortage at home.

75.4. [redacted] a 17 year old who is the de facto caregiver for a family of six people, two of whom are learners who ordinarily receive a

[40] Record 006-31-006-41' FA paras 50-74.

meal through the NSNP, said that they had not been able to buy food in June.

75.5. [redacted] the primary caregiver for a family of ten people, four of whom are learners who usually receive a meal under the NSNP, said that the groceries that normally last for a month now last only for three weeks and they struggle to afford to buy more.

75.6. [redacted] describes the pressure and urgency to find food for his two children and the stress that this causes.

75.7. [redacted] describes how her 10 and 15 year old children are experiencing “low energy and exhaustion” due to the shortage of food.

76. The Respondents have not attempted to respond to this evidence, and the further evidence in this regard. They do not allege that these learners are now receiving the meals to which they are entitled.

77. This failure to provide evidence of the actual provision of meals does not apply only to the learners who were identified in the founding papers. There is no evidence of the actual provision of meals at all to learners whose classes have not resumed. Beyond generalised statements, the Respondents provide no evidence of what meals have actually been provided, and to whom they have been provided. For example, no school principals or circuit managers have made affidavits providing evidence that meals have in fact been provided.

78. The survey carried out by the applicants demonstrates what has actually happened, and is continuing to happen.

79. This application was launched and served on 12 June 2020. Ten days later, the Respondents provided no evidence at all that meals are now actually being provided to the qualifying learners. All they have provided is generalized statements of good intention. They have not even produced an actual plan which shows that in each province they will provide the food, and how they will do so. They say simply in general terms that they plan to provide the food (in most instances) from 22 June 2020, the date of their affidavits. If they had in fact provided meals on that day, by the time when the answering affidavits were signed there would have been ample evidence showing what had actually been done in advance to place them in a position to make this happen. No such evidence is produced.

80. There is no evidence showing when the qualifying learners will actually resume receiving daily meals through the NSNP. Meanwhile, child hunger continues.

81. We submit that there is a widespread, daily and continuing breach of the Constitution.

A CONTINUING INFRINGEMENT OF THE CONSTITUTION

82. The applicants rely on two rights in the Bill of Rights: section 28(1)(c), read with the section 27(1)(c), and section 29(1)(a). These rights are reinforced by sections 7(2) and 9(1) and (2). We discuss each right below.

Section 28(1)(c): The child's right to basic nutrition

Section 27(1)(b): The right of access to food

83. Section 28(1)(c) provides that every child has the right *"to basic nutrition, shelter, basic health care services and social services"*. In terms of section 28(3) a child is a person under the age of 18 years. A child also has a right of access to food in terms of section 27(1)(b) of the Constitution.

84. We deal first with the child's right of access to food.

85. The NSNP provides basic nutrition. It does not provide all meals that a child needs, but only one per day. It is basic because its intention is not to cover all nutritional needs of a child. Its focus is those which are necessary for learning.

86. The State is under a duty to give effect to this right. The right is not qualified by any internal modifiers such as *"progressive realization"*. It is immediately enforceable on its language. We accept that it may be limited by section 36 of

the Constitution. But this is not the case made out by the respondents.[41] The plain words of the Constitution should be given effect.

Right properly engaged

87. The respondents deny that the right to basic nutrition is engaged in this application. But this is contradicted by their own official statements as to the purpose of the NSNP.

88. The NSNP has been in operation since 1994. It was introduced under the Reconstruction and Development Program (RDP).[42] Clause 2.11 of the RDP deals with nutrition. It states the problem as follows: *"an enormous number of South African children under the age of 10 years are malnourished and/or stunted. Many thousands of adults, especially the elderly, are hungry, and millions of people, young and old, live in constant fear of being hungry.*".

89. In this context, the RDP aimed to ensure that *"within three years, every person in South Africa can get their basic nutritional requirement each day and that they no longer live in fear of going hungry.*".

90. Although it began as a primary school programme, the NSNP has since been expanded to all learners in quintile 1, 2 and 3 primary and secondary schools.

[41] Section 36 provides that for a limitation to be permissible, it must be "in terms of law of general application". The respondents do not allege any law which permits this limitation.

[42] *The Reconstruction and Development Programme* (1994, African National Congress), p 41.

In some provinces, the program extends to selected quintile 4 and 5 public schools.[43]

91. That objective of the RDP are echoed in the 2016 Report by the Department of Basic Education in its evaluation of the NSNP. That Report stated that although other forms of dealing with basic nutrition such as social grants remain, school feeding schemes remain pivotal in the State's effort to combat hunger among children. Families generally remain vulnerable to food insecurity. Although child hunger has declined, it remains unacceptably high.[44]

92. The 2016 Report explained the rationale for School Nutrition Program:

> *"School Nutrition Programs*, *School Feeding Schemes, Food for Education (FFE) programs and take home rations are all responses to poverty and the poor nutritional status of children. There are two main groups of arguments in support of feeding children in schools: The first group is a nutritional one; and the second is an educational one. However, it is difficult to separate the two, since well nourished children are assumed to perform better at school.*"[45] (Our underlining)

93. The Five-Year Strategic Plan 2015/2016 to 2019/2020 published by the Department of Basic Education[46] makes a similar point. It states that the NSNP

[43] Record 006-52; FA para 103

[44] Record 006-321; Annexure NM50 at pages 325 to 326

[45] Record 006-321; Annexure NM50 at page 326

[46] Record 006-339.

"is a government program for poverty alleviation, specifically initiated to uphold the rights of children to basic food and education." As we have noted, the Conditional Grant in the Division of Revenue Bill says the same.

94. Thus, the program serves the clear purpose of providing basic nutrition. The rationale for it is plain to see. The State has recognized the levels of poverty and the impact on children. One of the outcomes of good nutrition is improved performance at school. But it is not the sole outcome. The goals of nutrition and good performance at school are mutually reinforcing and indivisible.

Limitless duty?

95. The respondents also argue that the State has no obligation to provide each and every child with meals every day without limits. That is to caricature this application. The applicants have made no such argument. We submit, rather, that where the State has assumed the particular vehicle of providing the right to basic nutrition through the NSNP, it may not summarily terminate it without a similarly suitable program. The applicants do not ask for meals other than those that the State has committed to provide. Nor do they ask for meals for each and every child, in addition to those whom the State has undertaken to feed.

96. Section 28(1)(c) should be read together with section 7(2) of the Constitution. It obliges the State to *"respect, protect, promote and fulfill the rights in the Bill of Rights.*". As we have shown above, the State intended that qualifying learners will receive nutrition through the NSNP. The State has a duty to respect and protect that entitlement. That submission applies with equal force to the

right to basic nutrition, the right to food, and right to basic education, all of which are fulfilled by the NSNP.

97. That is so because the Constitution creates a negative obligation not to impair the right of access to the rights in our Constitution. This obligation was first identified by the Constitutional Court in its *Grootboom* judgment, in the context of evictions which deprive people of access to housing.[47] The Court subsequently applied this to the right to basic education in the *Juma Masjid* case.[48] The learners have an entitlement to receive, and have actually received, the food which is provided by the NSNP. According to the Director-General, this had to be suspended when the schools were closed in March 2020, because the Conditional Grant does not permit the provision of the meals other than when schools are open.[49] Whether or not that is correct, the entitlement and the corresponding obligation resumed when the schools were reopened on 8 June 2020. The state is under an obligation not to deprive the learners of that right.

98. In *Law Society of South Africa & Others v President of the Republic of South Africa & Others*[50] the Constitutional Court invalidated the decision of the President to sign an International Treaty whose effect was to abolish the Southern African Regional Tribunal. The Court noted that the impugned protocol *"seeks to take away a pre-existing individual right of access to the*

[47] Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 (CC) at para 34, referring the "obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".

[48] Governing Body of the Juma Musjid Primary School v Essay N.O. 2011 (8) BCLR 761 (CC).

[49] Record 011-14 at 15; AA para 16.

[50] 2019 (3) SA 30 (CC)

Tribunal.".[51] Second, the Court found that the Act impermissibly extinguished *"citizens' existing rights*" by infringing the obligation to respect, protect, promote and fulfill the rights in the Bill of Rights contained in section 7(2)[52].

99. In *Governing Body of the Juma Musjid Primary School v Essay* N.O.[53] it was held that the State is a bearer of positive obligations in respect of the rights contained in the Bill of Rights. But the rights may also be negatively protected from improper invasion. The breach of this obligation *"occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection.*"[54]

100. We submit in this case, the State accepted the obligation to provide basic nutrition to a specific category of children, namely learners who meet the qualification criteria to benefit from the nutrition program. Having accepted and assumed that responsibility, the State may not to deprive the children of that right by discontinuing the programme. To put the matter at its lowest, the State may not do so unless it provides a compelling justification for this. No such reason has been proffered.

101. This approach is consistent with the international jurisprudence in respect of socio-economic rights: *"any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified*

[51] Law Society at para 72

[52] Law Society at para 78

[53] 2011 (8) BCLR 761 (CC)

[54] Juma Musjid at paras 57 to 58

by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".[55]

102. This applies whether the right in question is the child's right to food under section 28(1)(c), or the right to food in terms of section 27(1)(c).

Primary vs Alternative duty

103. The State's final argument under this heading is that it bears no *"primary"* obligation to provide basic nutrition. It claims that such obligation rests with the parents. The argument stands to be rejected. Not every learner qualifies under the NSNP. Specific quintiles are selected, presumably on the basis of socio-economic data in respect of the qualifying schools. No doubt one of the factors taken into consideration is the ability of parents to provide the required meals. The founding premise of the NSNP is that the children will not receive this basic nutrition from their parents. To claim that parents – many of them now in even more precarious economic circumstances than before the Lockdown - should now *"take back*" the responsibility of providing this food is the height of cynicism.

104. But the argument is also fundamentally flawed in law. It is so that in *Grootboom*, the Constitutional Court held that section 28(1)(c) encapsulates the conception of the scope of care that children should receive in our society. One of its purposes is to *"ensure that children are properly cared for by their parents or*

[55] United Nations Committee on Social and Economic Rights General Comment 3, para 9, quoted in Grootboom at para [45].

families, and that they receive appropriate alternative care in the absence of parental or family care."[56]

105. Speaking specifically about shelter the Court held *"through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children is children are being cared for by their parents or families.*"[57]

106. But as the Court, noted the judgment does not mean that the State incurs no obligation in relation to children who are being cared for by their parents or families. The State remains responsible to provide families with other socio-economic rights to enable them to provide for their children.[58]

107. So the question is what is to happen where the parental or family care is inadequate. This is the real question in this case. The Constitution does not contemplate that children whose parents cannot afford to feed them should either be left to starve, or removed from their parents. Rather, it envisages that the State will guarantee their rights under section 28 of the Constitution.

[56] Grootboom at para 77

[57] Grootboom at para 77

[58] Grootboom at paras 76 to 78

108. The authority for this proposition is to be found in *Minister of Health & Others v Treatment Action Campaign & Others*[59] where the Court held:

> *"The State is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent or unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them.".*

109. That is precisely the case here. Cases such as *Centre for Child Law v Minister of Home Affairs*[60] provide further judicial endorsement for the approach in *TAC*. The Court held in reference to the finding in *Grootboom* that *"this suggests that the State is under a direct duty to ensure basic socio-economic provision for children who lack family care, as do unaccompanied foreign children. There is thus an active duty on the State to provide those children with the rights and protection set out in section 28."*[61].

110. In *Centre for Child Law v MEC for Education* 2008 (1) SA 223 (T) it was held that the children's rights in section 28 are not subject to internal limitation such as the availability of resources or progressive realization. They are unqualified

[59] 2002 (5) SA 721 (CC)

[60] 2005 (6) SA 50 (T)

[61] TAC at para 17

and immediate. They may, however, be limited under section 36 of the Constitution.

111. We submit that the arguments of the respondents do not avail. They reflect an impoverished understanding of our transformative Constitution. The language of section 28(1)(c) is clear. Every child is entitled to basic nutrition. The NSNP fulfils that right. Official State policy affirms this. Under section 7(2) of the Constitution the State must respect and protect existing access to the right. The State breaches the Constitution when, as in this matter, it abdicates responsibility by shifting the obligation back to parents, when it knows that they are unable to feed their children. As a matter of law, where parents are unable to provide adequate parental care, the State is duty bound to step in. Nowhere is this more stark than on the present set of facts. An appropriate declaratory order should accordingly be made that the State has failed to fulfil its obligations imposed by section 28(1)(c) of the Constitution.

112. A similar analysis applies to the general right of access to food under section 27(1)(b) of the Constitution:

> *(1) "Everyone has the right to have access to …*
>
> *(b) sufficient food …;*
>
> *(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights"*.

113. First, a deliberately retrogressive step, which removes and does not replace access to a constitutionally guaranteed right cannot conceivably constitute "progressive realization' of the right.

114. Second, as we have noted above, a retrogressive measure of that nature requires special justification in order to qualify as "reasonable". No such justification is offered. Most specifically, the respondents cannot and do not contend that they cannot afford to resume doing what they did before the Lockdown. It is common cause that the availability of funds is not an issue.

115. Third, a measure of this kind is not "reasonable" in terms of the criteria laid down by the Constitutional Court in *Grootboom*. Yacoob J said on behalf of the Court:

> *[44] Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.*

116. A measure which deprives one of the most vulnerable groups – indigent children – of access to one of the most basic needs – food can hardly qualify as "reasonable'.

The right to a basic education

History matters

117. Section 29(1)(a) of the Constitution provides that everyone has the right *"to a basic education"*.

118. Education, former Deputy Chief Justice Moseneke once noted, *"is primordial an integral to the human condition.".* Basic education is expressly provided for in the Constitution.[62] Education's potential is transformative, for both the individual and society.

119. At the heart of the Constitution is a commitment to resolving the inequality created under colonialism and apartheid.[63] The goal is to create a society based on the values of human dignity, equality and freedom.[64]

120. Therefore, interpreting the right to basic education must entail the specific goal of resolving the legacy of inequality in the education system. Yet, provision of education is trapped by the same apartheid legacy that it seeks to resolve. Formerly white schools continue to enjoy privilege. Black schools, on the other

[62] Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng & Another 2016 (4) SA 546 (CC) at paras 1 and 3

[63] Section 9 of the Constitution.

[64] Soobramoney v Minister of Health, Kwa Zulu Natal 1998 (1) SA 765 (CC) at para 16

hand are trapped in poverty. The Constitutional Court has remarked *"today, the lasting effects of the educational segregation of apartheid are discernable in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."*[65].

The scope

121. While the full scope of the right to a basic education is yet to be defined, some judicial pronouncements assist in this regard.

122. The right to a basic education is not subject to progressive realization or available resources. It is immediately realizable.[66]

123. Teaching staff, non-teaching staff and adequate teaching resources are necessary components of the right.[67]

124. The State's obligation to provide a basic education "is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners."[68]

[65] Juma Musjid Primary School at para 42

[66] Juma Musjid Primary School at para 37

[67] Centre for Child Law & Others v Minister of Basic Education & Others (National Association of School Governing Bodies as amicus curiae) 2012 (4) ALL SA 35 (EC) at para 32

[68] Madzodzo & Others v Minister of Basic Education & Others 2014 (3) SA 441 (ECM) at para 20

125. The right extends to textbooks, which are clearly part of the essential elements to the realization of the right;[69] to desks and chairs at which learners may learn;[70] and to scholar transport to enable learners to get to school.[71]

126. We now address the objections of the State to this claim.

State policy is instructive on the content of the right

127. The respondents deny that the NSNP is part of the right to a basic education. They are wrong. But this is not a question to be answered at the level of generality.

128. In *Section 27* Kollapen J held: *"What is relevant, however, in the context of the right, is the narrow question in this application whether the provisions of textbooks is a component of the right to basic education? The answer to this question, in my view, can be found quite easily in the policy statements of the State in respect of textbooks and their relationship to giving effect to the right to basic education."*[72] (Emphasis added)

129. Upon an analysis of various policy pronouncements made by the State, he concluded that *"the provision of learners support material in the form of*

[69] Section 27 & Others v Minister of Education & Another 2013 (2) SA 40 (GNP) at para 22

[70] Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM)

[71] Tripartite Steering Committee and another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG)

[72] At para 23

textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right."[73].

130. The Supreme Court of Appeal has taken the same approach. In *Minister of Basic Education v Basic Education for All*[74] the Court held:

> *"I agree with Counsel on behalf of BEFA that the DBE did not only set itself a 'lofty' ideal but that its policy and actions, as set out in the affidavits filed on its behalf, all indicate that it had committed to providing a textbook for each learner across all grades. The content of the section 29(1)(a) right is also determined in the DBE's Action Plan for 2014 – towards the realization of schooling in 2025. That certainly is what it achieved in pursuit of its own policy in respect of the other 8 Provinces and on its version of events for almost 98 percent of learners in Limpopo."* (Emphasis added)

131. The SCA thus measured the delivery of textbooks by reference to the Government's own policy pronouncements. These can be instructive in defining the scope of the right.

132. The same applies here.

133. First, the Division of Revenue Bill 3 of 2020 is relevant. It has been passed by the National Assembly. Its anticipated outcomes include *"access to education"*. The minimum feeding requirements in terms of the Bill includes the provision of

[73] At para 25

[74] 2016 (4) SA 63 (SCA)

meals to all learners in quintile 1 to 3 primary and secondary schools as well as identified special schools on all school days. The feeding requirements include the provision of nutritious meals to targeted learners in identified quintile 4 and 5 in line with available resources.

134. The Government had thus planned, and the National Assembly has authorized and allocated, the expenditure of funds to provide meals for all learners in quintile 1 to 3 primary and secondary schools and identified special schools on all school days.

135. Then there is the National Policy Guideline of 2009. It states that the NSNP is intended to provide meals to the most needy learners to help them to remain alert and receptive during lessons.

136. The 5-year Strategic Plan 2015/2016 to 2019/2020 specifies that the School Nutrition Program is used to alleviate poverty and is *"specifically initiated to uphold the rights of children to basic food and education".*

<u>The NSNP is an important component of the right</u>

137. Finally, we submit that in any event, properly construed, the right to a basic education must include, in appropriate circumstances nutrition provided for by the State. We say so with the following considerations in mind.

138. Firstly, the right to education is self-evidently an important right for self-development. But it acquires special significance in a country characterized by vast differences in race and class. The State itself accepts that the NSNP gives

effect to section 9(2) of the Constitution. Contrary to what the state appears to contend, section 9(2) does not entitle the state to confer benefits which it can retract at will. It is integral to the goal of equality. The Constitutional Court has affirmed in the *Van Heerden*[75] case that the measures taken under section 9(2) are "*integral to the reach of our equality protection*." The provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "*full and equal enjoyment of all rights*".[76] Restitutionary measures to promote equality under section 9(2) constitute an integral component of the right to equality.

139. The class of learners who benefit from the NSNP are especially vulnerable. They occupy a special place in the scheme of the Constitution as a consequence of their vulnerability. Section 28(2) *"recognizes the vulnerability of children, their special importance in our society and the need for additional protection for them."*[77] Moreover there is the *"overarching principle"* in matters involving children's rights and interest, namely that their best interest must be considered.[78]

140. The *"primary"* caregivers and parents are, on the common cause facts, unable to provide adequate food for their own children. This too is a legacy of the past. Trapped between poor parents and a recalcitrant State that refuses to recognize

[75] Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC).

[76] Van Heerden at para 30.

[77] AB & Another v Pridwin Preparatory School & Others [2020] ZACC 12 (17 June 2020) at para 142

[78] Section 28(2) of the Constitution

a constitutional entitlement to receive meals, the position of the learners in this application could not be worse.

141. The injunction in section 39(1) of the Constitution applies. When interpreting provisions in the Bill of Rights this Court should *"promote the values that underly an open and democratic society based on human dignity, equality and freedom."*.

142. Nothing is more undignified than starvation. If the State's argument is upheld that in the circumstances of this case the primary obligation rests with the parent, and there is no obligation on the State, the outcome is truly perverse. Learners would be unable to receive food from their parents. They would also not be able to demand the same from the State. Their vulnerability having worsened because of the lockdown, they would be driven to starvation.

143. This would not be an interpretation to the Bill of Rights that promotes human dignity, equality and freedom. It does the opposite. Hence, a constitutionally compliant interpretation must mean that the right to a basic education includes the entitlement to receive meals under the NSNP.

144. We submit that it is plain that the two rights in issue constitute a clear constitutional basis for the claim of the applicants.

APPROPRIATE RELIEF

145. The State has infringed the rights of learners. Its promises have been broken. Appropriate relief must be granted. We ask for both declaratory and supervisory relief.

146. Declaratory relief is competent in three instances. First, as *"appropriate relief*" in terms of section 38 of the Constitution. Second, where law or conduct is declared unconstitutional under section 172(1)(a) of the Constitution. Third, as just and equitable relief in terms of section 172(1)(b) of the Constitution.

147. We submit that this is a clear case for declaratory relief. There is a dispute as to whether the State bears the obligations for which the applicants contend, and whether the Minister and the MECs have carried out their obligations. This requires determination by the court.

When will supervisory and declaratory relief be granted?

Section 38 of the Constitution

148. Supervisory relief can be granted as just and equitable relief in terms of section 172(1)(b) of the Constitution, and in terms of section 38 of the Constitution.

149. Section 38 provides:

> *Anyone listed in this section has the right to approach a competent Court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief, including a declaration of rights.*

150. Thus, to qualify for appropriate relief an applicant merely needs to show that a right in the Bill of Rights has been infringed or is threatened with infringement. The applicants satisfy both requirements.

151. In *Fose v Minister of Safety & Security*,[79] the Constitutional Court explained the meaning of *"appropriate*" relief. It stated:

> *"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country so few have the means to enforce their rights through the Courts, it is essential that on those occasions where the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The Courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."*

152. In *Hoffmann v South African Airways*,[80] the Court held that appropriate relief in terms of section 38 must be construed purposively and in the light of section

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79 1997 (3) SA 786 (CC), para 69.

80 2001 (1) SA 1 (CC)

172(1)(b), which empowers the Court in constitutional matters to make any order that is just and equitable. The Court held that *"appropriate relief must be fair and just in the circumstances of the particular case."*. Appropriateness imports the *"elements of justice and fairness*":[81]

> *… the determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case.*

153. Appropriate relief is also forward looking. One of its objects is to *"deter future violations"*. This imposes an obligation on the Court, faced with evidence which proves violation of rights, not to gloss over the violation on the basis that declaratory relief is not necessary.

154. The relationship between sections 38 and 172 of the Constitution was recently considered by the Supreme Court of Appeal in *Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another.*[82] The Court held as follows:

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81 Hoffmann at para 42.

82 2020 (1) SA 52 (SCA).

"In the circumstances, the respondent's conduct must be declared inconsistent with the Constitution and therefore unlawful, as required by section 172(1)(a) thereof. This finding entitles the applicants to appropriate relief for the violation of their fundamental rights as envisaged in section 38 of the Constitution. As to what constitutes "appropriate relief", the Constitutional Court said in Fose "it is left to the Courts to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the Courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."

Section 172 of the Constitution

155. Section 172(1) of the Constitution provides that when a court is dealing with a constitutional matter within its power it must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency and may make any order that is just and equitable.

156. In *Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others*,[83] the Constitutional Court stressed the rule of law underpinnings behind the provisions of section 172 of the Constitution. The rule of law is entrenched

[83] 2011 (4) SA 113 (CC).

in section 1(c) of the Constitution, which provides that the rule of law is a foundational value of our Constitution and society.

157. In *Corruption Watch NPC & Others v President of the Republic of South Africa*[84] at para 68 it was explained that

> *"The operative word 'any' is as wide as it sounds. Wide though this jurisdiction may be, it Is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity."*

158. This echoes what was said by the Constitutional Court in *Economic Freedom Fighters & Others v Speaker of the National Assembly & Another*:[85]

> *"This Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable …*
> *The power to grant a just and equitable order is so wide and flexible that it allows Courts to formulate an order that does not follows prayers in the notice of motion or some other pleading."*

159. It is therefore clear that <u>both</u> under section 38 of the Constitution and 172 of the Constitution, the Court is entitled to grant an order that is appropriate or just and equitable.

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84 2018 (10) BCLR 1179 (CC).

85 2018 (2) SA 571 (CC), paras 210 to 211.

160. In *Mwelase v Director-General for the Department of Rural Development and Land Reform*[86] the Court held as follows (emphasis added):

> *"[46] … The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable…*
>
> *[48] In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in Black Sash I, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery.*
>
> *[49] The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. <u>In cases of extreme rights infringement, the ultimate boundary lies at court control of</u>*

[86] [2019] ZACC 30; 2019 (6) SA 597 (CC),

the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done."[87]

161. The remedy sought in this case is within the powers of this Court. It is also just and equitable, and it will be effective. It will not intrude unduly into the terrain of the Executive. It will vindicate the Bill of Rights, and ensure that the continuing breach is remedied.

162. For three reasons, judicial supervision is warranted in this case:

162.1. First, as we have shown above, the Department has played fast and loose with the facts: it misleadingly claims that it was always its intention to roll out the NSNP to all learners when schools re-open. Yet, the recordal of the Minister's decision shows that she had decided against this roll-out; and as a simply matter of fact, the NSNP was not rolled out to all learners when the schools re-opened. It is only this application which brought about a change of plan.

162.2. Second, the degree of violation is egregious. Children are a vulnerable group in general. They are especially vulnerable when they are also poor, and their parents unable to provide for them.

[87] See too Kent Roach and Geoff Budlender *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable* (2005) 122 *SALJ* 325-351, at 333-334.

162.3. Third, the consequences of continued breach by the respondents are very serious: very large numbers of children will continue to go hungry.

162.4. Fourth, as we have demonstrated, there is administrative chaos and confusion in the provinces. It requires the supervision of this Court.

163. We point out that even after the new "target" date on 22 June 2020, very large numbers of learners are still not receiving the meals to which they are entitled. It is impossible to say when they will receive them. Certainly, confident assertions by the Director-General and the other deponents as to when this "will" happen have proved to be unfounded. Their assertions, predictions and undertakings can regrettably not be relied upon.

CONCLUSION

164. The applicants have also asked for the admission of hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. The court has a discretion in this regard. We submit that for three primary reasons the evidence must be admitted.

164.1. First, the nature of the proceedings: these are urgent proceedings in which it is not easy to collect evidence from across the country, and particularly under the current circumstances.

164.2. Second, the reason why the evidence cannot be tendered by the person on whom the "probative" value of the evidence depends: We submit that ample reasons and justification has been provided. Learners who are children are particularly vulnerable in these cases and they should not be exposed to possible retaliation. The same applies to their parents. The impact of the testimony of parents could cascade to children.

164.3. Third, absence of prejudice on the part of the respondents. The evidence in most cases identifies the alleged breach with sufficient specificity that the respondents, who have management and control over the schools concerned, can check whether it is true, and if not, challenge it.

164.4. Fourth, the respondents have made no effort to challenge any of the evidence in the founding affidavit as to the conditions "on the ground":

164.5. Fifth, the respondents' sudden and unexpected about-turn in their answering affidavits left the applicants with very little time to establish what had actually happened in the implementation of the NSNP.

165. For all of those reasons, and because of the pressing urgency of this matter in the light of the daily and continuing breach of the Constitution and the rights of the learners, we submit that it is in the interests of justice that the evidence be admitted.

166. We submit that in these circumstances, the hearsay evidence should be admitted.

167. We submit that a proper case has been made for the relief sought, with costs including costs of three counsel.

Geoff Budlender SC

Tembeka Ngcukaitobi SC

Thabang Pooe

Counsel for Applicants

Johannesburg and Cape Town

27 June 2020