IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
17 July 2020 *S. Potterill*
DATE **SIGNATURE**

Case Number: 22588/2020

In the matter between:

EQUAL EDUCATION First Applicant

THE SCHOOL GOVERNING BODY OF VHULAUDZI

SECONDARY SCHOOL Second Applicant

THE SCHOOL GOVERNING BODY OF MASHAO

HIGH SCHOOL Third Applicant

and

MINISTER OF BASIC EDUCATION	First Respondent
MEC EDUCATION, EASTERN CAPE	Second Respondent
MEC EDUCATION, FREE STATE	Third Respondent
MEC EDUCATION, GAUTENG	Fourth Respondent
MEC EDUCATION, KWAZULU-NATAL	Fifth Respondent
MEC EDUCATION, LIMPOPO	Sixth Respondent
MEC EDUCATION, MPUMALANGA	Seventh Respondent
MEC EDUCATION, NORTHERN CAPE	Eighth Respondent
MEC EDUCATION, NORTH WEST	Ninth Respondent
MEC EDUCATION, WESTERN CAPE	Tenth Respondent

CHILDREN'S INSTITUTE	*Amicus Curiae*

JUDGMENT

POTTERILL ADJP

Background

[1] The essence of this matter aptly can be captured as: *"For now I ask no more than the justice of eating."*[1]

[2] The applicants are on an urgent basis seeking declaratory orders against the Minister of Basic Education [the Minister] and the MEC's of Education of eight provinces of South Africa [the MEC's] declaring that they are in breach of their constitutional and statutory duty to ensure that the National School Nutrition Programme [NSNP] provides a daily meal to all qualifying learners whether they are attending school or studying away from school as a result of the Coivd-19 pandemic. No relief is sought against the MEC of the Western Cape, the ninth province because the Western Cape provincial government had publicly committed and directed to immediately provide a daily meal to all qualifying learners, whether they have returned to class as Grade 7 or 12 learners. The breach in this application is from 8 June 2020, the date the schools were to be reopened and not for the entire period the schools were closed.

[3] The applicants also seek an order against the Minister and the eight MEC's that they without delay ensure that the NSNP is implemented in such a manner that it provides a daily meal to all qualifying learners.

[1] Pablo Neruda, Chilean poet and Nobel Prize winner

[4] The applicants further seek a supervisory interdict effectively seeking judicial supervision against the Minister and the MEC's with a step by step plan as to how the NSNP will be implemented with such plan to be submitted to the Court within 5 days and with follow up reports every fifteen days until the order is discharged by the Court. The applicants also seek an order that on the same papers, supplemented if necessary, they may approach the Court again on whether the plans comply with the respective duties and whether there was compliance with this Court order.

[5] The Court admitted, as unopposed, the Children's Institute represented by the Centre for Child Law as *Amicus Curiae*; a friend of the Court. This Court admitted into evidence the affidavit of Ms Hall, a senior researcher of the Children's Institute, a research unit based in the Faculty of Health Sciences at the University of Cape Town. I did so as the evidence was relevant to the issue before Court and a Court should be slow to refuse evidence that may assist in arriving at a just outcome, in particular those relating to vulnerable groups like children who are the subjects of this application.[2] In terms of s173 of the Constitution Act 108 of 1996 [the Constitution] this Court can regulate its own process and admit the evidence. And, in any event, the evidence was not objected to.

[2] *The Children's Institute v Presiding Officer of the Children's Court District of Krugersdorp and three others* 2013 (2) SA 620 (CC) par 33

[6] There was no objection to the hearsay evidence that the applicants presented on affidavit and I admitted the evidence in terms of s3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

[7] The urgency of the application and the standing of the applicants are undisputed. The fact that the application is brought in the interest of the rights of the learners to basic education and basic nutrition, in the interest of the parents of the learners, and in the public interest are also not disputed.

Issues to be decided

[8] In argument the issues before Court crystallised as to whether the applicants had set up a factual foundation for the remedy they sought because the Ministers and the MEC's never **refused** to implement the NSNP; in fact, they were implementing same. It was also argued that the remedy sought as a supervisory interdict is inappropriate. In the papers the Minister and MEC's also denied that their constitutional duty to provide basic education included the duty to provide basic nutrition.

[9] It is thus not in dispute that the Minister and the MEC's had to roll- out the NSNP to all learners when the school reopened.

Is there a factual basis for the application?

[10] In the very short heads of argument on behalf of the Minister and the MEC's only one point is taken. The point is that the crux of the applicants' case is a **"refusal"** to roll out the NSNP and there has never been a refusal by the Minister and MEC's to do so. The factual basis for the whole application thus does not exist. In the replying affidavit a new factual foundation, that not all qualifying learners are yet receiving daily meals, is set up as a salvage attempt. This kind of litigation is litigation by ambush and is impermissible.[3]

[11] In support of this argument the Court is referred to 9 instances in the founding affidavit where the word *"refusal"* is used as well as the crux of the applicant's case set out in par 170 which reads as follows:

> *"The **refusal** of the respondents to resume the NSNP for all qualifying learners, and to carry out their constitutional obligations effectively, diligently and without delay, constitutes a continuing violation of the rights of learners across the country. It requires urgent intervention."[my emphasis]*

[3] *Administrator, Transvaal v Theletsane* [1991] 4 All SA 132 (AD) 133-134

[12] The purpose of pleadings, or in applications the affidavits, is for the opposition to know what case they are to meet. The Minister and the MEC's clearly knew what they had to meet; their non-action of rolling out the NSNP when the schools opened to all learners. They understood this and answer to the very crux of the matter with; they have rolled out the NSNP, and to some learners it will be with a phased in approach.

[13] In reply the applicants answer with, well you have not rolled out the NSNP to all learners and a phased in approach is not what was undertaken and not in accordance with the Minister's and MEC's constitutional duties. The applicants refer to specific instances where there has been no roll out of the NSNP. This is a direct reply to the answering affidavit and sets out a continued non-action of the NSNP being rolled out to all qualifying learners when the schools were opened. This reply does not constitute a new cause of action. The Minister and MEC's had ample opportunity in the answering affidavit to set out why that had not managed to roll out to all schools.

[14] A Court is not blinded by a word choice, but looks to context and the totality of the evidence presented. It is disingenuous of the defence to be pinned on one word, "refusal", used in nine paragraphs out of a total of 171. If regard is had to the

context of the paragraphs, then the refusal relates to provision of the meals; not the Minister's and MEC's refusal. The argument went that the crux of the case is to be found in par 170 [quoted above]. Read in context and correctly the refusal *"... to resume the NSNP* "*...,* therein lies the refusal. In para 145 once again the refusal lies in: *"to provide meals to all learners is inconsistent with the section 195 requirements* ... *"* In par 46 the refusal lies in *"to resume the NSNP for all learners amounts to an unreasonable and unjustifiable limitation of the rights ..."*

[15] The order sought is in line with the factual basis set out; the NSNP has not been rolled out to all learners, it must be rolled out and should have been rolled out when the schools were opened to all learners whether physically attending school or not.

[16] This semantic defence is rejected as being in bad in law and contrived.

The NSNP

[17] In 1994 the first post-apartheid democratic government of South Africa initiated the NSNP. It is a programme that flows from the Reconstruction and Development Programme with the NSNP's main aim to improve the quality of education by enhancing learning capacity, school attendance and punctuality as well as

contributing to general health development by alleviating hunger.[4] The NSNP evolved and in 2004 it was expanded to all school going children under the auspices of the Department of Education with the programme now targeting all learners at schools from disadvantaged communities. It has been running for 26 years and is funded by the Government by means of a conditional grant in terms of the Division of Revenue Bill.

[18] In the words of the Director-General of the Department of Basic Education [the DG] Mr Mweli, the deponent to the opposition of this application: *"Where it was implemented, the Programme was shown to improve punctuality, regular school attendance, concentration and the general well-being of participating learners. Whilst learners were being provided with nutritious meals, they were taught to establish and maintain good eating and lifestyle habits for life. Nutrition education also provided educators with resource materials to support the curriculum and to make every school a healthy school. Furthermore schools were encouraged to establish food gardens from which they could obtain fresh produce to supplement the menu in line with South African Food Based Dietary Guidelines."*[5]

[4] White Paper on Reconstruction Development 1994
[5] Par 5 of answering affidavit

[19] It is thus literally a lifesaving programme for the poorest of the poor child by providing them with at least one nutritious meal a day while being educated. A programme that must be saluted.

The COVID-19 pandemic and the impact thereof on the NSNP

[20] In the months since the outbreak of the Covid-19 pandemic Courts have extensively pronounced on what the pandemic is, the devastation thereof and what the government did to address the COVID-19 pandemic.[6] Enough being said, all that remains to be said is that in this matter Covid-19 had the devastating effect of denying 9 million school going children at least one nutritious meal a day, leaving many, many children hungry and unfed while attempting to learn.

[21] In South Africa the schools were closed for a period of 12 weeks of which 2 weeks were holiday weeks, prior to this application. The children do not receive food over holiday periods. The children were encouraged to in the time of closure learn remotely through the use of broadcast and online resources made available by the Department.

[66] *One South Africa Movement and another v President of the Republic of South Africa and others* (24259/2020) [2020] ZAGPPHC 249 (1 July 2020); *Freedom Front Plus v President of the Republic of South Africa and others* [2020] ZAGPPHC 266 (6 July 2020); *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 (2 June 2020)*; Mohamed and others v President of the Republic of South Africa* (21402/20) [2020] ZAGPPHC 120: [2020] 2 All SA 844 (GP); 2020 (7) BCLR 865 (GP) (30 April 2020)

[22] The effect of the close of the schools and the NSNP not having been rolled- out during the COVID-19 period lockdown up to the date of hearing was demonstrated with reference to the Seekings report.[7] The purpose of the report is to provide an analysis of the efficacy and reach of the governments emergency expansion of social protection during the lockdown. Despite the criticism that the report did not take into account that the children do not receive food in the holidays the effect and reach of the government's emergency expansion of social protection was undisputed.

[23] The Government announced measures to mitigate the loss of employment, income and suffering due to the lockdown. Although the Child Support Grant was increased to R300 in May and R500 per month from June to October, government later explained that the amount is not raised per child, but per caregiver. The old age pension was increased by R250 per month from May 2020 to October 2020. The Covid-19 Social Relief of Distress Grant is a new grant that will be paid to anyone who is unemployed but is not receiving any other form of grant or unemployment insurance. The reach of this grant was to be 8 million unemployed people but only 38 000 has received this grant.

[7] Report on Social Grants and Feeding Schemes under the COVID-19 Lockdown in South Africa by Prof Jeremy Seekings, The Director of the Centre for Social Science Research at the University of Cape Town

[24] Feeding schemes were implemented and after two months of lockdown the Government stated that 788 000 food parcels were delivered. It is undisputed that the NSNP would have on its own provided 45 million meals per week rendering the generous estimate of 788 000 food parcels bleak in comparison. There is, and was, no viable substitute for the NSNP for the children.

[25] Furthermore, 77 % of undocumented children [without identity numbers] will not have benefited from the increase to Child Support Grant and have reportedly been excluded from food parcel programmes.

[26] The report notes that the social grant reforms failed to alleviate the plight of the poor. Millions of people who are in informal employment has received no income or grants and they cannot meet their and their families' basic needs and expenses. The Report describes the suspension of the NSNP as a colossal disaster for the distribution of food to poor children. The report concludes with the disturbing fact that less food was distributed to poor families during the lockdown than before the lockdown. Despite the emergency unemployment insurance reform implemented by the government, the failure to deliver the new emergency COVID-19 grant and the net cut-back in feeding programmes mean that *"many children in these households face the risk of malnutrition with possible long-term damage to their health.*"

[27] The facts and figures set out above, although patently dramatic, do not capture the reality on the ground; this the affidavits of the learners, chairpersons of the school governing bodies, and parents of the hungry learners do. The Minister and MEC's take note of the content of these affidavits.

[28] The affidavits support the facts and figures; the NSNP ensures at least one meal a day for learners who do not get regular meals at home enabling a learner to concentrate and learn and receive basic nutrition.

[29] The nub of the affidavits expresses this sentiment and summarised set out as below. At the Mashoa High School [third applicant] there are 7 children who has no access to food outside the NSNP with educators donating at the end of each term so that these learners can eat over the school holidays. They now had no food for the entire period. A grade 12 learner and his sister lives off R500 a month rendering them to pap twice a day with no meat, vegetables, sugar or milk to go with it.[8] The grade 12 learners who made affidavits all say the fact that they will now receive a nutritious meal leaves them guilt ridden with the knowledge that their siblings learning from home will not receive a nutritious meal [why grade 12 will receive meals comes to

[8] Annexure EE7

light later on in the judgment]. The learners express their frustration, stress and lack of concentration as a result of the food insecurity. Some express that they have just given up on studying. *"... My family fights a lot over bread and necessities. My siblings will cry and fight with each other. This impact on me emotionally."*[9] Learning on an empty stomach is extremely difficult as energy levels are low. There is more pressure on parents because the children are at home; *"When they were fed at school, this was not a worry for me. When my children ask for food it upsets me because I cannot always provide enough. Food is more expensive now and I have to buy more to feed everyone."*[10] The clinical director of The Teddy Bear Clinic for Abused Children states: *"In my experience, many of the children we support have siblings. The phased re-opening of schools that commenced on Monday 8 June 2020, will result in some children only returning to school at a later stage. If these children do not benefit from the meals provided through the NSNP, they will continue to experience food insecurity."*[11]

The affidavits make it clear that hunger is not a problem, hunger is an obscenity.

[30] The evidence of the amicus curiae is that an estimated 30% of the South African population experience severe levels of food insecurity – a far higher rate than the global average or even the average for Africa. The severity of high levels of

[9] Annexure NM17
[10] Annexure NM24
[11] Annexure NM29

unemployment leads to poverty and consequently to food insecurity. Even when employed, the income is not adequate with the informal sector employment totalling 5 million, who in turn supports 16 million people. The parents can accordingly not provide sufficient food and nutrition to their children. Children who suffer from hunger are at risk of various forms of malnutrition which include wasting, stunting, obesity and micronutrient deficiencies.

[31] The lockdown exacerbated the growing unemployment and the existing high poverty levels where 11.6 million children live in households below the upper poverty line. Job and earnings losses are par for the course and shockingly food prices have risen in lockdown.

[32] Of the nearly 20 million children in the country, 13 million are enrolled from grade R to Grade 12. Nine million of these children benefit from the NSNP. These are all learners in quintiles 1-3, which represent the poorest 60% of schools based on community poverty rankings including some quintile 4 schools. It enlightened the Court that the NSNP supplements the nutrition of half of all children in the country, three quarters of all learners and a fifth of the total population. The NSNP is thus well targeted to those who are poor and food insecure. The NSNP delivers micronutrients because it includes protein, vegetables and fruit. This is essential for

the schoolchildren because it is well-established that well-nourished schoolchildren learn better.

[33] The suspension of the NSNP has had substantial consequences for children as it has increased child hunger and placed already poor households with little to no food security. The NSNP is an established programme operating for many years in almost 20 000 schools all over the country. Ninety-eight present of children go to school, despite being poor. Schools are thus the critical points of contact for reaching vulnerable children with no other state service that can connect with children on such scale and with such regularity.

The suspension of the NSNP has infringed on the children's right to basic nutrition

[34] This Court accepts that the suspension of the NSNP has had a devastating effect on some nine million learners; overnight a reliable source of food/nutrition came to an and. The applicants submit that the Minister and MEC's have failed to fulfil their duty in terms of s29(1)(a) of the Constitution.[12] and s28(1)(c) a child's right to basic nutrition read with s27(1)(b)[13] by suspending the NSNP.

[12] Section 29(1): *Everyone has the right - (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.*

[13] Section 28(1): *Every child has the right - (c) to basic nutrition, shelter, basic health care services and social services.*

Section 27(1)(b): *Everyone has the right to have access to (b) sufficient food and wate.r*

[35] The Minister and MEC's say, but this duty under the NSNP they have been fulfilling, and insist they are in fact fulfilling, is just a welcome incident to their main purpose; the constitutional responsibility to provide basic education as provided for in section 29(1) of the Constitution. They have no duty in terms of s28(1)(c) of the Constitution because the right to basic nutrition is not engaged in this application. They set out that the NSNP has a historical context and was implemented to achieve substantive equality and to protect and advance children disadvantaged by unfair discrimination in terms of s9(2) of the Constitution.[14]

Do the Minister and MEC's have a constitutional duty in terms of S29(1)(a) of the Constitution to provide basic nutrition?

[36] The NSNP started with these two goals:

> *"To contribute to the 'improvement of education quality by enhancing ... learning capacity, school attendance and punctuality" and*
>
> *To contribute to 'general health development by alleviating hunger."*[15]

[14] Section 9(2): *Equality includes the full and equal enjoyment of all rights and freedoms to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

[15] White paper on Reconstruction and Development 1994; par 57 of affidavit of Ms Hall

[37] The *amicus* provided the Court with the reports of the State to the treaty bodies wherein the State punts the NSNP as one of the greatest successes.

[38] 38.1 In 2014 the NSNP was described in a report to the treaty bodies as follows:

> *"**Developments to address nutrition***
>
> *(a) School feeding is offered via the National School Nutrition Programme, providing daily meals to almost 10 million children, although provincial consultation processes highlighted the need for feeding to continue during school holidays and for better menu planning to improve nutritional value.*
>
> *(b) The National Health Act 9(2003) protects, respects, promotes and fulfils the rights of children to basic nutrition and basic health care services contemplated in in section 28(1)(c) of the Constitution."*[16]

The report to the Committee on Economic, Social and Cultural Rights under article 11 of the International Covenant on Economic, Social and Cultural Rights which provides for the right to an adequate standard of living contained the following pertaining to the NSNP:

[16] CRC/C/ZAF/2 page 92

"... Addressing challenges of malnutrition and stunting amongst children require a concerted effort between government, civil society and development partners. Daily meals are provided to 9 million learners in 20 000 schools through the National School Nutrition Programme. The programme aims to foster better quality education by enhancing children's active learning capacity, alleviating short-term hunger, providing an incentive for children to attend school regularly and punctually; addressing certain micro-nutrient deficiencies. School feeding is part of the Integrated Food Security Strategy for South Africa."[17]

38.2 The applicants referred to the 2016 report by the Department wherein the rationale for the NSNP is explained as follows:

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

[17] South African's Initial State Report to the Committee on Economic, Social and Cultural rights (2017) par 106

38.3 The Five-Year Strategic Plan 2015/2016 to 2019/2020 of the Department refers to the NSNP as *"a government program for poverty alleviation, specifically initiated to uphold the rights of children to basic food and education.*

38.4 The Division of the Revenue Bill[18] has as an outcome access to education and then provides for the provision of meals to all learners in quantile 1 to 3 and special schools. As well as some quantile 4 and 5 schools in line with available resources. The National Assembly has authorised and allocation of expenditure of funds to provide meals to those learners.

[39] 39.1 Internationally Article 27(2) read with Article 27(3) of the Convention on the Rights of the Child (1990)[the CRC] provides:

> *"States parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes,*
>
> *particularly with regard to nutrition, clothing and housing."*

[18] 3 of 2020

39.2 General Comment No 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24)(2013) CRC/C/GC/15 states that:

> *"School feeding is desirable to ensure all pupils have access to a full meal every day which can also enhance children's attention to learning and increase school enrolment. The Committee recommends that this be combined with nutrition and health education, including setting up school gardens and training teachers to improve children's nutrition and healthy eating habits."*

[40] On the Departments own documents the stance that the nutritional aspects of the NSNP is just a by-product of their duty to educate is simply wrong. The Department's own policy statements reflect basic nutrition as component to basic education. State policy is instructive on the content of the right to education and in the policies the provision of basic nutrition is inextricably linked to the fulfilment of basic education.[19]

[41] For many years this Department has taken on the duty to educate children in terms of s29(1)(a) and the right to basic nutrition [s28(1)(c)] through the NSNP. It is thus evident that the State through this Department and the NSNP has exercised it supplementary role to provide basic nutrition. The Department as educator listed its

[19] *Section 27 & Others v Minister of Education and Another* 2013 (2) SA 40 (GNP) par 22

achievements via the NSNP as providing basic nutrition. The content of the s29(1)(a) right is thus not only determined by the policies of the Department, but also by the actions of the Department.[20]

[42] The Minister and MEC's have a constitutional and statutory duty to provide basic nutrition in terms of s29(1)(a).

Can the state impair the right to access to basic nutrition?

[43] Section 28(1) of the Constitution is only qualified with the word *"basic"* and no internal qualifier. The failure to roll out the NSNP is thus justifiable only in terms of the criteria and proportionality analysis required by the general limitation clause of section 36. The rights to basic nutrition can thus also not be progressively realised.

[44] Furthermore, the State is a bearer of positive obligations in respect of the rights contained in the Bill of Rights. But, the Constitution also creates a negative obligation not to impair the right of access to the rights in our Constitution.[21] The State accordingly has a duty to respect and protect entitlement to basic nutrition and education as fulfilled by the NSNP.

[20] *Minister for Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA)
[21] *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC) par

[45] The Court applied the negative obligation to protect in the right to basic education in the matter of ***Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae*** **2011 (8) BCLR 761 (CC).** The breach of this obligation *"occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection."*[22] The Court further found that in diminishing an existing right there is an infringement of the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights contained in section 7(2) of the Constitution.

[46] The Minister and MEC's cannot take away the pre-existing right of basic nutrition of at least a meal a day during school terms.[23] Any deliberate retrogressive measure needs to be fully justified upon careful consideration with reference to the totality *"of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."*[24]

[22] paras 57 & 58
[23] *Law Society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC)
[24] *Grootboom* at para [45] quoting from the United Nations Committee on Social and Economic Rights General Comment 3, para 9

[47] The learners thus have an entitlement to receive basic nutrition which they have always received in terms of the NSNP. The Department, as part of the State, accepted the obligation to provide meals to learners who need the nutrition and benefit from the programme. By discontinuing the NSNP the State is depriving the learners of this right to nutrition.

[48] The learners may not be deprived of such right unless there is compelling justification. The Minister and MEC's proffered no justification whatsoever. The Department did submit that they suspended the programme because the Conditional Grant does not permit the provision of meals other than when schools are open. Whether this could constitute justification is not for this Court to decide because this application only addresses the situation when the schools were opened on 8 June 2020. No justification has been proffered for not rolling out the NSNP from 8 June 2020.

[49] It would seem that the Minister and MEC's seek *"justification"* on them not having a primary obligation to provide basic nutrition. The applicants have never suggested or argued that the Minister and MEC's must feed the children *"morning, noon and night*" as set out in the Department's answering affidavit. The applicants and the amicus curiae both acknowledge that parents have a duty to maintain and care for

their children, but that the state has a duty to provide appropriate care in the absence of parental or family care as a supplementary duty. The Minister and MEC's have done so by providing one nutritious meal a day to poor learners, i.e. to learners whose parents cannot provide sufficient nutrition to their children. Suspension of the programme left this duty unfulfilled. As a matter of fact; the relevant children have been receiving at least one nutritious meal a day during school terms, as a matter of law; the Minister has through the NSNP fulfilled this right to provide basic nutrition.

[50] This argument is thus on the facts untenable; only certain learners are receiving help from the NSNP, those whose parents' cannot provide the basic nutrition. These parents could not before lockdown provide for their children and as painfully demonstrated in the affidavits most certainly cannot in lockdown take the right to provide basic nutrition back.

[51] This argument is also flawed in law. The Constitution does not contemplate that children whose parents cannot afford to feed them should be left to starve or must be removed from their parents. The Constitution envisages that section 28 of the Constitution will protect those children. In the *Grootboom*-matter the Constitutional Court did find that s28(1)(c) ensures that children are properly cared for by their

parents and parents cannot shirk their parental responsibilities. But what is to happen when parents cannot provide basic nutrition to a child?

[52] The State remains responsible to provide families with other socio-economic rights to enable them to provide for their children. This is exactly what the State did with NSNP. In ***Minister of Health & Others v Treatment Action Campaign & Others***[25] the Court held: *"The State is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent or unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them.*" This finding is endorsed in ***Centre for Child Law v Minister of Home Affairs***[26]: *"this suggests that the State is under a direct duty to ensure basic socio-economic provision for children who lack family care, as do unaccompanied foreign children. There is thus an active duty on the State to provide those children with the rights and protection set out in section 28."* [27]

[25] 2002 (5) SA 721 (CC)
[26] 2005 (6) SA 50 (T)
[27] *Centre for Child Law v Minister of Home Affairs supra* para [17]

[53] The injunction in section 39(1) of the Constitution also applies. When interpreting provisions in the Bill of Rights this Court should "*promote the values that underlie an open and democratic society based on human dignity, equality and freedom."* If there was no duty on the Department to provide nutrition when the parents cannot provide the children with basic nutrition, the children face starvation. A more undignified scenario than starvation of a child is unimaginable. The morality of a society is gauged by how it treats it children. Interpreting the Bill of Rights promoting human dignity, equality and freedom can never allow for the hunger of a child and a constitutional compliant interpretation is simply that the Department must in a secondary role roll out the NSNP, as it has been doing.

[54] The children's right in s28 of the Constitution are not subject to internal limitation such as the availability of resources or progressive realization.[28] These rights are unqualified and immediate with the only limitation under s36 of the Constitution. The NSNP cannot be rolled out grade by grade.

[55] The Minister's does not justify why from 8 June 2020 it was reasonable not to roll out the NSNP to all the learners. It is common cause that the funding of the programme is not in issue. In the papers there is no averment that it is logistically impossible; in fact, the averment is that they are rolling out the NSNP. The NSNP

[28] *Centre for Child Law v MEC for Education* 2008 (1) SA 223 (T)

not being executed deprives indigent children of a basic right, food, and simply could not be justified. The Constitution has at its core to resolve the inequality created under apartheid and to create a society based on the values of human dignity, equality and freedom. Education was one of the sectors were inequality was paramount and needed serious redress. The Constitutional Court has remarked "*today, the lasting effects of the educational segregation of apartheid are discernable in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."*[29] The NSNP saw the light with the reconstruction programme because education was characterized by vast differences in race and class.

[56] The State itself accepts that the NSNP gives effect to section 9(2) of the Constitution, but section 9(2) does not entitle the state to confer benefits which it can retract at will. The Constitutional Court has affirmed in the ***Minister of Finance and Another v Van Heerden*** **2004 (6) SA 121 (CC)** at para 30 that the measures taken under section 9(2) are *"integral to the reach of our equality protection."* The provisions of section 9(1) and section 9(2) are complementary; to ensure *"full and equal enjoyment of all rights."*[30]

[29] *Juma Musjid* matter para 42
[30] *Van Heerden* para 30

[57] The CRC Committee in General Comment no 19 sets out that the obligation imposed on States by article 4 to realize children's economic, social and cultural rights to the maximum extent means that States should not take deliberate retrogressive measures in relation to economic, social and cultural rights. In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations. Internationally thus retrogressive steps, can only be taken when all other options have been considered.

[58] The only step taken by the Department, after the suspension of the NSNP, not before, was to work with the Department of Social Development to target needy learners as part of the Disaster and Social Relief Programme. The suppliers and offers of assistance to the Department were re-directed to the department of Social Development. The Minister and MEC's provide no information as to how many learners in fact received food. The Seekings Report makes it clear that in fact a very small percentage of learners did receive any food. The Director General confirms that there was a growing concern that this step the Department took would not reach all needy learners and therefore they took care to ensure that the NSNP would be rolled out with effect from 1 June 2020 when the schools were planned to open.

[59] Not only could there be no regression, but if the *"sudden emergency"* of the lockdown, as argued, justified regression in not rolling out the NSNP, the steps the Department took did not ensure that children in vulnerable situations were the last to be effected. The lockdown may have been due to a virus and not *per se* an economic crisis as referred to in comment 19, but one would be hard-pressed to argue that this principle is not applicable in these crisis times resulting in an economic crisis.

[60] The Minister and MEC's have thus not complied with their constitutional and statutory duties.

Was the NSNP rolled out from 8 June 2020?

[61] The short answer to this question is; no. The facts set out hereunder illustrates this fact.

[62] This Court accepts that the COVID19 pandemic caused severe unknown crises never before having to be dealt with by the Department. I am also sympathetic to Government officials whom are working long strenuous hours to solve these crises.

[63] The Department sets out their defence as follows: *"... that ever since 18 March 2020 we in the Basic Education Sector have used our best endeavours, within the scope and ambit of the resources available to us, to put reasonable measures in place for the continuance of the NSNP - we are in fact doing precisely that which the Applicants want us to do and we have been doing so without judicial supervision under a structural interdict."*[31]

[64] The schools closed on 18 March 2020 due the COVID-19 pandemic.

[65] On 29 April 2020 the DG made a representation to the National Coronavirus Command Council on the Basic Education sector plan and stated that meals for all learners would be procured as soon as the date for the reopening of the schools was announced.

[66] On 23 March 2020 there was a joint meeting to address food security for the beneficiaries under the NSNP. One of the reasons for the meeting was due to the numerous calls received by the Department to consider extending the provision of food to learners during the lockdown as schools were closed. The formalised partners of the NSNP, as well as many other donators stepped up to the plate and

[31] Par 11 of the AA

donated in many ways, handsomely so. But this Department then left distribution of food to learners in the hands of the Department of Social Development.

[67] On 29 April 2020 the DG on behalf of the Department made a presentation to the National Coronavirus Command Council on the Basic Education Sector Plan. The slides of all the Provinces state that *"meals for the learners would be procured as soon as the date of the reopening for the schools is announced."*[32]

[68] On 11 May 2020 the Minister responded to a letter from the Applicants informing the Applicants that the NSNP would resume once the schools reopened.

[69] On 19 May 2020 the Minister addressed a media briefing and announced that the schools would reopen on 1 June 2020, starting with grade 7 and grade 12. It was highlighted that the NSNP will be reopened for all learners when the schools open for grades 7 and 12. On the same date the Minister wrote to the Human Rights Commission informing it that the NSNP would be extended to all learners, not only grades 7 and 12 when the schools reopened.

[32] MBE13

[70] The reopening of the schools was then postponed to the 8th of June 2020. With regards to the NSNP the following was stated:

> *"The Nutrition Programme will be reopened for all learners when Grades 12 and 7 are introduced to schools on 1 June 2020. All food handlers will be supplied with the required personal protective equipment including gloves, aprons and cloth masks. These have already been procured by provinces as part of a basic health and hygiene package."*[33]

[71] On 21 May 2020 the Provinces were provided with a "Menu Quantity Calculator." This would enable the schools to very easily calculate the quantities of food to be prepared based on the schools estimate of the numbers of learners eating or collecting the meals. There was by then also plans in place pertaining to schools having to develop a time-table for feeding learners. The schools must utilise the funds transferred to them for also children who are not phased-in to prepare food parcels for collection by the learners or parents at the school in staggered collections.

[72] On 26 May 2020 the Department in a media statement confirmed that the NSNP would be rolled out for the benefit of all the learners.

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[33] MBE15

[73] Then on 1 June 2020 the Minister held a press conference with regards to the schools now opening only on 8 June 2020. Pertaining to the NSNP the Minister said the following:

> *"... we need to urgently start providing nutrition not only to learners that have returned. So for these learners that are returning there are plans, we have trained the school nutrition team that prepares food on new and different ways of preparing under the health requirements so we will provide nutrition to the grades that are phased in.* ***We would have wished also even to provide nutrition for grades that we have not phased in. But I had requested the sector and the MEC[s] to say maybe we need to wait a little. Get ourselves to acclimatize to the new environment, manage that which we are struggling to get right before we can introduce new programmes. So there is intention to start the nutrition but we are able to manage this new environment we find ourselves in before we can get into more programmes. But we have the intentions to do that.*** *" [my emphasis]*

[74] On 2 June 2020 the applicants wrote to the Minister and the Department seeking clarity on the roll out of the NSNP and an undertaking that the NSNP would be rolled out to all learners when the schools open as undertaken previously.

[75] On 7 June 2020 the answer to this letter is: *"When schools re-open, meals for the National School Nutrition Programme will be provided to learners in a phased-in approach."*

[76] On 8 June 2020 the schools reopened for grades 7 and 12 and most of those learners have received meals, however none of the other grades have received meals.

[77] On 12 June 2020 the applicants issued and served this application. The parties agreed that the Minister and MEC's would file their answering affidavits by 22 June 2020.

[78] On 19 June 2020 the DG wrote to the Head of the Gauteng Department of Education as follows:

> *"On Friday 12 June 2020, the Department and the Provincial Departments had been served with this application, challenging the decision of the Minister that the NSNP would only be rolled out to learners currently attending Grades 7 and 12, and would be rolled out later to other learners as they*

were phased in. The applicants had requested the court to grant an order that the NSNP be rolled out to all learners notwithstanding whether they are currently in school.

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

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

In the court papers submitted to Counsel, all provinces were required to start feeding all learners with effect from 22 June 2020. "Any later date will force the department to report to the court on a fortnightly basis."[34]

[79] It is denied that the Minister on 1 June 2020 did an about-turn about the rolling out of the NSNP. The explanation is that the Minister did not change any principles pertaining to the rolling out of the NSNP, only the practicalities. The approach was

[34] RA14

now a phased in approach, but the principle stayed the same that it would be rolled out to all learners whether at school or not.

[80] This submission is clearly untenable; despite many public and written undertakings that the NSNP would be rolled out to learners, whether attending school or not, when the schools opened, the NSNP was not rolled out to all learners not yet attending schools. In fact, this non rolling out to the other learners is common cause and this Court is troubled that such a defence is presented. The undertaking was not that it would be rolled out in phases to all learners when the schools reopened, but immediately when the schools reopened. There is accordingly no material dispute of fact.

[81] Upon analysis of the defence that, they are using their best endeavours to put reasonable measures in place for the continuance of the NSNP, they admit that they have not rolled out the NSNP as they undertook. Yet, there is a persistence that:

> *"we are in fact doing precisely that which the Applicants want us to do and we have been doing so without judicial supervision under a structural interdict."*[35] Making such a statement under oath when the common cause facts show the contrary, is surprising and disturbing.

[35] as quoted above; par 11 of the AA

Remedy

Declaratory relief

[82] I am satisfied that declaratory relief must be granted in this matter because the dispute as to whether the Minister and MEC's have a constitutional duty requires same. If a constitutional or statutory duty has been found to exist, then the non-compliance with that duty also needs to be declared.

[83] The *Amicus* requested that prayers 2 and 3 of the order as set out by the applicants be amended to include the reference to the relevant rights. This is a sound suggestion.

[84] Such declaratory relief can be granted in terms of s 172(1)(a) &(b) of the Constitution and also in terms of s38 of the Constitution.[36]

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[36] *Section 172: Powers of courts in constitutional matters.*

(1) When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including -

(i) an order limiting the retrospective effect of the declaration of invalidity;

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

Supervisory interdict

[85] The applicants have proved that a right in the Bill of Rights has been infringed. In terms of sections 172 and 38 of the Constitution This Court must this grant relief that is just and equitable or appropriate.[37]

[86] In ***Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another*** **2020 (1) SA 52 (SCA)** the Court found as follows:

> *"This finding entitles the applicants to appropriate relief for violation of their fundamental rights as envisaged in section 38 of the Constitution. As to what constitutes 'appropriate relief', the Constitutional Court said in Fose 'it is left to the Courts to decide what would be appropriate relief that is required to*

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Section 38: Enforcement of Rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

[37] Sections 172 and 38 of the Constitution; *Corruption Watch NPC & Others v President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC)

protect and enforce the Constitution. Depending on the circumstances of each case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that he rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the Courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'"

[87] Courts are wary to overreach and structural interdicts are not granted willy-nilly.[38] The foundation of this reluctance is that Courts accept that Court Orders will be adhered to. Having said that, there are matters that require suervisory interdicts. In ***Mwelase v Director-General for the Department of Rural Development and Land Reform*** **2019 (6) SA 597 (CC)** the Constitutional Court found:

[46] ... The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice ,dignity and equality That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable..

[38] *Mzalasi NO and Others v Ochogwu and Another* 2020 (3) SA 83 (SCA) par 13

[48] In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is in crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in Black Sash I, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery.

[49] The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In case of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done."

[88] Is this a matter where a supervisory interdict would be appropriate and/or just and equitable?

88.1 The submission on behalf of the applicants that the Department has played fast and loose with the facts is correct, in fact, rendering the defence meritless. The chronology of the common cause facts speaks for itself; this urgent application was the cause of a flurry of activity in the Department to roll out the NSNP as undertaken, which was eerily absent when the schools opened with the NSNP not rolled out to all the learners. The fact that only court papers spurred on activity to feed hungry children, leaves doubt with this Court whether on its own, the Department will perform. Continued breach by the Minister and MEC's will leave millions of children hungry through the cold winter and as long as lockdown lasts. Hunger is not an issue of charity, but one of justice.

88.2 Children are categorically vulnerable, poor hungry children are exceptionally vulnerable. The degree of the violation of the constitutional rights are thus egregious.

88.3 There is administrative chaos and confusion in the provinces requiring supervision of the Court. I highlight some of it.

88.3.1 In the Free State a circular was only sent to school principals on 17 June 2020 requesting the development of plans for the roll-out of the NSNP to all grades to commence on 22 June 2020. SADTU in response objected to the short period because there was no time to

plan before the implementation date. No facts were provided by the applicants that in fact there was a roll-out on 22 June 2020.

88.3.2 In KwaZulu-Natal an initial circular was sent out to provide meals to all learners under the NSNP once schools reopened. On 5 June 2020 this circular was withdrawn with a circular indicating that the NSNP would only be provided to returning grades. On 15 June 2020 this circular was withdrawn with a circular that on 17 June 2020 food would be delivered.

88.3.3 In Limpopo similarly an initial circular to schools limited the roll-out of the NSNP to only returning grades. The target date was 22 June 2020. This circular was withdrawn and the second applicant set out that it does not even receive sufficient weekly rations to provide for learners in Grades 7 and 12 for a full week, let alone all learners.

88.3.4 In the Eastern Cape, with reference to the applicants before Court, the province stated that the NSNP will be provided to all learners. Schools were instructed on 17 June 2020 to roll-out the NSNP by 22 June 2020.

88.3.5 The best illustration is captured in what transpired in Gauteng. The Director: School Nutrition of the Gauteng Provincial Department of Education sent a circular to the District Coordinators of the NSNP on

22 June 2020 with a heeding: *"Feeding Learners in All Grades."* This circular refers to a meeting held that morning, i.e 22 June 2020, stating that the Department *"intends implementing this project as of 22 June 2020."*

Once again the chronology of the common fact show that this application prompted activity from the Department. The activity is however in many instances without rhyme and reason, chaotic and unachievable.

[89] A structural interdict is a means to craft an effective, just and equitable remedy to ensure performance.

[90] The response to the remedy for a structural interdict is that the Minister and MEC's are not acting *mala fide*, have to cope with a constant state of flux and are in fact making plans. The Court was requested to take judicial notice of the Government gazetted dates whereby the grades will be phased in and the NSNP will be rolled out which would render a supervisory interdict unnecessary.

[91] This Court accepts that the Minister and MEC's are not acting mala fide. But, nothing in these objections to the remedy, as crafted by the applicants, can sway

this Court to not grant a supervisory interdict. The Minister and MEC's on their own papers had close to 3 months to make plans and yet, the roll-out of the programme is not close to fulfilment. It must be remembered that this is not a new programme, but one of 26 years strong. It is so that with COVID-19 safety procedures need to be formalised, but this was done. The collection and delivery of the food to learners not yet attending school may require new practicalities, but this court has utmost faith in principals, governing bodies, and mostly mothers of hungry children to devise plans to collect or deliver food to feed their hungry children.

Affidavits filed after the matter was heard and before judgment was granted.

[92] The applicants' filed an affidavit seeking the leave of the Court to submit information that is relevant and germane to the matter, but which only came to their attention during the afternoon of 2 July 2020; the day of the hearing, after oral argument. In court the defence to the structural interdict was that on 6 July 2020, as gazetted on 29 June 2020, the majority of the learners will return to school and then receive their meals through the NSNP. The remaining leaners will return to school on 3 August 2020. On this ground the structural interdict would serve no purpose.

[93] However on the afternoon of the hearing, after the hearing, the Minister announced, despite the Gazette, that only three grades in all provinces will resume class on 6

July 2020; grades 6,11 and R. No announcement was made about the other grades, only that it would be phased in.

[94] On 8 July 2020 the Respondent's attorney wrote a letter that they do not object to this supplementary affidavit of the applicants. In light of this supplementary affidavit they are in the process of preparing an update on the roll-out of the NSNP to date on learners that have not returned to schools and will present same to the Court.

[95] The applicants replied to this letter that they would object to any attempt to introduce new evidence which purports to show how many learners who have not returned to school are now receiving meals under the NSNP.

[96] The evidence contained in the applicants' supplementary affidavit is directly relevant and only became available on the same date as the hearing, but after the hearing. There is no cognisable prejudice to the respondents and the administration of justice will not be prejudiced. This evidence is admitted.

[97] On 16 July 2020, 14 days after the hearing, and a day before this Court proposed to hand down judgment, the respondents filed their signed supplementary affidavit. It

now sets out how many participating schools in each province are providing meals to learners. This updated roll-out information is presented to sway the court that the structural interdict is unnecessary. It sets out it would be fair to both sides and is in the public interest for the Court to exercise its discretion to admit this evidence.

[98] The applicants then filed a supplementary replying affidavit. The applicants object to the information in the respondents' affidavit as impermissible and inadmissible. Not only does this affidavit constitute hearsay evidence with no corroboration, but it contains evidence from the Western Cape who the state-attorney does not represent. But, the evidence contained in the affidavit shows that 2 weeks after the hearing close to 6 million leaners are still not receiving food. Under oath 7 of the provinces representatives in the confirmatory affidavits stated that by 22 June 2020 all learners will receive food. The supplementary affidavit now filed by the respondents makes it clear that by 22 June 2020 close to 6 million learners still have no food rolled-out, and their statements was an untruth. It was submitted this Court cannot rely on their undertakings.

[99] Filing affidavits after the hearing and before judgment is unusual and will only be entertained when good reasons are presented as to why this evidence could not have been presented during the hearing. Reserving a right to present further

evidence is not a good reason. If due to time constraints the evidence could not have been presented at the hearing, a postponement could have been sought. Not in the papers, nor in oral evidence was there any indication or complaint that they did not have enough time to collate this specific evidence.

[100] The evidence does indeed constitute impermissible evidence. It is new evidence, after the fact evidence, uncorroborated and not from personal knowledge. It should not be allowed.

[101] But, even if the evidence is allowed, the evidence presented does not work in the favour of the respondents. On 14 July 2020, let alone 22 June 2020, as stated under oath, the NSNP has not been rolled out to all the learners. The evidence shows that the undertakings given were not complied with. With this extreme rights infringement, the ultimate boundary lies at court control of the remedial process. The Court has little choice but to grant a temporary supervisory interdict.

Costs

[102] There is no need to deviate from the general rule that the costs must follow the result. The application's urgency and issues involved render the costs of three counsel just and equitable.

[103] I accordingly make the following order:

103.1 This application is dealt with as a matter of urgency in terms of Rule 6(5)(12) and the forms and service provided for in the Rule are dispensed with;

103.2 It is declared that all qualifying learners, regardless of whether or not they have resumed classes at their respective schools, are entitled to receive a daily meal as provided for under the National School Nutrition Programme (NSNP).

103.3 It is declared that the First Respondent (the Minister) is under a constitutional and statutory duty to ensure that the NSNP provides a daily meal to all qualifying learners, to ensure the proper exercise of the rights of learners to education and to enhance their learning capacity, whether they are attending school or studying away from school as a result of the Covid-19 pandemic.

103.4 It is declared that the Minister is in breach of that duty.

103.5 The Minister is ordered without delay to ensure that the NSNP is implemented in such a manner that it provides a daily meal to all qualifying learners, to ensure the proper exercise of the rights of learners to education and to enhance their learning capacity, whether they are attending school or studying away from school as a result of the Covid-19 pandemic.

103.6 It is declared that the Second to Ninth Respondents (the MECs) are under a constitutional and statutory duty to implement the NSNP in their respective provinces in such a manner that it provides a daily meal to all qualifying learners, whether they are attending school or studying away from school as a result of the Covid-19 pandemic.

103.7 It is declared that the MECs are in breach of that duty.

103.8 The MECs are ordered forthwith to implement the NSNP in their respective provinces in such a manner that it provides a daily meal to all qualifying learners whether they are attending school or studying away from school as a result of the Covid-19 pandemic.

103.9 The Minister is ordered within 10 days to file at this Court under oath, and provide to the applicants, a plan and programme which she will implement without delay so as to ensure that the MECs carry out without delay their duties referred to above, and which address the following matters:

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

103.9.2 What further steps she will take in that regard;

103.9.3 When she will take each such step.

103.10 The Minister is ordered to file reports with this Court under oath, and provide copies to the applicants, every fifteen days from the date of this order until the order is discharged by this Court, setting out the steps she has taken to give effect to this order, when she took such steps, what the results of those steps have been, what further steps she will take, and when she will take each such step.

103.11 The MECs are each ordered within 10 days to file at this Court under oath, and provide a copy to the applicants, a plan and programme which they will implement without delay so as to comply with their duties referred to above, and which address the following matters:

103.11.1 In respect of each school under their jurisdiction, when all of the qualifying learners will receive a daily meal under the NSNP, whether they are attending school or studying away from school as a result of the Covid-19 pandemic;

103.11.2 What steps they have taken to achieve that;

103.11.3 What further steps they will take to implement that plan and programme; and

103.11.4 When they will take each such step.

103.12 The MECs are ordered to file reports under oath with this Court, and to provide copies to the applicants, every fifteen days from the date of this order until the order is discharged by this Court, setting out the steps they have taken to implement the plan and programme, when they took such steps, and how many learners in each district in their area of jurisdiction are receiving, and how many are not receiving, a daily meal in terms of the NSNP.

103.13 The Applicants may set this matter down for further hearing or hearings by the Court, on these papers and the reports filed in terms of this order, supplemented to the extent necessary:

103.13.1 for a determination of whether the plans and programmes referred to above comply with the duties of the Minister or the MEC concerned as declared or set out in this order;

103.13.2 for a determination of whether the Minister or an MEC has complied with the order of this Court and/or with his/her duties as declared or set out in this order;

103.13.3 for further or alternative relief to ensure that the Minister and the MECs comply with their duties as declared or set out in this order.

103.14 The first to ninth respondents are ordered to pay the costs of this application, including the costs of three counsel.

S. Potterill

S. POTTERILL

ACTING DEPUTY JUDGE-PRESIDENT

GAUTENG DIVISION, PRETORIA

CASE NO: 22588/2020

HEARD ON: 2 July 2020

FOR THE APPLICANTS: ADV. G. BUDLENDER SC

ADV. T. NGCUKAITOBI SC

ADV. T. POOE

INSTRUCTED BY: Equal Education Law Centre

FOR THE 1st to 9th RESPONDENTS: ADV. M. OOSTHUIZEN SC

ADV. V. MASHELE

INSTRUCTED BY: State Attorney, Pretoria

FOR THE *AMICUS CURIAE:* ADV. A. SKELTON

ADV. K. OZAH

INSTRUCTED BY: Centre for Child Law

DATE OF JUDGMENT: 17 July 2020