F. Regulation 4(5)(a) results in a breach of the July 2013 order of this Court

[116] The 2013 court order required the Minister to "prescribe minimum uniform norms and standards for school infrastructure, and the time-frames within which must be complied with" (emphasis added). Sub-regulation 4(5)(a) does not contain such timeframe. Therefore it permits an indefinite pushing back of the time-frames contained in the regulations.

[117] The Minister contended that all she was required to do by that order was to prescribe the minimum norms and standards for the availability of the school infrastructure listed in section 5A(2)(a) and the timeframe within which such be made available. This is exactly what she did. The applicant cannot seek to obtain more than was stipulated in that court order. It is confined to the four corners of that court order. To lend support to this contention she relied on ***Eke v Parsons*** 2016 (3) SA 37 (CC) paragraph [31] where it was held: *"The effect of a settlement order is to change the status of the right and obligation between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings to finality to the lis between the parties; the lis becomes res judicata (literally, "a matter judged").*

It changes the terms of a settlement agreement to an enforcement court order....."

[118] The promulgation of the regulations and the insertion of the proviso in sub-regulation 4(5)(a) was in compliance not only with Chapter 3 of the Constitution but

also SASA and the 2013 court order. Lastly, also in compliance with section 35 of IGRF Act.

G. Regulation 4(3)(a) read with regulation 4(1)(b)(i).

Regulation 4(1)(b)(i)

"4(1) "Notwithstanding the provisions of these regulations, the norms and standards contained in the regulations –

(a).....

(b) as far as schools are concerned which exist when these regulations are published, must,subject to subregulation(5), and as far as reasonably practicable-

(i) with reference to the norms and standerds mentioned in subregulation (3)(a) and (b), be complied with within the period of three years from the date of publication of these regulations;"

Regulation 4(3)(a)

Regulation 4(3)(a) reads:

"(3) *As far as schools contemplated in subregulation (1)(b) are concerned –*

(a) and for purposes of subregulation 1(b)(i), all schools built entirely from mud as well as those schools built entirely from material such as asbestos, metal and wood must be prioritised;"

[119] The applicant's criticism is that sub-regulation 4(3)(a)does not state what is meant by "prioritisation" of schools built entirely from mud or materials such as asbestos, metal and wood – in particular, and whether these conditions have to be eradicated within the three-year timeframe. It also omits to deal with schools that are built partly from mud, asbestos, metal and wood, or which otherwise and also do not comply with the National Building Regulations, SANS 10-400 or the Occupational Health and Safety Act 85 of 1993 ("OHSA").

[120] Applicant pointed out that regulation 18(14)[9]of OHSA requires that the design of all new schools and additions, alterations and improvements to schools must comply with all relevant laws including the national Building Regulations, SANS 10-400 or the Occupational Health and Safety Act 85 of 1993 ("OHSA").

[121] It thus argued that the sub-regulation undermines the rights to a basic education, equality and dignity. It is also arbitrary. There is no rational basis for excluding an unsafe school or classroom from the ambit of the regulation, merely because part of the school is safe.

[122] The applicant sought the following relief in this regard:

> *"3 Declaring that regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations requires that all schools and classroom built substantially*

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[1] The regulation reads: *"Design considerations for all education areas:18. (14) In the planning and design of all schools contemplated in regulation (4)(1)(a), school design must comply with all relevant laws, including the National Building Regulations, SANS 10- 400 and the Occupational Health and Safety Act, 1993 (Act No 85 of 1993).*

from mud as well as those built substantially from materials such as asbestos, metal and wood, must within a period of three years from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and Occupational Health and Safety Act 85 of 1993;

4. Declaring that:

4.1 regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations is inconsistent with the Constitution and invalid insofar as it omits to deal with schools which are built partly from mud, asbestos, metal and wood, must within a period of three years from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and Occupational Health and Safety Act 85 of 1993 ("OHSA"); and

4.2 the word "entirely" whenever it appears in regulation 4(3)(a) is struck out' alternatively, the phrase "Schools built entirely" is struck out wherever it appears in regulation 4(3)(a), and is replaced with the words "classrooms built entirely or substantially";

[123] Mr Budlender SC pointed out that the relief sought by the applicant in fact is consistent with the Minister's responses to the applicant in her letter dated 17 March 2014.

[124] In its affidavit the applicant has explained that the need for the expeditious eradication of unsafe schools had always been at the forefront of the development of these norms and standards. In the founding affidavit it referred to draft regulations which were published by the Minister on 21 November 2008. Those regulation were never made into law. However, they provided a useful insight into the reasoning underpinning the need for minimum norms and standards. The 2008 draft Regulations categorised norms and standards into safety, functionality and effectiveness levels.

[125] Safety norms were described as:

"the bare minimal allowable for a school to remain open ... is basically a 'negative list' of what an operating school should not have like: caving structures that pose danger to learners, structures without roofing, temporary structures that do not meet South Africa's heal standards."

[126] The 2008 draft Regulations recognised the urgency with which government must ensure that schools are brought into compliance with safety norms:

"*schools that do not meet safety norms will not be tolerated and will be closed with immediate effect. Safety norms and standards are therefore regarded as emergency norms and all efforts will be made not to have any school at this level beyond the current sector strategy plan period (2012)""... safety norms are the bare minimal allowable for a school to remain open, and this level of provision is not meant to be sustained beyond the current strategic plan period."*

[127] On the same day that the 2008 draft Regulations were published for comment, the minister also published for comment the proposed Equitable Provision Policy. Unlike the 2008 draft regulations, the Equitable Provision Policy was eventually finalised. The Equitable Provision Policy envisages a four tiered continuum of minimum norms beginning with 'basic safety'. Basic safety entails the bare minimum of safety requirements below which a school will be deemed inoperable and immediately closed. For example, if learners are exposed to intolerable elements such as intolerably bad weather ... extremely unsafe building structures that could crumble onto learners."

[128] The applicant also referred to, the *Schools Infrastructure Guidelines* which state *"6.3 A school environment does not meet the basic safety requirements if learners are exposed to conditions such as 6.3.3.extremely unsafe building structures that could 'collapse on top of learners'.* It pointed out that the 2008 draft Regulations, equitable Provision Policy and School Infrastructure Guidelines all make reference to unsafe 'structures' (as opposed to entirely unsafe schools) that pose a danger to learners, and recognise the urgency of attending to these situations.

[129] In argument, Mr Budlender SC referred to the testimonies from teachers and pupils on the conditions at the schools. He argued that the extracts from those supporting affidavits demonstrate the importance of replacing unsafe structures.

[130] The further contention of the applicant was that these sub-regulations read together, 4(3)(a) and 4(1)(b)(i) undermine right of learners to a basic education, equality and dignity and of teachers to a safe working environment; equality and dignity. They are arbitrary in that they operate only in relation to schools which are built entirely of unsuitable and unsafe structures and are not aimed at replacing unsafe structures wherever they are found to exist. The applicant posited that there is no reason, let alone a justifiable or sufficient reason, for the failure to address unsafe structures which are found at schools.

[131] Applicant also challenged these sub-regulations on the basis that they are also inconsistent with the state's duty towards the teachers whom it employs.Section 8(1) of the OHSA places a duty on employers to provide and maintain a safe working

environment.[10] Furthermore, the Public Service Regulations promulgated in terms of section 41 of the Public Service Act 103 of 1994 (Govt Gazette 21951) provide in Part VI of section D that : "*A head of department shall establish and maintain a safe and healthy work environment for employees of the department.* "Mr Budllender argued that the State, in its capacity as an employer, has an obligation to ensure that teachers are able to work under safe conditions that do not pose a substantial risk to their safety.

[132] The Minister's response to this was that it is within her discretion and in the exercise of the powers vested in her to promulgate/publish these sub-egulations the way she has. In the exercise of that discretion her preference is to prioritise schools entirely built of mud and materials such as asbestos and wood. This does not mean that she does not regard the other schools not falling into that category as unimportant. This preference has been dictated to her by budget constraints. The fact that the applicant disagrees with her preference in this regard does not entitle the applicant to the relief it seeks unless it succeeds in demonstrating that the preference of the Minister flies in the face of the Constitution, SASA and/ or is an irrational. Otherwise interference with her discretion should not be allowed.

[133] Mr Erasmus SC argued that the applicant has not made out a case for broadening the scope of these regulations. He submitted further that in terms of sub – regulation 4(1)(b)(i), the schools which existed when the regulations were published are to be brought into the ambit of the regulations under sub-regulations

[10]Section 8(1) provides: 'every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'.

4(1)(b)(i) to (v) and should be consistent with the National Building Standards Act 103 of 1977, SANS 10-400 and Occupational Health and Safety Act 85 of 1993.

[134] Mr Erasmus SC prevailed upon the Court to follow the reasoning of the Constitutional Court in **Soobramoney v Minister of Health, KZN 1998 (1) SA 765 (CC) (1997 (12) BCLR 1696; [1997] ZACC 17)**[11]where the Court rejected an application that would have compelled the Minister of health to provide dialysis to one patient at the expense of the larger number of needy patients as the Minister was constrained by the budget available. The court held that the patient's demand to receive dialysis treatment at a state hospital had to be determined in accordance with the provisions of section 27(1) and (2) which entiltles everyone to health care services provided by the State within its available resources and not section 27(3). The latter section provides that no one may be refused emergency medical treatment. The Constitutional Court held that a court will be slow to interfere with rational decisions taken in good faith by political organs andmedical authorities whose responsibility it is to deal with such matters.

[135] Mr Erasmus SC also argued that this Court is also constrained to consider the particular impact that the legacy of apartheid education had in most black communities referring to what was said in **Head of Deaprtment: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another 2010(2) SA 415 (CC)** at paragraph 46 and in **Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others 2011(8) BCLR 761** at para 42.

[11]At paragraph 22

H Regulation 4(3)(b) read with regulation 4(1)(b)(i) (schools with no power, water or sanitation)

[136] Regulation 4(3)(b) reads:"(3) *As far as schools contemplated in subregulation (1)(b) are concerned –*

(a) ...

(b) and for the purpose of sub-regulation1(b)(i), all those schools that do no have access to any form of power supply, water supply or sanitation must be prioritised;"

[137] The applicant's complaint is that sub-regulation 4(3)(b) read with 4(1)(b)(i) does not make it clear how schools that do not have access to any form of power supply, water supply or sanitation are to be 'prioritised', and what is meant by that term, in particular, whether these defects have to be eradicated within the three year timeframe.

[138] Applicant submitted that the Minister had indicated that the intention was that these schools should be brought into compliance with the norms and standards (presumably as regards power supply, water supply and sanitation) within three years of the date of publication of the regulations. It argued that however, there is lack of clarity in this regard reading these regulations as they stand. This lack of clarity undermines the right to a basic education, equality and dignity in that these sub-regulations do not provide clearly for the material deficiencies in such schools to be addressed within three years or at all.

[139] The applicants sought the following relief:

"5. Declaring that regulation 4(3)(b) read with regulation 4(1)(b)(i) of the Regulations is to be read as requiring that all schools that do not have access to any form of power supply, water supply or sanitation, must within a period of three years from the date of publication of Regulations, comply with the norms and standards described in regulations 10, 11 and 12 of the Regulations;"

[140] The Minister's response in her affidavit was that it should be borne in mind that the services that are required in sub-regulation 4(3)(b) are outside her scope of services. Therefore, the IGF Act is applicable. In terms of this Act other state departments should be consulted in deciding on the provision of these services.

[141] Mr Erasmus SC argued that this Court is enjoined from granting the relief sought here. He referred to **National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012(6) SA 223 (CC)**[12] where the Constitutional Court cautioned that courts should be circumspect and ensure that they do not make orders that would trench, inappropriately, on the domains that the Constitution has allocated to other organs of state. He also referred to the description of the role of the courts provided in **International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012(4) SA 618 (CC)** where the following was said:

"[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government

[12] Referring to paragraph 44

exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

I Regulations 4(1)(a) read with 4(2) (schools and improvements which are excluded

[142] Regulation 4(2)(a) provides "*New schools and additions, alterations and improvements to schools excluded from subregulation 1(a) are those of which the planning and prioritisation within the current 2013-14, 2014-15 and 2015-16 MTEF cycle have already been completed. (b) The plans and prioritisation of the schools contemplated in paragraph (a) must, where possible and reasonably practicable, be revised and brought in line with these regulations."*

[143] Regulation (4)(3) of the norms and standards entitled "*Scope and application"* states that*: "[t]hese regulations apply to all schools."*

[144] In explaining the issue regarding these regulations, Mr Budlender SC referred to the founding affidavit where the applicant dealt with the explanation of the Minister that certain schools have already been planned and budgeted for within the three year Medium Term Expenditure Framework cycle (hereinafter referred to as ("MTEF") for the period 2013 to 2016 in the form of User Asset Management Plans (hereinafter referred to as "the U-AMPs"). He then pointed out that the Immovable Asset Management Act requires National and Provincial departments which use or intend to use immovable assets in support of their service delivery objectives, to prepare U-AMPs. (Section 6(1)(b) read with the definition of "user" in section 1).

These plans must (in the case of provincial departments) be submitted to provincial treasuries on a date determined by such treasuries.

[145] Mr Budlender SC also referred to section 26(4)(a)(ii) of the Division of Revenue Act 2 of 2013 which provides that for purposes of the EIG in the 2015/16 financial year, the accounting officer of the provincial department must submit to the National Treasury by 26 July 2013 a user management plan for all infrastructure programmes for the financial, next financial and 2015/16 financial years. Section 26(4)(b) provides that the National Treasury must, by 6 December 2013, notify the affected Provincial departments which infrastructure programmes and projects it will prose for full or partial funding through the grant in the financial year in question.

[146] He then submitted that the applicant understands therefore that at the time of promulgation of the regulations, there were school infrastructure projects which had already been planned and budgeted for. The purpose of the exclusion appears to be to avoid a situation in which new schools and improvements are required to be built in accordance with the norms and standards, which do not necessarily coincide with existing plans. In other words, the intention seems to be to allow infrastructure delivery to take place in accordance with existing and budgeted plans.

[147] The problem is that sub-regulation 4(2) entirely excludes from the norms and standards, all new schools and additions, alterations and improvements which are the subject of the MTEF plans. These schools are not subject to the timeframes for infrastructure delivery stipulated in regulation 4(1)(b). The norms do not apply at all

to schools referred to in the MTEF plan. If the state plans for a school in an MTEF period, and that plan is not fulfilled, the school remains totally excluded from the ambit of the Regulations. The applicant contended that this is arbitrary and irrational.

[148] The applicant submitted further that regulation 4(2)(b), which requires that where possible and reasonably practicable the plans and prioritisation of the schools contemplated in paragraph 9(a) be revised and brought in line with the regulations, does not address this concern because it does not say clearly enough what must happen in relation to future planning. There is no obligation on the state to ensure that in future these schools are dealth with appropriately and in accordance with the norms and standards.

[149] BEFA also attacked the sub-regulation 4(1)(b)(i)(ii)(iii)(iv); 4(3)(a);(b):(c);(d) because of the time frames stipulated therein. Sub-regulation 4(1)(b)(i) sets 28 November 2016 as the deadline for the replacement of the schools built entirely of mud; asbestos and wood and for the supply of power; water and sanitation at schools. Sub-regulation 4(1)(b)(ii) sets 28 November 2020 as the deadline for the provision of sufficient electricity; water; sanitation; electric connectivity and perimeter security in all schools. Sub-regulation 4(1)(b)(iii) sets 28 November 2023 as the deadline for libraries and laboratories; technology and life sciences in all schools. All the other aspects are to be provided by 31 December 2010.

[150] Its criticisms was that these deadlines all depend on the proviso to regulation 4(5)(a) therefore, if the Minister does not have resources and does not secure the cooperation of the other state organs all these will come to naught.

[151] Also any litigant seeking to enforce its right in terms of these regulations will be saddled with the burden of having to show that the respondent does have the requisite resources. This takes away the rights the norms and standards seek to protect.

[152] Furthermore, there is no provision for schools with urgent needs which fall to be ignored if they do not fall into the category identified in subreguation 4(3). The respondent does not explain why such schools are excluded. It argued that nothing precludes the Minister from making provision for temporary emergency relief pending the provision of permanent solution so that at least immediate threat is eliminated such as mobile class rooms and mobile toilets.

J Sub-Regulation 4(6) and 4(7)

[153] In assailing these sub-regulations, the applicant proceeded from the premise that mproving transparency and accountability in the provision of school infrastructure has always been at the heart of the applicant's campaign for minimum norms and standards. The norms and standards ought to facilitate participatory democracy and grassroots accountability by enabling communities, learners, educators, civil society organisations and the public at large to know what their rights

are, and what they are entitled to require of government. This is a necessary element of a reasonable programme.

[154] The Minister and the MEC's seem to take the view that they are not obliged to make the plans publicly available. The applicant pointed out, that the provincial plans which had to be provided to the Minister by 29 November 2014 were (with the exception of the Limpopo plan) made publicly available almost seven months later, in June 2015. The Limpopo plan was made available long after that. The provincial plans were only made publicly available after sustained requests and activism by the applicant.

[155] To date, the provincial implementation reports and updated plans have not been made available, despite request by the applicant.

[156] Denying the public access to these plans and reports has the result that school governing bodies, educators, parents and learners are prevented from knowing what their rights are, knowing what progress has been made and knowing what will be done in future and when it will be done. They are unable to monitor whether the state is complying with its commitments. They are prevented from engaging effectively with the state in this regard.

[157] The applicant also challenged the Minister's response that school's governing bodies will have sight of the plans and reports made in terms of these su-regulations. It pointed out even historically these governing bodies were never furnished with such plans and reports.

[158] For this reason and the reasons given above, the applicant sought the following relief:

> *"7 Declaring that Regulations 4(6)(a) and 4(7) are unconstitutional and invalid to the extent that they do not provide for the plans and reports to be made available to the public*
>
> *8. Directing the Minister to amend the Regulations to provide that the plans and reports submitted in terms of regulations 4(6)(a) and 4(7) of the Regulations must be made publicly available within a stipulated period of their having been submitted to the Minister, which period must be reasonable;"*

[159] Mr Erasmus argued that these regulations are borne out of sections 5A and 58C of SASA. The main rationale of 58C is that any plans and reports prepared by the Members of Executive Councils will be informed by inputs from school governing bodies which consist of the school principals; teachers; parents and members of the community concerned. The applicant ignores the pivotal role of the school governing bodies in the public schools and that these bodies are elected and constituted in a democratic and participatory manner to advance the legitimate interests of learners at a school.

[160] To drive the point home about the significance of governing bodies Mr Erasmus SC referred to *Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* 2013 (1) SA 632 (SCA) at paragraphs 28 to 29.In paragraph 29 of this case the Supreme Court of Appeal had this to say about school governing bodies:

"[29] *A governing body stands in a position of trust towards the school. It promotes the school's best interests and strives to ensure its development by providing quality education to the learners. Implicit in this model of governance is an acceptance on the lawmaker's part that the state cannot provide all the resources for the proper functioning of a high quality schooling system. So governing bodies are enjoined to 'take all reasonable measures within [their] means to supplement the resources supplied by the State in order to improve the quality of education provided by the school.*

[161] He thus argued that therefore, there is no basis for the applicant's argument that the regulations contain no mechanism for making plans and report available to the public.

THE LAW APPLIED TO THE FACTS

[162] It is axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.[13]

[163] In the preamble of the Constitution, the people of South Africa declare their recognition of the injustices of the past, and commit, through their freely elected representatives, to adopt the Constitution so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights, improve the quality of life of all the citizens of the Republic of South Africa. Section 1(a) enunciates the founding principles of the democratic South Africa,

[13]See Ryan Albutt v Centre for the Study of Violence and Reconciliation and Others 2010(3) SA 293(CC) para 49 and the authorities referred to therein.

namely, human dignity, the achievement of equality and the advancement of human rights and freedoms.[own underlining]. These values inform and give substance to all the provisions of the Constitution–see **Minister of Home Affairs v National Institute for Crime Prevention and the Integration of Offenders(Nicro) and Others 2005(3) SA 280 (CC)** paragraph 21.

[164] Section 1(c) of the Constitution makes the rule of law one of the founding values of the Constitution. The constitutional requirement of rationality is an incidence of the rule of law. The rule of law requires that all public power must be sourced in law[14]. In ***Law Society of South Africa and Others v Minister of Transport and Another*** 2011 (1) SA 400 (CC) Moseneke DCJ (as he then was) held that this means that state action exercises public power within the formal bounds of the law. Thus, when making law, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant to "*to promote the need for governmental action to relate to a defensible vision of the public good and to enhance the coherence and integrity of legislative measure.*"

[165] Section 7, first section in Chapter 2, the Bill of Rights states: "(1)This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.

[14] Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC at para [32])

[166] The rights entrenched in the Bill of Rights include equality, dignity, and various other human rights and freedoms, one of which is that everyone has the right to a basic education – see section 29(1). Section 28 deals with the rights of children. Section 28(3) stipulates: *"A child's best interests are of paramount importance in every matter concering the child."*

[167] In ***Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metroplitan Council*** 1999 (1) SA 374 (CC) the Constitutional Court held that a body exercising public power has to act within the powers lawfully conferred upon it. In ***Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of South Africa*** 2000 (2) SA 674 (CC) at para [20], that Court also held that the principle of legality also requires that the exercise of public power should not be arbitrary or irrational.

[168] The National Government bears the overall responsibility of ensuring the state's compliance with the obligation in section 29 (1)(a). This right and the Constitution as the whole has given birth to SASA. In its preamble, SASA reiterates the values in section 1 of the Constitution. It acknowledges the need for a new natural system for schools which will redress past injustices in educational provision, uphold the rights of learners, parents and educators and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the state.

[169] In ***Government of the Republic of South Africa and Others v Grootboom and Others*** **2001 (1) SA 46** the Constitutional Court held that it is fundamental to an

evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than the paper it is written on if the reasonableness of state action is determined without regard to the fundamental constitutional value of human dignity. Under the constitutional order, the recognition and protection of human dignity is a foundational value – see section 1 of the Constitution. In **Dawood and Others v Minister of Education and Others; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others 2000(3) SA 936 (CC)** at paragraph 35 the following was held:*"The value of dignity in our Constitutional framework cannot.....be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future."*

[170] Of course it is indisputable that basic school infrastructure plays a significantly high role in the delivery of basic education. The right to basic education, is distinguishable from the other socio- economic rights in the Constitution: the right to the have access to adequate housing;[15] health care services, including productive health care;[16]sufficient water and food[17] and social security.[18] These rights, unlike the right to basic education, all contain internal qualifiers which state that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.[19]

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[15]Section 26(1) of the Constitution
[16]Section 27(1)(a) of the Constitution
[17]Section 27(1)(b) of the Constitution
[18]Section 27(1)(c) of the Constitution
[19]Section 26(2) and 27(2) of the Constitution

[171] The Constitutional Court had occasion to address itself to the purport of the right to basic education in ***Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others*** 2011 (8) BCLR 761 **(CC)**. In guiding its way to the correct answer, the Constitutional Court considered, amongst others, international instruments. It quoted, with approval how the right to basic education is defined in the International Covenant on Economic, Social and Cultural Rights ("the ICESCR) Nkabinde J then quoted what is contained in General Comment 13 of this instrument where the following is held:

> *"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."*

[172] At paragraph 37, it Court held:*"It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio- economic right, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legisltive measures'. The*

right to basic education in section 29(1)(a) may be limited only in terms of the law of general application, which is 'reasonable and justified in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b).The state os, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.

[173] In **Juma Musjid,** the Constitutional Court also took cognisance of section 3(1) of SASA which makes school attendance compulsory for learners between the age of seven to 15 years or until the learner reaches the ninth grade, which ever occurs first. Section 3(3) further enjoins the respondent to ensure that there are enough school places so that every child in each province attends a schooll as required by section 3(1). The Constitutional Court then stressed that these statutory provisions which make school attendance compulsory for learners from the age of seven to 15, read with the entrenched right to basic education in the Constitution signify the importance of the right to basic education for the transformation of our society. It further held that the importance of the right to basic education is also foreshadowed by the fact that any failure by a parent to cause a child to attend school renders that parent guilty of an offence and liable, on conviction, to a fine or imprisonment for a period not exceeding six months. Further more any person, who, without just cause, prevents a learner who is subject to compulsory attendance from attending school is also guilty of an offence and liable on conviction to a fine for a period not exceeding six months.

[174] This dictum was also followed by the Supreme Court of Appeal in **Minister of Basic Education and Others v Basic Education For All and Others 2016 (4) SA 63 (SCA)**.[20] The Supreme Court of Appeal held:

*"[36] In JumaMusjid **[6]** the Constitutional court compared s 29(1)(a) to other socio-economic rights, for example, the right to housing under s 26 of the Constitution. Section 26(2) provides that the State 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. Section 29(1)(a) has 'no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures".' The Constitutional Court stated emphatically that the right to a basic education entrenched in s 29(1)(a) is 'immediately realisable' and may only, in terms of s 36(1) of the Constitution, be limited in terms of a law of general application that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.*

*[37] The right in s 29(1)(a) is distinct from the right to 'further education' provided for in s 29(1)(b). In Juma Musjid, the Constitutional Court considered it important that the legislature, in recognising the distinction between 'basic' and 'further education', made attendance at school compulsory in terms of s 3 of SASA for learners from the age of seven until the age of 15 or until he or she reached the ninth grade, whichever occurred first.**[8]** The Constitutional Court took the view that the aforesaid statutory provision, read with the entrenched right to basic education in s 29(1)(a) of the Constitution, indicated 'the importance of the right to basic education for the transformation of our society'.**[9]** In Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another **[2009] ZACC 32**; **2010 (2) SA 415** (CC), the Constitutional Court recognised the importance of education in redressing the entrenched inequalities caused by apartheid and its significance in transforming our society. Moseneke DCJ said the following: (paras 45-47)*

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[20]See paragraph 17

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

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

In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.'"[21] *[footnotes ommitted]*

[175] Similarly in **Madzodzo and Others v Minister of Basic Education and Others 2004(3) SA 441 (ECM)** this Court followed suitwhere the following was held:

"19 Access to schools is, therefore a necessary condition for the achievement of the right to education. So too is the provision of teaching and non-teaching staff (see Centre for Child Law and Others v Minister of Basic Education and Others (National Association of School

[21]References omitted

Governing Bodies as amicus curiae) [2012] 4 All SA 35 (ECG) at para 32) and the provision of adequate teaching resources. Our own history demonstrates the role that education plays in shaping social and economic development. Apartheid education has left a profound legacy, not only in the unequal and inadequate distribution of resources but in the appalling levels of literacy and numeracy still found in the general population as a consequence of decades of unequal and inadequate education. As noted in JumaMusjid (at para 42):

> *"The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."*

"[20] *The state's obligation to provide basic education as guaranteed by the Constitution 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. It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education."*

[176] Furthermore, it is that case that, as acknowledged by the respondent, that this right is multi-faceted, it includes the provision of proper facilities[22]. The Constitutional Court has consistently rejected an approach that a minimum core content could be read into a constitutional right[23].

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[22] Madzodzo at para [20]

[23] Grootboom *supra* at para [32]-[33]; Minister of health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at para [34]; Mazibuko *supra* at paras [52]-56]

[177] The reliance of the respondent on the **Ermelo** case is clearly wrong. The Ermelo case dealt with section 29(2) of the Constitution which confers on the learners the right to receive basic education in the language of their choice *"where that education is reasonably practicable"*. Its text is different from that of section 29(1) which does not contain internal modifiers.

[178] The stance of the Minister to simply rely on budgetary constraints does not save her. In the **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC)** paragraph 74 the Court had this to say:

"....This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."

[179] This approach was followed in **Madzodzo** by this Court where Goosen J held: "This court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the city to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."

[180] In determining this issue I must therefore consider what is at stake: the right to basic education which is a right that is unarguably immediately deliverable; the

situation on the grounds as a result of failure by the Minister to deliver this right and the consequences of the delay.

[181] In this case the respondent simply pleads: it does not have access to money, money is with other state organs. Also it depends of other state organs for the revision of what is need for the school infrasture. Section 41 of the Constitution compels it to co-ordinate its efforts with other state organs and her ability to deliver depends of the co-operation of those state organs and government departments. Put in another way, the respondent is paralysed, its limbs are cut –it is helpless. Therefore, because of this, the proviso in sub-regulation 4(5)(a) must be retained. Equally, because of this restraint, the MEC cannot be required to make their plans for provision of basic school infrastructure public. Also cannot be compelled to report on those plans, hence the terms of sub-regulation 4(6)(a) and 4(7). The issues raised here are also found with regards to her response to the prioritisation of schools with no power; sanitation or water dealt with in sub-regulation 4(3)(b) read with 4(1)(b)(i)

[182] As I understand the argument put forward by the Minister, her hands are tied. To me this means that she is at the mercy of the other departments and organs of State. This simply compromises the constitutional value of accountability. There is no way that the Government can be held accountable for the discharge of its duty to provide basic school infrastructure. Therefore, because the provision of basic basic infrastructure is indisputably integral component of the right to basic education, it means Government cannot be held to account.

[183] Section 195(3) of the Constitution expressly provides that national legislation must ensure the promotion of accountability and transparency. National legisltation includes subordinate legislation in terms of the Act Parliament.

[184] The natural consequence flowing from the stance of the Minister is that Government can never be expected to account. Furthermore, it means that the public cannot ascertain whether, when and what school infrastructure to expect. Members of the public can also not assist in drawing the attention of the Government to errors in the implementation of the scheduled programmes. The public is hamstrung by this.

[185] I cannot fathom a reason why, given the nature of the right in question, and the abundant crisis, the respondent cannot develop a plan and allocate resources in accordance with her obligations. In the event that she alleges that she is unable to do so, it is incumbent upon her to justify that failure under section 36 or 172(1)(a) of the Constitution. This she has not done.

[186] I have also considered paragraph 35 in **Minister of Home Affairs v Nicro** relied upon by the Minister in holding that it would be irresponsible for her to promulgate norms and standard without adding the condition in 4(5). Relying on paragraph 35 to justify her stance that argued that she does not bear responsibility to provide any empirical evidence or proof to justify that the proviso in regulation 4(5) is reasonable. This stance loses sight of the fact that these regulations were born to

give effect to the right of basic education. Where they do not give life to that right surely the Minister bears an obligation to proffer some justification. The stance she has adopted is a dismissive stance which cannot be countenanced. Even worse, the facts upon which the minister will advance to justify these regulations are within her knowledge. In **Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as *amicus curiae)* 2001(4) SA 491 (CC)** paragraph 19 the court held:

> *"It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under section 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."*

[187] The stance of the Minister in this case, namely that the government's efforts are hamstrung by the lack of adequate resources, budget and reliance on other state

organs was also relied on in ***Madzodzo***. In that case, the Court rejected it on the basis of the norms and standards determined for the public schools. In **Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005(2) SA 359 (CC)** in confirming that accountability of one of the founding principles binding on the state it the held:

"[75] The value of accountability is thus expressly mentioned in a range of provisions in the Constitution. As importantly, however, the value is asserted within the scheme of the Bill of Rights. The Bill of Rights requires that where an entrenched right is limited, that limitation may be constitutionally permissible if it is "reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom".Section 36(1), therefore, requires the state, or any person asserting that a limitation of a right falls within the provisions of section 36(1), to show that the limitation is reasonable and justifiable. It is one of the objects of the Bill of Rights to require those limiting rights to account for the limitations. The process of justifying limitations, therefore, serves the value of accountability in a direct way by requiring those who defend limitations to explain why they are defensible. The value of accountability, therefore, is one which is relevant to a consideration of the "spirit, purport and objects of the Bill of Rights".

[76] The value of accountability is asserted not only for the state, but also for all organs of state and public enterprises which would include all four respondents. The principle that government, and organs of state, are accountable for their conduct is an important principle that bears on the construction of constitutional and statutory obligations, as well as on the question of the development of delictual liability.

[188] Regarding the proritisation she has given to schools that are built entirely with mud; materials such as asbestos, metal and wood, her stance is that this is within her discretion. In the exercise of her discretion it is the schools in this category that are priorities for replacement of their structures with those that comply with the

National Building regulations, SANS 10-400 of the Health and Safety Act. So, the sub-regualtions 4(3)(a) read with sub-regulation 4(1)(b)(i) should be retained as they are.

[189] The undisputed testimonies amassed by the appellant and BEFA show that the dangerous and unsafe conditions are not only limited to the schools that the Minister has prioritised in her regulations. These conditions are also found in those schools that only have part of the structure built of mud and these other materials. The testimonies show that the learners and educators who use these structures daily confront the risk of injuries and death. That most of the times no effective learning actually takes place in these structures. The Minister did not present any information to counter these allegations.

[190] From the information presented to Court, it is clear that these schools are targetted because of they are built in structures that constitute both health and safety and other environmental hazards for their users. The Minister acknowledged the existence of the risks in those schools in the oter schools as well. Yet, her response is that the Court must defer to the exercise of her discretion.

[191] The Minister's response response does not assist the Court in that this Court does not know what being "prioritised".

[192] The Minister's response also does not assist because by her reliance on the exercise of her discretion in response to this challenge she has not explained why

the other schools should also not fall into the prioritised list in light of the impact of their conditions. The Minister did not put any rational basis for the distinction she has drawn. The fact of the matter is: an unsafe structure poses the same risk to learners and teachers whether there are also some safe structures at the school.

[193] The same criticism is found regarding the provisions of sub-regulation 4(2)(b) which deals with new schools and improvements to existing schools. The effect of regulation 4(1)(a) read with 4(2) is to exclude currently budgetted schools from the norms and standards. This is glaring inconsistency that has also not been explained by the Minister.

[194] The crude and naked facts stairing us are that each day the parents of these children send them to school as they are compelled to, they expose these children to danger which could lead to certain death. This is fate that also stares the educators and other caregivers in the schools in the face.

[195] The obligation upon the respondent to provide basic education has been in existence since 1996 when the Constitution was born, 22 years ago. Thus the respondent has had adequate time to plan and budget for all its duties in respect of the right to basic education. Even accepting that apartheid left gaping disparities and wide gap in education infrastructure, with the proviso in sub-regulation 4(5)(a) there is no hope that such a gap will ever be closed or if so to a significant extent.

The proviso provides the respondent with a lifetime indemnity against discharging the duty she owes in terms of section 29(1)(a).

[196] The natural consequence flowing from the stance assumed by the Minister is that she cannot make any commitment regarding the basic norms and standards for the infrastructure in public schools. This is unpalatable given that the requirement here is for a minimum requirement for basic infrastructure nothing more nothing less. It is also inconsistent with the Constitution.

[197] In ***Rail Commuters*** *supra,* the Court held that the Constitution affirms accountability as a value and requires reasonable steps be taken by the relevant organs of state to comply with their legislative and constitutional obligations. Our Courts have always rejected the reliance on budget contraints as a justification for failure to provide essentials.

[198] In response, whilst resisting the relief sought by the applicant, the respondent offers absolutely nothing. This is untenable. There is an incongruence manifested by the acceptance on the one hand of the reality of the substandard public school infrastructure and the inherent dangers created thereby on the other hand, not offering anything. This open-ended approach is unreasonable and thus unacceptable.

[199] The interpretation of section 40 and 41 of the Constitution that the respondent contended for also cannot be sustained. It cannot core exist with the values

enunciated in the Constitution. The situation confronting the minister with regards to the need for resources to discharge its responsibility is not unique to her. There is interdependence in government. The members of the public owed a duty by government must be secured in the knowledge that government is driven by the values in the Constitution. Every section in the Constitution should be read against those values.

[200] Over and above this, in the present case, the Court order of 2013 required that the Minister should consult with her stakeholders prior to the development of the regulations. The obvious puport of that term in the order is that the regulation should provide a final document of commitments by the Minster against which she would be held accountable. The respondent did not proffer any explanation in this regard. It was content with just arguing that the judgment is no longer in issue. Even section 5C of SASA requires her to consult with the Minister of finance in coming up with the regulations.

[201] Regarding the relief that this court can give I have considered section 172 of the Constitution. Section 172 gives the Court power to adjudicate upon matters in which there is violation of the Constitution. In ***AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, South African Social Security Agency and Otheres 2014 (4) SA 179 (CC)*** at para [42], the court held:

"There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the

Court must provide effective relief for infringements of constitutional rights. On this basis, there can be no question that requiring SASSA to re-run the tender falls squarely within this Court's remit. What the public lost in the flawed tender process was the chance to secure a contract with the most competitive and cost-effective tenderer, as the merits judgment explained."

[202] Furthermore, in ***Rail Commuters*** at paragraph [108] the Court regarded declaratory relief of particular value, in that it allows the Court to declare the law, while leaving the decision as to how best to observe the law in the hands of the executive and legislature. Therefore, this Court can declare invalid any law or conduct inconsistent with the Constitution to the extent of such inconsistency. The relief sought by the applicant is competent under section 172 of the Constitution.

COSTS

[203] This case is about the assertion of the right to basis education stipulated in section 29 of the Constitution. In **Biowatch Trust v Registrar Generic Resources and Others** 2009 (6) SA 232 (CC) the Costittutional Court set out the applicable rule as follows: *"the general rule for an award of costs in consitutional litigation between a private party and the state if the private party is successful it should have its costs paid by the state and if it is unsuccessful each party should pay its own costs."*

[204] The applicant's position is that the Court should follow the lead of the Constitutional Court.

[205] BEFA did not seek costs in respect of its application to intervene. It sought costs associated with the answering affidavit and its supporting filed by the respondent in its late answer to BEFA's application for leave to intervene. These affidavits were filed just a week before the argument of this matter, on 6 March 2018. In this affidavit they responded to some of the allegations contained in BEFA's affidavit. Then on the morning of the argument of this matter the Minister sought the condonation of the late filing of her answering affidavit.

[206] BEFA had filed its affidavit accompanying its application to intervene on 6 October 2016. The respondent consented to that application. BEFA thus sought a punitive costs order against the minister for the answering and supporting affidavit of the Minister.

[207] The Minister challenged BEFA's application for a costs order against her. She argued that in the first place an *amicus curiae* is not a litigant; secondly, BEFA was afforded an opportunity to deal with the respondent's affidavit subject to the postponement of this application. BEFA had rejected that proposal.

[208] Mr Erasmus SC then argued that as an *amicus curiae* BEFA is not entitled to costs and had correctly not sought costs of its application to intervene and it has no basis to seek the costs of the minister's answering affidavits. Equally, they also have not opposed the admission of these affidavits.

[209] I do not agree that BEFA should not recover the costs occassioned by its having to respond to the belated opposition of the respondent to its intervention in this matter.

THE ORDER

1. In the circumstances I grant an order in the following terms:

"1. **Sub-Regulation 4(5)(a)** of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 (No. R. 920 in Government Gazette 37081 of 29 November 2013) ("the Regulations") is inconsistent with the Constitution, the South African Schools Act 84 of 1996 ("SASA") and the order granted on 11 July 2013 by Dukada J in this Court under case number 81/2012, and is accordingly unlawful and invalid;

2. **Sub-Regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations** should read that **all** schools and classroom built substantially from mud as well as those built substantially from materials such as asbestos, metal and wood, must within a period of three years from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and Occupational Health and Safety Act 85 of 1993;

3. **Sub-Regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations:**

(I) is inconsistent with the Constitution and invalid insofar as it omits to deal with schools which are built partly from mud, asbestos, metal and wood, must within a period of three years

from the date of publication of the Regulations, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and Occupational Health and Safety Act 85 of 1993 ("OHSA"); and

(II) the word **"entirely"** whenever it appears in regulation 4(3)(a) is struck out alternatively, the phrase "**Schools built entirely"** is struck out wherever it appears in regulation 4(3)(a), and is replaced with the words **"classrooms built entirely or substantially";**

4. **Sub-Regulation 4(3)(b) read with regulation 4(1)(b)(i)** of the Regulations is to be read as requiring that all schools that do not have access to any form of power supply, water supply or sanitation, must within a period of three years from the date of publication of Regulations, comply with the norms and standards described in regulations 10, 11 and 12 of the Regulations;

5 **Sub-Regulation 4(2)(b)** of the Regulations is inconsistent with the Constitution and invalid insofar as new schools and additions, alterations and improvements which are the subject of the MTEF plans are not subject to the norms and standards set out in the Regulations; and

6 **Sub-Regulation 4(2)(b)** of the Regulations is to be read as requiring that all current plans in relation to the schools and projects contemplated in paragraph (a) must, as far as reasonably practicable, be implemented in a manner which is consistent with the Regulations, and that all future planning and prioritisation in respect of these schools must be consistent with the Regulations;

7. **Sub-Regulations 4(6)(a) and 4(7)** are unconstitutional and invalid to the extent that they do not provide for the plans and reports to be made available to the public;

9. The Minister is to amend the Regulations to provide that the plans and reports submitted in terms of regulations 4(6)(a) and 4(7) of the Regulations must be made publicly available within a stipulated period of their having been submitted to the Minister, which period must be reasonable.

10. Directing the first respondent to pay applicant's the costs of this application and BEFA's costs in opposing the Minister'sapplication to exclude BEFA's submissions.

N MSIZI

Acting Judge of the High Court

Representation:

For the Applicant: Equal Education Centre:
Mr Budlender SC assisted by A Du toit
C/O Gordon MacCune Attorneys
King Williams Town

For the *Amicus Curiae*: BEFA: Adv Stein C/O Gordong MacCune Attorneys
King Williams Town

For the respondent: Mr MC Erasmus SC Assisted by: EM Baloyi-Mere and J Merabe