

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

CASE NO. **81/2012**

In the matter between:

<b>EQUAL EDUCATION</b>	First Applicant
<b>INFRASTRUCTURE CRISIS COMMITTEE OF MWEZENI SENIOR PRIMARY SCHOOL</b>	Second Applicant
<b>INFRASTRUCTURE CRISIS COMMITTEE OF MKANZINI JUNIOR SECONDARY SCHOOL</b>	Third Applicant

and

<b>MINISTER OF BASIC EDUCATION</b>	First Respondent
<b>MEC FOR EDUCATION: EASTERN CAPE</b>	Second Respondent
<b>GOVERNMENT OF THE EASTERN CAPE PROVINCE</b>	Third Respondent
<b>GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA</b>	Fourth Respondent
<b>MEC FOR EDUCATION: FREE STATE</b>	Fifth Respondent
<b>MEC FOR EDUCATION: GAUTENG</b>	Sixth Respondent
<b>MEC FOR EDUCATION: KWAZULU-NATAL</b>	Seventh Respondent
<b>MEC FOR EDUCATION: LIMPOPO</b>	Eighth Respondent
<b>MEC FOR EDUCATION: MPUMALANGA</b>	Ninth Respondent
<b>MEC FOR EDUCATION: NORTHERN CAPE</b>	Tenth Respondent
<b>MEC FOR EDUCATION: NORTH WEST</b>	Eleventh Respondent
<b>MEC FOR EDUCATION: WESTERN CAPE</b>	Twelfth Respondent
<b>MINISTER OF FINANCE</b>	Thirteenth Respondent

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**FOUNDING AFFIDAVIT TO SUPPLEMENTARY NOTICE OF MOTION**

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I, the undersigned,

**YOLISWA DWANE**

state under oath the following:

- 1 I am the Chairperson of Equal Education (EE), the first applicant. I deposed to the founding and replying affidavits in the main application. I am duly authorised to make this application on behalf of EE.
  
- 2 The facts contained herein are, to the best of my knowledge, true and correct. Unless otherwise stated or indicated by the context, they are within my personal knowledge. Where I make submissions of law, I do so on the basis of advice from my legal representatives, which advice I consider to be correct.
  
- 3 As I explain below, this application is brought pursuant to a settlement agreement which was concluded by the parties shortly before the main application was to be heard. I ask that the contents of the founding, answering and replying affidavits in the main application be read as if specifically incorporated herein.

**PARTIES AND STANDING**

- 4 The first applicant (EE) and the first to twelfth respondents are as they were in the main application. The second and third applicants have withdrawn, as the specific relief they sought has been provided.

- 5 The second to thirteenth respondents all agreed to abide by the decision of the court and did not file any papers in the main application.
- 6 I ask that the information in my founding affidavit relating to the standing of the first applicant (paragraph 21) be read as incorporated herein.

### **THE PURPOSE OF THIS APPLICATION**

- 7 Since March 2010 EE has actively sought to engage the Minister and government on the prescribing of regulations for minimum norms and standards for school infrastructure (“the Regulations”) in terms of section 5A(1)(a) and (2)(a) of the South African Schools Act 84 of 1996 (“the Schools Act”) and the National Policy for an Equitable Provision.
- 8 As I set out in my founding affidavit to the main application, this engagement included writing numerous letters, meeting with the Director General, meeting with the Minister and her staff, leading a march of 20 000 people to Parliament, meeting with the Deputy Director General, and inviting the Minister to speak at EE’s “People’s Summit for Quality Education” at Khayelitsha.
- 9 The Minister and her staff gave numerous undertakings that she would publish the Regulations. However, this never happened. In August 2011 our attorneys wrote to the Minister requesting written reasons why the Regulations had not yet been promulgated, and asking her to state when they were reasonably likely to be promulgated. Two months later, in October 2011, the

Minister responded by saying that she had decided to adopt “guidelines” for school infrastructure instead of Regulations.

- 10 Once it was clear that the Minister had no intention of prescribing binding Regulations in terms of section 5A of the Schools Act, the main application was launched. In the main application, EE sought an order directing the Minister to make Regulations within three months of the date of judgment.
- 11 The main application was filed on 3 March 2012. After lengthy delays by the Minister in filing an answering affidavit, the matter was set down for argument on 20 November 2012.
- 12 One week before the hearing, the Minister’s legal representatives approached our attorneys requesting a meeting between the parties and proposing that the matter be settled.
- 13 On 16 November 2012 I, together with three other EE leaders, one of our attorneys and senior counsel met in Pretoria with the Minister, the Deputy Minister, the Director General, and the Department’s legal representatives, which included the state law adviser, the legal adviser in the department, junior counsel and senior counsel. As a result of that meeting, EE and the Minister entered into a settlement agreement which was signed on 19 November 2012 and is attached as annexure “A” to the notice of motion.
- 14 Of particular relevance to the present application, the agreement recorded that:

1. *The first respondent (the Minister) has undertaken to make and promulgate regulations which prescribe minimum uniform norms and standards for school infrastructure in terms of section 5A(1)(a) and 5A(2)(a) of the South African Schools Act before 15 May 2013. The Minister also undertakes to publish a draft set of the regulations for public comment on or before 15 January 2013; and to consider any comments made pursuant to their publication before 31 March 2013.*

...

4. *Should there be non-compliance with any of the terms of the undertaking; any of the applicants may approach the High Court on an expedited basis for appropriate relief, provided that the first to fourth respondents have received two weeks' notice of the application concerned. It is specifically recorded that the appropriate relief may include, but is not limited to, making this order an order of court and an order for specific performance in terms of the agreement.*

(emphasis added)

15 The Minister has failed to make and promulgate the Regulations by 15 May 2013 or at all. She is therefore in breach of the agreement. She has unilaterally and in breach of the agreement decided that she will not comply with her undertaking, and asserts that she is entitled to a further six months to promulgate the Regulations.

16 EE accordingly seeks the relief set out in the notice of motion. In essence, EE asks for a declaration that the Minister is in breach of the agreement, and an order directing her to comply, within 45 calendar days of the date of the order, with her obligations under the agreement and under section 5A(1) of the Schools Act. In the founding affidavit in the main application, I summarised in paragraphs 44 to 50 and 174 to 176 why the Minister is under an obligation, under the Act, to prescribe minimum uniform norms and standards. She is in

any event under an obligation to do so, because in the settlement agreement she undertook to do so.

17 In what follows I address the following issues:

17.1 The history of broken promises and delay in prescribing the Regulations;

17.2 The events from when the settlement agreement was signed on 19 November 2012 until the agreed deadline for the Minister to prescribe the Regulations expired on 15 May 2013;

17.3 The reasons which the Minister now gives in an attempt to justify her breach of her undertaking, and prolonging the continuing breach of the Act and of the rights of learners;

17.4 The reasons for seeking an order directing the Minister to prescribe Regulations within 45 days of judgment.

## **HISTORY OF DELAY**

18 This matter has a long history of repeated delays, promises to prescribe the Regulations, and failures to keep to those promises.

19 As long ago as November 2008, the then Minister Naledi Pandor published draft Regulations for school infrastructure for public comment. Those draft Regulations stated: *“These norms and standards will be fully adopted by the end of 2009 and will be implemented in a phased manner starting from 2010.”* Minister Motshekga subsequently stated in Parliament that *“comments were*

*received in response to the 2008 call for comments and these were incorporated into the document.*" (attached as "**YD SUP1**") She also confirmed that the 2008 draft was approved by the Council of Education Ministers (CEM) and Heads of Education Committee (HEDCOM). The 2008 draft was attached to the original founding affidavit as **YD39** and the confirmation of approval by CEM and HEDCOM as **YD41**.

20 The Draft National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (NPEP) was also published in November 2008 and stated that "*National norms and standards will be developed during 2008, and fully adopted by the end of 2009... Effective from January 2010, all provinces will have aligned their provision programs to national norms and standards and set targets.*" The relevant extract is attached as "**YD SUP2**".

21 In 2009 a new set of Draft Norms and Standards for School Infrastructure emerged, which was not gazetted for public comment. This stated: "*These norms will be fully adopted by the end of the 2009/2010 financial year and will be implemented in a phased manner during the 2010-2014 Strategic Plan period.*" A copy is attached as "**YD SUP3**".

22 In September 2009 Minister Motshekga (the current Minister) stated in Parliament: "*We have developed norms and standards that commit government to providing school buildings of a particular standard.*" And: "*Norms and standards for physical infrastructure [were] approved by both the Council of Education Ministers (CEM) and the Heads of Education Committee*

*(HEDCOM) in 2008” and “are awaiting concurrence of the Minister of Finance”.* These two Parliamentary questions were attached to the original Founding Affidavit as **YD40** and **YD41**.

- 23 Those draft Regulations were never promulgated into law.
- 24 Answering a question in Parliament on 26 Feb 2010 the Minister wrote that the National Minimum Norms and Standards for School Infrastructure exist and that *“they will be implemented with effect from the 2010 financial year”*. A copy of the Parliamentary question is attached as **“YD SUP4”**.
- 25 On 2 March 2010 EE wrote to the Director General (DG) requesting information about the status of the draft Regulations.
- 26 In April 2010, EE sent letters to the Minister and the DG requesting written clarification about the status of the draft Regulations and asking for a timetable for the finalisation of the norms and standards. There was no immediate response to these letters.
- 27 On 22 April 2010 EE met the DG in Pretoria to discuss the status of the draft Regulations. In this meeting, the DG said that the documents had been approved by the Minister of Finance and were awaiting the signature of the Minister.
- 28 On 9 May 2010 the Minister wrote to EE stating that the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning

Environment (NPEP) was soon to be published. She then stated: “*This policy will be followed by the Norms and Standards for School Infrastructure.*” This was attached to the original Founding Affidavit as **YD46**.

- 29 On 11 June 2010, the Minister published the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (NPEP). This document stated that the Regulations for norms and standards would be developed and fully adopted by March 2011. This was attached to the original Founding Affidavit as **YD12**.
- 30 On 20 July 2010 the DG wrote to EE noting that “*the Minister must develop national minimum norms and standards ... by the end of the 2010/2011 financial year*” and stating that the Regulations “*are currently with the DBE Legal Services and will be promulgated as regulations thereafter.*” This was attached to the original Founding Affidavit as **YD47**.
- 31 On 3 September 2010 in Parliament the Minister cited the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment. She then stated: “*This policy will be followed by the Norms and Standards for School Infrastructure.*” A copy of the Minister’s response to the Parliamentary question is attached as “**YD SUP5**”.
- 32 In a presentation to Parliament’s Portfolio Committee on Basic Education on 13 October 2010, the DG, Mr Bobby Soobrayan, stated: “*The Minister of Finance concurred on the Policy on Infrastructure as well as the Norms &*

*Standards for School Infrastructure.*” A copy of the relevant portion of the presentation is attached as “**YD SUP6**”.

- 33 In a presentation to Parliament’s Portfolio Committee on Basic Education on 9 November 2010, the Department of Basic Education (DBE) stated: “*Specifications for making ordinary schools environmentally accessible to the disabled ... were incorporated into the national Infrastructure Norms for application in all new classrooms and buildings.*” A copy of the relevant portion of the presentation is attached as “**YD SUP7**”.
- 34 Addressing Parliament’s Portfolio Committee on Basic Education on 1 November 2010 the DG said that because there was “*a lack of provincial capacity to spend funds*” the plan was to create capacity in the National Department to “*monitor, design, support infrastructure norms*”. I attach a copy of the minutes of the meeting as “**YD SUP8**”.
- 35 On 26 November 2010 in answer to a Parliamentary Question, the Minister stated: “*The Department of Basic Education developed the Minimum Uniform Norms and Standards for School Infrastructure.*” In answering another Parliamentary Question about the cost of providing sports facilities at schools the Minister cited “*the Norms and Standards for School Infrastructure*”. The first answer was attached to the original Founding Affidavit as **YD48** and the second is attached here as “**YD SUP9**”.
- 36 The DBE’s Annual Report 2009/2010 stated: “*The Regulations in terms of Section 5A of SASA (Norms and Standards for School Infrastructure) was*

*drafted. A plan to process and finalise these regulation is underway... The Draft Norms and Standards Regulations were obtained from Legal Services and are being prepared for gazetting...The Minister of Finance concurred on the Policy on Infrastructure, as well as on the Norms and Standards for School Infrastructure.”* The relevant extracted pages are attached as “**YD SUP10**”.

- 37 The March 2011 deadline for the promulgation of binding norms and standards as promised earlier in the NPEP, as described above, came and went without the Regulations being prescribed, and without any explanation by the Minister for this failure to meet her commitment.
- 38 On 18 April 2011 the Deputy Director General, Mr S G Padayachee, gave a presentation to EE stating: “*The draft Norms and standards were approved by CEM and the Minister of Basic Education and received concurrence from the Minister of Finance during 2008/09 financial year. The Norms and Standards were then translated into regulations and were presented to the State Law Adviser for comments.*” He added that: “*Amendments will be effected and the Norms will be presented to HEDCOM and CEM.*” This was attached to the original founding affidavit as **YD51**.
- 39 On 8 May 2011 the Minister wrote to EE stating: “*In respect of the National Minimum Norms and Standards for School Infrastructure, the Document will serve at the next Council of Education Minister’s (CEM) meeting and once approved will be published for public comment and then follow the subsequent necessary processes. Once the document has gone through the necessary*

*processes, I will announce a date for its release.*” A copy of the Minister’s letter is attached as “**YD SUP11**”.

40 Briefing Parliament’s Portfolio Committee on Basic Education about sports in schools on 20 June 2011 the DG, Mr Soobrayan said that the DBE had developed norms and standards which, as policy, were applied to every school constructed. He stated that every school would have to comply with basic norms and standards. He stated that infrastructure norms and standards had been passed and were used to guide new developments in infrastructure. These norms and standards were applied to backlogs. I attach a copy of the minutes of the briefing as “**YD SUP12**”.

41 On 25 June 2011, the Minister spoke at a public event organized by EE. She said that a barrier to the finalisation of the Regulations was the requirement that the approval of the CEM be obtained. In fact, approval by CEM was not a requirement, and in any event, the CEM had already given its approval. I attach a transcript of the Minister’s speech as “**YD SUP13**”.

42 On 3 August 2011, our attorneys the Legal Resources Centre (the LRC) wrote to the Minister requesting reasons why the Regulations had not been promulgated. The letter specifically asked for an estimated date when the Regulations would be promulgated. The letter is attached as annexure YD7 to the original founding affidavit.

43 The Minister responded to this letter two months later, on 10 October 2011 (annexure YD53 to the original founding affidavit). She now changed her

position completely. She stated for the first time that she was not required to promulgate Regulations at all, and that any action regarding norms and standards was a matter for her discretion. She said that instead of making Regulations she was going to make non-binding “guidelines”.

44 In November 2011, the Minister wrote to the LRC, stating that even the non-binding ‘guidelines’ were still in draft form and also needed approval from the HEDCOM and the CEM (annexure YD55 to the original founding affidavit). The Minister said that she could not share the document with EE before it was approved by those two bodies later that month. Three more months passed without the Minister releasing the document.

45 It was by now clear that the Minister did not intend to prescribe the Regulations at all. As a result, EE launched the main application for an order compelling her to do so.

46 The Minister delayed filing her answering affidavit for many months. EE granted the Minister three separate extensions for the filing of her answering affidavit. In the end, her answering papers consisted of a single short affidavit by a Deputy Director General, Mr Padayachee. The answering papers did not dispute the extensive factual material in the founding papers which described the inadequacy of the infrastructure at schools across the country, or the assertion that these conditions constitute a breach of the constitutional rights of the learners at those schools.

47 The matter was set down for hearing on 20 November 2012.

48 Days before the case was to be heard, the matter was settled on the terms set out in the agreement attached as annexure A to the notice of motion.

49 Initially the Minister had proposed that she would publish draft Regulations for public comment by 15 December 2012 and the final regulations by 15 May 2013. At the meeting to discuss the settlement agreement, she requested an extension of one month (until 15 January 2013) for publishing the draft Regulations, while retaining her proposed date for publication of the final regulations at 15 May 2013. EE agreed to this, and the parties duly entered into the settlement agreement on this basis.

#### **Events since the settlement agreement was signed**

50 Acting in terms of paragraph 1 of the settlement agreement, on 8 January 2013 the Minister published a Notice containing draft regulations and inviting public comment.

51 The Notice stated that the closing date for comment was 15 March 2012. The LRC wrote to the Minister's legal adviser on 23 January 2013 pointing out that the settlement agreement provided that the comment period would be until 31 March 2013, and requesting that this be clarified. On 14 February the Department confirmed that the closing date for comments was 31 March 2013, and stated that a notice announcing this correction would be published. The Minister duly published a notice announcing the correction.

- 52 On 20 February the LRC received an e-mail from the Minister’s legal adviser requesting that the settlement agreement be amended to extend the date for promulgation of the Regulations from 15 May 2013 to 31 August 2013. The request was made pursuant to a request from the National Economic Development and Labour Council (NEDLAC) to the Minister to extend the comment period to 30 June 2013 to allow NEDLAC an opportunity “to *engage on the regulations*”. The e-mail and the letter from NEDLAC are attached as “**YD SUP14**” and “**YD SUP15**”.
- 53 On 25 February the LRC wrote to the Department (attached as “**YD SUP16**”) recording EE’s concerns about unduly delaying the promulgation of the Regulations, but stating that we agreed that the date for promulgation could be extended by 10 weeks to 31 July 2013 on condition that:
- 53.1 NEDLAC agreed to hear submissions by EE at the Development Chamber meeting scheduled for 6 March;
- 53.2 NEDLAC agreed that EE would be invited to participate fully in any further process that NEDLAC may undertake,
- 53.3 NEDLAC undertook to comment on the draft Regulations before the end of May 2013.
- 54 The LRC sent a follow up letter on 4 March requesting a response. On 5 March the Minister’s legal adviser replied by e-mail. He attached a response from NEDLAC which stated:

*“we are cognisant of the Settlement Agreement between the DBE and Equal Education which requires the promulgation of the regulations before the 15<sup>th</sup> of May 2013. It is not the intention of NEDLAC constituents to delay the promulgation of the Norms and Standards.”*

55 The Minister’s legal adviser stated in his e-mail that

*“it would in light of this letter not be necessary to amend the settlement agreement and the department will comply with the timeframes as set out in the agreement”.*

56 The Minister thus no longer sought to delay prescribing the Regulations on the basis of a desire to consult NEDLAC. The e-mail from the Minister’s legal adviser and the letter from NEDLAC are attached as “**YD SUP17**” and “**YD SUP18**” respectively.

57 The draft Regulations were published for comment on 8 January 2013. They were an enormous disappointment. They failed to provide meaningful or binding minimum norms and standards as required by the Schools Act. EE and various other interested parties submitted comments on the draft Regulations before the end of March 2013.

58 In terms of the settlement agreement, the Minister had one and a half months (until 15 May 2013) to consider the public comments and to amend the draft Regulations as appropriate.

59 On 9 May 2013, almost six weeks after the closing date for comments and less than a week before the Minister was obliged to publish the Regulations, she wrote to EE. She stated that she had received 35 comments on the draft

Regulations from stakeholders. She said that *“in the main, stakeholders object to the fact that the norms and standards lack substance and certainty, and that there is no clear framework or plan for implementing the norms and standards”*. She also said that the Department was engaged in consultation with NEDLAC, which would prepare a report for her and for parliament’s portfolio committee on basic education. The Minister requested EE to consider a renegotiated settlement agreement that would postpone the date of final publication of the Regulations *“in order to allow enough time for the redrafting of the norms and standards”*. She did not suggest any time by which she would make the Regulations. The letter is attached as **“YD SUP19”**.

60 EE immediately called meetings and consulted with a large number of its members nationwide regarding the Minister’s request for an extension. The vast majority of members were strongly opposed to granting the Minister’s request, which was perceived as yet another attempt to delay the promulgation of the Regulations, without good cause. After extensive deliberations, however, EE agreed to a further one month extension to 15 June 2013.

61 The LRC wrote to the Minister on 16 May informing her of our offer of a further month to complete the process of amending the Regulations for publication. This would have given the Minister a full eleven weeks from the conclusion of the public comment process. The letter summarised the unfortunate history of delays, and stated that if the Minister rejected the offer of a one month extension EE would renew its application in court. The letter is attached as **“YD SUP20”**.

62 On 17 May the Minister replied that she could not agree to the one month extension, as she could not finalise the Regulations within that period. She gave a number of reasons why she said it was not possible, and now said that a further six months was required. The letter is attached as “**YD SUP21**”. I address the reasons advanced by the Minister below.

63 On 31 May the LRC wrote to the Minister explaining why her proposal was not acceptable to EE, and giving notice that this application would be filed. This letter is attached as “**YD SUP22**”.

#### **REASONS PROVIDED FOR THE BREACH OF THE UNDERTAKING**

64 Certain of the reasons which the Minister gives for the further delay relate to purely procedural matters of which she must have been aware when she entered into the settlement agreement - for example, the need for the State Law Adviser to certify the Regulations. They cannot provide any basis for the new position which the Minister has now taken up, in breach of her undertaking and the agreement.

65 The Minister puts up three main reasons to justify her assertion that (contrary to the agreement) she is entitled to a further six months. They are:

65.1 She proposes to seek input on the amended draft Regulations from the Heads of Education Departments Committee (HEDCOM) and the Council of Education Ministers (CEM).

65.2 She is awaiting a report from NEDLAC and will need to consider any comments made or amendments proposed by NEDLAC;

65.3 She proposes to release a further amended set of draft Regulations for yet another public comment process before she makes the Regulations.

66 I submit, for the reasons set out below, that none of the reasons advanced by the Minister justifies a further six-month delay or constitutes an obstacle to amending the draft Regulations and publishing a final set of Regulations without further delay. None of them provides any legal basis for either the Minister's breach of her undertaking, or the continued breach of the rights of learners under the act and the Constitution.

**First reason: Resubmission of Regulations to HEDCOM and CEM for more input**

67 In her 17 May 2013 letter the Minister states that

*“the redrafted Regulations will also have to be submitted to the Heads of Education Department Committee (HEDCOM) and the Council of Education Ministers (CEM) for their input. It is important that HEDCOM and CEM be consulted, as the provincial education departments will be responsible for the implementation of the Regulations.”*

68 Section 5A of the South African Schools Act makes clear that the assent of the CEM is not needed for the promulgation of the regulations, only that they should have been consulted. As described above, the CEM has been consulted extensively. The section makes no mention of HEDCOM whatsoever.

69 I submit that to the extent that there was a need for HEDCOM and the CEM to be consulted yet again on the draft Regulations, that must have been apparent to the Minister when she first undertook that the regulations would be made by 15 May 2013. That was a date which she proposed. It cannot be a valid justification for the Minister's breach of the agreement.

70 I submit that in any event, there is no need for these bodies to be canvassed for their input again. Both HEDCOM and CEM have already had extensive opportunities to make input. At paragraphs 42 – 54 of my replying affidavit in the main application (pages 708 - 711) I deal with the minutes of the HEDCOM and CEM meetings where drafts of the Regulations were discussed and input was given. The minutes record that HEDCOM approved the adoption of binding Regulations for school infrastructure.

71 Finally, if the CEM or HEDCOM had wished to comment on the draft Regulations, they had an opportunity to do so when the Minister published them for public comment. They did not do so.

72 I point out that all of the provincial MECs chose not to oppose the main application, and to abide by the decision of the court in this matter.

**Second reason: The NEDLAC process**

73 In her 17 May 2013 letter the Minister states that "*the consultation process involving NEDLAC has not been concluded, and I am awaiting NEDLAC's final*

*report. Once it has been submitted, I will have to consider the report and the recommendations contained therein.”*

74 As set out above, in March 2013 NEDLAC stated (**YD SUP18** above) that it did not wish to delay the promulgation of the Regulations by 15 May 2013. Pursuant to that letter, the Minister’s legal adviser confirmed that it would not be necessary to amend the timeframes of the settlement agreement on account of NEDLAC, and that the Minister would adhere to the agreed timeframes.

75 The Minister now seeks to revive the NEDLAC process as a justification for delay, despite the position adopted by NEDLAC itself.

76 I also submit that there is no basis for the Minister now to give NEDLAC an extended (and unspecified) period to comment on the draft Regulations, particularly when NEDLAC itself has stated that it does not wish to delay the promulgation of the Regulations beyond 15 May. The Minister gives no indication of when the NEDLAC consultation will be completed.

**Third reason: Another public comment process**

77 The Minister states in her 17 May letter that she will consider the 35 comments made on the draft Regulations and include the suggestions with merit, and this will *“inevitably result in a substantial redrafting of the Regulations.”* She then states that *“the Department will have to publish the redrafted Regulations in*

*the Government Gazette in order to allow all the stakeholders the opportunity to submit comments”.*

- 78 I am advised and submit that it is not necessary for the Minister to publish another version of the regulations for yet another round of public comments. Three draft versions of the regulations have been published so far (one in the form of “guidelines”), and two public comment processes have taken place (2008 and 2013). Such a process could go on indefinitely: If a revised draft is now published for comment, and the revised draft is further amended in the light of those comments, the result could be (and in the light of the history of this matter is likely to be) that the Minister will say that the further revised draft must be published for comment and possible further amendment (and no doubt also submitted to the CEM and HEDCOM). Meanwhile, the Minister continues to be in breach of her undertaking, and the rights of learners continue to be breached on a daily basis.
- 79 The Minister is under a legal duty to prescribe Regulations that comply with the Constitution, the Schools Act, and her undertaking. She is not obliged to undertake yet another process of public comment before doing so.
- 80 EE has always recognised that it is for the Minister, subject to the law, to determine and prescribe the content of the minimum uniform norms and standards for school infrastructure. If any stakeholder considers that the final version promulgated is unlawful, it can approach a court for relief.

81 I submit that none of the reasons given by the Minister provides any justification either for the breach of her undertaking, or for further prolonging the continuing breach of the Schools Act and of the constitutional rights of learners.

**Unspecified request for extension of time**

82 What the Minister was required to do after 31 March 2013 was to consider the comments, include those suggestions which had merit, and amend the Regulations accordingly. While a substantial redrafting may be required, it cannot reasonably take more than six weeks to do this. The draft regulations are not a particularly long document. The Minister now apparently seeks to rely on her failure to produce a draft that complies with the relevant constitutional and legislative provisions to justify yet another delay.

83 The Minister states that “*six (6) months would be a more realistic timeframe*”. Even now, the Minister does not offer any guarantee that even this timeframe would be complied with. The history of this matter regrettably gives no reason for any confidence in this regard. The assertion of an entitlement to a further six months in which to promulgate the Regulations is only the latest of many attempts by the Minister to delay complying with her legal obligation to comply with her statutory obligation and her undertaking to prescribe minimum norms and standards for schools infrastructure.

## RELIEF

- 84 The continuing delay in prescribing the Regulations prolongs the suffering of learners and teachers who attend schools where the inadequate infrastructure prevents effective teaching and learning, and puts their health and safety at risk. In the main application it is common cause that these are the consequences of the inadequate infrastructure. The continuing delay means a continuing breach of the learners' constitutional right to a basic education.
- 85 The extension sought will mean that yet another school year will come to an end without the Minister having prescribed the Regulations.
- 86 EE has been willing to be accommodating, within reason:
- 86.1 It entered into a settlement agreement which gave the Minister six months to promulgate the regulations, in accordance with the dates which were proposed by the Minister herself.
- 86.2 When the Minister initially suggested that NEDLAC needed to be accommodated, EE offered to grant the Minister an extension until 31 July 2013. It then became clear that NEDLAC did not wish to delay the promulgation of the Regulations, with the result that this issue fell away, and the Minister undertook to abide the original deadline of 15 May 2013.
- 86.3 Most recently, EE offered to extend the deadline by a month. This was not accepted by the Minister.

- 87 This application has been made necessary by the Minister's unilateral action, in breach of the settlement agreement, in deciding not to promulgate the Regulations by the agreed date of 15 May 2013.
- 88 EE submit that this matter is now urgent in light of the seriousness of the breach and its consequences, and the history of continuing delay and broken promises in the promulgation of the Regulations. The applicants will seek that this matter be enrolled for hearing on 11 July 2013 in this Honourable Court.
- 89 By the time this matter is heard (if that takes place on 11 July 2013), the Minister will already have had an additional nearly two months since the deadline in the settlement agreement expired, a full 15 weeks since the public comment period closed on 31 March 2013. We assume that this time has been well used by the Minister, such that much of the redrafting should already be done. I submit that it is just and more than reasonable to direct the Minister to prescribe the Regulations within a further 45 calendar days of the order made by this court.
- 90 I submit that in the light of the history of this matter, it is appropriate that the Minister be ordered to pay the costs on the attorney and client basis, including the costs of two counsel. This will be addressed in argument.
- 91 I therefore pray that an order be granted in terms of the notice of motion to which this affidavit is attached.

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**YOLISWA DWANE**

I hereby certify that the deponent stated that she knows and understands the contents of this affidavit, and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at **KING WILLIAM'S TOWN** on this the **10th day of JUNE 2013**. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

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COMMISSIONER OF OATHS