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3 August 2020

Dear Minister Motshekga

EQUAL EDUCATION & OTHERS v MINISTER OF BASIC EDUCATION & OTHERS (22588/2020)

1. As you know, on 17 July 2020 the High Court handed down judgment in the case of *Equal Education & Others v Minister of Basic Education and Others*. The orders made by the Court included the following in respect of the national Minister:

“103.9 [W]ithin 10 days to file at this Court under oath, and provide to the applicants, a plan and programme which she will implement without delay so as to ensure that the MECs carry out without delay their duties referred to above, and which address the following matters:

103.9.1 What steps she has taken to ensure that the MECs continue to provide food to all qualifying learners during the State of Disaster without delay;

103.9.2 What further steps she will take in that regard.

103.9.3 When she will take each such step.”

2. On Friday, 31 July 2020, you filed an affidavit pursuant to that paragraph of the order.
3. While we appreciate your effort to comply with the order, we are deeply concerned by what we submit are fundamental flaws in the affidavit:

3.1 First, the affidavit and its annexures do not constitute a reasonable, coherent and comprehensive plan and programme, capable of implementation;

3.2 Second, the affidavit refers to budgetary constraints towards the end of the year, but provides no indication of how this will be dealt with to ensure that all qualifying learners receive a daily meal in compliance with government's constitutional and statutory commitments, and the order made by the Court; and

3.3 Third, the instructions to MECs with regard to reports on the implementation of the NSNP do not appear to be in accordance with the requirements of the court order.

Lack of a reasonable, coherent and comprehensive plan and programme

4. Our courts have over the years, in cases including *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) and *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC), set out the approach to be followed in order to determine whether a plan and programme in respect of the qualified socio economic rights (eg housing, health care, food, water and social security) are reasonable. A reasonable plan and programme must:

- 4.1 be capable of facilitating the realisation of the right;
- 4.2 be clear, comprehensive and capable of implementation;
- 4.3 clearly allocate responsibilities and tasks to the different spheres of government;
- 4.4 make available appropriate financial and human resources necessary for implementation;
- 4.5 be reasonably conceived and implemented;
- 4.6 be balanced and flexible and make appropriate provision for short and medium and long-term needs;
- 4.7 be transparent, with its contents made known effectively to the public; and
- 4.8 make short-term provision for those whose needs are urgent.

5. The National School Nutrition Programme (NSNP) is intended to give effect to the unqualified rights of children to basic education and basic nutrition. These rights require a plan capable of immediate implementation. The affidavit and the annexures provided fail to meet even the lower threshold requirement of reasonableness in terms of the requirements set out above. In particular:

- 5.1 It is difficult to determine what exactly the plan is and who is responsible for implementing the different aspects of the plan;
- 5.2 There are no principles to guide MECs on the development of province-specific plans and programmes to roll-out the NSNP, given that grade 12s return to their classes today, and most other learners do so on 24 August 2020. Guidance is necessary to ensure that the NSNP reaches all qualifying learners to prevent ongoing hunger during this period. This may include providing options for access to learners who live a distance from the school; informing the learners and their parents affected that each learner will be provided with a daily meal before they return to their classes; and informing them of when and how the learners will receive the food to which they are entitled. According to information received by Equal Education, the uptake of the NSNP has thus far been lower than expected. It is reasonable to believe that a substantial reason for this is a lack of information in this regard.
- 5.3 Given the predicted budget shortfall towards the end of the year, there is no plan as to where the money will come from. This is elaborated on below.
- 5.4 While reference is made to a business plan, it is not made available for the Court to scrutinize. It is not clear why provincial business plans are only to be finalized by 20 August 2020, given that all qualifying learners are entitled to school meals from today, when the Grade 12 learners return to their classes. The urgency of the matter is apparent.
- 5.5 In order for the Minister to carry out her obligations, she must monitor what is happening in the provinces. The affidavit contains a table which states that a “review of monitoring mechanisms in consultation with PEDs and other stakeholders” will take place next month. But it does not say what the current monitoring mechanisms are, and how they will operate.

Lack of planning to deal with budgetary constraints

6. The Minister states at paragraph 4.2.5 that the business planning process to date has determined that there are possibilities of budget inadequacy during the latter months of the year (November and December 2020).
7. However, the Minister does not say what has been done or will be done to ensure there is sufficient budget to comply with the order of the High Court.

8. We note that the Constitutional Court held in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd)* 2012 (2) SA 104 (CC) that it is not good enough for government to state that it has not made budgetary provision, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.

Timeframes imposed by the Minister

9. The structural order imposes the following reporting timeframes on the MECs:
 - 9.1 MECs must within 10 days file a plan and programme which sets out in respect of each school under their jurisdiction, when all of the qualifying learners will receive a daily meal under the NSNP; what steps they have taken to achieve that; what further steps they will take to implement that plan and programme; and when they will take each such step.
 - 9.2 The MECs must further file reports under oath every fifteen days from the date of the order until it is discharged by the Court, setting out the steps they have taken to implement the plan and programme, when they took such steps, and how many learners in each district in their area of jurisdiction are receiving, and how many are not receiving, a daily meal in terms of the NSNP.
 - 9.3 As we have noted, Annexure F to the Minister's affidavit includes a schedule of the reporting dates which is not consistent with the court order.

Conclusion

10. We respectfully submit that the Minister's affidavit falls short of what is required by the court order. It does not comply with her constitutional and statutory duties, as set out in the order, to ensure proper implement of the NSNP to all qualifying learners.
11. The Minister is requested to remedy the defects which we have identified. The applicants will be satisfied if this is done in the further report which the Minister is required by paragraph 103.10 of the order to file within 15 days from the date of the order.
12. As you will be aware, paragraph 103.13 of the order authorises the applicants to approach the court for further relief to ensure compliance with the order. We sincerely hope that this will not be necessary.

Sincerely

A handwritten signature in cursive script, appearing to read 'Stevenson'.

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