IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO

Case no: 276/2016
Date heard: 11 to 13 March 2018
Date delivered: 19 July 2018

In the matter between:

EQUAL EDUCATION	First Applicant
AMATOLAVILLE PRIMARY SCHOOL	Second Applicant

vs

MINISTER OF BASIC EDUCATION	First Respondent
MEC FOR EDUCATION: LIMPOPO	Second Respondent
MEC FOR EDUCATION: EASTERN CAPE	Third Respondent
MEC FOR EDUCATION: FREESTATE	Fourth Respondent
MEC FOR EDUCATION: GAUTENG	Fifth Respondent
MEC FOR EDUCATION: KWAZULU NATAL	Sixth Respondent
MEC FOR EDUCATION: MPUMALANGA	Seventh Respondent
MEC FOR EDUCATION: NORTHERN CAPE	Eighth Respondent
MEC FOR EDUCATION: NORTH WEST	Ninth Respondent
MEC FOR EDUCATION: WESTERN CAPE	Tenth Respondent

JUDGMENT

MSIZI AJ:

Introduction

[1] Though this application was launched by both applicants, it is now pursued by the first applicant only, hence referefence to an applicant in the judgment. Although all the respondents initially filed notices to oppose the application the fourth, fifth and sixth respondents later filed notices to abide. However, none of the other respondents participated in these proceedings except the first respondent. Therefore, in this judgment, the first respondent will be referred to as the respondent or the Minister, interchangeably.

[2] On 14 December 2016 the Court admitted the Basic Education for All ("hereinafter referred to as "BEFA") to intervene as an *amicus curiae* with leave to adduce evidence and argue the matter. It aligns itself with the cause of the applicant. This Court is grateful to the *amicus curiae* for its assistance.

[3] Before I delve into the central issue in this application, it is convenient that I first consider the preliminary points that have been raised by the respondent.

POINTS *IN LIMINE*

A. APPLICATION OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT NO 3 OF 2000 (hereinafter referred to as "PAJA")

[4] The Minister argued that the promulgation of these regulations constitutes administrative action and in promulgating them she was performing her public functions in terms of section 5A of the South African schools Act, No 84 of 1996 (hereinafter referred to as "SASA"). Therefore, this application is subject to the provisions of the PAJA.

[5] In support of this contention she referred to the definition of the term: "administrative action" in section 1 of PAJA. The terms is defined as*: "any decision taken, or any failure to take a decision by an organ of sate, when exercising a power in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person and which has a direct, external legal effect."*

[6] The Minister relied on what was said Chaskalson CJ in ***Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)*** **2006 (2) SA 311 (CC).** She contended that the relief sought by the applicant, insofar as it is based on a review application in terms of PAJA, is incompetent. Furthermore, the application is out of time and the applicant has failed to make out a case that an extension should be granted for the time period within which to bring the review application. During the course of argument, the Minister abandoned the point regarding the lateness of the application.

[7] The applicant's stance was that there is no comprehensive rule on whether or not the making of regulations is automatically an administrative decision. Whether the exercise of making of regulation is an administrative decision is a case specific issue. Mr Budlender SC, for the applicant, proposed that the best approach is to ask whether the making of the regulation negatively affects rights because that is part of the definition of administrative action in PAJA. His explanation was that it is not all regulations that have adverse effect, an example of regulations falling in this category are traffic regulations regulating the direction of the traffic on the road.

[8] With respect to the regulations, which are the subject-matter of this application, he argued that these can be seen two ways: (i) as having an adverse impact because they reduce the basic right to education; or (ii) as violating the principle of legality as applicable in terms of section 172 of the Constitution and the rule of law as set out in section 1 of the Costitution. The applicant has based its case on section 172(1) of the Costitution.

[9] In addition to this, Ms Stein for BEFA contended further that PAJA cannot be invoked as a justification for denying a litigant a constitutional right, which in this case is derived from section 172 of the Constitution. It is the Constitution that is supreme and not PAJA.

[10] This issue of whether PAJA is applicable to the regulation-making exercise arises because of the oft-held belief that the making of regulations is automaticalyy an administrative action. In the case of ***Mostert NO v The Registrar of Pension Funds and Others*** **2018(2) SA 53 (SCA)** decided on 15 September 2017 case no 986/2016 ZASCA 108, the Supreme Court of Appeal explained the correct position:

"[8] A word of caution may not be out of place. New Clicks[1] is no authority for the proposition that the making of regulations by a minister, in general, is administrative action for purposes of PAJA. It seems, with respect, that the statements in some of the other judgments in that case, to the effect that this is what Chaskalson CJ held, were based on a misinterpretation of what he said. The learned Chief Justice said what is or is not administrative action for the purposes of PAJA is determined by the definition in section 1. He analysed the regulations in question in the light of the definition, concluded that legislative administrative action has not been excluded from the definition of administrative action, and said:

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[1] This is in reference to *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC)

'It follows that the making of the regulations in the present case by the Minister on the recommendation of the Pricing Committee was "a decision of an administrative nature". The regulations were made "under an empowering provision". They had a "direct, external legal effect" and they "adversely" affected the rights of pharmacists and persons in the pharmaceutical industry. They accordingly constitute administrative action within the meaning of PAJA'. (My emphasis).

[9] In a separate judgment Ngcobo J expressed the view that PAJA applied to the specific power to make regulations conferred by s 22G (2)(a)-(c) of the Medicines and Related Substances Act 101 of 1965 (Medicines Act). He emphasised that he refrained from deciding whether PAJA is applicable to regulation-making in general. Two of the judges in that matter expressed their agreement with this approach while Sachs J held that PAJA was not applicable, save in the specific respect of fixing the precise amount chargeable as a dispensing fee. Moseneke J held that it was unnecessary to decide whether PAJA applied to ministerial regulation-making, and four judges concurred in his judgment.

[10] In dealing with the applicability of PAJA to regulation-making Chaskalson CJ was therefore not speaking for the majority of the court, and, as I have tried to show, in any event confined himself in this regard to the specific regulations that the court was dealing with. It seems, with respect, that in City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) the position was also stated too widely (para 10). The final word on regulation-making and the applicability of PAJA to it may therefore

not have been spoken. And as this matter shows, not all the provisions of PAJA, and particularly s 7, are tailored for the review of a regulation."

[11] *Clear from the above, the better view is that there is no comprehensive rule, whether or not the regulation making process is an exercise of administrative action depends on the merits of each case. It depends on the nature of the power being exercised and the consequences of its exercise. The fact of the matter is that there is no general rule that when a Minister makes regulations she is exercising administration action.* ***Mostert*** *has made it clear that what Chaskalson CJ said in the New Clicks is no authority for such stance.*

[12] I have also considered the judicial policy referred to by Ngcobo CJ (as he then was) in **Albutt v Centre for the Study of Violence & Reconciliation 2010 (3) SA 293 (CC) (2010 (5) BCLR 391; [2010] ZACC 4)** in paragraph 82:
"Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal." This and the fact that it is clear from the reading of the case as pleaded by the applicant on its papers that it is only relying on PAJA as an alternative to its main case. I have also taken into account what this case is about, which I address myself to later.

[13] This Court is constrained to adjudicate this matter on the basis pleaded by the applicant – see **Gcaba v Minister of Safety and Security 2010(1) SA 238 (CC)** at paragraph 75.

[14] Therefore, I reject this point *in limine*.

B NON-JOINDER

[15] The Minister contended that the attack levelled at regulation 4(5)(a) (this regulation subjects the realisation of the norms and standards to the availability of resources and co-operation of other government agencies and entities responsible for infrastructure), compels the applicant to join those entitites in this application. Therefore, the Minister raised the issue of non-joinder of the National Assembly, the Minister of Public Works, the Minister of Treasury, the Minister of Water and Sanitation, the Minister of Energy, the Minister of Rural Development and Land Reform and Eskom SOC Limited who she maintained are necessary parties with direct and substantial interests in this matter.

[16] To illustrate the point, she pointed out that she does not have control over, for instance, the department of public works which is the department with the competence to provide the physical structures required for the schools. Also that her department lacks the competence of that department. Consequently she cannot make a commitment over that department hence the qualification in regulation 4(5)(a).

[17] This omission, she contended, is not merely one of non-joinder. It also violates the constitutional division of powers between the different spheres of government and organs of state. It further permeates the entire application and also manifeststhe violation of the principle of subsidiarity, simultaneously short-circuits the Constitution and SASA.

[18] Contending for the joinder of these entities, the Minister argued that it is now a well-established principle of law that, in the exercise of its inherent power, a Court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject-matter and the outcomes of the litigation, have been joined as parties.[2]

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[2] See Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657 and 659; Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA) at para 9

[19] Mr Erasmus SC for the respondent referred to the ***City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another***.[3] He pointed out that in that case the Constitutional Court was of the view that it would generally be preferable for all of government departments to be involved in the complex legal proceedings regarding eviction and access to adequate housing.

[20] The Minister sought the joinder of other parties mainly on the basis that they are the service providers to her department. The difficulty with this submission is that her department has numerous service providers relative to the provision of school infrastructure. In her answering affidavit she mentioned the Departments of Energy, Public Works, Water and Sanitation and Finance, Rural Development and Land Reform, as well as Eskom. Also how long is that string? For instance, municipalities qualify as service providers they provide water and sanitation services. Would they also have to be joined?Surely not. There are 257 municipalities in South Africa, 8 Metropolitan municipalities, 44 district municipalities and 205 local municipalities. So all 257 would have to be joined.

[21] Replying to this in the replying affidavit, the applicant pointed out that in the founding affidavit it cited the Minister in dual capacity-as the representative of the National Government and the person required by South African Schools Act, No No 84 of 1996 (hereinafter referred to as "SASA") to prescribe the minimum norms and standards for infrastructure. Its stance was that it is for the Minister as the bearer of those duties and the representative of the National Government of which she is a part, to engage them in this litigation to the extent that this may be necessary. It is the Minister who bears the overall responsibility on behalf of the National Government for the realisation of the right to a basic education. These duties arise from the Constitution; SASA and the National Education Policy Act 27 of 1996 ("NEPA"). The applicant also submitted that the Minister did not dispute that she has been cited also in her

[3] 2012 (2) BCLR 150 (CC) at paragraph 45.

capacity as the representative of the National Government. Equally, the MECs are before the Court as representatives of the Provincial Government. There is one National Government and nine Provincial Governments. All are before Court. He refuted that there is a need to join every one of the government as contended by the Minister.

[22] In Court, *Mr Budlender SC* referred to Rule 10A of the Uniform Rules of Court and to the Interpretation Act 33 of 1957, pointing out that the definition of"law", which is "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law." He then submitted that regulations are included in that definition.

[23] I have considered that in the founding affidavit the applicant cited the Minister in her capacity as both the political head of national education and the representative of the National Government. The Minister did not dispute that. Similarly, it cited the MECs as representatives of Provincial Governments. This also remained undisputed. Therefore, before this Court is the National Government and the Provincial Governments together with the national minister of basic education and the members of legislatures heading the education portfolio in all 9 provinces.

[24] Considering this citation, I also gave due regard to the structure of the National Government of the Republic of South Africa as described in section 85 of the Constitution.

"**85. Executive authority of the Republic**(1)The executive authority of the Republic is vested in the President. (2) The President exercises the executive authority, together with the other members of the Cabinet, by —

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) ...

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) ..."

[25] From this it is abundantly clear that Cabinet is the national executive authority which discharges its duty through the President and the Ministers. With respect to the Provincial Government, the provincial executive authority lies with the Premier together with the MECs jointly. Given this, I am thus satisfied that both the National and Provincial Governments are before this Court.

[26] In ***Gory v Kolver NO and Others*** 2007 (4) SA 97 (CC) at paragraph [12], that Court held: "This Court would not be able to function properly if every party with direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity."

[27] Also in ***Khosa and Others v Minister of Social Development and Others Mahlauke and Another v Minister of Social Development*** 2004 (6) SA 505 (CC) the Court proceeded to entertain the matter despite a point of non-joinder of the Minister of Finance in an application of constitutional invalidity raised by the MEC of Health and Welfare, Northern Province.

[28] In ***Economic Freedom Fighters and Others v Speaker of National Assembly and Others*** [2016] 1 ALL SA 520 (WCC) the issue was the non-joinder of President, Chief Justice and the Minister of Finance to a litigation concerning a constitutional challenge aimed at Parliament and the Provincial Medical Schemes Act. In holding that pragmatism should inform the principle of joinder, Binns-Ward J held: "*That some degree of flexibility in the application of the principle of joinder of necessity may be permissible on pragmatic ground finds support in the full court judgment of Mohamed J in* ***Wholesale Provision Supplies CC v Exim International CC and Another 1995(1) SA 150(T)*** *where the future Chief Justice remarked that 'the rule which seeks to avoid orders which might affect third parties in proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case."*

[29] *In casu*, I have considered the following: (i) that the Minister has been cited both as the political head of her department and as a representative of the National Government. In the latter capacity all the other Ministers she contends should be joined have thus been joined; (ii) I am convinced that given the issue at hand as founded on the papers of the applicant it is incorrect that there should have a joinder of other entities. Section 5A of SASA enjoins the minister to consult with the Minister of Finance prior to prescribing these regulations. So it must follow that she would have done so and would have taken the outcome of that consultation into consideration when she prescribed these regulations. No purpose shall be served by the joinder of the Minister of finance. Section 5A puts accountability for these regulations right at the door step of the Minister; (iii) furthermore, the 2013 Court order enjoined the Minister to consult with all the relevant stakeholders prior to the promulgation of the regulations; and (iv) the regulations simply require the Minister to provide the framework for the essential standards and norms. They are not about her expenditure an issue that comes up later at the point of implementation.

[30] I have also considered that the nature of the right in question and who the beneficiaries of the rights are. This case is about the right to basic education. Its primary beneficiaries are children. If asserting their right to basic education is made as complicated as what the respondent proposes, that amounts to denial of their access to the courts. That cannot be in the spirit of our Constitution. I deal with this more when I address myself later to the significance of the right to basic education.

[31] From the aforesaid, this Court is entitled to proceed on the basis that the Minister had already consulted with the relevant parties and the regulation in respect of which she bears the primary responsibility have captured everything emanating from those parties thus dispensing with the need to join them in this suit.

[32] I am convinced that in the present case none of the parties the Minister seeks to join will be prejudiced by the grant of the order in this application or the order that will eventually issue will be hollow.

[33] I, therefore, reject this point of non-joinder.

[34] With these preliminary issues out of the way, I now turn to consider the central question presented in this matter, the impugned regulations stipulated by the respondent.

THE BACKGROUND

[35] The impugned regulations emanate from section 5A of SASA which provides as follows:

> "**5A. Norms and standards for basic infrastructure and capacity in public schools.—**
>
> (1) The *Minister* may, after consultation with the Minister of Finance and the *Council of Education Ministers*, by regulation prescribe minimum uniform norms and standards for—
>
> *(a)* schoolinfrastructure;
> (*b*) capacity of a *school* in respect of the number of *learners* a *school* can admit; and
> (*c*) the provision of learning and teaching support material.
>
> (2) The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following:(*a*)In respect of *school* infrastructure, the availability of—
> (i)classrooms;
> (ii)electricity;
> (iii)water;
> (iv)sanitation;
> (v)a library;
> (vi)laboratories for science, technology, mathematics and life sciences;
> (vii)sport and recreational facilities;
> (viii)electronic connectivity at a *school;* and
> (ix)perimeter security;
>
> (*b*)in respect of the capacity of a *school*—
> (i)the number of teachers and the class size;

(ii)quality of performance of a school;
(iii)curriculum and extra-curricular choices;
(iv)classroom size; and
(v)utilisation of available classrooms of a school;
(*c*)in respect of provision of learning and teaching support material, the availability of—
(i)stationery and supplies;
(ii)learning material;
(iii)teaching material and equipment;
(iv)science, technology, mathematics and life sciences apparatus;
(v)electronic equipment; and
(vi)school furniture and other school equipment."

[36] This section was introduced into SASA by the Education Laws Amendment Act 31 of 2007, and amended by the Basic education Laws Amendment Act 15 of 2011.

[37] Section 5A must be read together with section 58C of SASA which reads:

"**58C. Compliance with norms and standards.—**

(1) The *Member of the Executive Council* must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005), ensure compliance with—

(*a*)norms and standards determined in terms of sections 5A, 6 (1), 20 (11), 35 and 48 (1);

(2) ...

(3) The *Member of the Executive Council* must, annually, report to the *Minister* the extent to which the norms and standards have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply.

(4) ...

(5) The *Head of Department* must comply with all norms and standards contemplated in subsection (1) within a specific *public school* year by—

(*a*)identifying resources with which to comply with such norms and standards;

(*b*)identifying the risk areas for compliance;

(*c*)developing a compliance plan for the province, in which all norms and standards and the extent of compliance must be reflected;

(*d*)developing protocols with the *schools* on how to comply with norms and standards and manage the risk areas; and

(*e*)reporting to the *Member of the Executive Council* on the state of compliance and on the measures contemplated in paragraphs (*a*) to (*d*), before 30 September of each year.

(6) The *Head of Department* must—

(*a*)in accordance with the norms and standards contemplated in section 5A determine the minimum and maximum capacity of a *public school* in relation to the availability of classrooms and *educators*, as well as the curriculum programme of such *school*; and

(*b*)in respect of each *public school* in the province, communicate such determination to the chairperson of the *governing body* and the *principal*, in writing, by not later than 30 September of each year."

[38] Section 58C creates a mechanism for ensuring compliance by MECs and heads of departments with the minimum norms and standards, as well as providing for regular and accurate reporting as regards levels of infrastructure in accordance with the Intergovernmental Relations Framework Act, No 13 of 2005, (hereinafter referred to as "IGRF Act").

[39] Section 35(1) of the IGRF Act provides:

35. Implementation protocols.—

(1) Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol."

THE 2013 COURT ORDER

[40] The case of the applicant is also based on the Court order of 2013.

[41] In 2011 the Minister had not prescribed the regulations envisaged by section 5A. At that point the stance of the Minister was that she was not obliged to promulgate the regulations as that was a matter depending on her discretion. After failed attempts by the applicant to persuade the Minister otherwise, it took the Minister to Court to compel her, *inter alia*, to make the regulations. It is not necessary that I deal with what happened between the launch of that application and the ultimate grant of the court order.

[42] On 11 July 2013, the parties settled the matter and concluded a settlement agreement which was subsequently made an order of the Court, hereinafter referred to as ("the 2013 court order"). The terms of that order are the following :

> "1. *The Minister must, by 12 September 2013, publish for comments, amended draft regulations for Minimum Uniform Norms and Standards for Schools Infrastructure in terms of section 5A(1)(a) of the South African Schools Act, 84 of 1996, and in her sole discretion consult directly with stakeholders.*
>
> *2. The Minister must, by 30 November 2013, prescribe Minimum Uniforms Norms and Standards, by the promulgation of Regulations for Schools Infrastructure, in terms of section 5A(1)(a) of the South African Schools Act 84 of 1996, which provides for the availability of the school infrastructure referred to in section 5A(2)(a) of the Act. The Regulations shall prescribed Minimum Uniform Norms and Standards for School infrastructure and the timeframe within which they must be complied with.*
>
> *3. There is no order as to costs."*

[43] On 29 November 2013, the Minister finally promulgated the regulations. This was precededed by a production of various drafts to which the applicant, as a stakeholder, submitted comments to aspects of those drafts that it was not satisfied with. The last draft which proceeded the regulations was prepared in October 2013.

[44] Some of the concerns raised by the applicant on the 2013 draft, were the following:

(i) there were no stipulated timeframes within which unsafe structures and other hazards were to be eliminated. The applicant proposed norms to be followed in case of emergency or to ensure safety;

(ii) regulation 3(3) made the implementation of the norms subject to the resources and co-operations of other government agencies and entities responsible for infrastructure in general. The concern of the applicant was that the regulation would be rendered meaningless if provincial Education Department could escape responsibility for complying with them by shifting the blame to other role players in the infrastructure delivery process;

(iii) the members of the Executive Council in the various provinces were to make their plans and annual reports available publicly and should contain detail for school communities to be able to plan properly. Those plans should identify which schools were earmarked for the provision of infrastructure;

(iv) they failed to include within their ambit those schools already planned for but not yet in existence at the date of promulgation; and

(v) they did not prohibit inappropriate building materials such as corrugated iron, mud or dangerous material such as asbestos.

[45] The applicant was still not entirely happy with these final regulations as it is of the view that they contain material problems. It still holds that view hence this application. It thus seeks this Court's intervention in respect of some of them, namely, regulation 4(1)(b)(i); 4(2)(b); 4(3)(a); 4(3)(b); 4(5)(a); 4(6)(a) and 4(7).

[46] The meaning of the regulations is not in dispute. The issue that remains for determination by this Court is whether these regulations are inconsistent with the Constitution; SASA and the order of 2013.

[47] The parties are also agreed that the right to basic education as contained in section 29(1) of the Constitution is affected by the regulations. Furthermore, that the provision of the basic school infrastructure is an integral component of this right. Also that this right has been put in the highest hierarchy of the socio- economic rights. However the Minister contends that this matter is not about the right to basic education but rather about infrastructure at black schools.

[48] The Minister also did not deny the backlog in basic school infrastructure. The minister readily acknowledged that significant numbers of schools still lack the most basic resources: water, sanitation and electricity. Large numbers of schools face serious problems with class size, the quality of educators, and the availability of learning material. She posited though that there has been significant improvement.

[49] The Minister furnished figures of such improvement In her answering affidavit: in 1994 almost 60% of public schools have no electricity; 34% has no water;12% has no toilets; 61% no phones;82% no library and 57% of schools had class –rooms with 45 or more learnrs.

[50] Since 1996 the number of schools with no running water dropped from approximately 9,000 to approximately 1,700; number of schools with electricity dropped from 15,000 to 2,8000. She then referred to the National Education Infrastructure Management System Reports ("NEIMS") which was produced May 2011 in which statistics are documented. NEIMS is a database of public schools derived from surveys conducted in 1996 and updated in 2000. The Minister then

detailed the specific findings regarding resources as contained in the survey of public schools conducted in 2011.

[51] In 2011 her department became more involved in infrastructure development, largely through the new Accelerated Schools Infrastructure Delivery Initiative ("ASIDI'). This initiative monitors the status of progress and ensures transparency by compiling lists identifying schools that are being targeted for infrastructure improvement through national or provincial initiatives on the department's website.

[52] To illustrate the strides made by Governement in an effort to deal withi problems relating to schools, the respondent then set out the overhaul of the regulatory framework to ensure the realisation of the right to basic education. Included in this SASA *inter alia,* makes schooling of children between the age of 7 and 15 compulsory; the Nationa Education Policy Act, No 27 of 1996 ("**NEPA")** which provides for the determination of the educational policy. Government also increased its expenditure on education from 6.4% GDP in 1994 ; 6.8% in 1998 and 5% of GDP in 2012.

[53] Referring to these, she then pointed out that these overall statistics compare well with developing and developed countries. Furthermore, significant progress has been made and efforts are in place to improve the infrastructure and reduce or at least eliminate the backlog. In this respect she also referred to another NEIMS report of 2015 which showed the improvements made in infrastructure.

[54] In its papers, BEFA also introduced evidence in the form of testimonies from learners in Limpopo. This evidence falls into two categories: The first is where the state of the school infrastructure poses direct and imminent threat to the health and safety of learners. The second category is where the state of school infrastructure is such that teaching and learning cannot take place, or can only take place at certain times. BEFA argued that the first category is of circumstances that constitute violation of learners' health and safety, as well as

their right under sections 9;10; 29(1)(a) and 28(2) of the Constitution. The second category amounts to denial of access to education as well as the violation of sections 9;10 and 28(2) of the Constitution.

[55] Regarding the evidence contained in its affidavit, BEFA referred to a few cases. I give a sample. It referred to the well known tragic death of the 5 year old Michael Komape, who fell into a pit toilet filled with urine and faecal matter and drowned. It also referred to an account of one Letsoapele Sunnyboy Mokwana, the chairperson of the Masereleng Secondary School Governing Body. Mr Mokwana's account was that the school has one pit toilet only. This pit toilet is shared between all the teachers at the school and the female learners. The male learners are compelled to walk a distance to the bushes to relieve themselves. Kgoagelo one of the male learners at the Masereleng Secondary School, expressed how unhappy and afraid he is of this predicament. He does not feel safe to walk the long distance and being alone so far away from people. As a compromise he gets others to accompany him, an option which while safe, leads to the sacrifice of his privacy. In this case a better option.

[56] At Segware Secondary School where the male learners have the same predicamen as those of Masereleng, one of the learners described their challenge as follows: *"I hate going to the bushes because there is a group of gangsters who loiter nearby. They call themselves "Mabhokaharam".....if they see us, they force us to play dice with them. If we refuse to do so, they try to rob us. I tried to help my situation by not carrying money or anything valuable with me to the bushes, but if they find that we do not have anything, they beat us up."*

[57] Where the parties part way is: (i) on whether the respondent can be compelled to commit herself to stipulation of the norms and standards for essential basic infrastructure at schools without the qualification contained in regulation 4(5)(a) any or any other qualification for that matter; and (ii) whether that qualification should not be accepted as a law of general limitation in terms

of section 36 of the Constitution; (iii) whether the other impugned regulations are irrational or unreasonable.

[58] I now deal with the impugned regulations and the grounds of attack mounted by the applicant and BEFA.

THE REGULATIONS

A. Sub- Regulation 4(5)(a)

[59] This regulation reads:

"*4(5)(a) the implementation of the norms and standards contained in these regulations is, where applicable, subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and making available of such infrastructure.(b) the Department of Basic Education must, as far as practicable, facilitate and co-ordinate the responsibilities of the government agencies and entities contemplated in paragraph (a)." [own underlining]*

[60] The applicant sought the following relief in respect to this sub-regulation:

"1. *Declaring that 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 the above Honourable Court under case number 81/2012, and is accordingly unlawful and invalid;*

2. In the alternative to paragraph 1 above, reviewing and setting aside regulation 4(5)(a) of the Regulations;"

[61] The applicant contended that this sub-regulation makes the implementation of all the norms and standards subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general. The applicant challenged this sub-regulation on the basis that It gives Government, including MEC's and heads of Provincial Education Departments, a means of escaping the obligation to provide adequate school infrastructure in order to fulfil the right to basic education.

[62] The applicant further contended that this condition amounts to the failure of the Minister to comply with her obligation to make binding uniform norms and standards as enjoined by SASA. Therefore the Minister has failed to adhere to the Constitution, SASA, and by the Court of 2013.

[63] Applicant thus posited that the effect of sub-regulation 4(5)(a) is to render the norms and standards ineffective, because it makes the duty of the Minister under the regulations subject to unspecified and indeterminate qualifications which may be superimposed by other (unspecified) organs of state, because they decline to co-operate, or because they choose not to make resources or infrastructure available for this purpose, or because they are not competent in providing it. The result is that these are not uniform norms and standards as required by the SASA.

[64] To illustrate its point, in the founding affidavit, the applicant referred to two national education grants which are intended for spending by provinces on school infrastructure. One of the grants was the Education Infrastructure Grant (the "EIG"). In the 2014/2015, budget R1 177 914 000 was allocated to the Eastern Cape through the EIG. R181 343 000 of this amount went unspent. The National Treasury has since stopped the allocation of the EIG to the Eastern Cape (which was to have been R530 million) in terms of section19 of the Division of Revenue Act 1 of 2015 (the "Division of Revenue Act"). Section 19(1) of the Division of Revenue Act provides that allocation of funds may be stopped (a) on the grounds of persistent and material non-compliance with the Division of Revenue Act; (b) if the National Treasury anticipates that a province or municipality will substantially underspend on the allocation, or any programme, partially or fully funded by the allocation, in the 2015/2016 financial year; (c) for purposes of the assignment of a function from a province to a municipality, as envisaged in section 10 of the Municipal Systems Act; or (d) if a province implementing an infrastructure project does not comply with construction industry best practice standards and guidelines, as identified and approved by the National Treasury. The applicant's assumption is that the reason that the grant was stopped in this case is because it was anticipated that the Eastern Cape would again substantially underspend on its allocation.

[65] The applicant further contended that this demonstrates that proper planning and implementation in co-operation between the department of education and other departments and entities was not taking place even when funds were made available.

[66] Mr Budlender SC then argued that it is reasonable to anticipate that when a complaint is raised that the norms and standards have not been complied with, the answer will be that there has been no breach because of the proviso in this sub-regulation 4(5)(a).

[67] Both applicant and BEFA stressed that when the issue of the purport of this su-regulation is considered, this Court should keep in mind that the provision of basic school infrastructure is a component of basic education. Therefore, the sub-regulation in its current frame threatens the delivery of the right to basic education.

[68] The position of the respondent is explained in her answering affidavit. In paragraph 18 thereof she stated:

"At first glance ad the mere reading of section 29(1)(a) as opposed to other relevant rights in the Bill of Rights in the Constitution, the right is unqualified, immediately realisable, and not subject to available resources. Of utmost importance is that the right to basic education is not a stand-alone, absolute right and it is limited by the law of general application such as Regulations Relating to Minimum Norms and Standards for Public Schools(Infrastructure Norms and Standards) (sic) like any of the right in the Bill of Rights. I submit that the enabling legislation giving effect to the right points that basic education is progressively realisable like any of the other relevant rights and this resonates with the Constitutional Court's dictum in the Ermelo case by indicating that this is important and must be understood: 'within the broader constitutional scheme to make education progressively available and

accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress….."[4]

[69] In paragraph 88 she further submitted the following: "*I am advised that the Applicant it is wrong in law to suggest "that the right to basic education necessarily implies the right to an education that is of reasonable quality". The applicant is introducing a new undefined standard of quality different to the one that is in the enabling legislation. In fact, the right to education is that of progressively high quality for all learners and which the National Planning Commission indicated that: "by 2030, South Africa should have access to education ….of the highest quality, leading to significantly improved learning outcomes."(reference omitted) However, I am advised that the correct standard set by the Constitutional Court on numerous occassions is whether reasonable measures have been put in place by the State on any matter concerning the adjudication of any right in the Bill of Rights."*

[70] In the heads of argument the Mr Erasmus SC submitted that the Minister is not compelled to provide empirical evidence to support her stance that the proviso in sub-regulation 4(5)(a) is reasonable. He advanced that it would have been irresponsible of the Minister to promulgate norms and standards that are not subject to the availability of resources and co-operation of government agencies. For this stance the Minister relied on paragraph 35 of **Minister of Home Affairs v National Institute of Crime Prevention and Re-Integration of Offenders and Others 2005(3) SA 280 (CC)** where the following was said: **"***This calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification*

[4]This is Head of Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another 2010(2) SA 415 (CC) paragraph 61

analysis facts and policy are often intertwined. There may be instances where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that the policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is a sufficient connection between the means and ends, that may be enough to justify the action taken to address them."

[71] Mr Erasmus SC proposed that the matter at hand should be looked at from the perspective that the promulgation/publication of the regulations is a matter of choice or the exercise of discretion of the Minister. The question that begs an answer is thus not whether there is a better way of proclaiming the regulations or getting to the desired results. It would be incorrect for this Court to then consider whether the route taken by the Minister in coming up with these regulations is correct or not. This Court cannot look at the regulations *in vacuo*. He criticised the approach of the applicant and the *amicus curiae* in that they rely on the fact that there are still schools without proper infrastructure to conclude that there is thus a problem with the norms and standards.

[72] The Minister acknowledged that infrastructure is a facet of the right to basic education and that the right to education is an immediately realizable right and not progressively realizable. However, her proposition was that in this case this Court

should take the approach that the positive dimension of the right to education is realized or fulfilled progressively or over a period of time.

[73] Explaining this submission, *Mr Erasmus SC* stressed that the infrastructure required for basic education is not provided by the Minister. Schools are constructed at the behest of the Department of Public Works and so are other parts of the infrastructure. The Minister is constrained by section 41 of the Constitution to report the other departments and organs of state. She also cannot decide and commit on their behalf on the availability or otherwise of resources. Therefore, even though the Minister is accountable for provision of basic education she cannot be accountable for the provision of infrastructure as that is outside her competence.

[74] These regulations are the product of the Minister's full compliance with the provisions of section 5A (1) of SASA subject to the constitutional constraints created by sections 40 and 41 of the Constitution. It is incorrect that she should be expected to provide things outside the competence of her department which is only the provision of basic education and not other services. She is not the Minister of Public Enterprise, Water and Sanitation and Human Settlement. Requiring her to provide what is outside her competence is not in accordance with the Constitution.

[75] Her submission was that in terms of section 40 read with section 41, she is obliged to adhere to the principles of co-operative governance stipulated therein in conducting her business. She stressed section 41(e)(f)(g) and (h) in this regard. Her contention was that clear from these provisions it was already anticipated in the

Constitution that there will be a certain field of overlapping and co-operation required by the different organs of state. The Intergovernmental Relations Framework Act (IGRF Act) was born out of this. IGRF Act defines National Government as the National Executive established by Chapter 5 of the Constitution and includes all national organs of state. Section 91 and 92 (1) contained in this chapter 5 of the Constitution casts a responsibility upon her only for the powers and the functions she is assigned by the President. This is equally the case with the other departments.

[76] *Mr Erasmus SC* then posited that therefore the Minister cannot willy-nilly decide that she can decide for the other Ministers. For example, she cannot decide for the Minister of Water and Sanitation where water will be, how water will be allocated and supplied.

[77] The fact that the full realization of the right can be achieved progressively does not alter the obligation of the state to take those steps that are within its power immediately and other steps as soon as possible.

[78] Explaining that the Minister is dealing with the failing school infrastructre, Mr Erasmus SC then referred to the Minister's answering affidavit where she deals with the remnants of the apartheid era regarding the infrastructure in schools. He pointed out that the Minister has to date not been able to eradicate the backlog as she is humstrung by both the depth of the infrastucture backlog and the constitutional constraints.

[79] Mr Erasmus SC stressed that the applicant is not assailing any of the provisions of SASA, the primary legislation to be resorted to regarding the provision of infrastructure for schools. He argued then that, in that case whatever is contained in SASA and whatever the Minister does in accordance with SASA can never be branded unconstitutional because of the principle of subsidiary which is that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation to give effect to the right or alternatively to challenge the legislation as being inconsistent with the Constitution.

[80] The Minister's further contention was that no issue has been taken with regard to what the Minister set out to achieve in terms of SASA as described fully in the preamble to SASA. He referred to the second and third paragraphs of the preamble to SASA. To amplify his point, he argued that it is clear from the reading of the preamble that SASA was the voice of the people, the product of democratically elected representatives. He then posited that, even though the term "progressively" is not expressly used in the regulations, by implication the delivery of the right to "a basic education in connection with "availability" of education through a adequate and functioning educational institutions or infrastructure will have to be "progressively realised" and qualified by the terms such as "as far as reasonably practicable" and "subject to the resources". According to the Minister SASA contemplates that the right to a basic education with regard to desired infrastructure at public schools shall be realised progressively subject to available resources at the disposal of the state.

[81] The minister further relied on ***Mazibuko v City of Johannesburg*** 2010 (4) SA 1 (CC) to support her case that socio-economic rights are further limited by the qualification that they are only available to the extent that state resources permit.

[82] The angle assumed by the Minister was simply that this case is not about the content of the right to basic education but simply about the infrastructure at schools.

B. Regulation 4(5)(a) is an unjustified limitation on the right to basic education.

[83] The further ground of attack was that the norms and standards purport to limit the state's obligation to fulfil the right to basic education, by limiting the state's obligation to provide adequate infrastructure at schools. It makes all of the norms and standards subject to the resources and co-operation of government agencies responsible for infrastructure in general. This limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in light of the fundamental importance of the right to basic education.

[84] Regulation 4(5)(a) impermissibly limits that right by allowing government to remain legally unaccountable for its obligations in terms of SASA and the Constitution even after the target dates in the norms and standards have come and gone.

[85] BEFA also assailed this sub-regulation. It filed various documents in support of its attack which it postulated serve to confirm that this sub-regulation falls short of the constitutional standard binding upon the respondent. It submiited that the

inconsistency of this sub-regulation with section 29(1)(a) of the constitution has a further ripple effect in that it results in the violation of other basic rights: to dignity ; equality and further failure to hold paramount the best interest of a child. Yet, the respondent has adopted a course of action that lacks urgency and ignores the state's obligation to provide immediate relief to the learners.

[86] Both applicant and BEFA were aligned in the contention that this sub-regulation subjects the implementation of the norms and standards to the standard of progressive realisation. BEFA referred the Court to what was said in **Madzodzo and Others v Minister of Basic Education and Others 2004(3) SA441 (ECM) paragraphs 19 and 20.** It concluded that therefore, the respondent is obliged to do everything in its power to realise the right in full and immediately.

[87] Referring to the statistics in the NEIMS Report regarding the dire state of school infrastructure, BEFA, however, acknowledged that the full delivery of all the aspects of safe and adequate school infrastructure is not immediately possible. It referred the Court to an article: "Concretising the Right to Education by Cameron McConnachie and Chris McChonacie (2012) 129 SALJ 445 at 588 where the authors noted: *"the disruptive effect that an immediate order would have on the government's budgeting and planning and "queue "jumping" may militate against immediate relief."*

[88] Proceeding from this BEFA contended that it is nevertheless possible to strike a balance between an immediately realisable right and the realitiies of practical constraints in a way such as not to interfere with the integrity of the content of

section 29(1)(a) of the Constitution as defined by the Courts. The question of practicality itself should be located in the areas approproate for an analysis of the circumstances, namely, limitation in terms of section 36 of the Constitution and remedy in terms of section 172(1(a) of the Constitution. BEFA explained that the latter option is not applicable *in casu*.

[89] Ms Stein then submitted that to the extent that the respondent is unable to discharge the right to basic education in full and immediately, it must justify such failure through the mechanism of section 36 of the Constitution. Also it could argue that an order compelling it to discharge the right in full and immediately would not be just and equitable.

[90] BEFA further argues that by simply relying on budgetary constraints the respondent has dismally failed to justify the limitation it sought to put into the right to basic education which would be acceptable in terms of section 36 of the Constitution.

[91] BEFA proceeded on the premise that it accepts that this sub-regulation is of the law of general application. Once then it is accepted that the limitation is through a law of general application, the question of limitation is one of proportionality which involves the balancing of different interests. In this regard, it referred to **S v Manamela and Another 2000(3) SA 1 (CC)**where the Constitutional Court held:

"*In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more pursuasive or compelling the justification must be.*

Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, applying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."[5]

[92] It pointed out that, though the respondent asserted the sub-regulation as a law of general application, it nevertheless failed to justify its limitation against the requirements set out in section 36 of the Constitution.

[93] In its heads of argument BEFA referred to an Indian case of **Avinash Mehrota v Union of India and Others.**[6] The facts of that case are summarised herein. A fire broke out in the middle of an overcrowded school with thatched roof. The fire swept through the school. A large number of the school children could not escape as there was only one entrance, a situation aggravated by there being a narrow stairway and classrooms without windows. 93 children died. A petition was made to court for improved conditions relying on the right to education and to life both of which are guaranteed in the Constitution of India. Given that the problem a systemic problem of unsafe schools, the petitioner in that case sought a directive regarding the development of minimum safety standards for schools and ensuring the implementation thereof. In response to the petition each state of India submitted evidence regarding safety in schools.

[94] In making its finding the court held: *" we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The*

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[5]At para 32

[6]Writ petition (civil) no 483 of 2004, (2009) 6 SCC 398

right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety." The court of India then confirmed that the right to education must incorporate safe schools.

[95] Referring to the testimonies of learners and others regarding the state of disrepair of the infrastructure at the schools, BEFA prevailed upon the Court to draw from the approach in India. Ms Stein also pointed out that none of the evidence BEFA has brought is disputed by the respondent.

C Regulation 4(5)(a) is not rationally connected to the purpose of sections 5A and 58C of SASA

[96] The applicant proceeded from the premise that the purpose of sections 5A and 58C of SASA read with the Constitution is to ensure that legally binding norms and standards relating to physical infrastructure in schools by which government may be held to account are prescribed. As already adverted to such norms and standards are required in order to ensure that the right to a basic education is realised.

[97] For the reasons already stated in the prevus grounds, the applicant argued by inserting the proviso in this sub-regulation, the Minister fundamentally undermines the achievement of that purpose. This provision is not rationally connected to the purpose for which the power to make these regulations is conferred upon the Minister.

[98] The Minister's response was that the applicant misunderstood the limits of the rationality review. Mr Eramus SC argued that the test is not whether the regulation is fair or appropriate or even whether there is a bettter way to achieve the end. The rationality test is restricted to whether the measure the law-giver chose is properly related to the public good it seeks. The decision may not be the best in the circumstances but as long as its strikes a reasonable equilibrium, it should stay.

[99] Mr Erasmus SC referring to **the Albutt v Centre for the Study of Violence and Reconciliation and Others**[7] at 41 contended that this Court is not at liberty to interfere with the matter that is in the discretion of the Minister. In that case is was held:

"[51] The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved".

[100] Mr Erasmus SC supported this point further by reference to ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*** 2004 (4) SA 490 (CC) paragraph [54]. He also prevailed upon this Court to take into account the principle of separation of powers in this regard – referring to **Minister of Environmental**

[7] Referred to in paragraph 12 *supra*

Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA) at 52 where the Court quoted, with approval what is said in Hoexter's *The Future of Judicial Review in South African Administrative Law (2000) 117 SALJ 484 at 185*, that, *"the important thing is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness if the decision, and thus obliterate the distinction between review and appeal."*

[101] Mr Erasmus SC then emphasised the limitations on the powers of the Court dealing with rationality. He referred to ***Law Society of South Africa and Others v Minister of Transport and Another*** 2011 (1) SA 400 (CC) where the court made it clear that the requirement of rationality is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise.

D. Regulation 4(5)(a) offends the constitutional value of accountability

[102] The applicant argued that the principle of accountability is entrenched in section 1 of the Constitution as a founding democratic value. Furthermore, section 195(1)(f) of the Constitution provides that public administration must be accountable. In addition section 41(1)(c) of the Constitution imposes an obligation "on all spheres of government and all organs of state within each sphere" to "provide effective, transparent, accountable and coherent government for the Republics as a whole." Also, section 7(2) of the Constitution obliges the State to realise the right to basic education. It has to do so in an accountable manner. The provision of adequate

school infrastructure is a necessary ingredient for the realisation of the right to a basic education.

[103] It argued that sub-regulation 4(5)(a) has the effect of rendering government unaccountable for the proper provision of school infrastructure. Where there is a failure to provide adequate infrastructure, government will seek to justify its failure to comply with the norms and standards by contending that they are subject to regulations 4(5)(a).

[104] The highly qualified nature of the obligation to provide adequate school infrastructure will result in the public being unable to hold the government accountable for its failures in this regard.

[105] In addition to this submission BEFA argued that the way the sub-regulation is framed the onus would be on a party seeking to assert its right to show that the Minister has the necessary resources and co-operation from other agencies and entities. Whereas It is the Minister which should advance reasons for her inability to discharge her duty to provide basic education and not the other way round.

E Regulation 4(5)(a) subverts the constitutional requirement of co-operative governance

[106] The applicant pointed out that section 41(1)(c) of the Constitution imposes an obligation on all spheres of government and all organs of state within each sphere to

"provide effective, transparent, accountable and coherent government for the Republic as a whole." This subsection should be read with section 41(1)(h)(iv) of the Constitution which requires that all the spheres of government and organs of state to co-operate with one another in mutual trust and good faith by co-ordinating their actions. Governmental co-operation is thus constitutionally mandated as a means to ensure accountable and coherent governance.

[107] It stressed that the co-operative governance chapter of the Constitution is designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. Co-operation is of particular importance in the field of concurrent law-making and implementation of laws. It is desirable where possible to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made in the budgets of the different governments.

[108] The applicant argued that regulation 4(5)(a) deals with government as if it may permissibly operate in separate components with mutually exclusive functions. This is inconsistent with co-operative governance. All the spheres of government are interdependent and interrelated, in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. The same must apply to departments which are organs of state.

[109] Regulation 4(5)(a) permits and in fact facilitates the failure of co-operative governance. Applicant referred to a letter of 17 March 2014 that the Minister had

written to the applicant, where the Minister said that co-operative governance will take place. Yet she has made a regulation which explicitly does not require co-operative governance, and which ensures that a failure of co-operative governance will not have any legal consequences.

[110] Mr Erasmus SC stressed that the qualification in regulation 4(5)(a) is informed by the constraint created by section 41 as articulated in IGRF Act. Simply put the Minister cannot remove the qualification in this sub-regulation. To do so would open up the MECs who are charged with the actual implementation of the norms and standards, for challenge for failure to deliver the basic school infrastructure. They would never be able to plead that the services or infrastructure is not available. The regulation is therefore in full compliance with the Constitution particularly section 41 which enjoins cooperative governance.

[111] To lend support to this submission, *Mr Erasmus SC* referred to ***IEC v Langeberg Municipality*** where the Constitutional Court held:

"All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are interrelated. None of these spheres of Government nor any of the governance within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that whilst they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole section40 and 41 were designed in an effort to achieve this result."[8]

[8]At paragraph [26

[112] He further referred to paragraph [37] of the ***Grootboom*** case for additional support of this point. For these reasons, argued the Minister, the relief sought by the applicant, cannot be granted.

[113] *Mr* Erasmus *SC* furthermore, linked this to the point of non-joinder. He argued the reasons advanced by the Minister also explain why there should have been a joinder of the other entities to answer on the availability of budget; infrastructure and resources required.

[114] He further argued that the sub-regulation is a product of a democratic process. It was made on the strength of SASA, a product of a democraticaly elected parliament. Therefore, it is incorrect to hold it unconstitutional. It is equally incorrect to hold the regulation irrational because there is nothing irrational with the Minister asserting that what she is called upon to provide is outside her competence. Equlally, there is no basis for challenging this qualification on the basis that the Minister is shrugging her accountability.

[115] Over and above this, the Minister simply does not have unlimited resources and as such is unable to commit on financial resources for which she depends on what the department of Finance and the Treasury allocate for her department. Therefore, it would not have helped even if she had consulted with the other entities prior to making these regulations. The simple issue is that the Minister cannot provide for what she does not have. The qualification is therefore not a limitation of the right to basic education rather is in cognisance of the principle of co-operative governance and the limitation of the state machinery with limited coffers.